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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on **21.02.2022**
Judgment pronounced on **11.05.2022**

\+ **W.P.(C) 284/2015 & CM Nos.54525-26/2018**

RIT FOUNDATION ..... Petitioner

Through : Ms Karuna Nundy with Mr Mukesh Sharma and Mr Raghav Awasthy, Advs.

versus

THE UNION OF INDIA ..... Respondent

Through : Mr Tushar Mehta, SG and Mr Chetan Sharma, ASG with Ms Monika Arora, CGSC along with Mr Vinay Yadav, Mr Amit Gupta, Mr Akshya Gadeock, Mr Rishav Dubey, Mr Rajat Nair, Mr Sahaj Garg and Mr R.V. Prabhat, Advs. for UOI.

Mr Rajshekhar Rao, Sr. Advocate/Amicus Curiae with Mr Karthik Sundar, Ms Mansi Sood and Ms Sonal Sarda, Advs.

Ms Rebecca M. John, Sr. Adv. As Amicus Curiae with Mr Harsh Bora, Ms Praavita Kashyap, Mr Chinmay Kanojia, Mr Pravir Singh and Ms Adya R. Luthra, Advs.

Mr Amit Lakhani and Mr Ritwik Bisaria as Intervenors for Men's Welfare Trust.

\+ **W.P.(C) 5858/2017 & CM No.45279/2021**

KHUSBOO SAIFI ..... Petitioner

Through : Mr Colin Gonsalves, Sr. Adv. With Ms. Olivia Bang, Ms Sneha Mukherjee, Ms Mugdha and Ms Aimy Shukla, Advs.

versus

THE UNION OF INDIA & ANR. ..... Respondents

Through : Mr Ruchir Mishra, Mr Sanjiv Kumar Saxena, Mr Mukesh Kumar Tiwari and Mr Ramneek Mishra, Advs. for UOI.

Mr Gautam Narayan, ASC, GNCTD with Ms Nikita Pancholi, Adv.

Mr Rajshekhar Rao, Sr. Advocate/Amicus Curiae with Mr Karthik Sundar, Ms Mansi Sood and Ms Sonal Sarda, Advocates.

Ms Rebecca M. John, Sr. Adv. As Amicus Curiae with Mr Harsh Bora, Ms Praavita Kashyap, Mr Chinmay Kanojia, Mr Pravir Singh and Ms Adya R. Luthra, Advs.

Mr R.K. Kapoor, Advocate for applicant in CM 19948/2016.

\+ **W.P.(C) 6024/2017**

ALL INDIA DEMOCRATIC WOMEN'S ASSOCIATION. Petitioner

Through : Ms Karuna Nundy, Ms Ruchira Goel, Mr Rahul Narayan, Mr Nitish Chaudhary, Ms Ragini Nagpal, Ms Muskan Tibrewala, Mr Utsav Mukherjee and Mr Shashwat Goel, Advs.

versus

THE UNION OF INDIA ..... Respondent

Through : Mr Chetan Sharma, ASG with Mr Anil Soni, CGSC along with Mr Devesh Dubey, Mr Vinay Yadav, Mr Amit Gupta, Mr Akshya Gadeock, Mr Rishav Dubey, Mr Sahaj Garg and Mr R.V. Prabhat, Advs. for UOI.

Mr Rajshekhar Rao, Sr. Advocate/Amicus Curiae with Mr Karthik Sundar, Ms Mansi Sood and Ms Sonal Sarda, Advocates.

Ms Rebecca M. John, Sr. Adv. As Amicus Curiae with Mr Harsh Bora, Ms Praavita Kashyap, Mr Chinmay

Kanojia, Mr Pravir Singh and Ms Adya R. Luthra, Advs.

\+ **W.P.(CRL) 964/2017**

FARHAN ..... Petitioner

Through : Mr Sahil Malik, Adv.

versus

STATE & ANR. ..... Respondents

Through : Ms Nandita Rao, ASC for State.
Mr Rajshekhar Rao, Sr. Advocate/Amicus Curiae with Mr Karthik Sundar, Ms Mansi Sood and Ms Sonal Sarda, Advocates.
Ms Rebecca M. John, Sr. Adv. As Amicus Curiae with Mr Harsh Bora, Ms Praavita Kashyap, Mr Chinmay Kanojia, Mr Pravir Singh and Ms Adya R. Luthra, Advs.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MR JUSTICE C. HARI SHANKAR

RAJIV SHAKDHER, J.:

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Preface:

1. What looms before us is Lord Hale's Ghost. Thus, the key question which arises for consideration in these matters is whether or not we should exorcize Hale's Ghost? Hale's formulation was embedded in the doctrine of coverture; a condition which allowed a married woman to sue only through the personality of her husband. Since then, the world has moved on. Women in most parts of the world are treated as individuals, free to enter into contracts in their own right but when it comes to sexual communion with their husbands, their consent counts for nothing. In plain words, the poser

before the court is: Should a husband be held criminally liable for raping his wife who is not under 18 years of age?

1.1. Before I proceed further, I must state, with all humility at my command, that as I began to pen this judgment, the enormity of its impact on the society was not lost on me. I do not lay claim to being the repository of all wisdom that must be brought to bear in dealing with a sensitive issue that I am to rule on. That said, it is incumbent on courts to take decisions concerning complex social issues and not dribble past them, as that is the mandate of the Constitution and, therefore; a duty and obligation which must be discharged if one is to remain true to the oath taken under the Constitution. Thus, the *mea culpa* on behalf of the institution is that one way or the other the issue ought to have been laid to rest much earlier.

2. As was evident to us during the hearing that both within the court and outside, people all across have views concerning the issue at hand which vary in their contour and texture depending on which side of the debate they fall on; the legal issue, though, rests in a narrow space.

3. The moot point is (which is a more particularized version of what was stated right at the beginning) whether or not Exception 2 appended to Section 375 of the Indian Penal Code, 1860 [hereafter referred to as 'IPC'] should remain on the statute. Having said that, it is the impact and its ripple effect, in law, that one is required to grapple with. Thus, those who support the proposition that Exception 2 to Section 375 of the IPC, which is ubiquitously referred to as Marital Rape Exception [hereafter referred to as 'MRE'] should be struck down, broadly, contend that it is an archaic provision which represents the most abhorrent vestiges of colonialism while those who argue that the provision should be retained on the statute, contend that striking down the provision is fraught with the danger of disrupting

marital and familial relationships, triggering misuse of law and transgression of the Constitutional periphery within which the courts are obliged to function.

4. At this juncture, I must also advert to the fact that those who seek striking down of MRE i.e., Exception 2 to Section 375 of the IPC, in consonance with the arguments advanced *qua* the said provision, also seek striking down of Section 376B which concerns sexual intercourse by a separated husband with his wife, *albeit*, without her consent. Consequently, prayer is also made for striking down Section 198B of the Code of Criminal Procedure, 1973 [hereafter referred to as the 'Code'] which prohibits a court from taking cognizance of an offence punishable under Section 376B of the IPC except upon satisfaction of the facts which constitute the offence once a complaint is lodged by the wife against her husband.

5. Thus, for the sake of convenience, MRE/Exception 2 to Section 375 of the IPC and Section 376B as also Section 198B of the Code will be collectively referred to as the "impugned provisions" unless the context requires one to refer to the provisions individually.

6. Besides, at this juncture, it would be relevant to note that one is dealing with four petitions out of which two are purely in the nature of Public Interest Petitions while the third petition (i.e., W.P.(C)No.5858/2017) which concerns a person by the name, Ms Khushboo Saifi, is a halfway house, in a sense, that she has also made assertions which seek to establish that she has been subjected to sexual abuse including rape by her husband. She contends that because MRE continues to remain on the statute, she is disabled from prosecuting the complaint concerning rape allegations made against her husband.

6.1. The fourth petition (i.e., W.P.(Crl.) No.964/2017) has also been

instituted by an individual i.e., Mr Farhan. The prayer made in the writ petition is to quash a particular FIR i.e., FIR bearing no.204/2016, dated 25.11.2016, registered at Police Station Hauz Qazi, Delhi, under Sections 376/363/342 of the IPC read with Sections 3 & 4 of the Protection of Children from Sexual Offences Act, 2012 [in short 'POCSO Act'] and the proceedings commenced thereto.

6.2. Qua this petition, no oral arguments were advanced by the counsel-on-record for the petitioner i.e., Mr R.S. Malik. A perusal of the written submissions filed on behalf of the petitioner is suggestive of the fact that issues concerning Muslim Personal Law have been raised. It is, broadly, argued that MRE is not impacted by provisions contained in the POCSO Act.

6.3. This submission is made in the backdrop of the following broad averments made in the writ petition : that the petitioner is married to one Ms Alina i.e., respondent no.2, and that at the point in time, when the petitioner i.e., Mr Farhan and Ms Alina/respondent no.2 entered into sexual communion in the first instance, the latter was about 15 years of age. In other words, based on Muslim Personal Law (*Shariat*) and Muslim Personal Law (*Shariat*) Application Act, 1937 [in short "Shariat Act"] which accords pre-eminence to the former, the stand taken is that the provisions of the POCSO Act would have no impact on MRE.

6.4. Since, these are aspects on which arguments were not advanced, neither by Mr Malik nor the counsel for the respondents, this petition will have to be dealt with separately after pronouncement of the decision in the remaining three cases.

7. With this preface, let me, broadly, cull out the arguments advanced by learned counsel for the parties both "against" and "for" the proposition that

the impugned provisions should be struck down.

Arguments against striking down the impugned provisions

8. The charge against the proposition that the impugned provisions should be struck down was led by Mr J. Sai Deepak, who appeared for the intervenor - Men Welfare Trust (MWT) and Mr R.K. Kapoor, who represented another applicant i.e., an NGO by the name Hridaya.

9. The arguments of Mr Deepak, broadly paraphrased, were as follows :

9.1. MWT is not opposed to the criminalization of spousal sexual offences, especially, non-consensual sex between spouses or those in spouse like relationships. MWT does not contend that husbands/men have a right to impose themselves on their wives/spouses sighting marriage, as be all and end all of, implied consent to every marital privilege including sexual intercourse. That being said, trust, dignity and respect which form the basis of a marriage is a two-way street. A multilayered and multivariable nature of a marital relationship has been reduced by the petitioners to one singular issue i.e., consent; a proposition with which MWT disagrees. MWT propounds a more calibrated position. Thus, MWT's objections to the writ actions are, principally, the following :

(i) The prayers made in the writ petition are beyond the scope of this court's jurisdiction and/or power that it may wield under any law or the Constitution since the prayers if granted would create a new class/specie of offence which is beyond the power of judicial review conferred on this court. In other words, if the prayers, as sought, are granted, it would erode and/or violate the basic feature of the Constitution, namely, the Doctrine of Separation of Powers that too in a matter concerning the criminalization of a sexual act committed by a husband on his wife, which is, otherwise, protected under MRE.

(ii) The Doctrine of Separation of Powers does not have a mere transactional construct i.e., division of territory/turf between various organs of the State but is meant to preserve the right of the Republic meaning the people to participate in law and policymaking lest it becomes the preserve of the few. Therefore, if this court were to grant the prayers sought by the petitioners, it would have the effect of keeping the Republic outside the pale of participation in law and policymaking on a sensitive social issue thereby truncating fundamental rights as well as empowering an "unelected body" to undertake an exercise which is beyond its constitutional mandate and expertise. The striking down of MRE would result in the creation of a new offence without considering its social impact. There is a need to create an ecosystem to deal with the issue at hand, such as the provision of a "definition", "processes", "safeguards", "evidentiary standards", "forums" amongst others; none of which the court is equipped to forge or prescribe. The court is, thus, a sub-optimal forum for considering a variety of perspectives that are not only legal but also social and cultural. The court by its very construct does not allow the participation of multiple stakeholders which is why the creation of a new class of offence is beyond its constitutional remit involving judicial review. The proceeding at hand is a textbook case in point since it has not allowed for inputs from various legitimate stakeholders who are better qualified to weigh in on the subject beyond the narrow and incomplete confines of legality and constitutionality.

(iii) Since the learned Amici, lean in favour of the position adopted by the petitioners, in the interest of balance and natural justice, inputs ought to have been sought from other Amicus Curiae as well.

(iv) It is emphasized that while MWT does not question the right of learned Amici to hold and present their position on the issue at hand,

additional Amicis should have been appointed to present a more diverse perspective.

(v) MRE does not in any manner envisage or require a wife to submit to forced sex by the husband and does not encourage a husband to impose himself on the wife; contrary to what the petitioners contend. It is important to note that there are remedies available to address non-consensual sex between spouses, something which is apparent on a plain reading of Section 376B and Section 498A of the IPC as also the provisions of the Protection of Women from Domestic Violence Act, 2005 [hereafter referred to as "D.V. Act"]. These are provisions that bring forth the legislative intent to criminally prosecute a husband who refuses to respect consent.

(vi) The legislature, by creating a separate legal ecosystem for dealing with spousal sexual violence, has, in effect, criminalised non-consensual sex between spouses without terming it as rape within the meaning of Section 375 of IPC and, at the same time, balanced the rights of husbands by appending MRE. This distinction has been made by the legislature having regard to the complexity involved while dealing with the institution of marriage (and not on account of patriarchy) as contended by the petitioners.

(vii) The distinction is, both, reasonable and based on intelligible differentia and therefore, must pass muster of Articles 14, 15, 19 and 21 of the Constitution.

(viii) Assuming for the sake of argument that the legal framework which criminalises spousal sexual violence is inadequate, that by itself cannot be the reason to declare the impugned provisions unconstitutional. The gaps in the law which arise on account of inadequacy cannot be remedied by the judiciary since these aspects fall within the exclusive domain of the legislature. This court, exercising powers under Article 226, cannot fill a

legal void or redress obvious lacunae. Although, the Supreme Court while exercising powers under Article 141 could do so since this court is not invested with the said power it cannot fill the perceived vacuum in the framework of the law.

(ix) Although the impugned provisions are part of our colonial legacy, they have undergone a process of Indianisation after the enactment of the Constitution; an aspect which is evident from the Parliamentary cogitations and consequent amendments effected in the IPC and the Code.

(x) Article 372 of the Constitution protects laws enacted prior to the Constitution coming into force as long as they pass muster of other provisions contained in the Constitution, in particular, provisions concerning fundamental rights. Therefore, the presumption of constitutionality also attaches to pre-constitutional laws unless successfully rebutted by one who seeks to assail such a law. A law cannot be struck down merely because it pre-dates the Constitution.

(xi) The legislature has the power and right under the Constitution to undertake social experiments so long as they are not manifestly arbitrary; the judiciary cannot interdict such laws merely because it has a different or a diametrically divergent point of view. The leanings or, individual proclivities of judges cannot become the basis for exercising the power of judicial review.

(xii) In a matter relating to spousal sexual violence, "Bharatiya Legislature" should have the power and freedom to ideate and consult with other stakeholders having regard to the social and cultural mores of our society without being subjected to pontification by the petitioners in the garb of "international norms and standards". This approach of the petitioners reeks of coloniality and goes against their submission that MRE is "less

constitutional" since it is colonial. The petitioners' position of what is colonial and what is international is selective, convenient and constitutionally fallacious.

(xiii) Furthermore, if international norms and standards are to be applied, as contended by the petitioners then, the movement all over is towards enacting gender-neutral laws in the realm of sexual violence. While MWT has actively campaigned for gender-neutral laws and the preservation of the institution of marriage, the petitioners have sought gender-specific prayers and the creation of gender-specific offences at the expense of marital institutions. The abuse of the provisions of Section 498A of the IPC has been recognised by the courts and, therefore, there is a need to introduce gender-neutrality in the sphere of sexual violence. Therefore, if MRE is struck down, it would only add to the existing inequities and injustice. Thus, the appropriate forum would be the legislature as the enactment of law requires the formulation of policy which ought to be informed by a baseline study and not mere legal arguments. Since this court has taken up the matter after seven years and it has taken over two months to hear legal submissions, the legislature is surely entitled to, being accorded sufficient time to undertake consultation with the States and various public interest groups and organisations which operate in this space. There does not exist a single judgment either in Bharat or elsewhere which has granted the kind of prayers sought by the petitioners. No amount of semantic jugglery misrepresentation of case law can refute this fact. At best this court can prod the legislature into expediting the process of consultation and legislation if the legislature deems it necessary but under no circumstances, can a court of law direct a direction or outcome of the process. In fact, the court cannot even influence the process by issuing an advisory opinion on matters which

are outside the scope of its constitutional remit. It is only the Supreme Court which has the power to issue an advisory opinion under Article 143 if the Hon'ble President of "Bharat" so seeks it. There is no such power vested in the High Court under Article 226 to issue an advisory opinion to the legislature either of the Centre or the State. The striking down of MRE would result in enlarging the scope of the said provision and end up in recognizing the sexual act committed in the context of marriage as an offence. This power is beyond the scope of the court's power of judicial review available under Article 226 of the Constitution or even to the Supreme Court under Article 141 of the Constitution. Therefore, reliance on judgments such as ***Shreya Singhal v. Union of India***, (2015) 5 SCC 1[1] or ***Navtej Singh Johar v. Union of India***, (2018) 10 SCC 1[2] which concerns Section 66A of the Information Technology Act, 2000 [in short "IT Act"] and Section 377 of the IPC respectively would have no relevance to the instant case. These were judgments where a challenge was laid to a criminalising provision whereas if MRE is struck down, it would result in the exact opposite consequences i.e., end up criminalising an act committed by a husband *qua* his wife in the context of marriage.

(xiv) The reliance by the petitioners on the judgment rendered in ***Shayara Bano v. Union of India***, (2017) 9 SCC 1[3] is also baseless since all that the Supreme Court did was to declare the practice of *talaq-e-biddat* recognized under Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 as unconstitutional. The question as to whether criminal consequences should entail if recourse is taken to *talaq-e-biddat* by the husband was left to the wisdom of the legislature.

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[1] In short "***Shreya Singhal***"
[2] In short "***Navtej Singh Johar***"
[3] In short "***Shayara Bano***"

(xv) If this court were to grant the prayers sought by the petitioners, it would encroach onto the exclusive domain carved for the legislature under Article 246 of the Constitution. The issue concerning marital rape/spousal sexual violence requires consideration of various aspects including social, cultural and legal. Although, the issue escalated to this court is legal, the consequences are social and cultural. Policymaking is today data-driven (anecdotal evidence will not suffice) and, therefore, dealing with the issue at hand as a mere *lis* would amount to missing the forest for the trees. The petitioner's invitation to the court to transgress the line of the Doctrine of Separation of Powers is "deeply disturbing" for it could have disastrous consequences as people's respect for institutions as well as Constitution would be diminished. Furthermore, Constitutional morality and institutional independence would stand undermined if the petitioner's prayers were to be granted.

(xvi) The reliance placed by the petitioners on the judgment of the Supreme Court rendered in ***Independent Thought v. Union of India***, (2017) 10 SCC 800[4] is misplaced; in particular, emphasis laid on the " inversion test" (relied upon by Ms Karuna Nundy i.e., counsel for one of the petitioners), is equally misconceived. In this context, it was contended that a bare perusal of paragraphs 1 and 190 of the judgment would show: firstly, that the court, in that case, had confined its discussion to the issue concerning whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age would tantamount to rape. Secondly, the judgment made it amply clear that the Court could not create an offence. [See paragraph 190 of ***Independent Thought***.]

(xvii) The judgment in ***Independent Thought*** was rendered to do away with

the conflict which arose on account of provisions contained in the POCSO Act/Prohibition of Child Marriage Act, 2006 [in short 'PCM Act'] and MRE insofar as it concerned girls falling in the age group 15 to 18 years. The court's anxiety was to do away with the immunity granted to men who marry girls under the age of 18 when POCSO Act defined a child as a person who was below 18 years of age. According to the court, the problem was compounded since Section 42A of POCSO Act provides that it would override all other legislations. It is in this context that the Supreme Court read down MRE with respect to a girl child falling between 15 and 18 years of age. [See paragraphs188 and 189 of the ***Independent Thought***.]

(xviii)Thus, petitioners cannot take recourse to the inversion test and apply the observations made in ***Independent Thought*** to buttress their stand concerning marriage between adults. [See paragraphs 73 to 75, 83 to 85, 89 to 94 and 108.]

(xix) The petitioners' argument that striking down MRE would not amount to the creation of a new offence but would merely enlarge the scope of offenders is an argument that deserves to be rejected. The legislature has consistently given *sui generic* treatment to the institution of marriage and, therefore, the wisdom of the legislature needs to be respected. Although the impugned provisions have a colonial legacy, they should be presumed to be constitutional unless demonstrated otherwise by the challenger. [See Article 13(1) of the Constitution.] The petitioners' argument based on the judgment of the Supreme Court rendered in ***Navtej Singh Johar*** that there is no presumption of constitutionality qua statutes enacted prior to the coming into force of the Constitution is misconceived as the said judgment is "*per incuriam*" for the following reasons :

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[4] In short "***Independent Thought***"

(a) The Supreme Court has relied upon Article 372(2) and the dissenting judgment of Chief Justice A. M. Ahmadi (as he then was) in ***NDMC v. State of Punjab***, (1997) 7 SCC 339 to conclude that pre-constitutional laws do not enjoy the same degree of presumption of constitutionality as those which were enacted after the Constitution came into force. The appropriate provision that the court ought to have discussed is Article 13(1) of the Constitution. Even though, the court notices its judgment in ***John Vallamattom v. Union of India***, (2003) 6 SCC 611[5] which adverts to Article 13 of the Constitution, there is no discussion of that article in ***Navtej Singh Johar***.

(b) In ***Navtej Singh Johar,*** although the court referred to the judgments rendered in ***Chiranjit Lal Chowdhuri v. Union of India***, 1950 SCR 869 and ***State of Bombay v. F.N. Balsara***, 1951 SCR 682, both of which dealt with pre-constitutional enactments and the presumed constitutionality of those statutes, these aspects were not given due consideration in ***Navtej Singh Johar's*** case. Likewise, the courts also did not consider the impact of another judgment rendered by it in ***Reynold Rajamani v. Union of India***, (1982) 2 SCC 474 which concerned the Divorce Act, 1869 i.e., a pre-constitution enactment. The question, therefore, which arises for consideration is whether the presumption of constitutionality attaches to pre-constitution laws.

(xx) The fact that Section 376B of the IPC and Section 198B of the Code were incorporated in the respective statutes by Act 13 of 2013 i.e., after the Constitution came into force would enjoy the presumption of constitutionality. Furthermore, the court needs to recognise the fact that despite demands made to do away with MRE, the legislature chose not to

[5] In short "***John Vallamattom"***

remove the said provision from the statute would lend a presumption of constitutionality even to this provision. In this context, it is important to bring to the notice of the court that MRE has been adverted to in the following documents despite which the legislature has chosen, as indicated above, not to remove it from the statute :

(a) Paragraph 5.9.1 of the 167th Report of the Parliamentary Standing Committee of Home Affairs on the Criminal Law (Amendment) Bill, 2012.

(b) 19th Report of the Lok Sabha Committee on Empowerment of Women (2012-2013). [See paragraph 1.64.]

(c) Report of Justice J.S. Verma (Retd.) Committee on Amendments to Criminal Law. [See paragraph 79 of the report.]

(d) 172nd Report of the Law Commission of India on Review of Rape Laws. [See paragraph 3.1.2.1 of the report.]

(xxi) Thus, regardless of the position in law, concerning the presumption of constitutionality of pre-constitutional laws, it is inaccurate for the petitioners to contend that MRE is a colonial provision or baggage of the English Doctrine of Coverture under which the wife is treated as a mere property of the husband. The petitioners have failed to cite a single document that would demonstrate that after coming into force of the Constitution, the legislature has retained MRE by relying upon the Doctrine of Coverture. Therefore, in the absence of any supporting material, to use patriarchy in the argument *qua* MRE vis-a-vis the Indian Legislature as well as the Indian society at large is to impute "colonial attitudes" on "Bhartiya society", *albeit*, without basis. In short, baseless and slavishly imported rhetoric cannot replace cogent and evidence-based legal arguments.

(xxii) Contrary to the contention of the petitioners, the impugned provisions do not suffer from manifest arbitrariness or discrimination. For petitioners to

seek striking down of the impugned provisions on the touchstone of Articles 14, 15, 19 & 21, they would have to discharge the onus which rests on them i.e., that the impugned provisions are unconstitutional. The contention that they are not unconstitutional is based on the following submissions :

(a) Under the IPC, sexual offences fall under Chapter XVI which relates to offences affecting the human body while offences concerning marriage and cruelty by the husband or relatives of the husband fall under Chapters XX and XXA respectively. A sexual offence committed by a person who is not a spouse or is a stranger attracts the provisions of Section 375. Likewise, gang rape attracts the provisions of Section 376D. Sexual offences committed by persons in a position of authority are covered by Section 376. Similarly, unnatural offences without exception attract Section 377. Besides this, sexual offences committed by a husband while remaining a husband attract Section 498A of the IPC. Furthermore, sexual offences committed by a husband after legal separation or *de facto* separation attract the provisions of Section 376B of the IPC. Notably, under Section 376(2), although, a host of dramatis personae are covered and, if found guilty, accorded a punishment of not less than 10 years, with life imprisonment prescribed as maximum punishment; a specific provision under Section 376B is engrafted in the IPC for the husbands. This is also true with regard to those who are covered under sub-section (2) of Section 376 of IPC. Even though, this provision relates to a “person in authority”, it does not include husbands. The provision of the IPC when read along with Section 114A of the Indian Evidence Act, 1872 [hereafter referred to as the "Evidence Act"] would have grave consequences if extended to husbands. Section 114A of the Evidence Act, *inter alia*, provides that in a prosecution for rape under various clauses of Section 376 of the IPC referred thereto where sexual intercourse by the

accused is proved and the question which arises for consideration is as to whether or not it had the consent of the woman and if the woman states that she did not accord consent, the court shall presume that no consent was given by the woman. The explanation appended to this section makes it clear that sexual intercourse shall mean any of the acts mentioned in Clauses (a) to (d) of Section 375 of the IPC. This provision has the portent of disrupting marital relationships.

(xxiii) Striking down MRE would render the provision provided under the heading "Fourthly" in Section 375 of the IPC otiose since it is predicated on natural conjugal relationships between the spouses. That being said it cannot be said that there is no remedy available for non-consensual sex or spousal sexual violence. [See provisions of Sections 377 and 498A of IPC.]

(xxiv) The acts referred to in Clauses (a) to (d) of Section 375 of the IPC are deemed as sexual acts and, therefore, are not *per se* illegal and also outside the remit of unnatural offences within the meaning of Section 377. What makes the sexual acts illegal is when they fall under any of the seven circumstances outlined in Section 375 of the IPC. Therefore, consent is not the sole deciding factor. What determines whether or not the sexual act is an offence are the circumstances set forth in Section 375. In other words, circumstances/context determine the nature of consent or its absence. In contradiction, the sexual act between a separated husband and wife whether under a decree of separation or otherwise is premised on the consent of the wife. This distinction is not based on patriarchal consideration but has practical connotations since it is next to impossible to establish the absence of consent given the intimate nature of the relationship between spouses and possibly the absence of eye-witness accounts. It is for this reason that the absence of consensual conjugal relationships is easier to presume in the

event of legal or *de facto* separation. This is also the reason why preliminary enquiry is required to be carried out under Section 198B of the Code to assess if couples live apart while residing under the same roof before booking the husband for an offence under Section 376B of the IPC. Given the age of sexual liberation that we live in, it is not possible to conclude whether the wife was exposed to sexual cruelty or non-consensual sex. In other words, even the presence of bruises or injury cannot automatically lead to an adverse conclusion as they could be merely a manifestation of passion that may subsist between spouses when they indulge in sexual acts. Therefore, State's intervention through the legislative route is required to balance individual dignity and prevent the possibility of abuse of legal remedies which may end up harming an individual's dignity/reputation.

(xxv) The argument that consent alone matters and marriage changes nothing in this regard is legally and practically baseless. The marriage is accompanied by obligations that the partners have to bear which *inter alia* include conjugal expectations, financial obligations and, finally, duty towards progeny. If these aspects are kept in mind then it cannot be said that the institution of marriage cannot form the basis of sustaining MRE. A careful reading of the language employed in Sections 375 and 376B of the IPC would show that the expression "will" and "consent" although related are not identical which explains the reason for the use of "without consent" in Section 376B of IPC. In a marital relationship, since conjugal expectation is a two-way street, partners may choose to accede to, sexual acts for a variety of reasons and not all of them would necessarily amount to cruelty. In such circumstances, consent is given as a part of spousal intimacy although the will to engage may be absent. If every such incidence is treated in a cut and dried manner as an incidence of marital rape then the only way

partners in a marriage may survive would be by drawing up a detailed written agreement and the steps to be observed for courtship or mating or, by creating a detailed evidentiary record of every act of intimacy and/or by inviting a third party to act as a witness- none of which is healthy for the survival of the institution of marriage. This would be a blinkered approach to consent without having regard for the context.

(xxvi) Besides the remedies available in IPC, victims of spousal violence can also take recourse to the provisions under the D.V. Act. Section 3 of the D.V. Act defines sexual abuse to include any conduct of sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of women. Clearly, this includes non-consensual sex. The contention advanced by the petitioners that the provisions of Section 19(2) of the D.V. Act only provide for civil remedies is belied if one were to have regard to Section 19(2) of the said act. The said provision empowers the magistrate "to pass any other direction which he may deem reasonably necessary to protect or provide for the safety of the aggrieved person". As a matter of practice, the magistrates routinely issue directions for the registration of FIR under Section 498A, 376B and 377 of the IPC. Therefore, to claim that there is an absence of criminal remedies concerning non-consensual sex is incorrect. Sufficiency and adequacy of remedies fall within the ken of the legislature. The difference in punishment to be accorded for spousal sexual violence and other safeguards such as limitation is a conscious legislative call taken having regard to the special status of marital relationships under the IPC and D.V. Act. The legislature's endeavour in treating spousal sexual violence as a specie distinct from rape within the meaning of Section 375 comes through if one looks at MRE and Section 376B from that perspective. The *sui generic* treatment given to sexual offences committed in marital

relationships highlights the differences in what is categorized as an offence and not as contended by the petitioners as to who commits the offence i.e., the offender. In this context, the submission advanced on behalf of the petitioners based on Section 40 of the IPC i.e., that it defines offence in the context of an act that is made punishable and, therefore, does not draw a distinction based on the offender or the context is misconceived. The IPC is replete with provisions where acts committed by different dramatis personae take a different shape or result in a different outcome. Illustratively, the same offence committed by an adult instead of a juvenile results in different outcomes. Likewise, the provisions of the POCSO Act are illustrative of the fact that the IPC is not blind to context, relationships, age or other valid aspects. Therefore, the legislature has consciously avoided using the word rape in the context of spousal relationships, not to protect the spouse but those connected with them, namely, families and the progeny.

(xxvii) The marital institution is a legitimate concern of the State. The mores and values of other countries cannot be foisted on our society. The current state of public morality on such issues can only be ascertained by the legislature and not the court. Furthermore, every policy disagreement cannot be escalated to the threshold of unconstitutionality and courts cannot be used as instrumentalities to upset policy decisions merely because a certain cross-section of the society disagrees with them. Although disagreements are expected in democracy, not all disagreements demonstrate and/or establish the unconstitutionality of a provision. Critically, the judiciary cannot treat such disagreements with policy as proof of unconstitutionality. The decisions of the legislature must be preserved and defended to the extent possible and wherever necessary through purposive interpretation.

(xxviii) The petitioner's contention that international norms and

standards should be taken into account while ruling on the issue at hand ignores the safeguards which are provided, for instance, in the Sexual Offences Act enacted in 2003 by the United Kingdom. Section 1 of the said Act allows the accused to raise a defence that he was under a reasonable belief that sexual intercourse with the alleged victim was consensual. Likewise, Section 23 of the very same Act exempts spousal and civil partners from the applicability of Sections 16 to 19 which relate to abuse of a position of trust. The said Act also spells out evidentiary standards and circumstances in which conclusive presumptions may be drawn. The Act envisages Standard Operating Procedures for the prosecution of cases concerning an allegation of rape. The Act is gender-neutral.

(xxix) Likewise, the reliance placed by the petitioners on the judgment of the European Court of Human Rights (ECHR) in ***C.R. v. United Kingdom***, (1995) 21 EHRR 363[6] misses the point that it concerned an estranged couple, a situation which is squarely covered under Section 376B of the IPC.

(xxx) Contrary to the impression given by the petitioners, in Nepal, a petition similar to the ones filed in this court was quashed. Nepal has brought in several procedural safeguards when the law on spousal sexual violence was finally introduced by the legislature which included enunciation of legal proceedings within 35 days of the commission of the alleged offence.

(xxxi) Importantly, Nepal's legislation is also gender-neutral. The different States of the United States of America have taken varying positions, for instance: in the State of Maryland, spousal defence is recognised. Similarly, Connecticut treats spouses differently from strangers. Likewise, the State of Idaho recognises special circumstances in which a spouse/partner may be

[6] In short "***CR v. UK***"

prosecuted. Safeguards have been introduced by other States such as Nevada, Rhode Island, Oklahoma, South Carolina and Virginia. None of the international instruments cited by the petitioners envisage the creation of offences by the judiciary and critically they address the issue of sexual dignity and violence in gender-neutral terms.

(xxxii) In sum, MWT does not oppose the recognition of spousal sexual violence. Its position is spousal sexual violence stands already criminalised and, therefore, the grievance concerning inadequacy can only be addressed by the legislature and not the judiciary. Inadequacy or perceived inadequacy is a matter which falls within the ken of the legislature and cannot become a ground for a constitutional challenge. It is, according to MWT, possible to protect individual dignity and marital institution without sacrificing one for the other. Gender-neutral approach to such issues should be consistent with the calls for gender equity.

10. I must note that the arguments that Mr Sai Deepak advanced, covered to a very great extent the submissions which were made in the opening by Mr Amit Lakhani and Mr Ritwik Bisaria on behalf of MWT. To avoid prolixity, their arguments are not specifically recorded herein.

11. Mr R.K. Kapoor, who appeared for Hridaya, the other intervenor, made submissions that are more or less in line with the arguments advanced by Mr Sai Deepak on behalf of MWT. Briefly, Mr Kapoor's submissions can be paraphrased as follows :

(i) Retention of MRE on the statute does not involve a violation of Article 14 of the Constitution. In 1983 when Section 375 of the IPC was amended by the Parliament only the expression "Of rape" was substituted with "Sexual Offences". The substance of Section 375 remained intact.

(ii) Despite several amendments made to the IPC and other related

statutes, MRE remained undisturbed. Thus, the wisdom or the motive of the Parliament cannot be subjected to judicial scrutiny. The courts are precluded from legislating. Courts only interpret the law, in case the law is misused, it is for the legislature to amend, modify or repeal the law if deemed necessary. In this context, reference was made to the 172nd report of the Law Commission of India, the Draft Criminal Law (Amendment) Bill, 2012, the report of Justice J.S. Verma Committee [hereafter referred to as "Justice Verma Committee Report"] and the 167th report of the Parliamentary Standing Committee on the Criminal Law (Amendment) Bill, 2012 presented to the Rajya Sabha on March 1, 2013. Besides this reference was also made to the extracts from the judgment rendered by the Supreme Court in (i) ***Raja Ram Pal v. Hon'ble Speaker, Lok Sabha***, (2007) 3 SCC 184 at paragraph 409, and (ii) ***Sushil Kumar Sharma v. Union of India,*** (2005) 6 SCC 281[7] at paragraph 16.

(iii) Section 376B and MRE/ Exception 2 to Section 375 of IPC represent persons who fall into two different classes. On account of judicial separation, husband and wife are physically and mentally set apart and, therefore, the wife's consent for a sexual relationship stands withdrawn from the date of separation. Therefore, it cannot be said that retention of MRE would amount to a violation of Article 14.

(iv) Article 14 permits reasonable classification based on nexus and object that is sought to be achieved by the legislature. The 167th report of the Parliamentary Standing Committee *inter alia* states *"..... It was, therefore, felt if the marital rape is brought under the law, the entire family system will be under great stress ....."*. The Courts cannot examine the adequacy of the objects sought to be achieved or the motive of the legislature in passing a

[7] In short "***Sushil Kumar Sharma***"

statute or retaining a provision so long there is some object behind it. In case, MRE is struck down, husbands who are not separated would be in a worse position than those who are separated from their wives and indulge in non-consensual sexual acts. Such husbands would be subjected to harsher punishment than those who are booked under Section 376B of the IPC. Husbands, who are not separated from their spouses if found guilty of the offence of rape under Section 376 of the IPC, will be amenable to imprisonment for a term which shall not be less than 10 years but which may extend to imprisonment for life. Whereas punishment by way of imprisonment provided under Section 376B is minimum of 2 years but may extend to 7 years. In this behalf, reference was also made to Section 376(2)(h) and 376(2)(n) concerning rape committed on a woman who is known to be pregnant or repeated acts of rape committed on the same woman. These provisions would demonstrate that striking down MRE would lead to harsher consequences for the husband as compared to those husbands who are separated from their spouse. Furthermore, our attention was also drawn to Section 114A of the Evidence Act to demonstrate the anomaly that would arise vis-a-vis the husbands who remained in marriage and those who are separated from their wives.

(v) Therefore, Section 376 of the IPC concerns offences involving persons who fall in a separate and distinct class that cannot be tampered with by the court. [See ***Sant Lal Bharti v. State of Punjab***, (1988) 1 SCC 366[8] and ***H.P. Gupta & Anr. v. Union of India & Ors.***, (2002) 10 SCC 658.]

(vi) Thus, the issue concerning punishment that should be imposed on husbands who are not separated from their wives and are held guilty of the offence(s) described under Section 375 of the IPC needs legislative

[8] In short "***Sant Lal Bharti***"

intervention. It is not the position of the impleaded respondent that if a husband indulges in a sexual act without the consent of the wife, he should go scot-free; what is objected to is subjecting him to a punishment harsher than that which is provided for separated husbands under Section 376B of the IPC. The Parliamentary Standing Committee in its 167th report, therefore, rightly observed the following in paragraph 5.9.1 : "*...The Committee felt that if a woman is aggrieved by the acts of her husband, there are other means of approaching the court.....*" It would have to be presumed that the Parliament, at that juncture, was aware that the husband could be punished under the D.V. Act. In this context, reference was made to Section 3 read with Explanation I of the D.V. Act. The petitioners' submission which tantamount to contending that MRE can be struck down because of the inadequacy of punishment provided in the D.V. Act is untenable because Section 376B of the IPC also provides for a lesser punishment that is not under challenge.

(vii) It is important to note that the concerned magistrate under Section 31 of the D.V. Act is entitled to impose a penalty by way of imprisonment and fine in case the husband commits a breach of a protection order. Furthermore, the magistrate is also empowered to frame charges under Section 498A and other provisions of IPC in case offences committed by the husband are brought to his/her notice. As per the provisions of Section 32 of the D.V. Act, such an offence is cognizable and non-bailable.

(viii) India is not a "Hindu" State, unlike Nepal. Although there are several statutes dealing with personal laws concerning Hindus, Muslims, Sikhs, Christians, Jains and others, the provisions of IPC apply to all. MRE benefits all irrespective of their faith and identity. In the same vein, reference was made to the Special Marriage Act, 1954 [in short “SMA”] to establish that

divorce can be sought on the ground of cruelty. Reference was also made to Section 2(iv) of the Dissolution of Muslim Marriage Act, 1939 which *inter alia* furnishes a ground for divorce in case a husband fails to perform his marital obligations, albeit without reasonable cause for three years. It was contended that likewise, where a wife denies conjugal rights to a husband, it has been treated as cruelty and a ground for seeking divorce by the husband. [See ***Vidhya Viswanathan v. Kartik Balakrishnan***, (2014) 15 SCC 21.]

(ix) The courts in India ought not to apply western concepts. The concept which is in vogue in western countries cannot form the basis for striking down a statutory provision made by Parliament having regard to the needs of its people. Therefore, one cannot plead that there has been a violation of Article 14 on the ground that while a wife located in a western country can file a complaint about sexual abuse, the same remedy is not available to a wife located in India. [See ***Sant Lal Bharti.***]

(x) In case MRE is struck down, it is likely to be misused as has happened in respect of cases lodged under Section 498A of the IPC. [See ***Sushil Kumar Sharma.***]

(xi) The courts cannot extend the meaning given to a word or expression used in a statute. Therefore, the expression "relative" or "trust" used in Section 376(2)(f) of the IPC cannot be extended to include a husband.

(xii) MRE has been retained on the statute to protect the "institution of marriage". An individual is subjected to punishment for committing a crime as it impacts the society at large which needs to be protected from the pernicious effect of such crime. Thus, the legislative policy of not punishing an offence committed by a husband upon his wife which otherwise would fall within the purview of Section 375 is taken out of its realm by Exception 2 appended to the said section only to protect the society i.e., the institution

of marriage. That marriage is a social institution that has social, economic, cultural and religious ramifications, has been accepted by courts [See ***Sivasankaran v. Santhimeenal***, 2021 SCC OnLine SC 702.]

(xiii) MRE has the potential of destroying the institution of marriage. [See 167th report of the Parliamentary Standing Committee.] The endeavour to save the institution of marriage also finds recognition in various statutes including the Hindu Marriage Act, 1955 [in short "HMA"]. In this context, reference was made to Section 13, 13B, 14, 13(1A) & 16 of the HMA to show there is an endeavour to save the institution of marriage. A petition of divorce cannot be filed unless one year has elapsed since the date of marriage. Likewise, a divorce petition based on mutual consent cannot be instituted unless it is shown that parties have been living separately for one year or more. Furthermore, under Section 13(1A), a decree for divorce can only be filed after parties have undergone judicial separation for one year or a decree of restitution of conjugal rights remains unsatisfied for the said period. Section 16 seeks to provide legitimacy to children who are born from a void or voidable marriage. Thus, the institution of marriage is important not only for the couple involved but also for the family which includes children and parents. [See ***Amit Kumar v. Suman Beniwal***, 2021 SCC OnLine SC 1270.]

(xiv) The position of a sex worker cannot be compared with persons bound by marriage. The perpetrator or the abuser cannot claim restitution of conjugal rights against a sex worker and correspondingly a sex worker cannot claim maintenance against the perpetrator or abuser. There is no emotional relationship between the sex worker and the perpetrator whereas the relationship between the husband and wife is a package comprising mutual rights and obligations which are social, psychological, religious and

economic. It cannot be limited to just one event of consent in the context of sexual relationships.

(xv) Same punishments cannot be provided for dissimilar situations/acts. [See ***Arvind Mohan Sinha v. Amulya Kumar Biswas & Ors***., (1974) 4 SCC 222.] MRE presents a case of reasonable classification and hence cannot be struck down under Article 14 of the Constitution. Thus, even if a violation of Article 21 of the Constitution is established, reasonable classification is permissible for providing different punishments.

(xvi) Retention of MRE on the statute does not indicate that the Parliament justifies the act. It only establishes that it is not deemed fit to be punished under Section 376 of the IPC. Therefore, if the husband were to use force or intimidation in committing marital rape, the wife could trigger other provisions available in IPC as also in various other statutes to have her grievance redressed. [See paragraph 5.9.1 of the 167the report of the Parliamentary Standing Committee and also see Sections 323 to 326, 326A, 326B, 328, 336, 352, 354, 354A, 354B, 354C, 355, 498A, 304B, 506 and 509 of IPC as also provisions of the D.V. Act.]

(xvii) Forced sexual intercourse between a husband and wife cannot be treated as rape. At worst, it can be treated as sexual abuse as is clear upon perusal of the definition of "cruelty" found in Section 3 of the D.V. Act.

(xviii) A wife cannot prescribe a particular punishment that can be imposed on the husband "to satisfy her ego". The only difference between Section 376 of the IPC and the D.V. Act is with regard to the quantum of punishment, although, the act of sexual abuse is an offence under both statutes. The object and purpose of retaining MRE cannot, thus, be said to be arbitrary or violative of Articles 14, 15 or 21 of the Constitution. It is for this reason that under the Code, a different procedure has been provided vis-a-

vis offences relating to marriage. [See Section 198, 198A and 198B of the Code, and Sections 113A and 113B of the Evidence Act.] For other offences as well, there is a provision under the Evidence Act for drawing presumption. [See Sections 111A and 114A of the said Act.] Likewise, it cannot be said that since rape is a heinous crime, Parliament should have provided the death penalty in all cases relating to such crime. Illustratively, reference was made to Section 376A, 376AB, 376DB and 376E of the IPC [which provide for the death penalty], as against the offences which are brought within the purview of Sections 376(2) and 376D.

(xix) The importance of conjugal rights in marriage can be ascertained by having regard to Section 9 of the HMA which concerns restitution of conjugal rights. The remedy under this provision is available to both spouses and denial of sex by either spouse is construed as cruelty and, thus, is available as a ground for divorce. [See ***Vidhya Viswanathan v. Kartik Balakrishnan***, (2014) 15 SCC 21.] Legislative wisdom cannot be doubted on the ground of flawed classification. In this context, the example was given of offenders to whom the provisions of the Probation of Offenders Act, 1940 or Section 360 of the Code were available. Likewise, it was contended that offences that were punishable with imprisonment for a longer period such as offences falling under Section 420 and 494 of the IPC could be compounded under Section 320 of the Code while others with a shorter duration of punishment, for example, an offence punishable under Section 353 of IPC which was not compoundable. Reference was made to Section 494 of the IPC which concerned an offence of a spouse entering matrimony while the other spouse was alive. It was submitted that although the punishment could go up to 7 years, the same was compoundable. These examples were cited to demonstrate the latitude that the Parliament enjoyed

in providing different punishments for different offences. Similarly, reference was also made to Sections 302, 303, 304, 304A and 304B of the IPC. It was stated that, although the death of a victim is a foundation for invoking, both, Section 304A and 302 of the IPC, the punishment that can be awarded under the two provisions may vary. The quantum of punishment can vary depending upon the relationship between the parties. The powers of judicial review conferred on the court are limited. While exercising the power of judicial review, the court cannot substitute its own opinion for the wisdom of the legislature. [See ***K.S. Puttaswamy v. Union of India***, (2017) 10 SCC 1[9].]

(xx) It cannot be said that if one organ i.e., the legislature gives protection to the citizens by engrafting in the statute MRE, the other organ, which is the judiciary, can take away the protection by striking down the exception and, thus, creating an offence. It is a settled law that what cannot be done directly can also not be done indirectly. In ***Joseph Shine v. Union of India***, (2019) 3 SCC 39[10] and ***Navtej Singh Johar***, the court de-criminalized acts that constituted offences under Section 497 and 377 of the IPC. Therefore, those judgments are distinguishable. Similarly, in ***K.S. Puttaswamy*** case, the court extended the meaning of Article 21 by confirming the right of privacy of citizens, it did not criminalize any act.

(xxi) The ***Independent Thought*** only read down MRE/Exception 2 to Section 375 of IPC but did not create an offence. The ***Independent Thought*** is a binding judgment for the issue raised and adjudicated in that case and, therefore, has no application to the issues obtaining in the instant matters.

(xxii) The power of the High Court under Article 226 cannot be equated with the power available to the Supreme Court under Articles 32, 141 and

[9] In short " ***K.S. Puttaswamy*** "

142 of the Constitution.

(xxiii)The Supreme Court, via the decision rendered in ***Vishaka v. State of Rajasthan***, (1997) 6 SCC 241[11], endeavoured to fill up the legislative vacuum in the area concerning sexual harassment of women in workplaces while exercising powers under Article 32 of the Constitution. In that case, the court had emphasized that their decision could be treated as law declared under Article 141 of the Constitution. The courts can make recommendations to the Parliament, if changes are required in the law. [See ***Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan***, (2009) 16 SCC 517.]

Arguments advanced for striking down the impugned provisions

12. In support of this proposition, submissions were advanced by Mr Colin Gonsalves, Ms Karuna Nundy and the two amici appointed by this court i.e., Mr Rajshekhar Rao and Ms Rebecca John, Sr. Advocates.

13. Mr Gonsalves, broadly, made the following submissions :

13.1. He began by alluding to the journey that the matters had taken since 2015 and in this behalf adverted to the fact that the Union of India (UOI) had filed its counter-affidavit on 25.05.2016 in W.P.(C) No.284/2015 and that pleadings were completed on 29.08.2016. Based on the record, he stated that arguments in the captioned matters were heard by the earlier bench at length for 26 days between 29.08.2017 and 14.08.2018. He also adverted to the fact that the present bench had taken up the matter on 15.12.2021 (when an early hearing application was allowed) and, consequently, commenced hearing in the matter on 07.01.2022 on a daily basis.

13.2. Mr Gonsalves contended that UOI's written submissions dated

[10] In short "***Joseph Shine***"
[11] In short "***Vishaka***"

26.08.2017 revealed that for defining marital rape, a broad-based consensus of the society would have to be obtained. In the said written submissions, according to Mr Gonsalves, UOI had taken the position that it was, therefore, necessary to implead various State Governments to obtain their opinion and avoid complications that may arise at a later stage. The submission was that, although five years had passed, UOI had failed to undertake a consultative process which is evident from a perusal of written submissions dated 12.01.2022, additional affidavit dated 03.02.2022 and further additional affidavit dated 21.02.2022.

14. Since Mr Gonsalves was representing the petitioner in W.P.(C)No.5858/2017 [hereafter referred to as "Khushboo Saifi case"], he briefly adverted to the facts arising in the said matter.

14.1. In this context, it was pointed out that Ms Khushboo Saifi was a married woman of 27 years of age. She had got into an arranged marriage with, one, Mr Aizaz Saifi on 04.12.2016 and, at that juncture, she was pursuing a course in Bachelor of Arts (B.A.) from Indira Gandhi National Open University. It was pointed out that, at the time of marriage, she was in the final year of the said course.

14.2. Mr Gonsalves drew our attention to the assertions made in the writ petition that Mr Aizaz, at the time when he entered into matrimony with Ms Khushboo Saifi, was already involved in an extra-marital relationship with another woman, who, he eventually married on 16.04.2017 without providing any maintenance to Ms Saifi. The assertions concerning ill-treatment meted out to Ms Saifi by her husband Mr Aizaz including forced sexual intercourse on multiple occasions without having regard to her physical well-being were also referred to in the course of arguments. The

averment made by Ms Saifi that she was raped by her husband i.e., Mr Aizaz was also brought to our notice. It was emphasized that Ms Saifi was not provided medical aid either by her husband or by her in-laws and that she was not allowed to use her mobile phone. The only way that she could communicate with the outside world was through her husband's phone and even these conversations were recorded. Mr Gonsalves pointed out that it is in these circumstances that she approached an NGO for shelter, which led to Ms Saifi filing an FIR with Crime Against Women (CAW) Cell at South-East District, Srinivas Puri, Delhi, on 12.06.2017.

15. Besides facts involving Ms Saifi, Mr Gonsalves also made the following general submissions. Mr Gonsalves prefaced his arguments with the issues that, according to him, arose for consideration in the instant cases, which, in effect, were also the broad contours of his submissions.

15.1. Firstly, according to him, MRE was manifestly arbitrary as it sought to decriminalise a crime as heinous as rape.

15.2. Secondly, Section 376B of the IPC was unconstitutional since it created a distinction between husbands, who are not separated from their wives and those who are separated by bringing the latter class of husbands within the definition of rape in respect of forced sexual intercourse under Section 375 and, at the same time, assigned lesser punishment for such a crime.

15.3. Thirdly, rape is a heinous crime that has multiple consequences including mental trauma and severe adverse medical effects. It would be arbitrary to decriminalize marital rape on the ground that by entering into matrimony, a woman consents to a continued sexual relationship from which she cannot retract.

15.4. Fourthly, there is no rationale for distinguishing between married and

unmarried men who subject women to forced sexual intercourse.

15.5. Fifthly, marriage cannot be a relevant consideration in concluding whether a criminal offence has been committed or not.

15.6. Sixthly, the rape of a woman by her husband was unconstitutional, right from inception and is being put to test only now.

15.7. Seventhly, in any event, having regard to the passage of time and a better understanding of gender equality, MRE should not be permitted to remain on the statute.

15.8. Eighthly, the distinction sought to be drawn between western and Indian values insofar as marital rape is concerned, is untenable in law. There is no truth in the submission that Indian society is somehow superior to western societies and that marital rape is not known in India.

15.9. Ninthly, this court should not desist from examining the constitutionality of the impugned provisions only because it is impossible to prove the occurrence of marital rape as at times it happens within the confines of a household.

15.10. Tenthly, this court should also not desist from examining the constitutionality of MRE only because some women may file a false complaint against their husbands.

16. Elaborating upon the aforementioned submissions, Mr Gonsalves submitted that the distinction drawn concerning the offence of rape between those who are married as against those persons who are unmarried, was unmerited. The classification, according to him, had no rational nexus to the object sought to be achieved if the legislative policy on rape is to be taken forward. Insofar as the constitutional courts are concerned, they have to only examine whether the impugned provisions stand the test of Articles 14, 15 and 21 of the Constitution. Therefore, once such a declaration is made,

matters concerning proof and false complaints could be examined in specific cases by the trial courts.

16.1. Therefore, the circumstances in which the conduct of the husband would amount to 'coercion' or 'consent' would be examined by the trial courts in the given fact situation. Evidence led by the prosecution and defence will determine the outcome of cases that are dealt with by the trial courts. Adjudication of cases of marital rape and non-marital rape has been carried out in various jurisdictions and, therefore, there are legal precedents available to the trial courts to deal with such issues. These issues, though, should not come in the way of a constitutional court to examine the vires of MRE.

17. The argument that in a marriage, there is a presumption in favour of consensual sex which is not present in forced sexual intercourse outside marriage is flawed. The argument is founded on the theory that husbands have a greater degree of laxity available to them with regard to consent when engaging in sex with their wives. That this argument is untenable in law can be tested against the plight of a sex worker. The Supreme Court has decried such an attempt by holding that even a sex worker has a right to refuse forced sexual intercourse. [See ***State (NCT of Delhi) v. Pankaj Chaudhary***, (2019) 11 SCC 575**.**]

18. The submission advanced that forced sex in marriage cannot lead to a husband being sentenced to imprisonment for a term spanning between 10 years and life; the insinuation being that the sentence should be much less, is flawed. This is also an argument put forth to defend the retention of MRE on the statute. These submissions are premised on an erroneous understanding of the role of constitutional courts. The court cannot resolve all complications that concern sentencing; a job entrusted to the Parliament and,

those which emerge out of a particular fact situation. All that is required of the court, at this juncture, is to test the vires of the impugned provisions against the provisions of the Constitution. Once such a step is taken, it is open for the Parliament to step in and take the necessary next steps in the matter which includes whether a husband found guilty of rape should be visited with a lesser punishment.

19. It is important to note that both the courts and parliament have in the past dealt with new and complex issues that have arisen in criminal law. By way of example, reference was made to the guidelines issued by the Supreme Court that were required to be adhered to by the trial courts in cases concerning sexual abuse of children and those related to children involving domestic violence [See ***Sakshi v. Union of India***, (2004) 5 SCC 518 and ***Rajnesh v. Neha***, (2021) 2 SCC 324.]

20. Thus, the elimination of MRE is the first step that is required to be taken.

20.1. Deflating a grave and heinous offence such as rape is untenable. The argument loses sight of the fact that the penology behind punishment is concerned not only with the incarceration of the convict but also with stigmatizing the conduct which does not meet with the approval of the society. Since rape is a grave and heinous offence, society at large should know about the conduct of the convict. Therefore, the submission that other provisions of the IPC provide for equivalent punishment for sexual offences, and hence, MRE should remain on the statute is untenable in law.

21. Equally, the argument that misuse of law should be a reason to desist from striking down MRE should be rejected outrightly by the court. How, misuse of the law needs to be dealt with is an aspect which would require the intervention of the legislature [See ***Sushil Kumar Sharma***.]

22. The submission advanced that the observations made in the ***Independent Thought*** cannot be relied upon is erroneous; once a judgment is delivered on a given set of facts it is not open to a court to state that it cannot be relied on as a precedent. A judgment once delivered belongs to the world and thus, such observations cannot bind the judges, lawyers and members of the public in other cases. If there is parity, then, litigants should be free to apply the ratio of an earlier judgment notwithstanding such observations. [See ***Ramesh Bhavan Rathod v. Vishanbhai Hirabhai Makwana***, (2021) 6 SCC 230; at paragraph 37 and ***D. Navinchandra & Co. v. Union of India,*** 1989 SCC OnLine Bom 485; at paragraph 37.]

23. The submission that in marriage there is an "expectation of sex" i.e., a right to have sex absent consent would amount to resurrecting the Ghost of Lord Hale. Marriage merely gives social sanction to sex between adults. Procreation that follows such sexual union also receives acceptability from society. Therefore, a husband may "expect sex" but from there to argue that he would have the right to demand sex from a woman merely because she is in marriage with him, bereft of love, for satisfying carnal desire and procreation, is morally and legally untenable as it institutionalizes violence within the family. It is, therefore, the duty of a constitutional court to end such institutional violence against women. It is quite possible that even if this court were to nullify MRE, women victims may not lodge complaints and may suffer silently as social change does not occur automatically with the alteration in law alone. Might be said, it would be the first important step towards a real change and education of women in respect of their rights over their own bodies.

24. Ms Karuna Nundy, who appears on behalf of the petitioners, who have instituted W.P.(C) No.284/2015 (i.e., RIT Foundation) and W.P.(C)

No.6024/2017 [i.e., All India Democratic Women's Association (AIDWA)] alluded to the work carried out by these organizations to promote social and gender equality in India across classes, castes and communities.

24.1. Ms Nundy highlighted the fact that the challenge laid to MRE on the ground that it was unconstitutional as a logical and inevitable corollary has led the petitioners to challenge Section 376B of the IPC and Section 198B of the Code.

25. In this context, the submission made was until marital rape is declared explicitly to be an offence, it will continue to be condoned. It is a moral right of a woman to refuse unwanted, forcible sexual intercourse. This case is about respecting the right of a wife to say "no" to sexual intercourse and recognizing that marriage is no longer a universal licence to ignore consent.

26. The Constitution is transformative as citizens are transforming. Social transformation should ensure that citizens' right to justice, liberty, equality and fraternity is protected. Citizens' rights travel along the constitutional path because judges' personal and social moralities travel to the destination of constitutional morality. Substantive equality is dependent on the recognition of historical wrongs and discovering remedies for curing the wrong. The right of a wife to say "yes" to sexual intercourse includes the corollary i.e. the right to say "no" [See ***S. Sushma v. Commissioner of Police***, 2021 SCC OnLine Mad 2096; and ***Indian Young Lawyers Assn. (Sabarimala Temple-5J.) v. State of Kerala,*** (2019) 11 SCC 1.]

27. The ***Independent Thought*** case is a binding authority for several propositions including aspects concerning MRE. This judgment is also a precedent that is relied upon for the proposition that Section 376B of the IPC and 198B of the Code create a separate and a more lenient penal regime when a separated husband subjects his wife to forceful sexual intercourse. In

this regard, it is required to be noticed that initially, this court had dismissed the challenge raised to MRE because the petition filed by Independent Thought at the relevant time was pending adjudication before the Supreme Court. It is when Mr Gaurav Aggarwal, Advocate, for Independent Thought clarified to this court that the challenge before the Supreme Court was confined to married girl children aged between 15 to 18 years, that these petitions were taken up for hearing. [See order dated 08.09.2017 passed by this court.]

28. The ratio decidendi of ***the Independent Thought*** case would apply while testing the constitutional validity of MRE as a whole. The propositions laid down by the Supreme Court in ***Independent Thought*** would also apply to all women i.e., wives who are aged 18 years and above. In support of this proposition, Ms Nundy relied upon the inversion test evolved by Professor Eugen Wambaugh (Harvard Law School); a test which was applied by the Supreme Court in a decision rendered in ***State of Gujarat v. Utility Users' Welfare Association***, (2018) 6 SCC 21[12]; at paragraph 113. This test was also cited with approval by a three-judge bench of the Supreme Court in ***Nevada Properties (P) Ltd. v. State of Maharashtra***, (2019) 20 SCC 119[13]; at paragraph 13.

29. Applying the inversion test, it was submitted that ***Independent Thought*** case is an authority for the following propositions.

(i) A woman cannot be treated as a commodity. She has every right to say no to sexual intercourse with her husband. [See paragraph 66 at page 840.]

(ii) Marriage to a victim does not make a rapist a non-rapist. [See paragraph 75 at page 843.]

[12] In short "***Utility Users' Welfare***"

(iii) MRE creates an artificial distinction between married and unmarried women. [See paragraph 79.3 at page 844.]

(iv) Woman is not subordinate to or a property of a man. [See paragraph 84 at page 846.]

(v) The view that criminalizing marital rape would destroy the institution of marriage is unacceptable since marriage is not an institution but personal - nothing can destroy the institution of marriage except a statute that makes marriage illegal and punishable. [See paragraph 92 at page 849.]

(vi) MRE is discriminatory as it creates an anomalous situation where the husband can be prosecuted for lesser offences but not rape. [See paragraph 186 at page 883.]

(vii) Removing MRE will not create a new offence since it already exists in the main part of IPC. [See paragraphs 190 to 194 at pages 884-885.]

30. Each of the aforesaid propositions laid down in the ***Independent Thought*** case is binding on this court; an aspect which comes to fore if the inversion test is applied. In other words, if each of these propositions were to be reversed, the court could not have reached the conclusion that it did in the **Independent *Thought*** case. Furthermore, even obiter as a matter of judicial propriety would be binding on the high court. [See ***Peerless General Finance and Investment Co. Ltd. v. Commissioner of Income Tax***, 2019 SCC OnLine SC 851 at paragraph 13.]

31. There is no presumption of constitutionality in respect of a pre-constitutional statute like the IPC, even though it has been adopted and continued to remain in force after the Constitution was brought into force. Since MRE is a pre-constitutional provision, parliament's failure to remove it is a "neutral fact". [See ***Joseph Shine*** at paragraph 270 and ***Navtej Singh***

[13] In short "***Nevada Properties (P) Ltd.***"

Johar at paragraphs 359-364.]

32. As per Article 13, if a provision is found to be unconstitutional, the courts must act; holding that the matter is within the ken of the legislature is not a correct approach. [See ***Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India***, (1992) 2 SCC 343, paragraphs 48 to 50; and ***Independent Thought,*** paragraphs 166 and 167.**]**

33. The number of people affected or harmed by the impugned provisions cannot disentitle others from seeking relief from this court as this would be an irrelevant consideration while deciding upon the rights of parties. [See ***Shayara Bano,*** paragraphs 56 and 57 and ***Navtej Singh Johar***, paragraph 367.]

34. Although, while ruling upon economic policies and statutes having financial implications, the court should employ restraint, this does not hold good for statutes dealing with civil liberties or those which infringe fundamental rights. Qua such statutes, the courts should play the role of activist. [See ***Govt. of A.P. v. P. Laxmi Devi***, (2008) 4 SCC 720[14] at paragraph 88, and ***Govt. of A.P. v. G. Jaya Prasad Rao***, (2007) 11 SCC 528.]

35. MRE violates Article 14 of the constitution. It creates three classes of victims and perpetrators though the act is similar i.e., forced sexual intercourse.

35.1. The MRE is violative of Article 14 as it creates an unreasonable, discriminatory and manifestly arbitrary classification. Merely satisfying the test of intelligible differentia is not sufficient to pass muster of Article 14. To pass muster of Article 14, the impugned provisions must fall within the scope of the following facets of Article 14: there should be intelligible

[14] In short "***Laxmi Devi***"

differentia between classes, and there must be a rational nexus with the legitimate objects sought to be achieved.

36. MRE suffers from irrationality and manifest arbitrariness as it provides immunity from prosecution for rape to a man who has forcible sex with his wife but not to a man who has forcible sex with a woman who is not his wife. Furthermore, Section 198B of the Code and Section 376B of IPC provides qualified immunity; in the form of an increased threshold for cognizance and a lesser sentence in respect of a man separated from his wife. Such privilege of purported sanctity of an institution over the rights of individuals is manifestly arbitrary and is violative of Article 14. The mere existence of purported logic without a determining principle is not sufficient to protect the impugned provisions from being declared manifestly arbitrary. [See ***State of Bihar v. Brahmputra Infrastructure Limited***, (2018) 17 SCC 444 at paragraph 7.]

37. Moreover, if the purported rationale for retaining the impugned provisions has outlived its purpose or does not square with constitutional morality, the same should be declared manifestly arbitrary. [See ***Joseph Shine*** at paragraph 102.]

38. Provisions of law that postulate institution of marriage that subverts equality is manifestly arbitrary and bad in law. [See ***Joseph Shine*** at paragraphs 168, 169 and 182.]

39. The argument for retaining MRE is not supported by any determining principle. Those who support this view have not been able to establish how removing MRE is bad for marriage. There is no discussion found in legislative debates to support this view. There is also no reasoned dissent *qua* the recommendations made in this behalf by Justice Verma Committee Report. Therefore, the argument put forth that MRE finds mention in the

statute to protect the institution of marriage is not an adequate determining principle. MRE is archaic and is based on an outdated notion of marital relationships that has no place in a just constitutional order.

40. Although, there can be no doubt that there is an intelligible differentia between married, separated and unmarried persons, what this court is required to examine is whether the differentia between married and unmarried couples has a rational nexus with the object sought to be achieved, which is, to protect forced sexual intercourse within marriage. Therefore, if MRE is unconstitutional, whether qualified immunity extended to separated husbands under Sections 198B and 376B of the IPC would survive. It is well established that the object of a statute determines its constitutionality. [See ***Nagpur Improvement Trust v. Vithal Rao,*** (1973) 1 SCC 500 at paragraph 26 and ***Subramaniam Swamy v. CBI,*** (2014) 8 SCC 682 at paragraph 58.]

41. Pre-constitutional object of MRE was to protect the conjugal rights of husbands after the enactment of the constitution has undergone a change. The object of rape laws as set out in post-constitutional amendments to Sections 375 and 376 of IPC has been to protect women from violence and to secure for them sexual autonomy and right to bodily integrity. The object of post-constitutional rape laws is briefly this: "*no man should be able to force a woman to have sex with him without her consent*".

42. MRE is flawed for the following reasons :

42.1. It nullifies the object of the main provision and, hence, must fail. The object of the main provision is to criminalize rape. The purported defence put forward for retaining MRE i.e., protection of conjugal rights in the institution of marriage would destroy the object of the main provision. [See ***S. Sundaram Pillai v & Ors. v. V.R. Pattabiraman & Ors***., (1985) 1 SCC

591 at paragraph 27 and ***Director of Education (Secondary) & Anr. v. Pushpendra Kumar & Ors***, (1998) 5 SCC 192 at paragraph 8.]

42.2. It places the privacy of marriage as an object above the privacy of the individual in the marriage. Parliamentary debates which make a vague reference to preserving the institution of marriage as justification for retaining MRE is a "neutral fact". The courts need to examine whether this neutral fact should be held to be subsidiary and directly contrary to the explicit object of the legislation. The attempt to privilege the institution of marriage over the rights conferred on an individual i.e., the victim–wife under Article 21 of the Constitution can only be regarded as an unconstitutional object. An individual victim – wife's right not to be raped cannot be held hostage to an imposed conception of marriage. [See ***Joseph Shine,*** at paragraph 192.] And, therefore, while seeking to secure a victim-wife's rights under Article 21 of the Constitution, the court can scrutinize the "intimate personal sphere of marital relationships". [See ***Joseph Shine***, at paragraph 218.]

42.3. The purported protection of conjugal rights by not penalizing forced sex within marriage is not a legitimate object post-adoption of the Constitution as it does not align with the understanding of conjugal rights as it obtains today. [See ***John Vallamattom*** at paragraph 36.] Conjugal rights end where bodily integrity begins while enforcing a decree of restitution of conjugal rights between a married couple. Court can direct either party i.e., husband or wife to cohabit but it cannot force them to have sexual intercourse. Thus, refusal of either party to cohabit can only lead to attachment of property or imprisonment in civil prison. A spouse can even obtain a divorce in case of non-compliance with the decree in his/her favour on the ground of cruelty. Therefore, by denying a spouse sex, a person's

property and freedom may be at risk but not his/her bodily integrity. [See Section 9 of the HMA and judgment rendered by this court in ***Harvender Court v. Harmander Singh***, AIR 1984 Del 66 as also the decision rendered by the Supreme Court in ***Saroj Rani v. Sudarshan Kumar Chadha***, (1984) 4 SCC 90[15].] Therefore, the expression "conjugal rights" cannot include non-consensual acts adverted to, say for example, in Clauses (a) and (b) of Section 375 of IPC. Conjugal rights as enforced *via* courts begin and end at cohabitation and consortium. Anything beyond this is reduced to the status of conjugal expectation only, the denial of which is the ground for divorce. The courts are unanimous in holding that sexual intercourse cannot be forced *via* a decree of restitution of conjugal rights. MRE, on the other hand, sanctions and indeed encourages husbands to have forced sexual intercourse with their wives.

42.4. At present, the act of forced sexual intercourse can be punished only if ingredients of lesser offences under Section 354 and related but distinct offences under Section 498 and such other provisions of IPC are present. Via MRE, a husband gets sanction to enforce his conjugal right contrary to what the understanding of the law is without approaching the court. Thus, allowing a husband to enforce his conjugal expectation of sex by permitting him to have forced sexual intercourse with his wife without penal consequences is akin to saying that a wife who believes that she is entitled to maintenance, would have the right to sell her husband's personal belongings and property without his consent and thereupon appropriate the proceeds towards her maintenance.

42.5. Unlike the United Kingdom, India has a written Constitution which lays great emphasis on fundamental rights. A statute or a provision of the

[15] In short "***Saroj Rani***"

statute that does not conform to Part III of the Constitution can be struck down by courts. This duty is cast on the courts by Article 13 of the Constitution. Macaulay's object in inserting MRE in the IPC when the Constitution had not been adopted is liable to be struck down as it does not align with its ethos. The deference to the original statute ought not to be paid in perpetuity. The only legitimate object of the anti-rape laws, at present, is to protect the bodily integrity and sexual autonomy of women.

43. MRE seeks to make a dubious distinction between husbands and non-husbands, insofar as perpetrators are concerned and likewise, between wives and non-wives as regards victims. In the context of a forced sexual act- it is construed as rape when committed by a person other than a husband but is deemed less than a rape when committed by a husband.

43.1. The foundation of the arguments advanced on behalf of the respondents and intervenors is that there is an intelligible differentia between husbands and other persons who commit such acts which, in turn, has a rational nexus with the object of protecting the institution of marriage and preserving conjugal rights of the husband. In other words, this distinction lends support to the argument that MRE does not violate Article 14. This argument is flawed for the reason that every offence has three basic components i.e. the perpetrator, the victim and the act itself. These three components are present whether the offence is committed by a husband or a person other than the husband and, therefore, on all three counts, MRE should fail.

44. Taking this argument forward, the husband may have an expectation and even an in-principle agreement that there would be sex in marriage. Based on this it could be argued that there is an intelligible differentia on this basis between a husband and a person who is not a husband. However,

MRE in law is flawed since it is not restricted to protecting the husband's expectation of sex but it elevates this expectation to the husband's right to have forcible sexual intercourse with his wife at any point in time and under any circumstances irrespective of her consent. Therefore, the expectation of sex cannot have rational nexus with the object sought to be achieved. The distinction drawn between forced sexual intercourse by the husband and persons other than a husband is legally untenable as it has no rational nexus with the object sought to be achieved by Section 375 of the IPC. [See ***Independent Thought*** at paragraph 75.]

44.1. What is ironic is while MRE privileges a husband's right to fulfil his sexual desire as and when he wishes to exercise it, it effaces the wife's right not to engage in sexual acts. This by itself cannot stand constitutional scrutiny. [See ***Joseph Shine*** at paragraph 168; ***Anuj Garg & Ors. v. Hotel Association of India & Ors.*** (2008) 3 SCC 1[16] at paragraphs 42 and 43; and ***Navtej Singh Johar*** at paragraph 438.]

45. Insofar as the victim is concerned, this distinction also does not serve the object of Article 375. In both cases, the victim ends up being degraded and humiliated. [See ***Independent Thought*** at paragraph 72.] Therefore, if the inversion test is applied, the observations made in the said paragraph could be applied to these cases as well.

46. In rape, the harm caused to the victim may vary and is independent of the relationship subsisting between the parties. For instance, if a woman is sleeping with a live-in partner and he presumes that there is consent, although, wrongly, and commits a sexual act, the victim may choose not to prosecute the partner. The victim may ask her partner to obtain consent in future. However, for instance, where a victim is subjected to gang rape and

[16] In short "***Anuj Garg***"

one of the rapists is the husband, while all others who were part of the act would be liable for prosecution under Section 376 of IPC, the husband would be protected because of MRE. It cannot be the State's policy or in its interest to prosecute only some rapists and not those who are married to the victim in such cases.

46.1. MRE grants blanket immunity to sexual acts enumerated in clauses (a) to (d) of Section 375 of the IPC and also exempts husbands from the offence of aggravated rape. For example, rape, which results in the victim's death or persistent vegetative state. [See Section 376A and Section 376D of IPC.]

47. The protection under MRE extends to the extent that if the husband were to allow for the acts described in Clause (a) of Section 375 to be done to another person without the wife's will or consent, it will not constitute rape. Bundling these acts committed by the husband on his wife or allowing another person to commit acts described in Clauses (a) to (d) of Section 375 with another person with lesser offences such as cruelty, simple assault or grievous hurt, ring-fences the husband without any legal or moral justification. Apart from anything else, the constitutionality of MRE has to be tested against the backdrop of the amendment made to the rape laws in 2013 and 2018.

48. As per Explanation 2 to Section 375 of the IPC, consent should be unambiguous, unequivocal and voluntary. Therefore, consent qua a prior sexual act will not extend to future occasions [See judgment dated 03.11.2021 rendered by the Punjab and Haryana High Court in CRM-M-46063-2021, titled ***Narendra Singh v. State of Haryana***, and ***Syam Sivan v. State of Kerala***, 2021 SCC OnLine Ker 4307.]

49. Expectation and broad agreement to have a sexual relationship in

marriage cannot do away with the wife's right to withhold consent as otherwise, it would result in giving the husband a pass-through to have sexual intercourse with his wife even when she is sick or has contracted a disease or is injured.

50. Consent is foreground in IPC in provisions concerning sexual intercourse. [See ***Navtej Singh Johar*** in the context of Section 377 of IPC and ***Joseph Shine*** in the context of Section 497 of IPC.]

51. The difference between the language of Section 377 and 375 is that in the former, the element of consent is absent. An act of forced sexual act as provided in Section 375, Clauses (a) to (d) of IPC irrespective of who commits it, is rape. The relationship between perpetrator and victim cannot change that fact. Rape is rape and, therefore, one should fairly label the offence for what it is. [See ***Independent Thought*** at paragraph 75.]

52. 'Fair labelling' is an important part of criminal law jurisprudence. The label should give sufficient information to the public at large as regards the offence that is committed. It plays an educative and declaratory function and, thus, in a way, reinforces the standards that the society may have set for itself. It also helps in establishing the principle of proportionality as the criminal justice system needs to provide for punishment that is proportionate to the gravity of the offence. A fair label plays an important role in expressing social disapproval of certain sorts of sexual offences; rape being one of them. Thus, helps, in a sense, the perpetrator, the victim as also the prosecution and the defence in grappling with the offence and its consequences. Fair labelling enables criminal justice professionals, judges and other stakeholders to make fair and sensible decisions [See Andrew Ashworth & Jeremy Horder, Principles of Criminal Law, Seventh Edition, 2003 at page 25; Scottish Law Commission's Discussion Paper on Rape and

other Sexual Offences, at paragraph 4.16; also see ***State of Karnataka v. Appa Balu Ingale & Ors.***, 1995 Supp (4) SCC 469.]

52.1. The attempt of the prosecution to seek conviction for rape in the guise of grievous hurt or cruelty is like attempting to fit a square peg in a round hole. The ingredients of offences such as grievous hurt, outraging the modesty of a woman and cruelty are substantially different from that of rape. Over the years, rape laws in India have evolved to the extent that victims are entitled to protection and support from the State. However, because marital rape is not called out as rape; generally, it enables States to shirk responsibility and accord the same level of care and protection which is given to a woman who is raped by a person other than her husband. [See the following provisions contained in the Code: Section 357A (Compensation to all victims of crime); Section 357C (all hospitals to provide free and immediate first aid to rape victims); Section 164A (protocols of medical examination for rape victims); Section 154 (recording complaint of rape victim); Section 164 (manner of recording statement of a rape victim); Section 309 (expedited trial in rape cases); Section 327 (in camera trials of rape offences); Section 53A (medical examination of the rape accused if it is believed that such examination will afford evidence of the commission of an offence)]. Likewise, Section 228A of the IPC protects the rape victim by penalizing disclosure of her identity. Similarly, the proviso appended to Section 146 of the Evidence Act prohibits eliciting evidence or putting questions in cross-examination to the victim as to her "general immoral character" or "previous sexual experience" for establishing consent or the quality of consent.

52.2. Furthermore, criminal laws such as IPC penalizes wrongful acts and punishes the wrongdoer, if found guilty. MRE allows the wrongdoer i.e., the

husband to escape the consequences that the law provides, although, the act, otherwise, is wrongful.

53. Criminal law in India recognizes the principle of cognate offences. Such offences indicate the similarity and common essential features between the offences; they primarily differ based on the degree of the offence. Non-consensual sexual act within the meaning of Clauses (a) to (d) of Section 375 of IPC may not be covered under cognate or lesser offences if it is not accompanied by physical violence or hurt inflicted on the body of the victim. In the case of a married woman, the power which is otherwise available vis-a-vis the alleged rapist under Section 53A of the Code i.e., examination of the blood, bloodstains, semen and swab unless done, will not in all likelihood lead to the conviction of the husband under cognate provisions. Thus, non-consensual sexual intercourse which is not accompanied by physical violence may disable a victim-wife from prosecuting her husband for cruelty under Section 498A, for hurt under Section 323 and 326 or for outraging her modesty under Section 354 of the IPC. The crux of the challenge to MRE is the moral and legal approbation attached to the act of rape.

54. MRE violates Article 14 as the relationship between the perpetrator and the victim has no rational nexus with the object of the rape laws.

55. Woman's right to physical integrity flows from her right to life, dignity and bodily privacy protected under Article 21. The right to make reproductive choices is a dimension of personal liberty; which means, a woman has a right to refuse participation in sexual activity. [See ***Suchita Srivastava v. Chandigarh Administration***, (2009) 9 SCC 1[17] at paragraph 22; affirmed in ***K.S. Puttaswamy*** at paragraph 83.]

[17] In short "***Suchita Srivastava***"

56. Gender violence is often treated as a matter concerning family honour; privacy must not be a cover for concealing or asserting patriarchal mindsets. [See ***K.S. Puttaswamy*** at paragraph 245.]

57. MRE is founded on a stereotypical understanding of ascribed gender roles in marriage. This would render it discriminatory under Article 15 of the Constitution. MRE dilutes agency, bodily autonomy and protections accorded by law to women in marital relationships who are subjected to rape and is, thus, violative of Article 15(3) of the Constitution. [See ***Independent Thought*** at paragraphs 180 and 181.]

58. Since MRE forms part of a statute which is pre-constitutional and, therefore, there is no presumption of constitutionality and because there is an ex-facie infringement of a married woman's fundamental rights under Article 15(1) of the Constitution, the burden of proof shifts on to the State to demonstrate that the statute is constitutional.

59. In consonance with the "strict scrutiny test", the State should demonstrate that: the impugned provision is *intra vires* the Constitution; infringement of woman's rights via the impugned provisions serves a compelling State interest; the infringement is proportionate; and lastly, it is not only narrowly tailored but is also the least restrictive measure adopted to progress the State's interest and the object it seeks to achieve. [See ***Anuj Garg*** at paragraphs 46, 47, 50 & 51 and ***Naz Foundation v. Government of NCT of Delhi***, 2009 SCC OnLine Del 1762[18] at paragraphs 108, 111, 112; also see ***Subhash Chandrs & Anr. v. Delhi Subordinate Services Selection Board,*** (2009) 15 SCC 458 at paragraph 82; ***Independent Thought*** at paragraphs 83 and 84, and ***Navtej Singh Johar*** at paragraph 314.]

59.1. MRE fails the strict scrutiny test. There can be no compelling State

[18] Affirmed in ***Navtej Singh Johar.***

interest in protecting husbands who facilitate gang rapes of their wives or rape their wives by insertion of objects or have forced penile-vaginal intercourse as none of these acts further either the institution of marriage or can be called conjugal rights of a husband.

60. Even if one were to accept that there was a State interest in protecting the institution of marriage, deeming non-consensual sex within marriage to be legal and the consequential harm it entails upon the victim is in no way proportionate to such interest, if any, of the State.

60.1. Nothing that the State i.e., the Union of India has filed by way of counter-affidavits and/or affidavits from time to time and written submissions discharges this onus placed upon it.

61. MRE is also liable to be struck down on the ground that it violates Article 19(1)(a) of the Constitution. Article 19(1)(a) of the Constitution guarantees freedom of expression to all citizens. Intimate sexual acts are a part of an individual's right to freedom of expression, albeit, subject to reasonable restrictions contained in sub-clause (2) of Article 19. [See ***Navtej Singh Johar***, at paragraph 641.1.]

62. MRE fails to label forced sexual intercourse as rape and to protect to the full extent a woman's non-consent. The impugned provisions do not recognize the right of a woman to say “no" to sexual intercourse with her husband and as a logical sequitur, these provisions also take away a married woman's ability to say a "joyful yes" to sexual intercourse. Both aspects put MRE at cross-purposes with Article 19(1)(a) of the Constitution and, thus, limit the married woman's right to freedom concerning sexual expression and behaviour . [See ***R. v. J.A***., (2011) 2 SCR 440, Supreme Court of Canada, at paragraph 114.]

63. The right to sexual expression applies to an adult woman. MRE

reduces a wife's sexual desire and consent to a nullity. MRE also does not fall under the eight grounds that Article 19(2) allows as reasonable restrictions. Out of the eight grounds, only one ground can, if at all, remotely apply to MRE i.e. decency or morality and therefore, this restriction should be read in consonance with constitutional morality. An individual's sexual desire is part of self-expression and is protected under Article 19(1)(a) and, thus, MRE cannot be justified on the ground of morality. [See ***National Legal Services Authority (NALSA) v Union of India*** (2014) 5 SCC 438[19]**,** at paragraph 69; and ***Navtej Singh Johar*** at paragraph 641.1.]

64. Striking down MRE would not create a new offence. An offence is an act or omission punishable under the Code. The offence of rape under IPC is an act of forcible/non-consensual intercourse, as described in Clauses (a) to (d) and circumstances Firstly to Sixthly set out in Section 375 of IPC, by a man on a woman which is not dependent on the relationship between the perpetrator of the crime and the victim of the act. Thus, any act falling within the ambit of the aforesaid provisions would constitute an offence of rape. MRE grants impunity from prosecution for the very same offence for a particular class of offenders i.e. husbands. Therefore, if MRE is struck down, it would not create a new offence. It would only bring within the ambit of the existing offending acts a new class of offenders i.e., husbands. [See ***Independent Thought*** at paragraphs 190 to 194.]

65. Striking down a provision as it is unconstitutionally under inclusive, will not tantamount to the creation of a new offence. [See ***People v. Liberta,*** (1984) 64 N.Y.2d 152[20], New York Court of Appeals and ***State of Gujarat v. Ambika Mills,*** (1974) 4 SCC 656]

65.1. The law distinguishes creation of a new offence and interpretation of

[19] In short "***NALSA***"

constituents of an existing offence which is the traditional negative act of judicial review. [See ***Hiral P. Harsora v. Kusum Narottamdas Harsora***, (2016) 10 SCC 165[21] at paragraph 50; ***Balram Kumawat v. Union of India***, (2003) 7 SCC 628 at paragraphs 4, 5, 23, 36, 37 & 40 and ***Devidas Ramchandra Tuljapurkar v. State of Maharashtra***, (2015) 6 SCC 1 at paragraphs 108 & 141.] Therefore, while adjudging the constitutional validity of a provision, the court deems it fit to strike it down and because of this, a new class of offenders get included within the ambit of the provision, this would not amount to the creation of a new offence as it is only a by-product of the court fulfilling its duty under Article 13. What would amount to creating a new offence would be if the court is called upon to alter the main ingredients of the act constituting a new offence.

66. Thus, "offence" pivots on the act or omission and not the offender *per se*. An offence may include a perpetrator, victim, as also, the act but what is punishable under IPC is the act or the thing done. [See Section 40 of the IPC and Section 2(n) of the Code. [Also see ***Queen - Empress v. Kandhaia & Ors.***, 1884 SCC OnLine All 142 and ***S. Khushboo v. Kanniammal & Anr.***, (2010) 5 SCC 600 at paragraph 30.] The submission is that the offence of rape is an act of forcible/non-consensual intercourse, as described in Clauses (a) to (d) and circumstances Firstly to Sixthly, by a man upon a woman which is entirely separate from the relationship obtaining between the perpetrator and the victim of the act. Therefore, it is the act which falls within the ambit of the provision which would constitute the offence of rape. The contention is that striking down or reading down an unconstitutional provision is an interpretative exercise carried out by the court in the discharge of the court's constitutional duty which is recognized as falling

[20] In short "***People v. Liberta***"

within the domain of the court since the days of ***Marbury v. Madison*** 5 US 137 (1803).

67. Unconstitutional exception provided in a statute cannot have a free pass from judicial review on the ground that its removal would result in the creation of a new offence. [See ***Motor General Traders v. State of Andhra Pradesh,*** (1984) 1 SCC 222, at paragraphs 26 and 28].

68. The apprehensions expressed by MWT and those opposing the petitioners that the burden of proof in certain cases, say, offences falling under Section 376(2)(f) may shift in case MRE is struck down, is unfounded. Since MRE was on the statute when the said provision was inserted, the courts would take recourse to the mischief rule or apply the principles of purposive construction and could thus hold the expression "relative" would not bring by default a spouse within the ambit of Section 376(2)(f). The courts could also apply the doctrine of *noscitur a sociis* and hold that since the expression "relative" appears in the company of expressions such as "guardian" and "teacher" or a person in a position of "trust" or "authority", the only relationship which would get covered under the expression "relative" could be that where the accused is in a position of power over the complainant akin to fiduciary trust.

68.1. However, other aggravated forms of rape such as those covered under Sections 376A (results in death or persistent vegetative state of the victim) and 376D (gang-rape) go unpunished insofar as the husband is concerned will be punished in case MRE is struck down.

69. The argument that if the MRE is struck down, the provisions concerning rape will be misused is devoid of any empirical data. In fact, the most recent data (2015-2016) of the National Family Health Survey (NFHS)

[21] In short "***Harsora v. Harsora***"

reveals that 83% of married women falling between the age bracket 15 - 49 years were victims of sexual violence committed by their "current husbands" while 9% were subjected to violence by their "former husbands".

70. Furthermore, the analysis of NFHS data reveals that nearly 99.1% of sexual violence cases are not reported and in most such instances, the perpetrator is the husband of the victim. This data also reveals that a woman is 17 times more likely to face sexual violence from her husband than from others. Besides this, even after cases involving marital rape and assault are excluded, the data reveals that only 15% of sexual offences committed by persons other than the current husband of the victim are reported to the police. It is important to emphasize that there are enough and more safeguards available in the IPC to protect those who bear the brunt of a false criminal complaint being lodged against them. Provisions concerning these safeguards are found in Chapters X and XI of the IPC [see Sections 182, 191 and 211 of IPC].

71. The other argument raised on behalf of the respondents which is that striking down MRE would expose the husbands to the risk of being awarded a high mandatory minimum sentence of 10 years punishment is an argument that deserves to be rejected at the very threshold. This is so as sentencing is a matter of policy which does not fall within the realm of the court. The minimum mandatory sentence for an offence such as rape cannot be a consideration or factor in determining as to whether or not MRE is constitutionally viable. It is the court's bounden duty to strike down a provision which is unconstitutional notwithstanding the concerns that may be raised over its perceived (dis)proportionality. That said, it is a matter of concern for several women that high mandatory minimum sentences even in the context of non-marital rape do not serve the cause of women but instead

lead to lesser reporting of the offence and fewer convictions. A study of judgments concerning the offence of rape rendered by trial courts in Delhi between 2013 and 2018 revealed that under the old law, the conviction rate was 16.11% whereas after the Criminal Law (Amendment) Act, 2013, the conviction rate fell to 5.72%. The drop in conviction rate is significant and of grave concern. The sentencing policy, perhaps, needs a relook, both, by the government of the day and the parliament. The uptick in the mandatory minimum sentence has usually followed a heinous crime. The 1983 amendment introduced a mandatory 7 years minimum sentence following the Mathura rape case[22]. Likewise, the Nirbhaya gang rape triggered the Criminal Law (Amendment) Act, 2013 and *inter alia* resulted in increasing the minimum mandatory sentence to 10 years.

72. Thus, the mere existence of a high mandatory minimum sentence may result in problems regarding sentencing in all cases of rape. [See ***Narinder Singh v. State of Punjab,*** (2014) 6 SCC 466 at paragraphs 14 and 15.] Therefore, while the mere existence of a high mandatory minimum sentence cannot be the basis for striking down the entire provision concerning the offence of rape, the converse should also hold true. In other words, the existence of a high mandatory minimum sentence provided in Section 376(1) of IPC should not be the reason for not striking down MRE since a rapist remains a rapist irrespective of the relationship with the victim and the harm caused to the victim is independent of the relationship between the parties. [See Justice Verma Committee Report at paragraph 77.]

73. The submission is that the sentence imposed for rape whether within or outside marriage must be proportionate to the gravity of the offence, harm caused to the victim and other facts and circumstances obtaining in the

[22] ***Tukaram v. State of Maharashtra***, (1979) 2 SCC 143

matter. The high mandatory minimum sentence presently prescribed for the offence of rape may not meet the proportionality concerns articulated above. That said, these concerns cannot be the ground for refusing to strike down MRE. That courts both in India and abroad have made recommendations to the legislature regarding sentencing issues in the context of the offence of rape is discernible from the following judgments: ***Tulshidas Kanolkar v. State of Goa***, (2003) 8 SCC 590; and the judgments rendered by the Supreme Court of Nepal in ***Forum for Women, Law and Development v. His Majesty's Government of Nepal & Ors***. [Writ No. 55 of the year 2058 BS (2001-2022)][23] and ***Jit Kumari Pangeni and Ors. v. Govt. of Nepal*** [Writ No.064-0035 of the year 2063 (July 10, 2008)[24].]

74. While MWT has taken a position different from that of the petitioners insofar as striking down impugned provisions is concerned, another men's forum i.e., Forum for Engagement of Men (FEM) has supported the plea of the petitioners. [See paragraphs 1, 2 and 3 of FEM's application[25].]

75. There is no discretion available to the court when concerns regarding the violation of fundamental rights are raised before it. It is obligatory on the part of the court to exercise its powers under Article 226 if the violation of fundamental rights is established. Therefore, the argument that striking down MRE would lead to misuse, abuse, inconsistencies with social morality or such a move would be contrary to the legislative intent or would result in the imposition of high mandatory sentences on husbands are aspects which should not prevent the court from striking down MRE if it is ultimately found to be *ultra vires* the Constitution. Article 226 has two parts: The first part concerns the enforcement of fundamental rights under Part III

[23] In short "***FWLD (Nepal)***"
[24] In short "***Jit Kumari (Nepal)"***
[25] CM No.31578/2017, preferred in W.P.(C) No.284/2015.

of the Constitution. The second part gets triggered when a litigant approaches the constitutional court for purposes other than enforcement of rights contained in Part III of the Constitution. The discretion to grant or not to grant relief obtains, if at all, only in respect of the second part of Article 226. There is no discretion available to the court where a plea is made for enforcement of fundamental rights under Part III of the Constitution.

76. Like in the case of MWT, FEM which is a forum for men that supports the cause of the petitioners. On behalf of FEM, Mr Raghav Awasthy, made brief submissions, which have not been recorded specifically, to avoid prolixity, as they stand encapsulated in the submissions advanced by Ms Nundy.

Submissions advanced by *Amicus Curiae*

77. The submissions advanced by Ms Rebecca John, learned senior counsel, can be, broadly, paraphrased as follows :

77.1. IPC distinguishes general and special exceptions. General exceptions are contained in Chapter IV of the IPC while special exceptions are embedded in the relevant penal provision. MRE i.e. Exception 2 to Section 375 of the IPC falls in the category of a "special exception" to the offence of rape.

77.2. The burden of proving that the act committed falls within the realm of exception lies upon the accused. [See Section 105 of the Evidence Act.] Ordinarily, the person taking recourse to a special exception must prove that his act falls within the said exception; the standard of proof being the preponderance of probability. [See ***K.M. Nanavati v. State of Maharashtra***, AIR 1962 SC 605 at paragraph 18; ***Dahyabhai Chhaganbhai Thakkar v. State of Gujarat***, AIR 1964 SC 1563 at paragraphs 5 to 7 and ***Harbhajan Singh v. State of Punjab***, AIR 1966 SCC 97 at paragraphs 13 to 15].

77.3. Exceptions contained in the IPC are based on subjective and/or objective facts. Illustratively, Sections 78 and 82 of the IPC are acts which are based on objective facts. In contrast, for example, the exceptions to the offence of defamation provided under Section 499 of IPC are based on facts that are subjective and, therefore, must be pleaded and proved in a court of law.

77.4. Thus, exceptions based on objective facts prohibit prosecution. MRE (i.e. Exception 2 to Section 375 of IPC) does not have to be pleaded or proved unless the existence of marriage itself is in dispute.

78. The legislative history of MRE would show that it was incorporated to protect the conjugal rights of the husband and after considerable debate, it protected wives below 10 years of age from forcible sexual abuse. Thus, even before the preparation of the draft penal code by Lord Thomas B. Macaulay in 1837, the common law excluded the wife's consent from the sphere of sexual acts. The common law position is traceable to the Doctrine of Coverture and implied consent. According to this doctrine, the legal rights of a woman were effaced after marriage. A woman having entered matrimony was deemed as her having given irrevocable consent to participation in sexual acts with her husband. [See Hale's Doctrine.]

79. In support of her submissions, Ms John drew our attention to the relevant provisions of the draft IPC and the relevant notes appended thereto, the observations made by the Indian Law Commissioners in their "First Report on Penal Laws, 1844" and the resultant modification brought about in Section 375 when it was first incorporated in the IPC.

79.1. In this context, our attention was also drawn to how the parameters concerning age were incorporated in Exception 2 to Section 375 of IPC commencing from 1837 (when there was no provision for age in the

exception) up until 2017 when the Supreme Court rendered its decision in ***Independent Thought*** case.

80. Our attention was also drawn to the legislative history concerning sexual offences as it prevailed in the United Kingdom commencing with the amendment made to the Sexual Offences Act, 1956 *via* the Sexual Offences (Amendment) Act, 1976 and the view expressed by the House of Lords *qua* MRE in ***R. v. R***., 1991 UKHL 12 : 1991 (4) All ER 481[26].

80.1. The impact of the decision rendered in ***R. v. R.*** was also brought to our notice by referring to Section 142 of the Criminal Justice and Public Order Act, 1994.

81. Going further, Ms John made the following submissions :

(i) MRE renders a married woman remedy less when she is subjected to an offence of rape by her husband. It disregards the wife's right to consent to sex within marriage. Resultantly, while Section 375 criminalizes sexual acts committed without the consent of a woman, it exempts husbands from being prosecuted only on account of their marital relationship with the victim.

(ii) The MRE infringes the fundamental rights of a married woman. The validity of MRE has to be tested not with reference to the object of the State action but based on its effect it has on freedoms guaranteed under the Constitution. [See ***K.S. Puttaswamy***.]

(iii) MRE takes away a married woman's sexual agency. The provision subordinates the wife vis-à-vis her husband in the context of the marital arrangement obtaining between them. MRE is, therefore, manifestly arbitrary. [See observations made in ***Joseph Shine*** which struck down Section 497 of the IPC and, thus, decriminalized adultery.]

(iv) Antiquated notion of marriage as articulated more than 200 years ago

[26] In short "***R. v. R.***"

by Lord Hale needs to be changed. The common law understanding of marriage which was engrafted in the IPC should be judicially discarded as has been done in the United Kingdom; the country from which the doctrine was borrowed in the first instance. Constitutional courts must intervene when structures of injustice and persecution deeply entrenched in patriarchy destroy constitutional freedom. In doing so, the court would not be adopting a paternalistic approach but would be fulfilling its duty to give effect to the rights already enshrined in the Constitution.

82. The striking down of MRE would not lead to the creation of a new offence. [See ***Independent Thought*** and ***R. v. R***.]

83. Although, there are several provisions in the IPC which deal with offences committed against married women by their husbands, they do not address the crime concerning non-consensual sex between a husband and a married woman. In this behalf, our attention was drawn to Sections 498A, 304B, 306, 377 of the IPC; the presumptions created in law under Section 113A, 113B of the Evidence Act; Sections 3 of the Dowry Prohibition Act, 1961 [in short "Dowry Act"]; Section 3 of the D.V. Act and lastly, Section 24 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994.

83.1. The aforementioned provisions criminalize and punish a variety of crimes committed by a husband against his wife. These are criminal acts in the nature of physical violence, mental cruelty/violence and dowry demand. Furthermore, remedies are also available to a woman against abuse which is in the nature of physical, sexual, verbal or even emotional under the D.V. Act. Besides this, procedural rules of evidence create a presumption against a husband in the event of the unnatural death of a married woman or in a case involving the unlawful determination of the sex of a foetus. None of

them, as indicated above, bring within its ambit forced sexual acts committed by the husband on his wife. Likewise, Section 498A does not cover non-consensual sex. The statement of objects and reasons of the Criminal Law (Amendment) Act, 1983 whereby Section 498A was incorporated in the IPC establishes that it was introduced to deal with the specific evil of dowry deaths and marital cruelty inflicted by the husband or the in-laws on a married woman for dowry. The expression "cruelty" as defined in Section 498A does not bring within its ambit non-consensual acts committed within marriage. [See Section 498A(a) and (b) of IPC.]

84. In criminal law, offences are separately and distinctly defined. There is no overlap between provisions created to address crimes against women and the offence of non-consensual sex within marriage. Each of the aforementioned special provisions/statutes, framed for the protection of a married woman, deal with specific crimes. The crime of rape is outside the purview of the aforementioned provisions and/or statutes. [See the Statement of Objects and Reasons of D.V. Act, Dowry Act and Criminal Law (Amendment) Act, 1983.]

85. A perusal of the Statement of Objects and Reasons of the D.V. Act, the Dowry Act and the Criminal Law (Amendment) Act, 1983 would establish that the argument advanced by the respondents that equal and alternative remedies are available in law to wives concerning forced sex within marriage, is flawed. Assuming without admitting that equal and alternate remedies exist under law for the protection of married women, specific beneficial provisions carved out in law to protect the interests of a woman victim under the following provisions would still not be available to a married woman i.e., Section 228A of IPC; Sections 26, 53A, 154, 157, 161, 164, 164A, 309, 327 and 357C of the Code and the proviso appended to

Section 146 of the Evidence Act.

86. International Conventions can be read into domestic law, especially, for construing the contours of domestic law when there is no inconsistency between the international convention and the domestic law. [See ***Vishaka*** at paragraph 14; and ***Independent Thought*** at paragraph 34.]

86.1. Furthermore, in the same vein, India's obligation under the Convention on the Elimination of All Forms of Discrimination Against Women [in short "CEDAW"] requires that MRE should not remain on the statute. Reference in this regard is made to the following:

(i) CEDAW (37th Session, 2007) – Concluding comments on the Committee on the Elimination of Discrimination against women: India; at paragraphs 22 and 23.

(ii) CEDAW (58th Session, 2014) – Concluding Observations on the fourth and fifth periodic reports of India; at paragraph 11(c) of Clause C.

(ii) 47th Session, 2021 - UNSR on Violence Against Women, Dubravka Šimonović - Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention, at paragraphs 22, 36, 69, 70-72.

(iii) 47th Session, 2021 - UNSR on Violence Against Women, Dubravka Šimonović - A Framework for legislation on rape (Model Rape Law), at serial no. V, Article 2, paragraph 17.

(iv) 26th Session, 2014 - UNSR on Violence against women, its causes and consequences, Rashida Manjoo - Mission to India, at paragraphs 49-50, 78 of Clause IV(A).

(v) UNSR VAW – 52nd Session (Commission on Human Rights, 1996) – Report of the Special Rapporteur on violence against women, its causes and consequences.

87. Provisions in the IPC which provide for exceptions on account of marital relationships are based on crimes committed outside marriage and not a crime committed by one spouse upon the other. [See Sections 136, 212, 216 and 216A of IPC.]

87.1. Thus, even for the sake of argument, it is accepted that IPC recognizes that marital relationship is distinct from other relationships, no rational nexus is discernible between the exception carved out in Section 375 and the object sought to be achieved by the said provision which is to recognize and punish persons who commit the offence of rape on a woman. Therefore, the differentia between a married and unmarried woman has no rational nexus with the object sought to be achieved by the provision.

88. It is time to revisit the validity of MRE. Considering the fact that several countries around the world have done away with MRE and that much water has flown since the opinion given by the Law Commission of India in its 172nd Report was published in 2000- it is important to highlight that after the Nirbhaya gang rape case, via Criminal Law (Amendment) Act, 2013, several amendments were brought about in criminal law pursuant to recommendations made by the Justice Verma Committee which included a recommendation for deletion of MRE. Since then, the judicial opinion in India has moved perceptibly in the direction of recognizing the autonomy and sexual agency of an individual including that of a married woman. [See ***Nimeshbhai Bharatbhai Desai v. State of Gujarat***, 2018 SCC OnLine Guj. 732[27].]

89. MRE is anachronistic and an offensive provision; which has no place within the constitutional framework as it operates in India today. Thus, to give full effect to the plea for striking down MRE/Exception 2 to Section

[27] In short "***Nimeshbhai Bharatbhai"***

375 of the IPC, Sections 376B of IPC and Section 198B of the Code must also be struck down.

90. Ms John also made suggestions for changes that should be brought about by the legislature concerning sentencing. According to her, experience has shown that a high minimum mandatory sentence has not led to an increase in conviction rates. She suggests that the legislature needs to, perhaps, reduce the period of mandatory minimum punishment and at the same time restore the discretion which courts had in matters of sentencing before the Criminal Law (Amendment) Act, 2013.

90.1. Our attention was drawn to the fact that before the Criminal Law (Amendment) Act, 2013, the court had the discretion to impose a sentence of imprisonment less than the prescribed period, which was, 7 years. In this behalf, reference was also made to the sentencing regime which prevails in the United Kingdom and is governed by the provisions of the Coroners and Justice Act, 2009 and the guidelines framed thereunder by the Sentencing Council constituted under the said act. [See Sections 118 and 120 of Coroners and Justice Act, 2009.]

90.2. Lastly, the submission made was that should MRE be struck down, a husband cannot be brought under the provisions of Section 376(2)(f) of the IPC which deals with the offence of aggravated rape committed while the victim is in the custody of the perpetrator or holds the position of trust or authority with a woman-victim. The latter which is provided in Clause (f) of sub-section (2) to Section 376 should exclude the husband having regard to the context in which the expressions "relative", "guardian" or "teacher" are used.

91. Mr Rajshekhar Rao, learned senior counsel, made the following submissions concerning the issues raised in the course of the hearing :

91.1. The argument articulated on behalf of the respondents that this court should defer to the wisdom of the legislature or that the court is an improper forum for adjudication of the issues at hand and is not in a position to hear multiple opinions from various sections of the society is an argument which is liable to be rejected. This submission is flawed, broadly, for two reasons: First, it disregards the nature of the relief sought by the petitioners. Second, it ignores the power available to the court under Article 226 of the Constitution.

91.2. Article 13 read with Article 226 of the Constitution empowers the High Courts to strike down laws that are inconsistent with or in derogation of fundamental rights. [See ***Navtej Singh Johar.***] Constitutional courts have an obligation to declare laws which are found to be unconstitutional, more so, when legislatures have been lethargic despite the recommendation of expert bodies. [See Justice Verma Committee Report.] While examining the validity of a provision or statute, the courts should apply the "effect test" to ascertain whether an artificial distinction is created between different classes of persons. [See ***Anuj Garg.***] The role of the constitutional High Courts becomes particularly significant as they are obliged to ensure the retention of gender equality and to provide mechanisms to enable women to redress their grievances related to gender-based violence. [See ***Aparna Bhat v. State of Madhya Pradesh***, (2021) SCC OnLine SC 230.]

91.3. The question raised by the petitioners is not only one relating to the inadequacy of remedy but rather relates to the flagrant violation of the fundamental rights of a married woman. In other words, the assertion of a married woman is : to be treated at par with other women, to be accorded protection for her bodily integrity, recognition of her sexual agency and lastly, the right to prosecute the rapist irrespective of her relationship with

the offender. Therefore, while courts must give wide latitude to the legislature concerning statutes dealing with fiscal and economic matters as they are "essentially *ad hoc*" or "experimental", the approach to be adopted by the courts is very different when it concerns matters involving civil liberties and human rights. The petitioners seek the intervention of this court to strike down an unconstitutional provision and, not to, amend a policy decision. Consequently, the instant *lis* falls squarely within the ambit of Article 226 of the Constitution. [See ***Laxmi Devi***.]

92. MRE fails the Article 14 test. The argument advanced by the intervenors that because there exists a differentia between married and unmarried couples, which is, the basis for classification, MRE should be sustained is flawed for the following reason : This submission fails to appreciate that classification based on intelligible differentia should have rational nexus with the objects sought to be achieved viz. it must be "pertinent to the subject in respect of and the purposes of which it was made". [See ***State of U.P. v. Deoman Upadhyaya***, AIR 1960 SC 1125.]

92.1. While this test is easily applicable to the object of the statute as a whole for special enactments, it is the purpose of the specific provision which becomes relevant as in the case of general enactments such as IPC. [See ***Subramanian Swamy v. CBI***, (2014) 8 SCC 682; ***Harsora v. Harsora; Navtej Singh Johar;*** and ***Mithu v. State of Punjab***, (1983) 2 SCC 277[28].]

92.2. This is particularly so because within the same legislation, the same differential i.e., marital status may be used as the basis for classification in multiple sections, for example, in Sections 136, 212, 216 and 216A of the IPC and, therefore, while the differentia may satisfy the test of Article 14 in one case, it may not satisfy the test in another case such as MRE. In the

[28] In short "***Mithu***"

present case, the test can either be applied to Section 375 in its entirety or more narrowly, only to Exception 2 appended to it. Since the role of an exception or proviso is to carve out something from the main provision, it can neither subsist independently nor can it nullify the object of the main provision. Therefore, the test should be applied to Section 375 as a whole and if it is so applied, it would come to fore that the differentia sought to be drawn between married and unmarried couples is both irrelevant and arbitrary.

93. Admittedly, the purpose of Section 375 of the IPC is to punish non-consensual sexual acts - also it cannot be disputed that marital obligations, duties, rights or privileges cannot be enforced through violence or any other non-consensual acts, which would otherwise be an offence. Consequently, the classification between marital and non-marital relationships in Section 375 is impermissible under Article 14 of the Constitution. The factum of marriage would not bridge the gap between permissible and an impermissible act by treating the said fact as equivalent to conveying willingness or consent to engage in a sexual act as described in Clauses (a) to (d) of Section 375 of the IPC. Therefore, the substance of marital relationship between the offender and the victim is irrelevant for the purposes of Section 375. If, however, the opposite were true, the exception ought to have made an explicit alteration in the nature of consent that is required in a marital relationship (whether deemed or otherwise). In the absence of such provision, the court should not discover some undisclosed and unknown reason for classification which otherwise is hostile and discriminatory vis-à-vis an individual; in this case a married women victim.

93.1. The absence of consent is a foundation of the offence of rape under Section 375 of the IPC. The decriminalization of an act by a husband which

would otherwise constitute rape under the IPC is based on an archaic belief that the very act of marriage contemplates consent by the wife for sexual intercourse, for all times, during the subsistence of matrimony or, at least, till such time they will live separately whether under the decree of separation or otherwise. Apart from being founded on an outdated notion of the concept of marriage and the status of the wife within it, such a presumption concerning consent is inconsistent with the applicable law. Any suggestion to the contrary is manifestly arbitrary and unreasonable and constitutes a gross denial of equal protection of laws to a married woman. [See ***Lachhman Dass v. State of Punjab***, (1963) 2 SCR 353[29]; ***Independent Thought***; and ***Shayara Bano.***]

93.2. The importance of consent finds legal recognition under the IPC itself including offences falling under Chapter XVI involving offences affecting the human body which could be a precursor to non-consensual marital intercourse or those which deal with the product of such intercourse viz. procreation. [See Section 354A (sexual harassment); Section 319 (hurt); Section 339 (wrongful restraint); and Section 313 (causing miscarriage without woman's consent) of the IPC.]

93.3. The classification based on marital status creates an anomalous situation inasmuch as it gives a married woman lesser protection against non-consensual sexual intercourse by their husbands than against strangers. It also results in lesser protection than that which is available to a woman who is subjected to a non-consensual sexual act by a cohabitee or a live-in partner. This defeats the argument put forth that MRE has to be saved as it seeks to protect the institution of marriage. This is particularly disconcerting when IPC in the same breath recognizes that an act perpetrated by a person

[29] In short "***Lachhman Dass***"

who is in a position of trust i.e., in a fiduciary capacity is more egregious than one done by a stranger. [See Section 376(2)(f) of the IPC.]

93.4. The argument that the exception needs to be retained to preserve the institution of marriage is flawed for the following reasons: First, the law itself recognizes that it cannot force parties to have sexual intercourse even if they are married. This is evident from the fact that even orders for restitution of conjugal rights can only be enforced by attaching property. [See Order XXI Rule 32 of the Code of Civil procedure, 1908 (CPC) and ***Saroj Rani.***] Second, forced sexual intercourse in marriage, far from preserving the institution of marriage, is a reflection of what the marriage ought not to be. Marriage denotes a partnership of equals with reasonable marital privileges for both spouses. However, reasonable expectations or privileges cannot be equated with willingness or consent by default in all situations. [See ***Joseph Shine, Indra Sarma v. V.K. Sarma***, (2013) 15 SCC 755; ***State of U.P. v. Chhotey Lal***, (2011) 2 SCC 550[30].]

93.5. Marriage is no longer as "sacred" or "sacrosanct" as it was considered in the past. Legislative provisions for divorce and judicial separation support this conclusion. [See Sections 10 to 13B of the HMA; Sections 23 and 24 of the SMA; Sections 32 and 34 of Parsi Marriage and Divorce Act, 1936 and Sections 10, 10A and 23 of the Divorce Act, 1869].

93.6. Furthermore, procreation is not the only purpose of marital intercourse as is evidenced by the fact that it is impotence rather than sterility which makes a marriage voidable. [See Section 12(1)(a) of HMA.] This further reinforces the inbuilt statutory recognition of the right of a wife to expect a healthy sexual relationship with her spouse. Implicit in this presumption is that such a relationship is consensual. Therefore, the

[30] In short "***Chhotey Lal***"

contention that striking down MRE would destroy the institution of marriage is meritless since the husband can be prosecuted for several other offences in relation to the said act.

94. The argument that because of the subsistence of marital relationship between the offender and the victim, it would be inherently difficult to ascertain whether ingredients of willingness or consent were present in the sexual act must be rejected as an irrelevant aspect in the instant cases - as these are matters concerning the trial and evidentiary procedure and hence, can neither render the classification provided in the exception as reasonable or non-arbitrary nor can it prevent the same being struck down on constitutional grounds. The courts must "separate the grain from the chaff" when appreciating evidence which is true of every matter going to trial including matters involving sexual offences whether in the context of marriage or outside marriage. Thus, even if MRE is struck down and the rape committed by a husband on his wife is criminalized, the courts will have to continue to perform the same role of appraising evidence; there is no good reason, not to repose faith in the ability of the court to do so just because of the subsistence of marital relationship between the offender and the victim. To deny a married woman the right to call a rape a rape if committed by her husband, would strike at the very core of her right to life and liberty guaranteed under Article 21 of the Constitution. Independent of the challenge laid to MRE under Article 14, it violates the provisions of Article 21 of the Constitution. This submission is *de hors* the submission made that MRE does not satisfy the twin test provided in Article 14 of the Constitution i.e., that the classification should be based on intelligible differentia and that it should have nexus with the objects sought to be achieved by the provision as a whole.

94.1. The act of non-consensual sexual intercourse or rape is abhorrent and is inherently violative of the basic right to life and liberty guaranteed by Article 21 in any context. The act causes deep psychological, physical and emotional trauma. Such an offence is not an offence just against the victim but the society at large. It violates the woman's right to : (a) equality and equal status under the law which is conferred on all human beings (b) dignity and bodily integrity (c) personal and sexual autonomy (d) bodily and decisional privacy (e) reproductive choices i.e., right to procreate and absentation from procreation. [See ***Moti Lal v. State of M.P***., (2008) 11 SCC 20; ***State of Punjab v. Gurmit Singh***, (1996) 2 SCC 384; ***Bodhisattwa Gautam v. Subhra Chakraborty***, (1996) 1 SCC 490; ***State of Haryana v. Janak Singh***, (2013) 9 SCC 431; ***NALSA***; ***Joseph Shine; K.S. Puttaswamy; Z. v. State of Bihar***, (2018) 11 SCC 572 and ***Suchita Srivastava***.]

94.2. Rape is rape and a rapist remains a rapist; no amount of classification and verbal jugglery can alter that reality. Notably, every other woman including a sex worker is entitled to decline consent and prosecute for rape; a right which is not available to a married woman. [See ***CR v. UK***, ***Independent Thought;*** and ***State of Maharashtra v. Madhukar Narayan Madikar,*** (1991) 1 SCC 57.] The effect of MRE is to render the wife's lack of consent irrelevant inasmuch as where she does not consent to a sexual act, she cannot prosecute her husband for rape. There can be no greater indignity that the law can heap upon a woman than to deny her the right to prosecute for violation of her bodily integrity, privacy and dignity, that too, at the hands of her husband from whom she would legitimately expect to receive love and affection and who would be expected to safeguard her interests. The argument that the husband can be prosecuted *inter alia* under other provisions such as assault (Section 351 of IPC), sexual harassment (Section

354A of IPC) or for outraging her modesty (Section 354 of IPC), misses the point that if this submission is accepted, it would trivialize an act which has grave and irreversible psychological and physical consequences for the victim; for this reason alone, MRE deserves to be struck down.

94.3. Therefore, if the provision is violative of fundamental rights, as in this case, the court cannot step aside and wait for the legislature to intervene in the matter. The court is duty-bound to invalidate a provision or the statute if it infracts an individual's fundamental rights guaranteed under the Constitution. [See ***Independent Thought***; ***Shayara Bano*** and ***Delhi Transport Corpn. v. D.T.C. Mazdoor Congress***, 1991 Supp (1) SCC 600.]

95. It is fallacious to contend that the court cannot strike down MRE because it will result in discrimination against men due to the gendered nature of Section 375 of the IPC. The issue before the court is not whether Section 375 or any part thereof should be made gender-neutral but whether MRE is justifiable and tenable in law. Article 15 of the Constitution mandates positive discrimination in favour of women and, therefore, there are several statutes and provisions, which include Section 375, which carry this ethos forward. The challenge in these petitions is restricted to unreasonable classification created against women and, therefore, this court is empowered to strike down MRE on the ground that it violates Article 14 of the Constitution. Invitation to make the provision gender-neutral, if accepted by the court, would tantamount to stepping into the shoes of the legislature which is best avoided.

96. Striking down MRE will not create a new offence. The removal of the MRE from the statute on the ground that it is discriminatory and unconstitutional will only bring within the fold of offenders a particular category of offenders who are, presently, not subjected to the rigour of rape

law. The act of rape is punishable. The striking down of MRE will not criminalize a new behaviour or act.

96.1. There is will no violation of Article 20(1) as striking down would operate prospectively.

96.2. Courts have in the past expanded the application of existing offences by revoking exemptions granted to a class or by removing differences in sentences in different classes. [See ***Harsora v. Harsora***; and ***Mithu.***]

97. The continuation of MRE on the statute is in the teeth of India's obligations under Articles 1, 2, 5 and 16 of CEDAW which require the elimination of all forms of discrimination against women, particularly, in relation to marriage. Nations that are signatories to CEDAW are required to repeal all national penal provisions that give effect to acts of discrimination directed against women. Furthermore, the courts are required to give effect to the obligations undertaken under international conventions. [See ***NALSA***; ***Navtej Singh Johar***; ***People's Union of Civil Liberties v. Union of India***, (1997) 3 SCC 433; ***Apparel Exports Promotion Council v. A.K. Chopra***, (1999) 1 SCC 759.]

98. The courts in various other jurisdictions have recognized that exemptions from prosecution for the offence of rape based on the marital relationship between the offender and the victim is an antiquated concept and should no longer be available as a defence to an offender. [See ***R. v. R.; People v. Liberta***; ***FWLD (Nepal)***; ***Jit Kumari (Nepal)***; ***People of the Philippines v. Edgar Jumawan*** (G.R.No.187495 dt. 21.04.2014), Supreme Court of the Republic of the Philippines[31].]

98.1. The contention advanced by the intervenors that the aforementioned foreign jurisdictions did not have a provision akin to Section 2 to Section

[31] In short "***People v Edgar***"

375 of IPC is accurate insofar as U.K. and Nepal are concerned. The statute referred to in ***People v. Liberta*** at the relevant time provided a specific exception for an act of rape against one's wife. The law in Nepal now stands legislatively amended to criminalize the act, albeit, with lesser punishment than rape by a stranger. Notably, each of the aforementioned decisions in one form or another recognize that the existence of such an exception whether in the statute or, the law was "repugnant and illogical", abuse of the married woman's human rights and "simply unable" to withstand even the slightest scrutiny. Insofar as India is concerned, these very aspects militate against the continuation of MRE on the statute.

99. In sum, the submission is that this court ought to strike down the impugned provisions as they are violative of Articles 14 and 21 of the Constitution.

Analysis and Reasons

I. Brief History of Rape Law

100. To understand, why the continuance of MRE on the statute is problematic for a substantial number of persons, if not all, it would be useful to closely look at the history of MRE; a plain reading of which will disclose that it is steeped in patriarchy and misogyny. In fact, I would go further and say that MRE has contributed to diminishing the freedom won by human beings from slavery and the struggle that they experienced in removing discrimination on account of colour, creed, ethnicity and sex.

101. The genesis of MRE is rooted in the doctrine expounded by Sir Matthew Hale, Lord Chief Justice of the Court of King's Bench in a document titled "History of the Pleas of the Crown" which was published

sixty years after his death i.e., in 1736. The original formulation, as it appears, concerning MRE was framed by Sir Matthew Hale as follows :

> ***"Hiftoria Placitorum Corone***
> *Be fo, for the woman may forfake that unlawful courfe of life.*
> *But the hufband cannot be guilty of a rape committed by himfelf upon his lawful wife, for by their mutual matrimonial confent and contract the wife hath given up herfelf in this kind unto her hufband, which fhe cannot retract."*
>
> [Emphasis is mine.]

102. This formulation came to light with the publication of the book authored by John Frederick Archbold in a book titled Pleading and Evidence in Criminal Cases (1822: First Edition).

> "*assault, under 48 & 49 Vict. c. 69, s. 9 (ante, p. 1017). A woman may be convicted as principal in the second degree in rape. R.v. Ram, 17 Cox, 609, 610 n., Bowen, L.J. It is a general proposition that a husband cannot be guilty of a rape upon his wife. 1 Hale, 629; but it would seem that the proposition does not necessarily extend to every possible case: see the remarks of the judges in R. v. Clarence, 22 Q. B. D. 23. But both a husband and a boy under fourteen.*"
>
> [Emphasis is mine.]

103. A perusal of the aforesaid extract from John Frederick Archbold's book would show that even as far as the early part of 19th-century doubts were entertained as to the applicability of the principle articulated by Sir Matthew Hale (at least in certain circumstances) that a husband cannot be held guilty of committing the rape qua his wife. ***R. v. Clarence*** [1888] 22 Queen's Bench Division 23[32] was a case in point. This is a case that I would discuss in the latter part of my judgment. Suffice it to say that this case did bring to the fore the unmistakable fact that the proposition did not stand on terra firma. The English courts also found, it appears, ways and means to

[32] In short "***R v. Clarence***"

dilute the common law doctrine which was that once a woman entered matrimony, it was deemed that she had given her irrevocable consent to sexual communion with her husband. [See ***R. v. Clark***, (1949) 2 All ER 448[33]; ***R. v. Obrien***, (1974) 3 All ER 663[34]; ***R. v. Steele***, (1976) 65 Cr. App. R 22.]

104. However, the change in law moved at a glacial pace even in the United Kingdom (UK); the birthing mother of the troublesome common law doctrine. It appears that the offence of rape was formally defined for the first time with the enactment of the Sexual Offences (Amendment) Act, 1976. This Act amended the Sexual Offences Act, 1956 by defining the offence of rape as follows :

> " ***Sexual Offences (Amendment) Act 1976***
> ***1976 CHAPTER 82***
>
> ***1. Meaning of "rape" etc.***
> *(1) For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if –*
> *(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and*
> *(b) at the time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it;*
> *and reference to rape in other enactments (including the following provisions of this Act) shall be construed accordingly."*
>
> [Emphasis is mine.]

104.1. A close examination of the definition of rape, as extracted above, would show that it left, so to speak, a possibility of a defence being raised based on the Common Law Doctrine, adverted to above, when the offender was the husband and the victim his wife, because of the incorporation of the

[33] In short "***R v. Clark***"
[34] In short "***R v. Obrien***"

word "unlawful" along with the expression "sexual intercourse" in the definition of rape.

104.2. This aspect came to the fore in a case which travelled to the House of Lords from a judgment rendered by the Court of Appeal (Criminal Division) in R. v. R. The Court of Appeal had rejected the appeal preferred by the husband who was convicted for the offence of rape vis-a-vis his wife and in the process had read down the MRE i.e., the Common Law Doctrine that a husband cannot be held guilty of committing rape on his wife on the ground that once she entered into matrimony, she could not revoke her consent for sexual union.

104.3. Pertinently, the decision of the House of Lords in ***R. v. R.*** (this is important from the point of view of arguments advanced before us as to why this court should not enter the arena reserved for the legislature) impelled the English Parliament to amend the subsisting law i.e., the Criminal Justice and Public Order Act, 1994 by incorporating Section 142 in the said Act :

> "***PART XI***
> *SEXUAL OFFENCES*
> *Rape*
>
> ***142 Rape of women and men***
>
> *For section 1 of the Sexual Offences Act 1956 (rape of a woman) there shall be substituted the following section –*
>
> ***"Rape of woman or man***
>
> *(1) It is an offence for a man to rape a woman or another man.*
>
> *(2) A man commits rape if -*
>
> *(a) he has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it; and*
>
> *(b) at the time he knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it."*

105. A careful perusal of the aforesaid provision would show that the law in the UK was made, firstly, gender-neutral and, secondly, did away with the

possibility of the Common Law Doctrine being used as a defence by excising from the statute the word "unlawful" which preceded the expression "sexual intercourse".

106. Unfortunately, for whatever reason, the shifting of sands of time went unnoticed, as the legislative history of this country would show, *qua* MRE in IPC. However, the incursion caused by deviant and extremely hard cases, both, in the UK and India weighed with the lawmakers even when the first draft of the IPC was considered before its enactment. Section 375, as it exists today, in its earlier *avatar* i.e., in the draft IPC was referred to as Clause 359. This Clause 359 read thus :

> **"***OF RAPE*
>
> ***359.*** *A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:*
> *First.- Against her will.*
> *Secondly.- Without her consent, while she is insensible.*
> *Thirdly.- With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.*
> *Fourthly.- With her consent, when the man knows that her consent is given because she believes that he is a different man to whom she is or believes herself to be married.*
> *Fifthly.- With or without her consent, when she is under nine years of age.*
> *Explanation.- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.*
> *Exception.- Sexual intercourse by a man with his own wife is in no case rape."*
>
> [Emphasis is mine.]

107. One would notice that Clause 359 did not define sexual intercourse as widely as it obtains on the statute presently. Furthermore, it reinforced the Common Law Doctrine without making room for girl-children, who in our country, at that point in time, married at a very young age.

107.1. Besides this, I may add more as a trivia rather than anything else that,

although Englishmen are known for their exactitude and precision, the Exception used the expression "own wife" instead of "just wife" which, if nothing else, was a surplusage.

107.2. That apart, "Note B. on the Chapter of General Exceptions" was suggestive of the fact that the lawmakers of that time had decided to incorporate the exception in Clause 359 based on a wrongly held notion, as I view it, that amongst various conjugal rights, the husband had a unhindered right to have sex with his wife whether or not she consented to it. The relevant part of the said note is extracted hereafter :

> "Note B.
>
> *ON THE CHAPTER OF GENERAL EXCEPTIONS*
>
> *This chapter has been framed in order to obviate the necessity of repeating in every penal clause a considerable number of limitations.*
>
> *Some limitations relate only to a single provision, or to a very small class of provisions. Thus the exception in favour of true imputations on character (clause 470) is an exception which belongs wholly to the law of defamation, and does not affect any other part of the Code. The exception in favour of the conjugal rights of the husband (clause 359) is an exception which belongs wholly to the law of rape, and does not affect any other part of the Code. Every such exception evidently ought to be appended to the rule which it is intended to modify. ..."*
>
> [Emphasis is mine.]

108. Fortunately, the draft, as it appears, was put up for further scrutiny which resulted in a report being submitted by the Indian Law Commissioners. Paragraphs 444 and 445 of the report are revealing as they hemmed in the impact to some extent (I would say minuscule extent), where a child - bride was concerned. The said paragraphs are extracted hereafter :

> "***444.*** *Again Mr. Thomas objects to the "exception which declares that sexual intercourse by a man with his own wife is in no case rape." He says, "I doubt the propriety of this exception. The early age at "which children are married and are in the eye of the law*

wives, makes "it necessary that protection should be given to them by the law till "they are of age to reside with their husbands. I remember a case of "forcible violation and great injury to a child where the offender was "the husband." Mr. Hudleston and Mr. A.D. Campbell concur with Mr. Thomas.

***445.** Although marriages are commonly contracted among Mahomedans and Hindoos before the age of puberty on the part of the female, yet usually the bride remains in the house of her parents till she is of a fit age for the consummation of the marriage, and it may be fairly presumed that the parents, her natural guardians, will in general take care to prevent abuse in this respect. There may however be cases in which the check of the law may be necessary to restrain men from taking advantage of their marital right prematurely. To meet such cases it may be advisable to exclude from the exception cases in which the wife is under nine years of age. Instances of abuse by the husband in such cases will then fall under the 5th description of rape."*

[Emphasis is mine.]

109. It is this which resulted in providing in the first statutory avatar of Section 375 albeit in 1860, with a modification, that consent was immaterial where a man indulged in coitus with his wife, who was under 10 years of age, as against nine years provided in clause 359. However, the Common Law Doctrine which appeared in Clause 359 continued to subsist, save and except, that the exception would not operate where the wife was under 10 years of age. Clause 359 [which morphed into Section 375], when incorporated in IPC in 1860, read as follows :

"***375**. A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:*
First. Against her will.
Secondly. Without her consent.
Thirdly. With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.
Fourthly. With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that

he is another man, to whom she is or believes herself to be lawfully married.
Fifthly. With or without her consent, when she is under ten years of age.
Explanation. Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."
"Exception. Sexual intercourse by a man with his own wife, the wife not being under ten years of age, is not rape."
[Emphasis is mine.]

110. At this juncture, it would be also relevant to note as to how Section 376 read when it was incorporated in the statute for the first time. This is relevant from the point of view of the argument put forth before us by learned counsel for the parties with regard to "high minimum mandatory sentence" of 10 years obtaining presently in Section 376(1) of the IPC.

*"**376.** Whoever commits rape shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."*

111. As noticed above, Section 375 in its original form made no distinction based on age between a child who was subjected to forced sexual intercourse whether by a husband or a stranger; the age threshold, however, was kept under 10 years of age. This threshold was increased with the amendment brought about in 1983 (Act 43 of 1983) when the age threshold provided in the sixth circumstance, appended to Section 375, for a child, was raised to "under sixteen years of age", even though insofar as the child-bride was concerned, the threshold was kept at "under fifteen years of age" :

"Sixthly. - With or without her consent, when she is under sixteen years of age.

Explanation.- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

[Emphasis is mine.]

112. Besides this, the other relevant change which was brought about by Act 43 of 1983 was that a fifth circumstance was added which, in effect, legislatively disregarded consent given by a woman on account of the state of her mind due to unsoundness, intoxication, administration of stupefying or unwholesome substance administered either by the offender personally or through another which disabled the victim from understanding the nature and consequences of the act to which she had consented. Resultantly, what was placed under "fifthly" earlier i.e., the provision which dealt with the immateriality of consent said to have been granted by a child was renumbered as "sixthly".

113. The threshold vis-à-vis an unmarried girl-child who was subjected to sexual acts was raised by Act 13 of 2013 by enhancing the threshold to "under eighteen years of age". The other relevant amendments brought about by Act 13 of 2013 which included the expansion of the definition of rape by inserting Clauses (a) to (d) in Section 375 (which were descriptive of various sexual acts that a victim could be subjected to) and insertion of certain other provisions like Explanations 1 and 2 (and the accompanying proviso) and Exception 1; with MRE being renumbered as Exception 2.

113.1. To complete the narrative concerning the history of rape law, it needs to be noticed that via the Criminal Law (Amendment) Act, 2018 (No.22 of 2018), amendments were brought about qua certain provisions of the IPC, Evidence Act, the Code and the POCSO Act.

114. What exacerbated the dissonance between a girl-child who was subjected to a sexual act within marriage as against the one who became a victim of the act outside marriage was that for the former the threshold

remained as "under fifteen years of age", while for the latter the threshold was increased to "under eighteen years of age".

115. This anomaly was not corrected till the Supreme Court rendered its judgment in ***Independent Thought*** whereby the threshold for a child bride who is subjected to sexual intercourse by her husband was raised from "under fifteen years of age" to "under eighteen years of age".

116. In ***Independent Thought***, the Supreme Court squarely considered the ambit of MRE, albeit, in the context of a child-bride as a result of incongruity obtaining as to the threshold age as provided in the sixth circumstance and Exception 2 appended to Section 375 and the POCSO Act.

116.1. Although the narration of submissions recorded hereinabove would show that the petitioners have relied upon ***Independent Thought*** to demonstrate that irrespective of the issue at hand, in that case, the observations made therein concerning MRE would apply even to a married woman aged 18 years and above, this position has been contested by counsel for the intervenors who propound that the *status quo* should be maintained till such time the legislature intervenes in the matter. As to whether the observations in ***Independent Thought*** would apply given the disclaimers made by the learned judges who authored the judgment is an aspect that I would discuss in the latter part of the judgment.

117. For the moment, what I need to deal with immediately is the argument advanced by Messrs Sai Deepak and Kapoor and others who support their line of argument, which is, whether this court should, at all, examine the issue at hand on account of its inability to entertain various stakeholders, I presume this argument is made given the nature of court proceedings, and, thus, perceived inability of this court to assimilate various views and counter-views. An exercise which, according to them, can be performed

only by the executive and/or the legislature. To put it pithily, the argument is that if the court were to exercise powers under Article 226 and strike down the MRE, it would in effect carry out a legislative act and, thus, blur the Doctrine of Separation of Powers. In this context, it is argued in particular by Mr Sai Deepak that it would deprive the "Bhartiya Legislature" of the right to examine the issue threadbare, albeit, after undertaking a consultative exercise by involving myriad stakeholders. In sum, the call is for exercising "judicial restraint".

II. Separation of Powers

118. To my mind, this argument fails to recognize the fundamental concepts which are subsumed in our Constitution. The framers of the Indian Constitution attempted to draw the best from various constitutions and constituent documents available to them at the cusp of Independence. Some of the models that were available to the framers of our Constitutions at that juncture were (i) the United States (US) Constitution; (ii) the Constitution Acts enacted by the British Parliament establishing Federal Constitutions not only for India but countries like Canada and Australia; importantly, these documents drew inspiration from the American experience. [See H.M. Seervai, Constitutional Law of India, Fourth Edition, Vol. 1, 1A.9 at page 158.]

118.1. The US Constitution adopted the Doctrine of Separation of Powers, albeit, in the mistaken belief that English precedent was being followed. The Constitution of Canada, Australia and to a limited extent the Government of India Act, 1935 provided for an executive who was responsible to the legislature. Thus, the framers of the Indian Constitution adopted a system of Parliamentary Executive in preference to a Presidential system adopted in the US. Notably, in the US, the President is not responsible to the

legislature. The legislative business is carried out by Congress. The President is answerable only to the people who elected him. His Cabinet comprises persons who are referred to as Secretaries. Secretaries are appointed and removed by the President whereas, in India, the head of a successful party is, ordinarily, appointed as the Prime Minister whose Cabinet consists of Ministers, who are members of one or other House of the Parliament. The only exception to this prescription is when a person, who is appointed as a Minister in the Union Government and is not a member of either House of the Parliament, he is required to get elected to one or the other House of the Parliament within six months as otherwise, he would cease to be a Minister. [See Article 75(5) of the Constitution.] Although, like in the US, we have a President, who is the Commander-in-Chief of the armed forces, the comparison ends there. The President in our country acts like the sovereign of Great Britain on the advice of his Ministers who are responsible to the Parliament and, who, wield the real executive power.

119. To appreciate the point at hand, it is important to remember that the Doctrine of Separation of Powers and the Doctrine that the Legislatures are Delegates of the People [which is the basic doctrine of the US Constitution] do not form part of the Constitution of India. The framers of our Constitution rejected the Presidential form of Government, that is, an Executive independent of the Legislature and instead adopted the British model of government that is an Executive/ Cabinet which is responsible to and removable by the Legislature. [See H.M. Seervai, Constitutional Law of India, Fourth Edition, Vol. I, 1A.10 & 13 at pages 158 & 159.]

120. That said, while the framers of our Constitution did not adopt the Presidential system of government, we did adopt other features of the US Constitution which were not found in the Constitutions prevalent in Canada

and Australia. For instance, aspects which form part of the Bill of Rights in the US were made part of the Chapter on Fundamental Rights in the Indian Constitution. Our Preamble employs language which is somewhat similar to the American Constitution and accordingly our Constitution opens with the words : "WE, THE PEOPLE OF INDIA…" And likewise, insofar as the country's social and economic objectives were concerned, these were not restricted just to the Preamble but following the example of Irish Free State, they were provided in Part IV of the Constitution and titled as "Directive Principles of the State Policy" which were declared fundamental in the governance of the country but were not made enforceable. [See H.M. Seervai, Constitutional Law of India, Fourth Edition, Vol. I, 1A.11 at pages 158 & 159.]

121. The aforesaid broad framework of our Constitution is captured by Chief Justice B.K. Mukherjea [as he then was] in a decision rendered by him in ***Rai Sahib Ram Jawaya Kapur v. State of Punjab***, (1955) 2 SCR 225[35] :

> *"12. It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily, the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law.*

[35] In short "***Ram Jawaya Kapur***"

xxx *xxx* *xxx*

14. In India, as in England, the executive has to act subject to the control of the legislature; but in what way is this control exercised by the legislature ? Under article 53(1) of our Constitution, the executive power of the Union is vested in the President but under article 75 there is to be a Council of Ministers with the Prime Minister at the head to aid advise the President in the exercise of his functions. The president has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet. The same provisions obtain in regard to the Government of States; the Governor or the Rajpramukh, as the case may be, occupies the position of the head of the executive in the State but it is virtually the council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, "a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part." The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them.

xxx *xxx* *xxx*

19. ...As we have said already, the executive Government are bound to conform not only to the law of the land but also to the provisions of the Constitution. The Indian Constitution is a written Constitution and even the legislature cannot override the fundamental rights guaranteed by it to the citizens. Consequently, even if the acts of the executive are deemed to be sanctioned by the legislature, yet they can be declared to be void and inoperative if they infringe any of the fundamental rights of the petitioners guaranteed under Part III of the Constitution. ...."

[Emphasis is mine.]

122. Following the same ethos as was captured in ***Ram Jawaya Kapur's*** case, a Constitution Bench of the Supreme Court in ***Kalpana Mehta & Ors***.

v. Union of India & Ors., (2018) 7 SCC 1[36], made some pointed observations on Separation of Powers and the role of the Constitutional Courts in that framework. The question that fell for consideration was: whether the court could place reliance upon a report of the Parliamentary Standing Committee while exercising jurisdiction under Article 32 and 136 of the Constitution. Hon'ble Dr Justice D.Y. Chandrachud in his concurring judgment after adverting to a whole host of material veered to the view that separation of powers was a "nuanced doctrine". It involved "division of labour" and "checks and balances". Importantly, it was emphasized that the Indian Constitution, while recognizing the doctrine of separation of powers, had not adopted the same in its absolute rigidity. As to how the doctrine of separation of powers is to play out in real terms is best understood by adverting to the following dicta contained in the judgment :

> ***"246.*** *In I.R. Coelho v. State of T.N. [I.R. Coelho v. State of T.N., (2007) 2 SCC 1], the Court underlined the functional complementarity between equality, the rule of law, judicial review and separation of powers : (SCC p. 105, para 129)*
>
> > *"129. Equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law. These would be meaningless if the violation was not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary."*
>
> *xxx* *xxx* *xxx*
>
> ***255.*** *Parliament and the State Legislatures legislate. The executive frames policies and administers the law. The judiciary*

[36] In short "***Kalpana Mehta***"

decides and adjudicates upon disputes in the course of which facts are proved and the law is applied. The distinction between the legislative function and judicial functions is enhanced by the basic structure doctrine. The legislature is constitutionally entrusted with the power to legislate. Courts are not entrusted with the power to enact law. Yet, in a constitutional democracy which is founded on the supremacy of the Constitution, it is an accepted principle of jurisprudence that the judiciary has the authority to test the validity of legislation. Legislation can be invalidated where the enacting legislature lacks legislative competence or where there is a violation of fundamental rights. A law which is constitutionally ultra vires can be declared to be so in the exercise of the power of judicial review. Judicial review is indeed also a part of the basic features of the Constitution. Entrustment to the judiciary of the power to test the validity of law is an established constitutional principle which co-exists with the separation of powers. ....

***…256.** This discussion leads to the conclusion that while the separation of powers, as a principle, constitutes the cornerstone of our democratic Constitution, its application in the actual governance of the polity is nuanced. The nuances of the doctrine recognise that while the essential functions of one organ of the State cannot be taken over by the other and that a sense of institutional comity must guide the work of the legislature, executive and judiciary, the practical problems which arise in the unfolding of democracy can be resolved through robust constitutional cultures and mechanisms. The separation doctrine cannot be reduced to its descriptive content, bereft of its normative features. Evidently, it has both normative and descriptive features. In applying it to the Indian Constitution, the significant precept to be borne in mind is that no institution of governance lies above the Constitution. No entrustment of power is absolute."*

[Emphasis is mine.]

123. Thus, unlike the US Constitution, our Constitution is not based on rigid separation of powers, although, it provides for a separate Legislature, the Executive and the Judiciary. Illustratively, the Supreme Court has

advisory jurisdiction under Article 143 of the Constitution and likewise, legislative power is vested in the judiciary. [See Sections 122 and 129 of the CPC; also see H.M. Seervai, Constitutional Law of India, Fourth Edition, Vol. III, paragraph 25.42 at page 2636.]

124. Similarly, under the Constitution, the Legislature also exercises quasi-judicial powers. [See Tenth Schedule read with Article 102(2) of the Constitution.] These provisions concern the disqualification of a person who is a Member of the Parliament on the ground of defection. The decision concerning such persons rests with the Chairman or Speaker of the House, as the case may be. [See ***Kihoto Hollohan v. Zachillhu***, 1992 Supp (2) SCC 651 and ***Shrimanth Balasaheb Patil v. Karnataka Legislative Assembly***, (2020) 2 SCC 595.]

III Judicial Restraint

125. Having, thus, broadly, established that the rigid separation of powers doctrine does not apply in the Indian context, what is required to be examined is whether this court should, as contended by Messrs Sai Deepak and Kapoor, refrain from examining the contention of the petitioners that the impugned provisions (which includes MRE) are violative of married women's fundamental rights under Article 14, 15, 19(1)(a) and 21 of the Constitution. The argument is suggestive of the fact that the court does not have the jurisdiction or the requisite wherewithal to examine the grievance articulated by the petitioners.

125.1. Article 13 of the Constitution, in my view, enjoins the Constitutional court to declare any law, which is in force in India, whether enacted before the commencement of the Constitution or thereafter, "void" if it is found to be inconsistent or takes away and/or abridges the rights conferred by Part III

of the Constitution. The expression "inconsistent" found in Clause (1) and likewise, the expression "in contravention" found in Clause (2) of Article 13 mean one and the same thing. The expression "inconsistent" applies to laws enacted prior to the Constitution being adopted and being brought into force while the expression "in contravention" applies to laws which are enacted after the Constitution was adopted and brought into force. Between them, they cover the entire field and, thus, empower the court to declare void any law which violates the person's fundamental rights. The only exception being any amendment made to the Constitution under Article 368; Article 13 does not apply to such situation. [See Article 13(4).] The remedies for enforcing fundamental rights are provided in Article 32 [which falls in Part III of the Constitution] and Article 226 which confers power on the High Courts to issue various writs not only for the enforcement of rights conferred under Part III but also for "any other purpose". Clause (1) of Article 226 is a non-obstante clause which confers this power on the High Courts. Therefore, to suggest that the issue at hand can only be dealt with by the Executive of the day or the Legislature is unpersuasive. The submission that the issues involved concern a policy decision which, in turn, requires wide-ranging consultations with members of the public and domain experts misses, if I may say so, the wood for the trees inasmuch as it fails to accept that what the court has before it is a legal issue i.e., whether or not the impugned provisions (which includes MRE) violate a married woman's fundamental rights conferred under the Constitution.

126. The argument in substance is that the Court must exercise judicial self-restraint concerning the matter at hand and leave the working out of remedies for a married woman to the legislative wisdom. The further iteration of this argument is, that this Court should allow the Executive

and/or the Legislature (in consonance with the Doctrine of Separation of Powers) to examine the issue in the absence of judicially discoverable and manageable standards for resolving the lis. It is thus emphasised that this issue cannot be decided without initial policy formulation.

126.1. The thrust of the submissions made in this behalf by the intervenors is that if the Court were to adjudicate the issue at hand, it would take the power out of the hands of the people, which is, represented by the Parliament and, thus, would seriously diminish its standing.

126.2. These submissions tend to suggest that on account of the factors adverted to above, the aspects involved in the instant matters should be left best to be handled, by the Executive who in turn would engage in a consultative process being in effect the political party having majority in the Parliament. In other words only when the consultative process culminates in a legislative intervention can a solution be found qua the issues raised in the writ petitions. In an ideal circumstance this route could perhaps have been adopted but the grief that MRE has caused over the years impels me to deal with it as legal cause [which it is] seeking declaration of rights and the remedies that flow therefrom. Therefore, these submissions, in my opinion, have no merit.

126.3. There are enough and more judicial precedents which clearly establish that even actions which assail sovereign or legislative acts have been entertained by Courts whenever they impinge upon fundamental rights of the citizen. Therefore, the submission that intercession by court will diminish its standing is, in my view, a submission that is clearly flawed. As a matter of fact "*...National respect for the courts is more enhanced through the forthright enforcement of those rights rather than by rendering them nugatory through the interposition of subterfuges.*" [See ***Baker v. C Carr***,

1962 SCC OnLine US SC 40, at page 711, Clark, J.; also see ***A.K. Roy v. Union of India***, (1982) 1 SCC 271, paragraphs 26-27; and ***Madhav Rao Jivaji Rao Scindia v. Union of India***, (1971) 1 SCC 85, paragraph 45.]

127. Furthermore, for my part, this submission also represents, if I may say so, a half-truth. If it was a question concerning an economic policy or economic theory, I would easily defer to the wisdom of the Executive of the day and/or the Legislature as it is essentially experimental and requires a "play in the joints". [See ***R.K. Garg v. Union of India***, (1981) 4 SCC 675.] As alluded to above, the Doctrine of Judicial Self-Restraint is not applicable in cases which involve the determination of controversies that involve alleged infractions of fundamental rights by the State, in the context of violation of civil rights/human rights. Side-stepping such issues would be akin to the court seeking "an alibi" for refusing to decide a legal controversy, which it is obliged in law to decide. The perceived "harm to its reputation or prestige" can be of little consequences. [See H.M. Seervai, Constitutional Law of India, Fourth Edition, Vol.III, paragraph 25.46, at page 2640.]

128. Thus, "shunning responsibility" to decide what falls within the ken of the court and leaving it to the Executive and/or the Legislature, in my view, would constitute abandonment of the duty and the role which the Constitution has defined for the courts. Courts are engaged in the job of adjudication which involves the application of the law which includes the provisions of the Constitution to a given set of facts. Areas that the courts cannot venture into are carved out by the law. While I do not doubt that the issues at hand involve substantial questions of law which require examination in the light of relevant statutes and the provisions of the Constitution, there is to my mind, no better forum to rule on these issues

than the court itself.

128.1. The contention advanced by Messrs Sai Deepak and Kapoor as also those who support this argument does not impress me and, hence, is rejected.

129. Having cleared the deck, let me straight away deal with the elephant in the room i.e., why, according to me, the impugned provisions including MRE are problematic.

IV Ambit of Section 375 of IPC

130. This would require one, to layout, in the first instance, the broad contours of Section 375. A close perusal of Section 375[37] would show that it

[37] **375. Rape.-** A man is said to commit "rape" if he—
(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

First.Against her will.

Secondly.Without her consent.

Thirdly.With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.With or without her consent, when she is under eighteen years of age.

Seventhly.When she is unable to communicate consent.

Explanation 1.For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

firstly, describes various sexual acts in Clauses (a) to (d) and then lists out the circumstances in which those sexual acts would result in the commission of the offence of rape. Pertinently, Clauses (a) to (d) do not confine the scope of sexual acts, described therein, to a situation where the offender himself commits those acts but also extends the ambit of those very acts when the victim is made to perform the said acts with "any other person".

130.1. The “circumstances” that have been listed out, in which, sexual acts described in Clauses (a) to (d) will constitute rape, are seven in number. Besides this, the section includes two explanations i.e., Explanations 1 and 2. With Explanation 2, a proviso is appended. In addition thereto, two exceptions are carved out i.e., Exceptions 1 and 2. Exception 2 i.e., MRE is in the crosshair of instant challenge laid before the Court.

130.2. Therefore, the import of the provision i.e., Section 375, at present, is as follows: That one or more sexual acts referred to in Clauses (a) to (d) would constitute rape if the victim is a woman aged 18 years and above finds herself in one or more of the seven circumstances set forth therein.

130.3. The first circumstance alludes to situation when sexual act(s) are committed against her will, which, to my mind, would mean that while the woman-victim is in possession of her senses and, therefore, even though capable of giving her consent, does not give her consent to participation in the sexual act. In other words, the expression “against her will”, involves an element of resistance and opposition by the victim.

130.4. The second circumstance i.e., "without her consent", in my opinion, would be an act which is not accompanied by intelligent deliberation, as to the nature and consequences of the sexual act or is based on a false

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Exception 1.A medical procedure or intervention shall not constitute rape.

Exception 2.Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

misrepresentation of a fact at the time when the act was committed or by subjecting the victim to "inevitable compulsion" such as fear of injury or death.[38] Therefore, there may be a certain amount of overlap between the first and the second circumstance. The consent given in inevitable circumstances which tantamount to submission would overlap with the third and fifth circumstance.

130.5. The third circumstance addresses a situation where, although, the woman victim is said to have given her consent, the law disregards it if it is obtained by putting the woman-victim or any person that she is interested, in fear of death or hurt.

130.6. Likewise, in the fourth circumstance as well, the law disregards the woman victim's consent when the offender knows that he is not the woman victim's husband and while giving consent, she believes that the offender is another person to whom she is or believes herself to be lawfully married. The instance that, perhaps, could fall in this circumstance could be, say, the case of identical twins.

130.7. The fifth circumstance where the law disregards the woman's consent if, at the time when the woman-victim gives her consent, she is found to be unsound of mind or intoxicated or has been administered by the offender personally or through another any stupefying or unwholesome substance, disabling her from understanding the nature and consequences of the act to which she is said to have given consent.

130.8. Thus, in situations covered by the fourth and fifth circumstances, even though the sexual acts are committed with the consent of the concerned woman, they are disregarded, as in one case the consent is obtained by putting the woman-victim in fear while in the other situation i.e., the fourth

[38] See ***Deelip Singh alias Dilip Kumar v. State of Bihar***, (2005) 1 SCC 88; ***Chhotey Lal.*** Also see Section

circumstance, the offender employs a deception of a particular kind.

130.9. The sixth circumstance covers a situation where a girl child is subjected to sexual acts, adverted to in Clauses (a) to (d) of Section 375. The law in such situations considers the girl victim's consent immaterial or of no consequences given the fact that she is under 18 years of age.

130.10. The seventh circumstance is self-explanatory as it covers the situation where the woman victim is unable to communicate consent.

131. The aforementioned circumstance as also the other circumstances, adverted to in Section 375, has to be read with Explanation 2 which provides as to what would constitute consent. According to Explanation 2, consent means an unequivocal voluntary agreement whereby a woman communicates her willingness to participate in a specific sexual act and this communication can be made via words, gestures or any form of verbal or non-verbal communication. What is important is that the proviso makes it amply clear that only because a woman does not physically resist the act of penetration, shall not, because of this fact alone, be construed that the woman-victim consented to sexual activity. Thus, mere passivity or lack of resistance to a sexual act cannot be construed as consent.

131.1. To deduce consent, one would have to look at the forms of communications alluded to in Explanation 2.

131.2. Explanation 1 adverts to the fact that the vagina would include labia majora which is the two outer folds of the vulva i.e., the external part of the female genitalia. It appears that Explanation 1 has been incorporated to dilate and perhaps remove the possibility of a defence being raised that the sexual activity, described in Clauses (a) to (d) in Section 375, did involve the concerned female's genitalia [i.e., the vagina] and hence did not

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90 of IPC amounting to misconception of fact.

constitute rape.

131.3. Exception 1 excludes medical procedure or intervention from the offence of rape.

132. Exception 2 [i.e., MRE], in effect, saves from the rigour of the main provision which deals with the offence of rape, one category of offender (i.e., a husband) even though he subjects his wife who is not under 18 years of age to sexual acts, described in Clauses (a) to (d) of Section 375.

133. Sub-section (1) of Section 376 provides for punishment for rape, which, as prescribed, is rigorous punishment with a mandatory minimum sentence of 10 years, with a possibility of it being extended to imprisonment for life besides being mulct with a fine as well. The sub-section (2) of Section 376 covers cases of aggravated rape which include rape committed in custody[39], by a relative[40], guardian or teacher or by a person in a position of trust or authority, and on women placed in vulnerable circumstances[41] accompanied by an element of depravity. In cases covered under Section 376(2), the minimum mandatory sentence is 10 years which can extend to imprisonment for life; which, as the provision goes on to clarify, means imprisonment for the remainder of that person's natural life, in addition to, being burdened with fine.

133.1. Besides this, the other forms of aggravated rape are, *inter alia*, covered under Sections 376A (causing death resulting in a persistent vegetative state of the victim) and 376D (gang-rape). The punishment prescribed for these offences is much harsher. Under Section 376A, even a death sentence can be imposed on the offender.

134. Section 376B (read with explanation) concerns sexual acts, as

[39] Section 376(2)(a) to (e)
[40] Section 376(2)(f)
[41] Section 376(2)(g) to (n)

described in Clauses (a) to (d) to Section 375 which, if a husband subjects his wife to, while they are living separately under a decree of separation or otherwise, albeit, without her consent, is a punishable offence. The punishment though, which the legislature prescribes for an offence covered under the said provision is less rigorous. The prescribed minimum mandatory sentence of imprisonment is two years, which may extend to seven years, accompanied by imposition of a fine.

135. Thus, a careful perusal of the aforementioned provisions, in particular Section 375, would demonstrate the following.

135.1. Section 375 is concerned with the acts described in Clauses (a) to (d) which would morph into an offence of rape if committed in the seven circumstances, alluded to therein. Absent the seven circumstances, the acts, described in Clauses (a) to (d) of Section 375, do not acquire a criminal hue.

135.2. A close reading of the circumstances would reveal that except for the sixth circumstance (which concerns a girl-child under 18 years of age), willingness (as in the first circumstance) and consent (as in the second to fifth and seventh circumstance)- form the basis of separating acts which are lawful from those which are construed as unlawful. The circumstances are clearly agnostic to the relationship between the offender and the woman victim. Therefore, whether the offender is a stranger or a partner in a live-in relationship, he would fall within the purview of the offence of rape if he commits, sexual acts with a woman victim, as described in Clauses (a) to (d) of Section 375, under the seven circumstances, adverted to hereinabove. Consequentially, every woman victim, except a married woman, has the right to trigger criminal proceedings against the offender if she is subjected to forced sexual activity.

135.3. The firewall that is created via Exception 2 to Section 375/MRE vis-à-vis an offending husband, who subjects his wife to a non-consensual sexual act, is, thus, the main focus of the petitioners challenge in the writ petitions.

V In defence of MRE

136. In defence of the impugned provisions, in particular MRE, the following broad arguments are advanced.

(i) First, the distinction that MRE makes between married and unmarried women is constitutionally viable.

(ii) Second, the IPC itself contains provisions which are relationship-centric.

(iii) Third, the legislature has provided various avenues to enable a victim to seek redressal against spousal violence. In this context, reference was made to Section 376B and Section 498A of the IPC, as also, to the provisions of the D.V. Act.

(iv) Fourth, the husband has a "conjugal expectation" to *inter alia* have sex with his wife.

(v) Fifth, while the legislature does not condone spousal sexual violence, it chooses not to label the act as rape as it seeks to protect families including progeny. In other words, the State has a legitimate interest in protecting the institution of marriage.

(vi) Sixth, there is a palpable and real apprehension that striking down MRE could result in the lodgment of false cases.

(vii) Seventh, if the husband is prosecuted for marital rape, it would result in the State invading a married couple's private space. Being a closed space, it would be well-nigh impossible for the State to collect evidence concerning the allegation of rape.

(viii) Eighth, the striking down of MRE would create a "new offence" by criminalizing an act which up until now was not construed as an offence. The Court is not vested with such power, this power is reserved well and truly for the legislature.

V(i) <u>Constitutional viability of classification between married and unmarried women in the context of Article 14.</u>

137. To answer the question as to whether a classification based on the relationship between the offender and victim is constitutionally viable, one would have to examine whether the classification has an intelligible differentia with the object which is sought to be achieved. There can be no doubt that the legislature seeks to punish offenders who are guilty of committing rape; this principle is the bedrock on which Section 375 of the IPC is founded. It cannot, perhaps, also be doubted that there is a differentia between married, separated and unmarried couples. However, what needs to be established once the differentia is accepted is : whether the differentia between married and unmarried couples has a rational nexus with the object, which the main provision seeks to achieve, that is, protecting a woman from being subjected to a sexual act against her will or her consent. MRE does not meet the nexus test as it grants impunity to an offender based on his relationship with the victim. In other words, it grants impunity qua an act which would otherwise fall within the offence of rape under the main provision [i.e., Section 375] only for the reason it is committed within the bounds of marriage.

137.1. The classification, in my opinion, is unreasonable and manifestly arbitrary as it seems to convey that forced sex outside marriage is "real

rape"[42] and that the same act within marriage is anything else but rape. A 'chaste woman'[43] or a young girl – is more likely to be considered a 'victim'; but not a married woman. A prior sexual relationship is regarded as a reasonable defence because consent is assumed; but in the case of a married woman, it is not even put to test. Sex- worker has been invested with the power to say "no"; by the law; but not a married woman. In a gang rape involving the husband of the victim, the co-accused will face the brunt of the rape law; but not the offending husband only because of his relationship with the victim. A married woman's ability to say "no" to sexual communion with her husband when he is infected with a communicable disease or she is herself unwell finds no space in the present framework of rape law. Thus the rape law as it stands at present is completely skewed insofar as married women are concerned. To a woman who is violated by her husband by being subjected to the vilest form of sexual abuse (i.e., rape) it is no answer to say that the law provides her other remedies. When marriage is a tyranny, the State cannot have a plausible legitimate interest in saving it. In every sense, MRE, in my view, violates the equality clause contained in Article 14 of the Constitution. Article 14 of the Constitution not only guarantees that the State shall not deny to any person equality before the law but also guarantees that every person within the territory of India will have equal protection of the laws. MRE with one stroke deprives nearly one-half of the population of equal protection of the laws. The classification between married and unmarried women in the context of MRE (and what is observed hereinabove) is without doubt unreasonable. The test as to what is construed

[42] Kersti Yllo and M. Gabriela Torres , Marital Rape -Consent, Marriage and Social Change in Global Context

[43] Kersti Yllo and M. Gabriela Torres, Marital Rape -Consent, Marriage and Social Change in Global Context: Prologue – Understanding Marital Rape in Global Context, Kersti Yllo, page 1

unreasonable by the courts in the context of a provision in the legislation or subordinate legislation is articulated in ***Kruse v. Johnson***, (1898) 2 QB 91 which followed an earlier Privy Council judgment rendered in ***Slattery v. Naylor***, (1888) 13 App. Cas. 446:

> *"..... I do not mean to say that there may not be cases in which it would be the duty of the court to condemn bye-laws, made under such authority as these were made, as invalid because[they were] unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclose bad faith; if they involve such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court may well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.' But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A bye-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there."*
>
> [Emphasis is mine.]

138. If one were to apply the aforesaid test the only conclusion that can be drawn is that the classification between married and unmarried couples in the context of forced sex is not just unequal in its operation but is also manifestly unjust. MRE, in my opinion, is also oppressive as it can find no justification in the minds of reasonable men, for law makers could never have intended to make such a law. The ***Kruse v. Johnson*** test has been cited with approval by the Supreme Court in the following cases :

(i) ***Trustees of the Port of Madras v. Aminchand PyareLal***, (1976) 3 SCC 167. [See paragraph 23 at page 178.]

(ii) ***Maharashtra State Board of Secondary & Higher Secondary***

Education & Anr. v. Paritosh Bhupeshkumar Sheth & Ors., (1984) 4 SCC 27. [See paragraph 21 at pages 49 - 50.]

(iii) ***Shri Sitaram Sugar Co. Ltd. & Anr. v. Union of India & Ors***., (1990) 3 SCC 223. [See paragraph 47 at page 251.]

(iv) ***Supreme Court Employees' Welfare Association v. Union of India & Anr.,*** (1989) 4 SCC 187.

138.1. The classification, as is well established, should have a "causal connection" between what is sought to be classified and the object of the provision or, the statute. Over-emphasis on the classification test bears the risk of giving precedence to form over substance. The following observations made by Hon'ble Dr Justice D.Y. Chandrachud in ***Navtej Singh Johar*** capture the essence of the width and amplitude of Article 14 when applied to real-life situations :

> *"**408.** A litany of our decisions – to refer to them individually would be a parade of the familiar – indicates that to be a reasonable classification under Article 14 of the Constitution, two criteria must be met: (i) the classification must be founded on an intelligible differentia; and (ii) the differentia must have a rational nexus to the objective sought to be achieved by the legislation. There must, in other words, be a causal connection between the basis of classification and the object of the statute. If the object of the classification is illogical, unfair and unjust, the classification will be unreasonable.*
>
> ***409.*** *Equating the content of equality with the reasonableness of a classification on which a law is based advances the cause of legal formalism. The problem with the classification test is that what constitutes a reasonable classification is reduced to a mere formula: the quest for an intelligible differentia and the rational nexus to the object sought to be achieved. In doing so, the test of classification risks elevating form over substance. The danger inherent in legal formalism lies in its inability to lay threadbare the values which guide the process of judging constitutional rights. Legal formalism buries the life-giving forces of the Constitution under a mere mantra. What it ignores is that Article*

14 contains a powerful statement of values – of the substance of equality before the law and the equal protection of laws. To reduce it to a formal exercise of classification may miss the true value of equality as a safeguard against arbitrariness in state action. As our constitutional jurisprudence has evolved towards recognizing the substantive content of liberty and equality, the core of Article 14 has emerged out of the shadows of classification. Article 14 has a substantive content on which, together with liberty and dignity, the edifice of the Constitution is built. Simply put, in that avatar, it reflects the quest for ensuring fair treatment of the individual in every aspect of human endeavor and in every facet of human existence."

[Emphasis is mine.]

139. The Supreme Court made somewhat similar observations while examining the constitutional validity of Section 2(q) of the D.V Act which excluded from the definition of the respondent (against whom an action is filed), all persons except an adult male from the purview of the Act in ***Harsora v. Harsora :***

*"**32.** Article 14 is in two parts. The expression "equality before law" is borrowed from the Irish Constitution, which in turn is borrowed from English law, and has been described in State of U.P. v. Deoman Upadhyaya, (1961) 1 SCR 14, as the negative aspect of equality. The "equal protection of the laws" in Article 14 has been borrowed from the 14th Amendment to the U.S. Constitution and has been described in the same judgment as the positive aspect of equality namely the protection of equal laws. Subba Rao, J. stated: (SCR pp. 34-35 : AIR p. 1134, para 26)*

"26. ... This subject has been so frequently and recently before this court as not to require an extensive consideration. The doctrine of equality may be briefly stated as follows: All persons are equal before the law is fundamental of every civilised constitution. Equality before law is a negative concept; equal protection of laws is a positive one. The former declares that every one is equal before law, that no one can claim special privileges and that all classes are equally subjected to the ordinary law of the land; the latter postulates an equal protection of all

alike in the same situation and under like circumstances. No discrimination can be made either in the privileges conferred or in the liabilities imposed. But these propositions conceived in the interests of the public, if logically stretched too far, may not achieve the high purpose behind them. In a society of unequal basic structure, it is well-nigh impossible to make laws suitable in their application to all the persons alike. So, a reasonable classification is not only permitted but is necessary if society should progress. But such a classification cannot be arbitrary but must be based upon differences pertinent to the subject in respect of and the purpose for which it is made."

33. *In Lachhman Dass v. State of Punjab, (1963) 2 SCR 353, Subba Rao, J. warned that over emphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibly deprive Article 14 of its glorious content. That process would inevitably end in substituting the doctrine of classification for the doctrine of equality. This admonition seems to have come true in the present case, as the classification of "adult male person" clearly subverts the doctrine of equality, by restricting the reach of a social beneficial statute meant to protect women against all forms of domestic violence.*

34. *We have also been referred to D.S. Nakara v. Union of India, (1983) 1 SCC 305. This judgment concerned itself with pension payable to Government servants. An office Memorandum of the Government of India dated 25-5-1979 restricted such pension payable only to persons who had retied prior to a specific date. In holding the date discriminatory and arbitrary and striking it down, this Court went into the doctrine of classification, and cited from Special Courts Bill,1978. InRe: (1979) 2 SCR 476 and Maneka Gandhi v. Union of India, (1978) 2 SCR 621, and went on to hold that the burden to affirmatively satisfy the court that the twin tests of intelligible differentia having a rational relation to the object sought to be achieved by the Act would lie on the State, once it has been established that a particular piece of legislation is on its face unequal. The Court further went on to hold that the petitioners challenged only that part of the scheme by which benefits were admissible to those who retired from service after a certain date. The challenge, it was made clear by*

the Court, was not to the validity of the Scheme, which was wholly acceptable to the petitioners, but only to that part of it which restricted the number of persons from availing of its benefit."
[Emphasis is mine.]

140. Therefore, the court should eschew the proclivity of over-emphasizing the test of classification if Article 14 is to be applied with full vigour; which postulates affording equal protection of the laws to persons who are placed in similar and like circumstances. While doing so, the court should examine closely how the impugned statute/provision operates on the ground i.e., what is its real effect and impact on the persons who come within the sway of the statute/impugned provision. In doing so, the court should disregard remote and indirect consequences that may entail by virtue of the impugned statute/provision. [See ***Anuj Garg.***] Thus, the Doctrine of Classification which has been forged by constitutional courts to give practical content to the doctrine must ultimately subordinate itself to the prime principle, which is, that the fundamental right of the aggrieved person to seek equality before a law is preserved. [See ***Lachhman Dass***.]

141. The immediate deleterious impact of the provisions of MRE is that while an unmarried woman who is the victim of the offence of rape stands protected and/or can take succour by taking recourse to various provisions of the IPC and/ the Code, the same regime does not kick-in if the complainant is a married woman. In this context, one may have regard to the following provisions of the IPC and the Code : Section 228A of the IPC prevents disclosure of the identity of a rape victim except in certain circumstances set out therein. Likewise, Section 26 of the Code provides that the offences concerning rape/aggravated rape shall be tried as far as practicable by a court presided by a woman. Section 53A empowers a medical practitioner to examine, a person charged with committing an offence of rape if he has

reasonable grounds for believing that such examination will furnish evidence with regard to the commission of the offence. The first proviso to Section 154 mandates if information is given by a woman victim, *inter alia*, with regard to the offence of rape or its attempt, having been committed on her, such information shall be recorded by a woman police officer/any woman officer. Similarly, the second proviso to Section 161of the Code also requires the statement of the woman victim to be recorded by a woman police officer or by any woman officer. Under Section 164A, medical examination, *albeit*, with the consent of the woman-victim is to be conducted by a registered medical practitioner within 24 hours of information being received with regard to commission of offence of rape, while under the first proviso appended to Section 309, the inquiry or trial relating to the offence of rape is ordinarily to be completed within two months of the date of filing of the chargesheet. Section 327 provides that inquiry and trial of the offence of rape/aggravated rape shall be conducted in camera and as far as practicable by a woman judge or magistrate with leeway to the presiding judge to grant access to a particular person if thought fit by him/her or upon an application being made by any one party. Lastly, Section 357C mandates provision of first aid or medical treatment, albeit, free of cost to women who are *inter alia* victims of rape.

141.1. The aforementioned provisions are those provisions to which a married woman victim would have no recourse. The fact that the law does not operate even-handedly for women who are similarly circumstanced i.e. subjected to forced sex is writ large and no amount of legal callisthenics will sustain MRE. Therefore, in my view, MRE is bad in law as it violates Article 14 of the Constitution.

V(ii) <u>Relationship-centric provisions in the IPC</u>

142. This brings me to the argument that there are other provisions in the IPC which are relationship-centric and, therefore, MRE cannot be struck down on the ground that it grants impunity to the offender only because he is in a marital relationship with a woman-victim. The argument is only partially correct and, therefore, misses the point that Mr Rao and Ms Rebecca John had proffered in the course of the hearing.

142.1. First and foremost, what is required to be examined in this case, as noticed above, is the legal tenability of the impugned provision in the context of the object sought to be achieved. As discussed above, the stated object of Section 375 amongst others is to punish offenders who are found guilty of rape. The invidious classification that is brought about by MRE fails to achieve this object and, therefore, is unable to offer equal protection of the law to married women-victims who are similarly circumstanced. Thus, when contrasted with other provisions in the IPC, which provide for exceptions on account of the marital relationship– would show that they firewall offences which are committed outside marriage and not offences perpetrated by one spouse upon the other. In this context, one may advert to Sections 136, 212, 216 and 216A of the IPC which broadly concerns prosecution for offences for harbouring deserters, offenders, escapees and robbers/dacoits respectively.

142.2. In all these cases, where the person who is harboured and the one who harbours are in a spousal relationship, the law excludes such an offender from the rigours of prosecution. The point which was made and which emerges upon a plain reading of these provisions is that these are not provisions where the deserter, escapee, offender or robber/dacoit commits an offence on the harbourer with whom she or he is in a spousal relationship.

142.3. MRE, on the other hand, seeks to grant impunity to the husband i.e.,

the offender, although, the offence is perpetrated on the wife. Therefore, the argument that there are other provisions in the IPC that ring-fence defendants from prosecution based on a marital relationship are in the context of the aforesaid discussion completely misconceived.

V(iii) <u>A married woman can take recourse to other remedies</u>

143. The submission made that there are avenues available both in IPC and other statutes which can be taken recourse by a woman-victim to agitate her grievance concerning sexual violence once again fails to recognize the fact that none of them brings within its fold the offence of rape. Section 498A of the IPC which was cited in this context deals with an offence of "cruelty" committed by the husband or his relatives. The definition of "cruelty" plainly does not include the offence of rape as defined in Clauses (a) to (d) of Section 375. The expression "cruelty" as defined in Section 498A of IPC means wilful conduct which is of such nature that is likely to drive the woman to commit suicide or to cause grave injury to her life, limb or health. The expression also includes harassment of a woman where such harassment is directed towards coercing her or any person related to her to meet any unlawful demand concerning, property and/or valuable security. The failure of the victim or any person related to her to meet such demand is also construed as harassment under the said provision. Thus, the offence of rape cannot be brought within the ambit of Section 498A of the IPC.

144. Likewise, other provisions of the IPC such as Section 304B (concerning dowry death) and Section 306 (concerning abetment of suicide) do not bring within its ambit the offence of rape. The presumptions provided under Section 113A (with regard to abetment of suicide of a married woman) and 113B (vis-à-vis dowry death) under the Evidence Act are co-relatable to Section 498A and Section 304B of the IPC respectively. These

provisions by themselves do not militate against the argument that they do not further the cause of a woman-victim who wishes to agitate her grievance concerning forced marital sex.

145. Likewise, the Statement of Objects and Reasons of the D.V. Act would distinctly bring forth the point that it was enacted to protect women against domestic violence. The Statement of Objects and Reasons acknowledges that the remedies available under the "civil law" up until then did not address the phenomena of domestic violence in its entirety. The thrust of the D.V. Act is to protect women from becoming victims of domestic violence and to prevent the occurrence of domestic violence in the society. The fact that Section 498A of the IPC was available to a woman in cases in which she was subjected to cruelty by her husband or relatives was also noticed. The emphasis of Messrs Sai Deepak and Kapoor was on the definition of domestic violence as provided in Clause (a) of Section 3 read with Explanation 1(ii) of the D.V. Act. The submission was, that under Section 18 of the said Act, a magistrate can pass protection orders and likewise, issue a slew of directions under Section 19. In particular, it was pointed out that under sub-section (2) of Section 19, the magistrates routinely, issue directions for the registration of an FIR to protect or provide safety to the aggrieved person. It was pointed out that besides this, the magistrate also has power under Section 20 to grant monetary reliefs which, *inter alia*, require the respondent to make good the loss of earnings and/or to provide for medical expenses to the aggrieved person resulting from acts which emanate from domestic violence.

145.1. Clearly, these arguments, hedge around the main issue, which is, to call out the offence of rape for what it is. These arguments miss the point that although sexual abuse is included in the definition of domestic violence,

the offender is not tried for the offence of rape and the consequences that the offender would have to face, as provided in Section 376(1) of the IPC if found guilty. The fact that the magistrate under Section 19(2) of the D.V. Act can order registration of an FIR for every other offence other than marital rape only highlights the fact that the woman-victim is nowhere near the point from which she can trigger prosecution of her husband who has subjected her to forced sexual intercourse.

145.2. Similarly, the Statement of Objects and Reasons of the Dowry Act would disclose that the said Act was enacted to prohibit the "evil practice" of giving and taking dowry. It, in no manner protects married women against sexual abuse.

145.3. Insofar as redressal against injury caused on account of sexual abuse amounting to rape is concerned, the husband is not visited with any criminal liability for raping his wife. [See HMA, SMA; The Parsi Marriage and Divorce Act, 1936; and the Divorce Act, 1969.]

V(iv) <u>Conjugal expectation</u>

146. The submission that the husband has "conjugal expectation" to have sexual communion with his wife, in my opinion, is tenable as long as the expectation is not equated to an unfettered right to have sex without consent of the wife. The law cannot direct consummation. The best illustration is the decree of restitution for conjugal rights issued by the court under Section 9 of the HMA. Although a decree obtained under HMA can become the basis for seeking a divorce, the decree can be executed only by a attachment of property. [See Order XXI Rule 32 of CPC; and also see ***Saroj Rani.***]

147. Conjugal expectations, though, legitimate during the subsistence of a joyful marriage, cannot be put at par with unbridled access and/or marital privilege claimed by the husband vis-a-vis his wife disregarding the

circumstances which obtain at the given point in time as also her physical and mental condition.

V(v) <u>Non-consensual sexual intercourse is not labelled as "rape" to save the institution of marriage.</u>

148. The submission that the legislature has not condoned spousal sexual violence but has only taken a conscious decision not to label it as "rape" to protect the institution of marriage and by extension families and progeny, to my mind, ignores the fundamental fact that marriage is a union between two individuals [recognised by the law and the society] who may have familial attachments. The marital bond between individuals is the edifice of the familial structure. The expanse of the familial structure is, in turn, dependent on whether or not individuals are part of a joint family or have chosen for themselves a nuclear family. Thus, it is important that the edifice on which the familial structure is erected remains intact i.e. the union between the individuals. However, the edifice can remain intact only if it is rooted in mutuality, partnership, agency and the ability to respect each other's yearning for physical and mental autonomy. These, perhaps, are the core principles which require constant nurturing through love and affection. Undeniably when these core principles are violated that the edifice crashes resulting in the collapse of the familial structure.

148.1. The State has no role in setting up the edifice or the familial structure. The State via various statutory instruments recognizes the existence of the marital bond and provides avenues for its dissolution and/or remedies where it becomes unworkable. The HMA, SMA, D.V. Act and other legislations are illustrations of the role assigned to the State concerning the recognition of marriages, their dissolution and provision of remedies for aggrieved parties which includes maintenance/custody of progeny born from wedlock.

The State's interest is limited to the extent provided by various, such-like statutes of such genre.

148.2. It is in this backdrop that the State has legislatively intervened from time to time both in the sphere of criminal and civil law to provide remedies to women who are subjected to sexual abuse. Section 375, 376, 376B and other appurtenant provisions contained in the IPC for aggravated rape and the D.V. Act are prime examples of the legislative intervention made by the State in the interest of women exposed to sexual abuse and domestic violence.

148.3. That said, the State appears to have stopped short of conferring the right on a woman to call out an offender who happens to be her husband when he subjects her to rape. The argument that the State has recognized other forms of sexual offences and, therefore, to protect the familial structure, it does not wish to go further (i.e., empower a married woman to trigger the criminal law when her husband subjects her to rape) amounts to giving recognition to the abominable Common Law Doctrine that a married woman is nothing but chattel who loses her sexual agency once she enters matrimony.

149. Certain sexual offences need to be called out for what they are. Sexual assault by the husband on his wife which falls within the fold of Section 375 of the IPC, in my opinion, needs to be called out as rape as that is one of the ways in which the society expresses its disapproval concerning the conduct of the offender. Oddly, the prevailing mores in society appear to stigmatize the victim rather than the rapist. Therefore, I agree with Ms Nundy that the sexual assault which falls within the four corners of Section 375 of the IPC needs to be labelled as rape irrespective of whether it occurs within or outside the bounds of marriage. The fact that certain ingredients of the

offence covered under Section 375 are found present in other provisions of the IPC concerning hurt (Section 319 read with Section 321& 323), grievous hurt (Section 320 read with Section 322& 325) or cruelty (Section 498A) does not provide a satisfactory answer as to why a sexual assault which is synonymous with rape should not be labelled as rape when the offence is committed on an adult married woman by her husband.

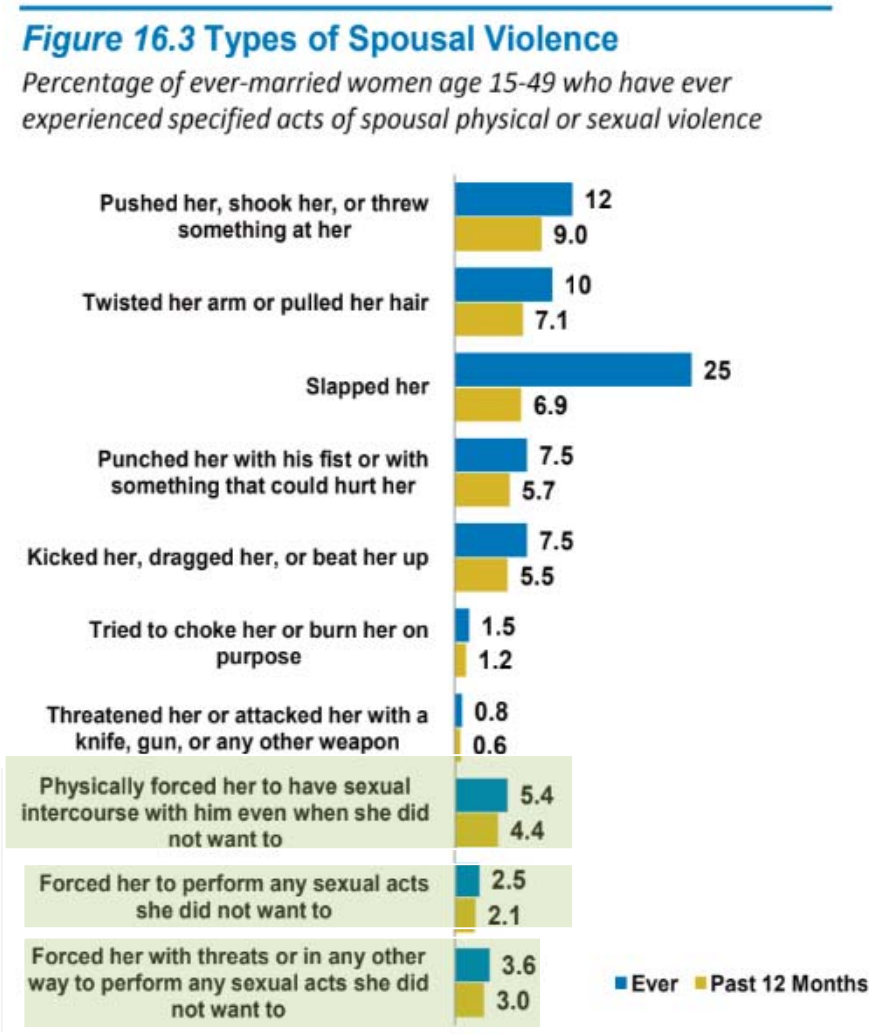
V(vi) Lodgement of false cases

150. The other argument that striking down MRE would result in the lodgement of false cases is based on a notion which is not backed by any empirical data. First and foremost, what is required to be kept in mind is that a vast number of women married or unmarried do not report sexual assaults because of the stigma attached to it. The most authentic data which was presented before us [and not refuted by the Union of India (UOI)/Government of National Capital Territory of Delhi (GNCTD)] was the National Family Health Survey (NFHS-4) carried out under the aegis of Government of India, Ministry of Health and Family Welfare for 2015-2016. The data placed before us disclosed that the survey appears to have been conducted among married women (falling between the age of 15 to 49 years). The survey revealed disturbing aspects concerning spousal sexual violence, both, from "current husbands" as well as "former husbands"; apart from the fact that 99% of the sexual assault cases remain unreported. The relevant part of the survey is extracted hereafter; the figures and narratives set forth speak for themselves.

> *"Table 16.6 Persons committing sexual violence*
>
> *Among women age[d] 15-49 who have experienced sexual violence, [the] percentage who report specific persons committing sexual violence according to current marital status and age at [the] first*

experience of sexual violence, India 2015-16

	Marital Status		*Age at [the] first experience of sexual violence*			
Person	*Ever married*	*Never married*	*<15 years*	*15 years or higher*	*Don't know*	*Total*
Current husband	*82.6*	*na*	*83.1*	*86.0*	*47.8*	*77.0*
Former husband	*9.2*	*na*	*9.8*	*10.0*	*4.0*	*8.6*



151. Therefore, the apprehension expressed that there will be a deluge of false cases against offending husbands does not appear to be correct. If the

NHFS data is taken into consideration, it establishes that 9.9 out of 10 cases of sexual assault in India go unreported. Thus, the contention that because there is a possibility of false cases being lodged and, therefore, the courts should refrain from striking down MRE even if it is unconstitutional, is in my view, a contention which is completely unmerited.

151.1. Besides the reason articulated hereinabove, this submission, if I may say so, is suggestive of the fact that the married women in India are manipulative or capable of being manipulated more than their counterparts in other jurisdictions. In support of this submission, observations made in judicial decisions concerning offences such as Section 498A of the IPC have been cited before us. In my view, the apprehension is, firstly, exaggerated and, as indicated above, is not backed by empirical data; the data in fact shows that the contrary is true. Secondly, the courts in India are fully equipped to deal with false cases. Lodgement of false cases is not confined to rape, it permeates, to an extent, to other provisions of IPC as well. Section 498A of the IPC is a case in point. Despite, noticing oddities in certain cases and/or false complaints being lodged the legislature has not been spurred into removing, the provision from the statute; I presume for three reasons: First, statistically, the number of false cases is minuscule. Second, it is a beneficial provision which protects a married woman from atrocities that may be inflicted on her by the husband and/or his family. Third, the Courts have been able to deal with such cases appropriately.

151.2. Thus, this being the track record of Courts up until now, no one need entertain doubts that the Courts would not be able to employ the same rigour *qua* false allegations of marital rape. The best way forward would be to create a sieve at every level so that false cases are weeded out.

151.3. However, if one were to accept the submission that there would be a

deluge of false cases against husbands and use this as the basis for rejecting the challenge laid to MRE, it would be a case of throwing the baby out with the bathwater.

V(vii) Invasion of Private Space

152. As regards the submission that prosecution of the offending husband for a rape offence would result in invading the private space of a married couple– is nothing but an attempt to keep the law at bay even when a heinous crime such as rape has occurred within what some would refer to as "sacrosanct" space. The argument to say the least is morally suspect and legally untenable. The reason for this is not far to see. When an offence of sexual abuse (short of rape) takes place within the confines of a married couple's private space, the law has unhindered access to the very same space to bring the guilty to justice. Thus, short of rape, if an offending husband inflicts hurt or grievous hurt or subjects her to cruelty or even sexual abuse, the investigators are undoubtedly empowered to enter the concerned couple's private space, which in joyful times is the preserve of a married couple. The attempt to keep away the law even when a woman is subjected to forced sex by her husband, by demarcating private and public space is to deny her the agency and autonomy that the Constitution confers on her. The distinction between private and public space has no relevance when rights of the women victim are infringed. In this context, the following observations in ***Joseph Shine*** being apposite are extracted hereafter :

> *"192. The right to privacy depends on exercise of autonomy and agency by individuals. In situations where citizens are disabled from exercising these essential attributes, the courts must step in to ensure that dignity is realized in the fullest sense. Familial structures cannot be regarded as private spaces where constitutional rights are violated. To grant immunity in situation*

when the rights of individuals are in siege, is to obstruct the unfolding vision of the Constitution. ....

XXX XXX XXX

"218....Constitutional protections and freedoms permeate every aspect of a citizen's life – the delineation of private or public spheres become irrelevant as far as the enforcement of constitutional rights are concerned. Therefore, even the intimate personal sphere of marital relations is not exempt from constitutional scrutiny..."

[Emphasis is mine.]

V(viia) Gathering evidentiary material would be difficult

153. Likewise, the argument that collection/gathering of evidence would be difficult in cases involving marital rape is, in my view, no different from the impediments faced by an investigator concerning other offences, short of rape, which occur in marital space.

154. Mr Sai Deepak's contention that investigation in private and intimate space because of fear of accusation of rape would require couples to enter into a detailed written agreement concerning courtship and/or mating or propel the persons involved to create evidentiary record concerning every act of intimacy or have third party witness the act, in my view, trivializes the sexual abuse inflicted on a woman. This argument, as observed hereinabove, stems from a pre-conceived notion that married women lack a sense of proportion or are inherently manipulative. The argument lacks substance because if this submission were to be accepted then the rape law ought not to apply also to couples who are in live-in relationships. The logical sequitur of this line of argument is that rape law should be confined to an offence committed on a woman by a stranger alone. In my opinion, the difficulty in collecting evidentiary material should not be the reason for keeping an

offending husband who subjects his wife to forced sex out of the purview of the substantive rape law.

154.1. These are the very same arguments which have been propounded by the persons such as intervenors in support of offending husbands who subject their wives to rape, and remain outside the purview of the rape law. Pertinently, similar objections received the attention of the UK Law Commission (1991) which was considered by it in its Working Paper No.116. To establish the untenability of the objection and for the sake of brevity, let me straight away extract some parts of the said report, as they are not only wholesome but are also based on robust common sense.

> *"4.51..... We are likewise unaware of any evidence to suggest that there would be significantly more problems of proof in relation to rape than in relation to other crimes within marriage, though we shall welcome further comment on that issue. However, because of the importance of this general issue we set out in this section for comment some further factors that seem to us to assist in assessing the matter.*
>
> *4.52..... As to the first, difficulty of proof, issues of evidence and proof in marital rape cases do not in fact appear to be different in kind from those arising in many crimes, sexual and non-sexual, where the case turns on the word of the accused against that of the alleged victim. The courts are well aware of these difficulties, particularly as they affect crimes like rape, and of their obligation to ensure that injustice does not occur..... We suggest, therefore, that the courts would be able to protect the interests of the accused here as in other cases involving sexual allegations.*
>
> *4.53 The converse fear is that courts would be so concerned to protect the interests of the accused that the extension of the law of rape to cohabiting married couples would have no practical effect. This would not be a problem in cases where the husband used violence; or boasted of his exploits; or otherwise created secondary evidence. But even in cases where the only evidence was that of the wife, courts would be capable of identifying testimony that was in fact credible and acting on it. We point out below that despite the considerable trauma that can attend participation in a rape trial, at least some complainants, even in cases of rape committed by intimates in private,*

appear to be willing to come forward, and convictions are obtained. While we recognise that a complaint by a wife might be scrutinised with particular care both by the prosecuting authorities and by the courts, we have seen no evidence to suggest that a law of marital rape would be unenforceable. As the High Court of Justiciary of Scotland put it in Stallard v H M Advocate,[44]

> *"We accept, of course, that proof of rape in marriage will, in many situations, be difficult, but that is no reason for saying that a charge of rape (of his wife) against a husband while the parties are still cohabiting, is not relevant for trial."*

[Emphasis is mine.]

155. Therefore, it cannot be said that the difficulties in proving rape as against other offences within marriage are somehow greater. Moreover, one cannot close one's eyes to the offence of rape merely because it is difficult to prove. There cannot be a greater travesty of justice. In my view, the rules of evidence as applicable in our country and scores of precedents of our Courts and of Courts in other jurisdictions can easily provide guidance on these aspects.

V(viii) New offence

156. One of the principal objections to striking down MRE is that it would create a "new offence". In support of the submission that striking down MRE would not create new offence, Ms Nundy, Mr Rao and Ms John, *inter alia*, relied upon the judgment in ***Independent Thought***. It was also their submission that what the criminal law punishes is the act of commission or omission; in this case, subjecting a woman to a forced sexual act, which is, agnostic to who the perpetrator of the crime is. In this context, reference was made to the provisions of the IPC and the Code which define the expression "offence".

[44] 1999 SCCR 248, 255C-D.

157. The contention is that if MRE is struck down all that it would do is to bring the offending husband within the fold of the substantive rape law. On the other hand, Messrs Sai Deepak and Kapoor read passages from the decision rendered in ***Independent Thought*** to demonstrate that the court was only attempting to correct the anomaly which subsisted vis-à-vis a child-bride who was subjected to forced sex by her husband. In this behalf, both, Mr Sai Deepak as well as Mr Kapoor highlighted the fact that the judges who rendered the decision have made it amply clear that they were not dealing with marital rape in the context of an adult woman. This argument was buttressed by relying upon the provisions of IPC i.e., the sixth circumstance contained in Section 375 and the provisions of the POCSO Act and PCM Act.

157.1. To meet this objection, Ms Nundy had relied upon the "inversion test", as formulated by Professor Eugene Wambaugh, which is cited with approval by the Supreme Court in ***Utility Users' Welfare*** and ***Nevada Properties (P) Ltd***.

158. In my view, the submission that if one were to strike down MRE, it would create a new offence, is misconceived for the following reasons :

(i) Firstly, the offence of rape is already defined in the substantive part of Section 375 of IPC. The sexual acts which are described in Clauses (a) to (d) of Section 375 constitute rape if they fall within any of the seven circumstances alluded to in the said provision. There are two exceptions provided in Section 375 and, thus, those who come within the ambit of the exception cannot be prosecuted for the offence of rape. The first exception concerns a circumstance where the woman undergoes a medical procedure or intervention. The second exception (which is the exception under challenge) concerns the act of sexual intercourse or sexual acts which

involve a man and his wife who is not under 18 years of age. The exception clearly subsumes the main provision without providing a determining principle or rationale as to why husbands who have subjected their wives to forced sex should not face the full force of the rape law. Since the stated objective of the rape law is to protect women from sexual abuse of the worst kind i.e., rape, there is no perceivable rationale for granting impunity to an offending husband in the context of marital rape. Thus, if MRE is excised, all that would happen is, it would extend the ambit of Section 375 to even offending husbands.

(ii) Secondly, a new offence/new crime would perhaps have been created if the ingredients of the offence had changed. [See ***People v. Liberta***.] It is no one's case that the ingredients of the offence have changed; all that would happen if MRE is struck down is that the offending husband would fall within the ambit of the offence.

(iii) Thirdly, reading down, filling gaps (casus omissus) and/or excising parts of an offending provision contained in a statute is a legitimate judicial tool employed by courts for severing what is unconstitutional and retaining that which is construed as lawful. [See ***C.B. Gautam v. Union of India*** (1993) 1 SCC 78[45]; ***Navtej Singh Johar***; and ***Harsora v. Harsora.***]

(iv) Fourthly, MRE (Exception 2 to Section 375 of the IPC) seeks to ring-fence the offender based on his marital relationship with the accused. The main provision is neutral to the relationship that may or may not subsist between the offender and the victim. Thus, a person who is a stranger or is in a live-in relationship with the victim can be prosecuted for the offence of rape. As a matter of fact, the legislature pursuant to the Criminal (Amendment) Act, 2013 has brought within the sway of rape law (Section

[45] In short "***C.B. Gautam"***

375) even separated husbands by inserting Section 376B in Chapter XVI of the IPC; a provision which is challenged by the petitioners on different grounds.

(v) Fifthly, what is principally punished under the criminal law is the act of omission or commission, as etched out in the IPC. Section 40 of the IPC which defines an "offence", *inter alia*, provides :

> "*Except in the Chapters and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this Code.*
> *In Chapter IV,……the word "offence" denotes a thing punishable under this Code, or under any special or local law as hereinafter defined.*
> *And in Sections 141, 176, 177, 201, 202, 212, 216 and 441, the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.*"
>
> [Emphasis is mine.]

(va) Likewise, the expression "offence" is also defined in Section 2(n) of the Code which reads as follows :

> "***2(n)*** *"offence" means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under section 20 of the Cattle-tresspass Act, 1871 (1 of 1871)."*
>
> [Emphasis is mine.]

(vb) Besides this, the Code also defines the expression "victim" in Section 2(w)(a) which reads as follows :

> "***2(wa).*** *"Victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir."*
>
> [Emphasis is mine.]

(vc) The aforesaid definitions of the expression "offence" and "victim"

would show that an act or an omission to commit an act is treated as an offence only if it is made punishable by any law whether it be the IPC or any special or local law. In other words, acts which produce or are likely to produce harmful effects as contemplated under the penal law are punishable. In the same way, omissions which produce or are likely to produce a similar harmful effect that the law seeks to plug are punished likewise. That being said, there are certain omissions that the law does not punish as is evident from the scheme of IPC.

(vd) Therefore, the penal law is act/omission centric and, in most situations, is neutral to who the perpetrator of the crime is. The fact that in certain cases (which includes provisions that find a place in IPC or special statutes such as Juvenile Justice Act, 2015) relationship enters the fray does not dilute the fundamental premise on which penal laws are pivoted, which is, that they punish the act committed (or its omission); which is made punishable, irrespective of the relationship between the offender and the victim. As noticed above; for example, *qua* the offence of harbouring a deserter, an offender, an escapee or a robber or a dacoit, the IPC, excludes the spouse from the rigour of prosecution. [See Sections 136, 212, 216 & 216A.] These provisions and the like would not sustain the argument that MRE should remain on the statute as, firstly, the dissonance that MRE creates by excluding a particular set of offenders from the ambit of the main provision is not found in such examples. Secondly, these are provisions which do not concern the perpetration of sexual violence by one spouse on the other, i.e. the husband on his wife.

159. The submission made by Mr Sai Deepak that the judgments cited on behalf of the petitioners i.e., ***Shreya Singhal*** and ***Navtej Singh Johar*** would have no applicability as they relate to a constitutional challenge to a

criminalizing provision i.e., Section 66A of the IT Act and Section 377 of the IPC respectively is unsound as it fails to recognize the fact that MRE is constitutionally suspect because it suffers from "under inclusivity" and fails to furnish a "determining principle" as to why offending husbands should be left out from the rigour of rape law.

159.1. The judgment of the House of Lords in ***R. v. R.*** made a particularly significant observation in this context (i.e., creation of new offence) while dealing with the expression "unlawful sexual intercourse" found in the UK Sexual Offences (Amendment) Act, 1976. The court was called upon to ascertain whether the word "unlawful" which preceded the expression "sexual intercourse" was a mere surplusage and not implying, outside marriage. The House of Lords ruled that the word "unlawful" was redundant since it was, even otherwise, unlawful to have sexual intercourse with any woman (married or unmarried) without her consent :

> *"The fact is that it is clearly unlawful to have sexual intercourse with any woman without her consent, and that the use of the word in the subsection adds nothing. In my opinion there are no rational grounds for putting the suggested gloss on the word, and it should be treated as being mere surplusage in this enactment, as it clearly fell to be in those referred to by Donovan J. That was the view taken of it by this House in McMonagle v. Westminster City Council (1990) 1 All ER 993, (1990) 2 AC 716 in relation to paragraph 3A of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1983.*
>
> *I am therefore of the opinion that Section 1(1) of the Act of 1976 presents no obstacle to this House declaring that in modern times the supposed marital exemption in rape forms no part of the law of England. The Court of Appeal (Criminal Division) took a similar view. Towards the end of the judgment of that court Lord Lane CJ said [(1991) 2 All ER 257 at 266, (1991) 2 WLR 1065 at 1074] :*
>
> > *'The remaining and no less difficult question is whether, despite that view, this is an area where the court should step aside to leave the matter to the parliamentary process.*

This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it.'"

[Emphasis is mine.]

159.2. The argument that the House of Lords in ***R. v. R.*** was dealing with a provision which was not akin to the MRE, although, literally correct, disregards the reasoning furnished by the Law Lords in concluding that the expression unlawful was a surplusage. The defendant's plea that a husband cannot be held guilty of raping his wife was based on the Common Law Doctrine of implied consent given by the wife once she entered matrimony. This defence was rejected by the trial court as well as the Court of Appeal (Criminal Division) and, ultimately, found resonance with the House of Lords. The ratio of the judgment in ***R. v. R.*** is squarely applicable, to my mind, to the issue at hand, both for the proposition that striking down MRE does not create a new offence and that if such a step is taken, the court need not leave the matter to the legislature.

160. Thus, for the reasons given above, I am not persuaded to hold that striking down MRE would result in the creation of a new offence.

161. Although, as noticed above, the petitioners relied upon the decision rendered in ***Independent Thought*** which, in turn, noticed the decision in ***R. v. R.,*** I have consciously not gone down that path because of the observations made by the learned judges that their rulings would not apply to MRE concerning an adult-woman. That said, it is important to observe that, even though the binding effect of the judgment rendered in ***Independent Thought*** may have been diluted, the observations made therein would surely have persuasive value. [See ***Periyar & Pareekanni Rubbers***

Ltd. v. State of Kerala, (2016) 1 SCC 294, paragraph 34[46].]

161.1. As adverted to hereinabove, the court in ***Independent Thought*** was also dealing with Exception 2 appended to Section 375 of the IPC, albeit, that part which concerned a child bride. The court after examining the provisions of the IPC and appurtenant statutes, read down Exception 2 and, in effect, declared that it would not apply if the sexual intercourse or sexual act was committed by a man with his wife, who was under 18 years of age. Thus, the age threshold concerning the girl-child was brought in line with the sixth circumstance outlined in the main part of Section 375. The age threshold provided in Exception 2 for the wife stands enhanced from "under fifteen years of age" to "under eighteen years of age"; to that extent, the impunity granted to the offending husband stands diluted. Therefore, as per the present state of law, if a husband has forced sex with his wife, who is under 18 years of age, he is liable to be prosecuted for rape as the principle of implied consent would not apply in his case.

161.2. That said, the logic, rationale and reasoning provided by the Supreme Court in ***Independent Thought*** while reaching this conclusion surely, has immense weight which cannot be brushed aside. [See paragraphs 190-193 at pages 884-885 of ***Independent Thought*****-**If the Court were to read down Exception 2 to Section 375, it would not create a new offence**.**]

VI MRE violates Article 21 of the Constitution

162. Apart from the fact that MRE, in my view, falls foul of the equality clause of the Constitution, it also violates Article 21 of the Constitution. The reason being that the offence of rape and injury caused remains the same irrespective of who the offender is. The fact that the rapist is the husband of

[46] In short "***Periyar & Pareekanni Rubbers Ltd.***"

the victim does not make the act of sexual assault any less injurious, degrading or dehumanizing. Irrespective of who the perpetrator is, forced sex mars the woman-victim physically, psychologically and emotionally. Rape, as an offence, deserves societal disapprobation in the strongest terms, notwithstanding, the fact that the rapist is in a marital relationship with the victim.

163. Modern-day marriage is a relationship of equals. The woman by entering into matrimony does not subjugate or subordinate herself to her spouse or give irrevocable consent to sexual intercourse in all circumstances. Consensual sex is at the heart of a healthy and joyful marital relationship. Non-consensual sex in marriage is an antithesis of what matrimony stands for in modern times i.e., the relationship of equals. The right to withdraw consent at any given point in time forms the core of the woman's right to life and liberty which encompasses her right to protect her physical and mental being. Non-consensual sex destroys this core by violating what is dear to her, which is, her dignity, bodily integrity, autonomy and agency and the choice to procreate or even not to procreate. While marital rape leaves physical scars, it inflicts much deeper scars on the psyche of the victim which remain with her years after the offence has occurred.

164. What makes the continuance of MRE on the statute egregiously problematic is, while it emasculates the woman's right to trigger prosecution against her husband for non-consensual sex, women, who are sex workers or are separated from their husbands, are invested with this right. Besides this, MRE makes no allowance for the circumstances in which a wife may say "no" to sex. For example, a wife may refuse to engage in sexual activity with her husband when she is ill or is menstruating or is unable to engage in sexual activity because of a sick child. The wife may also want to keep away

from sexual activity in a situation where the husband has contracted an infectious, sexually transmissible disease, such as HIV; her refusal in such a situation may emanate not only on account of concern for herself but also, to protect the progeny which may result from such communion. These are aspects which only exacerbate the lack of autonomy and sexual agency which stands embedded in MRE.

165. Even in the 19th century when the Common Law Doctrine was in play (i.e., that a husband could not be held criminally liable for raping his wife), difficulty was experienced in applying the doctrine, which was noticed in ***R. v. Clarence,*** (1886-1890) All ER Rep 133 : (1888) 22 Q.B.D 23.

165.1. This was a case where the husband was accused of having sexual intercourse with his wife at a time when, to his knowledge, he was suffering from gonorrhoea. It was found that the wife was ignorant of this fact. The argument was, had she known, she would have not consented to the sexual communion. In this backdrop, the court was called upon to consider whether the husband's conviction could be sustained under Section 20 and/or 47 of the Offences Against the Person Act, 1861. Section 20 was concerned with unlawfully and maliciously inflicting grievous bodily harm while Section 47, concerned the offence of assault, occasioning actual bodily harm. In this background, one of the arguments the court was required to consider was whether the wife's implied consent to intercourse stood revoked.

165.2. This case was heard by 13 judges out of which four rendered a dissenting opinion and, hence, sustained the conviction. The dissenting opinion of Hawkins, J. brings to fore the discomfort that the judges holding minority view experienced with the plurality opinion, which ruled against convicting the offending husband. Hawkins, J. opined rather felicitously that if the law was, as understood by the majority, he did not wish to be party to

such a judgment which would proclaim to the world that the law in England is that even though the husband deliberately and knowingly perpetrated such abominable outrage on his wife and yet he could not be punished for such "atrocious barbarity". The following observations being significant, in my view, need to be appreciated in the context of the present day MRE found in the IPC:

> *".... I proceed now to consider the question whether there was, in fact, an assault by the prisoner on his wife occasioning her either grievous or actual bodily harm. I answer this question, also, in the affirmative. By the marriage contract a wife no doubt confers upon her husband an irrevocable privilege to have sexual intercourse with her during such time as the ordinary relations created by such contract subsist between them. For this reason it is that a husband cannot be convicted of a rape committed by him upon the person of his wife. But this marital privilege does not justify a husband in endangering his wife's health and causing her grievous bodily harm, by exercising his marital privilege when he is suffering from venereal disorder of such a character that the natural consequence of such communion will be to communicate the disease to her. Lord Stowell in Popkin v. Popkin (16) said (1 Hag. Ecc. At p. 767, n.):*
>
> *"The husband has a right to the person of his wife, but not if her health is endangered."*
>
> *So to endanger her health and cause her to suffer from loathsome disease contracted through his own infidelity, cannot, by the most liberal construction of his matrimonial privilege, be said to fall within it; and although I can cite no direct authority upon the subject, I cannot conceive it possible seriously to doubt that a wife would be justified in resisting by all means in her power, nay, even to the death, if necessary, the sexual embraces of a husband suffering from such contagious disorder. In my judgment wilfully to place his diseased person in contact with hers without her express consent amounts to an assault.*
>
> *It has been argued that to hold this would be to hold that a man who suffering from gonorrhoea has communion with his wife might be guilty of the crime of rape. I do not think this would be so. Rape consists in a man having sexual intercourse with a woman without her consent, and the marital privilege being*

equivalent to consent given once for all at the time of marriage, it follows that the mere act of sexual communion is lawful ; but there is a wide difference between a simple act of communion which is lawful, and an act of communion combined with infectious contagion endangering health and causing harm, which is unlawful. It may be said that assuming a man to be diseased, still as he cannot have communion with his wife without contact, the communication of the disease is the result of a lawful act, and, therefore, cannot be criminal. My reply to this argument is that if a person having a privilege of which he may avail himself or not at his will and pleasure, cannot exercise it without at the same time doing something not included in this privilege and which is unlawful and dangerous to another, he must either forego his privilege or take the consequences of his unlawful conduct. ....

....Another argument used for the prisoner was that such cases as the present were not contemplated by the statute under which he was indicted; and it was also said that if it had been intended that the communication of a venereal disease to a woman during an act of sexual intercourse consented to by her should be punishable as a crime, some special enactment to that effect would have been introduced into one or other of the Acts of Parliament relating to women and offences against them. This is an argument to which I attach no weight, assuming the facts bring the case within the fair interpretation of the sections to which I have referred. ....

.....I think the legislature contemplated the punishment of all grievous bodily harm, however caused, if caused unlawfully and maliciously; and I cannot bring my mind for an instant to believe that, even had the circumstances before us been present to the minds of the framers of the Act, they would have excluded from its operation an offence as cruel and as contrary to the obligation a man owes to his wife to protect her from harm, as can well be conceived. ....

.... Fortified in my opinion, as I believe myself to be, by the plain words of the statute and by the authority of Willes, J., one of the greatest and most accurate lawyers of modern times, I have arrived at the conclusion that this conviction is right and in accordance with the law, and I cannot, therefore, be a party to a judgment which in effect would proclaim to the world that by the law of England in this year 1888 a man may deliberately,

knowingly, and maliciously perpetrate upon the body of his wife the abominable outrage charged against the prisoner, and yet not be punishable criminally for such atrocious barbarity. ...."

[Emphasis is mine.]

165.3. Coincidentally, around the same time i.e., in and about July 1890, a similar view was expressed in India by the Calcutta High Court in ***Queen-Empress v. Hurree Mohun Mythee*** (1891) ILR 18 Cal 49. In a nutshell, the view was that the husband's absolute right to marital privilege had to be hemmed in bearing in mind the wife's health and safety :

"5. Now, gentlemen, I must begin by asking you carefully to distinguish a certain branch of the law which has no connection with this case from other branches of the law which may have a connection with it. The branch of the law which has no connection with this case is the law of rape. It is probably within the knowledge of you all, gentlemen, that the crime of rape consists in having sexual intercourse with a female either without her consent, or when she is of such an age that she cannot in law consent, and that the crime consists in the fact of intercourse independently of circumstances, of intention, of knowledge, and of consequences. And, in the case of married females, as you probably know, the law of rape does not apply as between husband and wife after the age of ten years. But it by no means follows that because the law of rape does not apply as between husband and wife, if the wife has attained the age of ten years, that the law regards a wife over ten years of age as a thing made over to be the absolute property of her husband, or as a person outside the protection of the criminal law. That of course cannot be supposed. Under no system of law with which Courts have had to do in this country, whether Hindu or Mahomedan, or that framed under British rule, has it ever been the law that a husband has the absolute right to enjoy the person of his wife without regard to the question of safety to her as for instance, if the circumstances be such that it is certain death to her, or that it is probably dangerous to her life. The law, it is true, is exceedingly jealous of any interference in matters marital, and very unwilling to trespass inside the chamber where husband and wife live together, and never does so except in cases of absolute necessity. But, as I have said, the criminal law is applicable

between husband and wife wherever the facts are such as to bring the case within the terms of the Penal Code. I am not aware that there has occurred any case in this country in recent years in which such a matter has come under the consideration of a Criminal Court; but in earlier times there are recorded instances in the reports of the Sudder Nizamat, in which husbands have been criminally punished for having sexual intercourse with their wives with fatal results, in consequence of their wives being unfit by reason of immaturity for such intercourse, even in cases which did not fall within the law of rape. But at present we are guided simply by the Penal Code, and we have to see what provisions of the Penal Code are or may be applicable to the facts of this case."

[Emphasis is mine.]

165.4. Pertinently, this troubling aspect of uninhibited marital privilege, without regard to the health and safety of the victim, was noticed by the House of Lords in ***R. v. R.*** [See (1991) 4 All ER 481, 485.]

VII MRE violates Articles 15 and 19(1)(a) of the Constitution

166. Although, Article 15 of the Constitution prohibits the State from discriminating against any citizen inter alia on the ground of sex, the instant matters allude to discrimination made within the same sex, solely on the ground of their marital status. Continuance of MRE on the statute violates, in my opinion, Article 15 of the Constitution since it triggers discrimination against women based on their marital status. Resultantly, it impairs and nullifies their sexual agency with regard to coitus and their right to procreate or abstain from procreation. More fundamentally, their power to negotiate contraception, to protect themselves against sexually transmissible disease and to seek an environment of safety, away from the clutches of her abuses, is completely eroded.

166.1. Likewise, MRE, in my view, is also violative of Article 19(1)(a) of the Constitution, as it violates the guarantee given by the Constitution concerning freedom of expression, amongst others, to married women who

are citizens of this country. The guarantee of freedom of expression includes a woman's right to assert her sexual agency and autonomy. The fact that this right is also secured by Article 21 (which is available to non-citizens as well) lends strength to the right conferred on a married woman to express herself and not be subjected to non-consensual sexual intercourse by her husband.

VIII Separated husbands

167. Having examined the flaws in MRE, what needs to be dealt with is whether Section 376B read with Section 198B of the Code should also fall by the wayside. Since I have concluded that granting impunity to offending husbands under the MRE is violative of Articles 14, 15, 19(1)(a) and 21 of the Constitution, the class which comprises separated husbands would also necessarily have to be dealt with as any other rapist. In other words, separated husbands would suffer the same punishment, as prescribed for any other rapist under Section 376(1) of the IPC, as that would be the logical sequitur of striking down MRE. As noticed above, under this provision, the minimum mandatory sentence is 10 years whereas under Section 376B, for a separated husband, the minimum mandatory sentence is 2 years which may extend to 7 years. In both cases, in addition to imprisonment, the concerned court is also empowered to impose a fine. Furthermore, under Section 198B of the Code, no court can take cognizance of an offence punishable under Section 376B of the IPC (i.e., against a separated husband) except upon *prima facie* satisfaction of the facts which constitute the offence upon a complaint having been lodged by the wife against her husband. Thus, Section 376B of IPC and Section 198B of the Code which advert to the third category (i.e., separated husbands) provide not only a different procedure for

triggering the offence but also mandates a lower minimum sentence without being able to demonstrate how a rapist who falls in this category is different from a husband who is not separated or even a person who is a stranger to the victim. The provision, to my mind, is incongruous as, at the risk of repetition, I need to emphasise that a rapist remains a rapist irrespective of his relationship with the victim. The strenuous argument advanced on behalf of the intervenors that quality of relationship matters, provides no amelioration for the woman who is violently violated.

168. In the course of the hearing, one of the issues which arose for consideration concerned the punishment provided for aggravated rape, in the context of offending husbands. In particular, reference in this behalf was made to the expression "relative" mentioned in Section 376(2)(f) of the IPC. It was contended that if MRE was struck down, then, the husbands could also be held guilty of aggravated rape as they would fall within the meaning of the word "relative". To appreciate this argument, the relevant provision needs to be looked at closely :

> "***376. Punishment of rape.-***
> *(2)(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman."*

168.1. A close perusal of the provision would show that while the preceding clauses (a) to (e) of sub-section (2)(f), deal with a situation where the victim is confined to a physical space which is under the physical or constructive control of the offender, succeeding clauses [i.e., clauses (g) to (n)] of the very same sub-section relate to women placed in vulnerable circumstances. Clause (f) of sub-section (2) of Section 376 seeks to bring those offenders within the rape law, who are in a position of trust or have authority over the woman-victim. The persons specifically identified in this behalf, in clause

(f) of sub-section (2) of Section 376 [without confining it to them], are a relative, guardian or teacher. Although the ordinary meaning of the word "relative" would be a member of the family, whether related by blood or not or even a distant or close relative, the expression “relative” has not been defined either in IPC or in the Code, which does create an element of ambiguity.

168.2. Therefore, looking at the provision, holistically, in the context and setting in which the expression “relative” is mentioned, the legislature intended to include, in my opinion, only those relatives, who are in a position of trust or authority such as a guardian or a teacher. It appears that the legislature intended to bring within the fold of clause (f) of sub-section (2) of Section 376 offenders, who, to begin with, had a platonic relationship with the victim. In other words, the offender’s close bond with the victim, to begin with, was not suffused with sexual or romantic overtones.

168.3. Thus, when the expression “relative” is read contextually, the offending husband, in my view, would not fall within the ambit of the said expression and, therefore, the apprehension that the burden of proof would shift because of the presumption of lack of consent (as provided in Section 114A of the Evidence Act) would not arise in such cases. The principle of *noscitur a sociis* would apply to clause (f) to sub-section (2) of Section 376 of IPC insofar as the expression “relative” is concerned.

168.4. The other argument advanced insofar as clause (h) and (n) of sub-section (2) of Section 376 are concerned, that they would lead to harsher punishment as compared to husbands who are separated and covered under Section 376B and, therefore, MRE should not be struck down, in my opinion, is misconceived. Section 376(2)(h) and Section 376(2)(n) concern gross cases and, therefore, fall in the category of aggravated rape. Section

376(2)(h) concerns rape of a woman, who is known to be pregnant while Section 376(2)(n) pertains to subjecting the same woman to repeated rape. In view of the conclusion arrived at by me that Section 376B deserves to be struck down, this submission can have no merit. These are acts which deserve the same punishment, as prescribed by the legislature, irrespective of who the offender is.

IX Presumption of Constitutionality of Pre-Constitutional Statutes

169. I must indicate that a substantial part of the arguments, on both sides, was directed to the issue concerning the presumption of constitutionality in respect of a pre-constitutional statute such as IPC. Ms Nundy had relied upon the observations made in ***Navtej Singh Johar*** (see paragraphs 359 to 362) and ***Joseph Shine*** (see paragraph 270) to buttress her argument that no such presumption applied to pre-constitutional statutes.

170. Mr Sai Deepak, on the other hand, has contended that the judgment in ***Navtej Singh Johar*** is *per incuriam*. The reasons why he says so have been recorded hereinabove by me in sub-para (xix) of paragraph 9.1.

171. Suffice it to say that it is not open for this court to declare a judgment of the Supreme Court which is binding under Article 141 of the Constitution [not only on this court but all courts within the territory of India] as *per incuriam*. [See ***South Central Railway Employees Cooperative Credit Society Employees Union v. B. Yashodabai and Others*** (2015) 2 SCC 727[47].]

[47] 14. We are of the view that it was not open to the High Court to hold that the judgment delivered by this Court in *South Central Railway Employees Coop. Credit Society Employees' Union* v. *Registrar of Coop. Societies* [*South Central Railway Employees Coop. Credit Society Employees' Union* v. *Registrar of Coop. Societies*, (1998) 2 SCC 580 : 1998 SCC (L&S) 703] was per incuriam.
15. If the view taken by the High Court is accepted, in our opinion, there would be total chaos in this country because in that case there would be no finality to any order passed by this Court. When a higher court has rendered a particular decision, the said decision must be followed by a subordinate or lower court unless it is distinguished or overruled or set aside. The High Court had considered several provisions which, in its opinion, had not been considered or argued before this Court when CA No. 4343 of 1988 was decided [*South Central Railway Employees Coop. Credit Society Employees' Union* v. *Registrar of Coop.*

171.1. Furthermore, the following judgment of the Supreme Court has gone on to hold that even *obiter dicta* is binding : ***Municipal Committee, Amritsar vs. Hazara Singh***, (1975) 1 SCC 794[48]. Although, on this aspect, there is a contrarian view expressed by the Supreme Court in the matter of ***Periyar & Pareekanni Rubbers Ltd.***[49].

172. Having said so, I have, in reaching my conclusion, presumed (for the sake of argument) that the impugned provisions are constitutional. However, after closely examining the arguments put forth by both sides, I have reached (as discussed above) a definitive conclusion that the impugned provisions are violative of Articles 14, 15, 19(1)(a) and 21 of the

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Societies, (1998) 2 SCC 580 : 1998 SCC (L&S) 703] . If the litigants or lawyers are permitted to argue that something what was correct, but was not argued earlier before the higher court and on that ground if the courts below are permitted to take a different view in a matter, possibly the entire law in relation to the precedents and ratio decidendi will have to be rewritten and, in our opinion, that cannot be done. Moreover, by not following the law laid down by this Court, the High Court or the subordinate courts would also be violating the provisions of Article 141 of the Constitution of India.

[48] 4. ……..“Judicial propriety, dignity and decorum demand that being the highest judicial tribunal in the country even obiter dictum of the Supreme Court should be accepted as binding. Declaration of law by that Court even if it be only by the way has to be respected. But all that does not mean that every statement contained in a judgment of that Court would be attracted by Article 141. Statements on matters other than law have no binding force. Several decisions of the Supreme Court are on facts and that Court itself has pointed out in *Gurcharan Singh* v. *State of Punjab* [1972 FAC 549] and *Prakash Chandra Pathak* v. *State of Uttar Pradesh* [AIR 1960 SC 195 : 1960 Cri LJ 283] that as on facts no two cases could be similar, its own decisions which were essentially on questions of fact could not be relied upon as precedents for decision of other cases.

[49] 34. In *Director of Settlements* v. *M.R. Apparao* [(2002) 4 SCC 638] , this Court extensively elaborated upon the principle of binding precedent. The relevant para 7 is reproduced hereunder : (SCC pp. 650-51)

> “7. … Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an essential function of the Court to interpret a legislation. The statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not be similar. But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the court that forms the ratio and not any particular word or sentence. To determine whether a decision has ‘declared law’ it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. An ‘obiter dictum’ as distinguished from a ratio decidendi is an observation by the Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a binding effect as a precedent, but it cannot be denied that it is of considerable weight.”

Constitution. Besides this, it must be borne in mind that although a pre-constitutional law like IPC is saved by the provisions of Article 372 of the Constitution, they are, inter alia, open to challenge under the relevant provisions of the Constitution, such as in this case, under Articles 14, 15, 19(1)(a) and 21.

172.1. Thus, while examining the validity of such a legislation, one is required to keep in mind the changes that have been brought about in the society and the alteration that has been brought about over time, both, in the world view as well as in the view held by the domestic constituents.

172.2. The case in point is the judgment rendered by the Supreme Court in ***Anuj Garg.*** In this case, the Court was called to rule on the vires of Section 30 of the Punjab Excise Act, 1914, which prohibited employment of any man under the age of 25 years and any woman in any part of such premises in which liquor or intoxicating drugs were consumed by the public.

172.3. The Court, while ruling upon the issue, inter *alia* made the following apposite observations :

"8. .....

"28. ... The constitutionality of a provision, it is trite, will have to be judged keeping in view the interpretative changes of the statute affected by passage of time."

Referring to the changing legal scenario and having regard to the Declaration on the Right to Development adopted by the World Conference on Human Rights as also Article 18 of the United Nations Covenant on Civil and Political Rights, 1966, it was held : (John Vallamattom case [(2003) 6 SCC 611] , SCC p. 625, para 33)

"33. It is trite that having regard to Article 13(1) of the Constitution, the constitutionality of the impugned legislation is required to be considered on the basis of laws existing on 26-1-1950, but while doing so the court is not precluded from taking into consideration the subsequent events which have taken place thereafter. It is further trite that the law although may be constitutional when enacted but with

passage of time the same may be held to be unconstitutional in view of the changed situation.

9. Changed social psyche and expectations are important factors to be considered in the upkeep of law. Decision on relevance will be more often a function of time we are operating in. Primacy to such transformation in constitutional rights analysis would not be out of place...."

[Emphasis is mine.]

X Reliance on Decisions of Foreign Courts & International Covenants & Conventions

173. This brings me to the objections raised by MWT and Mr Kapoor with regard to the reliance placed by the petitioners on decisions of foreign courts and international covenants such as CEDAW.

174. While an attempt has been made to distinguish the foreign judgments cited by Mr Gonsalves, Ms Nundy and the two amicus curiae i.e., Mr Rao and Ms John on the ground that the jurisdictions in which the judgments were rendered did not have a provision akin to Exception 2 to Section 375, the fact remains that each of these judgments except ***FWLD(Nepal)***, concerned sexual assault by a husband or ex-husband on his wife, *albeit*, in different settings :

175. As indicated above, except for the judgment rendered by the Supreme Court of Nepal in ***FWLD(Nepal),*** which was a public interest petition, all other cases concerned women who had been raped by their husbands. Therefore, let me just briefly advert to them, to the extent they are relevant to the issue at hand.

176. The judgment rendered by the ECHR in ***CR v. UK*** was in a way examining, albeit, at the behest of the convicted husband, another facet of the judgment rendered by the House of Lords in ***R v. R.*** The convicted husband having lost right up to the House of Lords filed an application

under Article 7 of the European Convention on Human Rights [in short "Convention"], which, inter alia, stated that no one could be held guilty of a criminal offence on account of any act or omission, which did not constitute a criminal offence, under the national law or international law at the time when it was committed.

176.1. Therefore, the husband's argument before ECHR was, as the provisions of the Section 1(1)(a) of the Sexual Offences (Amendment) Act, 1976 had been interpreted to his prejudice for the first time by the Courts of England, he could not be convicted for the offence of rape. The argument being, having regard to the provisions of Article 7 of the Convention, the ECHR should not consider his conduct in relation to any of the exceptions of the immunity rule. The ECHR applied the foreseeability test in rejecting the husband's application. According to ECHR, the husband should have reasonably foreseen that over a period of time the law had dismantled the immunity which was available at one point of time, against the charge of martial rape :

> *"41. The decisions of the Court of Appeal and then the House of Lords did no more than continue a perceptible line of case-law development dismantling the immunity of a husband from prosecution for rape upon his wife (for a description of this development, see paragraphs 14 and 20-25 above). There was no doubt under the law as it stood on 12 November 1989 that a husband who forcibly had sexual intercourse with his wife could, in various circumstances, be found guilty of rape. Moreover, there was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law (see paragraph 34 above).*
>
> *42. The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords - that the applicant could be convicted of attempted rape, irrespective*

of his relationship with the victim - cannot be said to be at variance with the object and purpose of Article 7 (art. 7) of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment (see paragraph 32 above). What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom."

177. In ***People v. Liberta***, the defendant- husband had raped his wife, while the temporary protection order passed by the Court was in operation. Under the provisions of the Statute in force, at the relevant time, in the State of New York, a husband could be held guilty only if the spouses were living apart. In other words, in such a situation, they were deemed under the statute as not being married.

177.1. The defendant's husband, however, took the position that the temporary protection order in law and on facts, did not constitute living apart and hence he could not be convicted of rape. Therefore the argument was that since he remained married to his wife at the time rape was alleged to have occurred, he came within the ambit of MRE, both vis-à-vis the charge of rape and sodomy.

177.2. Besides this, the argument was that the subject penal law was gender-based and under inclusive, and, therefore, was "constitutionally defective".

177.3. On facts, the Court returned a finding that because of the prohibition in the temporary protection order the couple were in law living apart and, therefore, were not married.

177.4. The Court also came to the conclusion that the subject penal law was constitutionally invalid on account of under inclusion and because it was not gender-neutral. Interestingly, the Court grappled with the issue as to whether

it should declare the entire statute a nullity or instead, just sever the exemption. In reaching this conclusion, the Court made the following observations :

> *"…. While the marital exemption is subject to an equal protection challenge, because it classifies unmarried men differently than married men, the equal protection clause does not prohibit a State from making classifications, provided the statute does not arbitrarily burden a particular group of individuals….Where a statute draws a distinction based upon marital status, the classification must be reasonable and must be based upon "some ground of difference that rationally explains the different treatment"…*
>
> *xxx xxx xxx*
>
> *We find that there is no rational basis for distinguishing between marital rape and nonmarital rape. The various rationales which have been asserted in defense of the exemption are either based upon archaic notions about the consent and property rights incident to marriage or are simply unable to withstand even the slightest scrutiny. We therefore declare the marital exemption for rape in the New York statute to be unconstitutional.*
>
> *xxx xxx xxx*
>
> *Having found that the statutes for rape in the first degree and sodomy in the first degree are unconstitutionally underinclusive, the remaining issue is the appropriate remedy for these equal protection violations. When a statute is constitutionally defective because of underinclusion, a court may either strike the statute, and thus make it applicable to nobody, or extend the coverage of the statute to those formerly excluded…Accordingly, the unconstitutionality of one part of a criminal statute does not necessarily render the entire statute void..*
>
> *This court's task is to discern what course the Legislature would have chosen to follow if it had foreseen our conclusions as to underinclusiveness... As Judge Cardozo wrote over 50 years ago, "'The question is in every case whether the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether'" ["'[unless] it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law'"]). These principles of severance apply as well where elimination of an invalid exemption will impose burdens on*

those not formerly burdened by the statute…, and where the exemption is part of a criminal statute..

The question then is whether the Legislature would prefer to have statutes which cover forcible rape and sodomy, with no exemption for married men who rape or sodomize their wives and no exception made for females who rape males, or instead to have no statutes proscribing forcible rape and sodomy. In any case where a court must decide whether to sever an exemption or instead declare an entire statute a nullity it must look at the importance of the statute, the significance of the exemption within the over-all statutory scheme, and the effects of striking down the statute.. . Forcible sexual assaults have historically been treated as serious crimes and certainly remain so today.. Statutes prohibiting such behavior are of the utmost importance, and to declare such statutes a nullity would have a disastrous effect on the public interest and safety. The inevitable conclusion is that the Legislature would prefer to eliminate the exemptions and thereby preserve the statutes. Accordingly we choose the remedy of striking the marital exemption from sections 130.35 and 130.50 of the Penal Law and the gender exemption from section 130.35 of the Penal Law, so that it is now the law of this State that any person who engages in sexual intercourse or deviate sexual intercourse with any other person by forcible compulsion is guilty of either rape in the first degree or sodomy in the first degree. Because the statutes under which the defendant was convicted are not being struck down, his conviction is affirmed.

Though our decision does not "create a crime", it does, of course, enlarge the scope of two criminal statutes. We recognize that a court should be reluctant to expand criminal statutes, due to the danger of usurping the role of the Legislature, but in this case overriding policy concerns dictate our following such a course in light of the catastrophic effect that striking down the statutes and thus creating a hiatus would have... Courts in other States have in numerous cases applied these same principles in eliminating an unconstitutional exception from a criminal statute and thereby enlarging the scope of the statute. The decision most similar factually to the present one comes from the Alaska Supreme Court in Plas v State (598 P2d 966). That court addressed an equal protection challenge by a female prostitute to a statute which criminalized prostitution, and defined it as a female offering her body for sexual intercourse for hire. The court agreed with the defendant that the

statute violated equal protection because it covered only females, but chose to remedy this underinclusion by striking the definition, thereby expanding the statute to cover any person who engaged in prostitution, and affirmed her conviction."

[Emphasis is mine.]

178. As alluded to above, in ***FWLD,*** the Supreme Court of Nepal was called upon to examine the constitutional validity of Chapter No.1 on rape found in the Country Code. This chapter by not including in the definition of rape- non-consensual sexual intercourse between spouses, extended immunity to the offending husband. The State represented by the Attorney General had, broadly, advanced the following arguments; quite similar to what was put to us by the intervenors :

(i) Married and unmarried woman cannot be treated alike. Therefore, the equality clause is not violated.

(ii) The impugned provision has been framed keeping in mind that once parties enter into marriage, the consent for sexual intercourse is permanent.

(iii) There are other remedies available to the wife who is injured, such as divorce and having the husband booked for "battery".

(iv) It is for the legislature to conclude as to what sorts of acts committed by a person or group of persons in a society need to be criminalised and the punishment that should be imposed.

(v) It is not in conformity with Hindu religion to have a husband take consent to have sexual intercourse with his own wife.

179. The Supreme Court of Nepal after relying upon various international conventions including CEDAW and judgment of the New York Court of Appeals in ***People v Liberta,*** concluded that there is a gap in criminal law

insofar as it did not include marital rape as a criminal offence. The Court went on to rule that since norms and values in criminal law had to keep pace with time, that gap was required to be filled. Consequently, while the writ petition was quashed (a procedure peculiar to Nepal) holding that that the impugned definition of rape was not inconsistent with the Constitution, a direction was issued to the Parliament to introduce a Bill to fill the gaps concerning marital rape.

179.1. It appears that the gap pointed out in ***FWLD (Nepal)*** was filled; however, the punishment provided to offending husbands was considerably less. Insofar as the offending husband was concerned, under Section 3(6) of the Chapter on Rape, the punishment ranged between three to six months, whereas in other cases, the period of incarceration was much longer, which was corelated to the age of the victim. This provision was challenged in ***Jit Kumari (Nepal).***

179.2. In this case, the Court found that the petitioner had been sexually abused by her husband.

179.3. The petitioner, on the other hand, had argued that because the punishment imposed on the offending husband in a case involving marital rape was minimal, he would be released on bail pending adjudication of his appeal, leading to further victimisation. This plea found favour with the Court and, accordingly, a direction was issued to the State to amend the law to reconsider the quantum of punishment, concerning marital rape.

180. The judgment of the Supreme Court of Philippines in ***People v. Edgar*** also concerned the issue of marital rape. The complainant/wife had been subjected to rape by her husband in the presence of her children. Several defences were taken including that the wife had falsely accused the husband of rape; the wife had extra marital affairs and that the wife wanted to usurp

husband's business. The Supreme Court after taking note, inter alia, of the Hale doctrine, the provisions of CEDAW and the judgment of the New York Court of Appeals in ***People v. Liberta*** made the following pertinent observations:

> *"Rape is a crime that evokes global condemnation because it is an abhorrence to woman's value and dignity as a human being. It respects no time, place, age, physical condition or social status. It can happen anywhere and it can happen to anyone. Even, as shown in the present case, to a wife, inside her time-honored fortress, the family home, committed against her by her husband who vowed to be her refuge from cruelty. The herein pronouncement is an affirmation to wives that our rape laws provide the atonement they seek from their sexually coercive husbands.*
>
> *Husbands are once again reminded that marriage is not a license to forcibly rape their wives. A husband does not own his wife's body by reason of marriage. By marrying, she does not divest herself of the human right to an exclusive autonomy over her own body and thus, she can lawfully opt to give or withhold her consent to marital coitus. A husband aggrieved by his wife's unremitting refusal to engage in sexual intercourse cannot resort to felonious force or coercion to make her yield. He can seek succor before the Family Courts that can determine whether her refusal constitutes psychological incapacity justifying an annulment of the marriage.*
>
> *Sexual intimacy is an integral part of marriage because it is the spiritual and biological communion that achieves the marital purpose of procreation. It entails mutual love and self-giving and as such it contemplates only mutual sexual cooperation and never sexual coercion or imposition.*
>
> *The Court is aware that despite the noble intentions of the herein pronouncement, menacing personalities may use this as a tool to harass innocent husbands. In this regard, let it be stressed that safeguards in the criminal justice system are in place to spot and scrutinize fabricated or false marital rape complaints and any person who institutes untrue and malicious charges will be made answerable under the pertinent provisions of the RPC and/or other laws."*

[Emphasis is mine.]

181. Insofar as the application of international conventions/covenants is concerned, the established law is that the courts in India can take recourse to international covenants as long as they are not inconsistent with the domestic municipal law. As a matter of fact, the domestic courts "are under an obligation to give due regard to international conventions and norms for construing domestic laws when there is no inconsistency between them." [See ***Anuj Garg.***]

181.1.A case in point is ***Githa Hariharan v. RBI*** (1999) 2 SCC 228[50]. In this case, the Supreme court while construing the provisions of Section 6(a) of the Hindu Minority and Guardianship Act, 1956 and Section 19(b) of the Guardian and Wards Act, 1890 which were challenged on the ground that it violated the equality clause in the constitution took recourse to CEDAW and the Beijing Declaration to reach a conclusion that a woman could not be relegated to an inferior position vis-a-vis her guardianship rights qua a minor, when pitted against the father's right qua the child. [Also see ***Vishaka; Jolly George Varghese v. Bank of Cochin,*** (1980) 2 SCC 360[51]***; and Apparel Export Promotion Council v. A.K. Chopra,*** (1999) 1 SCC 759[52].]

181.2.It is relevant to note that both in ***Vishaka*** and ***Apparel Export Promotion Council*** case, the Supreme Court adverted to CEDAW. Both these cases again concerned women, who were subjected to sexual harassment, albeit, at work places. Insofar as ***Jolly George Varghese*** case is concerned, Justice V. R. Krishna Iyer [as he then was], while interpreting Section 51 of the CPC, drew inspiration from International Covenant on

[50] Cited with approval in ***Anuj Garg.***
[51] In short "***Jolly George Varghese*** case"
[52] In short "***Apparel Export Promotion Council*** case"

Civil and Political Rights (ICPCR).

181.3.I do not wish to multiply cases in which Supreme Court and Courts all over the country from time to time have relied upon international conventions, covenants and declarations as aid to their reasoning in reaching a conclusion, in matters, which concern violation of civil rights and/or human rights. It is also important to remind ourselves, something I have mentioned above, that the framers of our Constitution drew inspiration from Constitutional documents concerning other countries such as USA, Canada and Australia. Therefore, the argument that one should not look at decisions of other jurisdictions or refer to international conventions/covenants/declarations, disregards the fact that we live in an inter-connected global environment where there is constant exchange of ideas and frameworks adopted by one or the other country. If I may add, by way of figure of speech, where information is concerned, the "Earth is flat".

182. Thus, in the context of the foregoing discussion, it would be instructive to peruse and bear in mind the following brief extracts from certain Conventions/Declarations, which are relevant to the issue at hand and none of them, in my opinion, are inconsistent with the domestic law :

182.1.**CEDAW**

" Article I

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

xxx xxx xxx

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(g) To repeal all national penal provisions which constitute discrimination against women.

Article 15

1. States Parties shall accord to women equality with men before the law.

Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

xxx xxx xxx

(c) The same rights and responsibilities during marriage and at its dissolution;"

[Also see: General Recommendation No. 19: Violence Against Women updated by General Recommendation No. 35 on gender –based violence against women[53]]

182.2. The Declaration on the Elimination of Violence against Women

[53] **General Recommendation No. 35**

In its general recommendation No. 19 on violence against women, adopted by the Committee on the Elimination of Discrimination Against Women, at its eleventh session in 1992, the Committee clarified that discrimination against women as defined in Article 1of the Convention, included gender-based violence, that is, "violence which is directed against a woman because she is a woman or that affects women disproportionately", and that it constituted a violation of their human rights.

[DEVAW][54], inter alia, includes marital rape in Article 2(a)[55], which highlights the heightened awareness in most jurisdictions across the world that violence against women is an obstacle to attainment of equality, development and peace and an obstacle to enjoyment of rights and feelings, which otherwise are natural rights conferred on any human being.

182.3. **Beijing Declaration**[56]

> *"**D. Violence against women***
>
> *112. Violence against women is an obstacle to the achievement of the objectives of equality, development and peace. Violence against women both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms. The long-standing failure to protect and promote those rights and freedoms in the case of violence against women is a matter of concern to all States and should be addressed. Knowledge about its causes and consequences, as well as its incidence and measures to combat it, have been greatly expanded since the Nairobi Conference. In all societies, to a greater or lesser degree, women and girls are subjected to physical, sexual and psychological abuse that cuts across lines of income, class and culture. The low social and economic status of women can be both a cause and a consequence of violence against women.*
>
> *113. The term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. Accordingly, violence against women encompasses but is not limited to the following: *
>
> *(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the*

---

[54] Ratified by the United Nations General Assembly on 20.12.1993

[55] **Article 2**

Violence against women shall be understood to encompass, but not be limited to, the following:

a. Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

[56] Adopted by the United Nations in the Fourth World Conference on Women, held on 15.10.1995.

*household, dowry-related violence, **marital rape**, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;*

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs."

[Emphasis is mine.]

182.4. The aforesaid extracts from CEDAW, DEVAW and the Beijing Declaration are self-explanatory and hence do not need much dilation. To put it succinctly, it is now well-recognised in most jurisdictions that violence against women means an act of gender based violence, which includes inter alia marital rape. It is well documented that marital rape is recognised as an offence in more than 50 countries. We can ignore this rich resource material only at our own peril.

XI Parliamentary Committee Reports

183. As noticed in the earlier part of this judgment, both, Mr Sai Deepak and Mr Kapoor have called for judicial self-restraint because, despite several debates on the merits and demerits of MRE in various forums, the legislature chose not to change the *status quo*. While noticing this objection, I have taken note of the documents which were cited in this behalf. [See sub-para (xx) of paragraph 9.1 and sub-para (ii) of paragraph 11 above.]

184. Messrs Sai Deepak and Kapoor are right that despite the views being expressed for and against retaining MRE on the statute in forums such as the Parliamentary Standing Committee, the Lok Sabha Committee on Empowerment of Women, the 172nd Law Commission and the Justice Verma Committee, the *status quo* continues to obtain.

184.1. This, in my view, is no reason not to intercede in the matter if,

otherwise, I am convinced that MRE (as I am) is violative of the married women's fundamental rights under Articles 14, 15, 19(1)(a) and 21 of the Constitution. The fact that the legislature has not intervened, as observed by the Supreme Court in the ***Navtej Singh Johar*** case in the context of the challenge to Section 377 of the IPC is a "neutral fact" and, hence, cannot impede the examination by the court as to the Constitutional validity of MRE.

184.2. The observations made in this context by the Supreme Court in ***Navtej Singh Johar*** being apposite are extracted hereafter:

> *"**364**. The fact that the legislature has chosen not to amend the law, despite the 172nd Law Commission Report specifically recommending deletion of Section 377, may indicate that Parliament has not thought it proper to delete the aforesaid provision, is one more reason for not invalidating Section 377, according to Suresh Kumar Koushal [Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1]. This is a little difficult to appreciate when the Union of India admittedly did not challenge the Delhi High Court judgment [Naz Foundation v. Govt. (NCT of Delhi), 2009 SCC OnLine Del 1762 : (2009) 111 DRJ 1] striking down the provision in part. Secondly, the fact that Parliament may or may not have chosen to follow a Law Commission Report does not guide the Court's understanding of its character, scope, ambit and import as has been stated in Suresh Kumar Koushal[Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1]. It is a neutral fact which need not be taken into account at all. All that the Court has to see is whether constitutional provisions have been transgressed and if so, as a natural corollary, the death knell of the challenged provision must follow."*
>
> [Emphasis is mine.]

184.3. This apart, I am persuaded to attach weight to the observations and the final recommendations made by Justice Verma Committee in its Report on marital rape which were made after a deep dive into the prevailing

ecosystem concerning a rape law, both, within and outside the country. I intend to extract the same hereafter :

> *"72. The exemption for marital rape stems from a long out-dated notion of marriage which regarded wives as no more than the property of their husbands. According to the common law of coverture, a wife was deemed to have consented at the time of the marriage to have intercourse with her husband at his whim. Moreover, this consent could not be revoked. ...*
>
> *73. This immunity has now been withdrawn in most major jurisdictions. In England and Wales, the House of Lords held in 1991 that the status of married women had changed beyond all recognition since Hale set out his proposition. Most importantly, Lord Keith, speaking for the Court, declared, 'marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband.'*
>
> *74. Our view is supported by the judgment of the European Commission of Human Rights in C.R. v UK, which endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim. Importantly, it acknowledged that this change in the common law was in accordance with the fundamental objectives of the Convention on Human Rights, the very essence of which is respect for human rights, dignity and freedom. This was given statutory recognition in the Criminal Justice and Public Order Act 1994.*
>
> *75. We find that the same is true in Canada, South Africa and Australia. In Canada, the provisions in the Criminal Code, which denied criminal liability for marital rape, were repealed in 1983. It is now a crime in Canada for a husband to rape his wife. South Africa criminalised marital rape in 1993, reversing the common law principle that a husband could not be found guilty of raping his wife. Section 5 of the Prevention of Family Violence Act 1993 provides: 'Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife.' In Australia, the common law 'marital rape immunity' was legislatively abolished in all jurisdictions from 1976.[88] In 1991, the Australian High Court had no doubt that: 'if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law.' According to Justice Brennan (as he*

then was): 'The common law fiction has always been offensive to human dignity and incompatible with the legal status of a spouse.'

76. These jurisdictions have also gone further and recognised that consent should not be implied by the relationship between the accused and the complainant in any event. In the Canadian 2011 Supreme Court decision in R v. J.A., Chief Justice McLachlin emphasised that the relationship between the accused and the complainant 'does not change the nature of the inquiry into whether the complaint consented' to the sexual activity. The defendant cannot argue that the complainant's consent was implied by the relationship between the accused and the complainant. In South Africa, the 2007 Criminal Law (Sexual Offences and Related Matters) Amendment Act ('Sexual Offences Act') provides, at s. 56 (1), that a marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation.

77. Even when marital rape is recognised as a crime, there is a risk that judges might regard marital rape as less serious than other forms of rape, requiring more lenient sentences, as happened in South Africa. In response, the South African Criminal Law (Sentencing) Act of 2007 now provides that the relationship between the victim and the accused may not be regarded as a 'substantial and compelling circumstance' justifying a deviation from legislatively required minimum sentences for rape.

78. It is also important that the legal prohibition on marital rape is accompanied by changes in the attitudes of prosecutors, police officers and those in society more generally. For example, in South Africa, despite these legal developments, rates of marital rape remain shockingly high. A 2010 study suggests that 18.8% of women are raped by their partners on one or more occasion. Rates of reporting and conviction also remain low, aggravated by the prevalent beliefs that marital rape is acceptable or is less serious than other types of rape. Changes in the law therefore need to be accompanied by widespread measures raising awareness of women's rights to autonomy and physical integrity, regardless of marriage or other intimate relationship. This was underlined in Vertido v The Philippines, a recent Communication under the Optional Protocol of the Convention on the Elimination of Discrimination Against Women (CEDAW), where the CEDAW Committee emphasised the importance of appropriate training for

judges, lawyers, law enforcement officers and medical personnel in understanding crimes of rape and other sexual offences in a gender-sensitive manner.

79. We, therefore, recommend that:

i. The exception for marital rape be removed.

ii. The law ought to specify that:

a. A marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation;

b. The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity;

c. The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.

80. We must, at this stage, rely upon Prof. Sandra Fredman of the University of Oxford, who has submitted to the Committee that that "training and awareness programmes should be provided to ensure that all levels of the criminal justice system and ordinary people are aware that marriage should not be regarded as extinguishing the legal or sexual autonomy of the wife"."

184.4. As is well known, the Justice Verma Committee was constituted in the backdrop of the brutal gang-rape of a young lady which occurred in Delhi on December 16, 2012[57]. A spate of recommendations were made, some of which were accepted and, thus, formed a part of the Criminal Law (Amendment) Act, 2013. Amongst several amendments that were brought about by the Criminal (Amendment) Act, 2013 included the expansion of the definition of "rape", enhancing the minimum mandatory sentence under Section 376(1) and insertion of Section 376B which substituted Section 376A of the IPC. As noticed above, the legislature, for whatever reason, stopped short of accepting the recommendations of the Justice Verma

[57] Nirbhaya Gang rape case

Committee concerning the removal of MRE.

185. Given the foregoing discussion, I am clearly of the view that the recommendations were in line with the constitutional mores and/or morality which in the recent past have been captured and reiterated by the Supreme Court in the judgments rendered in ***Joseph Shine*** and ***Navtej Singh Johar***.

186. Thus, for the sake of argument, even if I concur with Messrs Sai Deepak and Kapoor that the State should define, monitor and sanction what would be appropriate conduct in the context of sexual activity between married couples, what needs to be emphasized is that the State, as a representative of the society, shares the responsibility to deprecate and punish sexual abuse/violence of every form. This responsibility, cast on the State, extends beyond interpersonal space ordinarily available to a married couple where there is no violence. Thus, when the State exempts criminal acts such as forced sex within marriage, it unwittingly engages in unequal disbursement of rights conferred by the Constitution. Consequentially, those, who commit the offence i.e., the husbands do not suffer the rigour of the law and those, who are victims, i.e., the wives get no protection from the law. [See Kersti Yllo and M. Gabriela Torres, Marital Rape -Consent, Marriage and Social Change in Global Context: Prologue – Understanding Marital Rape in Global Context, Kersti Yllo, page 13.]

XII Material & Case law Cited on behalf of the Intervenors

187. Before I conclude, I must now embark upon the exercise of delving through the judgments and the materials cited on behalf of the intervenors in support of their submissions. I must state at the outset that none of the material/judgments cited have persuaded me to hold that the impunity available to the husbands because of MRE should not be disturbed. In other

words, the status quo should continue till such time the Executive/the Legislature decides to intercede in the matter.

188. Let me first begin with the 167th Report of the Parliamentary Standing Committee of Home Affairs on the Criminal Law (Amendment) Bill, 2012.

188.1. This report was cited to demonstrate that despite deliberation, the matter was not taken forward and MRE continued to remain on the statute. Apart from the fact that deliberations of the Standing Committee on which the legislature chose not to move forward, as indicated above by me, is a "neutral fact", the extract placed before us clearly shows that several members had serious concerns about retaining MRE on the statute. The same is evident from reading the following extract from paragraphs 5.9.1 and 5.10.2 :

> "*5.9.1 ... Some Members also suggested that somewhere there should be some room for wife to take up the issue of marital rape. It was also felt that no woman takes marriage so simple that she will just go and complain blindly. Consent in marriage cannot be consent forever. ...*
> *5.10.2 ... One condition that can be transmitted through sexual intercourse and that person knowingly commits such intercourse without use of protection and that act should also be brought under aggravated crime. ...."*

[Emphasis is mine.]

188.2. The aforesaid extracts establish that there was a serious concern about the issue at hand. Although the majority on the Committee felt that the deletion of MRE would destroy the "institution of marriage", other members had different concerns.

188.3. To my mind, this by itself does not take the cause of the intervenors any further when looked at in the backdrop of physical and psychological impairment caused to a married woman who is subjected to rape by her husband.

189. The judgment in the matter of ***Laxmi Devi*** was cited in support of the proposition that the court must not easily invalidate a statute as it has the backing of the Legislature which comprises elected representatives. This case was concerned with a challenge laid to Section 47A of the Indian Stamp Act, 1899 (as amended by A.P. Act 8 of 1998). The impugned provision required a party to deposit 50% of the stamp duty as a condition precedent for making a reference to the Collector. The said provision was assailed on the ground that it was unconstitutional. It is in this context that the aforementioned observations were made by the court, but what is lost sight of, while relying on those observations, are the observations that are made in paragraphs 86 and 91 of the judgment :

> ***"88.*** *In our opinion, therefore, while Judges should practise great restraint while dealing with economic statutes, they should be activist in defending the civil liberties and fundamental rights of the citizens. This is necessary because though ordinarily the legislature represents the will of the people and works for their welfare, there can be exceptional situations where the legislature, though elected by the people may violate the civil liberties and rights of the people. It was because of this foresight that the Founding Fathers of the Constitution in their wisdom provided fundamental rights in Part III of the Constitution which were modelled on the lines of the US Bill of Rights of 1791 and the Declaration of the Rights of Man during the Great French Revolution of 1789.*
>
> *xxx xxx xxx*
>
> ***91.*** *It must be understood that while a statute is made by the peoples' elected representatives, the Constitution too is a document which has been created by the people (as is evident from the Preamble). The courts are guardians of the rights and liberties of the citizens, and they will be failing in their responsibility if they abdicate this solemn duty towards the citizens. For this, they may sometimes have to declare the act of the executive or the legislature as unconstitutional."*

[Emphasis is mine.]

189.1. In my view, the judgment provides heft to the proposition formulated in paragraph 126 to 126.3 above.

190. ***Indian Drugs & Pharmaceuticals Ltd. v. Workmen, Indian Drugs & Pharmaceuticals Ltd.*** (2007) 1 SCC 408 was yet another judgment cited in support of the proposition that the court should exercise judicial restraint. This case concerned casual workers who were employed on daily wages basis. The workmen had been given employment as dependants of employees who had died in harness. Upon an industrial dispute erupting between the parties, an award was passed by the Labour Court which held that workmen were entitled to regularization having regard to the long period, they had been in service. Besides this, the Labour Court also directed that workmen should be paid wages equivalent to those that were paid to regular employees. These directions which were the subject matter of the award were assailed by the petitioner company before the High Court. The High Court while agreeing with the petitioner company that the Labour Court could not have directed regularization, held that the workmen should continue in service till they reached the age of superannuation. Besides this the High Court directed that the workmen shall be paid wages at par with the regular employees.

190.1. It is in this background that the matter reached the Supreme Court. The Supreme Court after observing that the petitioner company had turned "sick" disagreed with the directions issued by the High Court as, according to it, regularization was not a mode of appointment.

190.2. In the facts of the case, the court noted that the workmen were employed pursuant to an agitation by the union and on compassionate grounds; and not *via* a regular mode. It is in these circumstances that the

court held that the directions issued for continuing the workmen in service would defeat the constitutional scheme concerning public employment.

190.3. In my view, the observations were clearly fact specific. The Court's observation that the creation of posts, appointments and regularization fell within the domain of the executive and/or the legislature, was contextual, which cannot be applied where a statute or a provision is challenged on the ground that it violates the fundamental rights of the affected party.

191. Likewise, the judgment rendered in ***Suresh Seth v. Commissioner, Indore Municipal Corporation & Ors.*** (2005) 13 SCC 287 has no applicability whatsoever to the present case. This was a case where a challenge was laid to an order passed by the High Court while hearing a civil revision petition. The petitioner before the Supreme Court had challenged the appointment of a person who occupied the post of a Mayor on the ground that he could not have held the post of a Mayor as he was a sitting member of the Legislative Assembly. However, by the time the matter reached the Supreme Court, the concerned member's tenure as a Mayor had expired, and therefore, the appeal, apparently, had been rendered infructuous. Thus, the court while dismissing the appeal made the observations to the effect that no *mandamus* could issue for amendment of the M.P. Municipal Corporation Act, 1956 disentitling a person from holding more than one post.

191.1. In my opinion, there is no such situation obtaining in the instant matters.

192. In the matter of ***Madhu Kishwar & Ors. v. State of Bihar & Ors.*** (1996) 5 SCC 125[58], a challenge was laid to certain provisions of Chota Nagar Tenancy Act, 1908 [in short "CNT Act"]. The provisions disabled the

[58] In short ***"Madhu Kishwar"***

tribal women from succeeding to the estate of her lineal ascendant. The custom prevailing amongst persons belonging to Scheduled Tribes restricted the line of succession to male descendants. The provisions of the CNT Act were challenged by way of an Article 32 petition. The principal plea was to bring the provisions of the CNT Act in line with the general principles that, obtained in the Hindu Succession Act, 1956 [in short 'HSA'], which put women at par with male descendants. The impediment to such an approach was Section 2(2) of the HSA.

192.1. A three-member bench rendered the decision in the matter. The majority on the bench while reading down Sections 7 and 8 of the CNT Act did not go that far as to strike down the said provisions. The majority protected the rights of female descendants under Sections 7 and 8 of the CNT Act by suspending the exclusive right of male succession till the female descendants chose other means of livelihood, manifested by abandonment and/or release of the holding. On the other hand, the minority view, in effect, veered around to the reasoning that the general principles which found a place in HSA could be applied to Scheduled Tribes.

192.2. It is in this context that the observations of the majority contained in paragraph 5[59] have to be viewed. It is also to be borne in mind that on a

[59] "**5.** In the face of these divisions and visible barricades put up by the sensitive tribal people valuing their own customs, traditions and usages, judicially enforcing on them the principles of personal laws applicable to others, on an elitist approach or on equality principle, by judicial activism, is a difficult and mind-boggling effort. Brother K. Ramaswamy, J. seems to have taken the view that Indian legislatures (and Governments too) would not prompt themselves to activate in this direction because of political reasons and in this situation, an activist court, apolitical as it avowedly is, could get into action and legislate broadly on the lines as suggested by the petitioners in their written submissions. However laudable, desirable and attractive the result may seem, it has happily been viewed by our learned brother that an activist court is not fully equipped to cope with the details and intricacies of the legislative subject and can at best advise and focus attention on the State polity on the problem and shake it from its slumber, goading it to awaken, march and reach the goal. For in whatever measure be the concern of the court, it compulsively needs to apply, somewhere and at sometime, brakes to its self-motion, described in judicial parlance as self-restraint. We agree therefore with brother K. Ramaswamy, J. as summed up by him in the paragraph ending on p. 36 (para 46) of his judgment that under the circumstances it is not desirable to declare the customs of tribal inhabitants as offending Articles 14, 15 and 21 of the Constitution and each case must be examined when full facts are placed before the court."

direction issued by the court during the pendency of the proceedings, an exercise was carried out by the Bihar Tribal Consultative Council which revealed that if the changes, as suggested, are effected in the HSA, the land over which tribals had ownership right, could get alienated.

192.3. Clearly, both the plurality and the minority views moved in the direction of granting relief to the tribal women. The methodology adopted and the degree of relief granted varied. The majority as well as minority members on the bench took recourse to judicial tools to alleviate the suffering of female tribals.

192.4. In contrast, in the instant matters, the most recent study, i.e., the Justice Verma Committee Report, did demonstrate that there was an imminent need for removing MRE from the statute. Despite a well-considered report, there has been no movement since 2013 on the issue of MRE. Therefore, the ratio of the judgment in ***Madhu Kishwar*** is not what is sought to be portrayed on behalf of the intervenors i.e., where courts find that a statute or a provision in the statute is violative of the fundamental rights, the same cannot be struck down.

193. As to how and when such judicial tools are employed is demonstrated in the judgment by the Constitution Bench in the ***C.B. Gautam*** case. This was a case which concerned, *inter alia*, a challenge to Section 269UD of the Income Tax Act, 1961 [in short 'Act'] which stood incorporated in Chapter XX-C of that very Act. The provisions contained in Chapter XX-C, in particular, Section 269UD, empowered the Central Government to pre-emptively acquire an immovable property which was a subject matter of an agreement to sell if it was undervalued by more than 15%. Furthermore, the provision also vested in the Central Government a right in such property, *albeit*, “free from all encumbrances”.

193.1. Thus, two questions principally arose for consideration before the constitution bench. First, whether the aforementioned provision should have had embedded in it leeway for an intending purchaser and/or seller to demonstrate as to why an order for compulsory purchase ought not to be passed by the appropriate authority, in a given case. Second, whether the all encompassing expression "free from all encumbrances" should be struck down as it had no rational nexus with the object sought to be achieved by the legislation, which was, to prevent tax evasion.

193.2. The Court employed, both, tools, inasmuch as, it read into the provision, the principles of natural justice i.e., the requirement to issue a show cause notice to the intending purchaser and/or seller as to why the property ought not to be compulsorily purchased by the Government. Furthermore, it struck down the expression "free from all encumbrances" and, while doing so, the court made the following pertinent observations :

> *"**36.** ....We agree that in order to save a statute or a part thereof from being struck down it can be suitably read down. But such reading down is not permissible where it is negatived by the express language of the statute. Reading down is not permissible in such a manner as would fly in the face of the express terms of the statutory provisions. ...."*
>
> [Emphasis is mine.]

193.3. The Court, thus, excised from the statute the aforementioned expression "free from all encumbrances" as, according to it, it failed to meet the test of Article 14 and sustained the remaining parts of the provision.

194. The judgment rendered in ***Census Commissioner & Ors. v. R. Krishamurthy*****,** (2015) 2 SCC 796, in my view, is also not applicable to the issue at hand. In this case, the court was called upon to consider whether the direction issued by the High Court to the Census Commissioner that census should be carried out in a manner that caste-wise enumeration and/or

tabulation get reflected in its report, was warranted, given the fact that no such direction had been issued by the Central Government under Section 8 of the Census Act, 1948 (as amended in 1993).

194.1. The Court held that the direction was flawed as the controversy that arose for adjudication before the High Court was entirely different. Before the High Court, a challenge was laid to the appointment of a person to a public office who was appointed solely on the basis that he belonged to a Scheduled Tribe. The High Court had noted that there were no persons belonging to a Scheduled Tribe residing in the place concerned (i.e., the Union Territory of Pondicherry) and that a presidential notification under Article 342 of the Constitution had not been issued. Based on this, the High Court concluded that no reservations for Scheduled Tribes could be made in the Union Territory of Pondicherry. Having said that, the High Court did not stop at this, it went on to issue directions to the Census Commissioner even though he was not a party to the proceedings.

194.2. A close look at the judgment also shows that a second writ petition was filed which was allowed in terms of the order passed in the first writ petition.

194.3. That said, the following observations made by the court shed light on how one needs to proceed in matters where a policy decision or a provision in the statute, as in the instant matters, is assailed.

> *"**25.** Interference with the policy decision and* [the] *issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue notification regarding the manner in which the census has to be carried out and the Central Government has issued notifications, and the competent authority has issued directions. It is not within the domain of the court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to*

> *declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policy-making by adding something to the policy by way of issuing a writ of mandamus. There the judicial restraint is called for remembering what we have stated in the beginning. The courts are required to understand the policy decisions framed by the executive. If a policy decision or a Notification is arbitrary, it may invite the frown of Article 14 of the Constitution. ....."*
>
> [Emphasis is mine.]

194.4. In my opinion, if at all, the observations help the cause of the petitioners.

195. The ***Social Action Forum for Manav Adhikar & Anr. v. Union of India, Ministry of Law & Justice & Ors.*** (2018) 10 SCC 443 was a case where the Supreme Court was, *inter alia*, considering the viability of some of the directions issued by one of its benches in the matter of ***Rajesh Sharma & Ors. v. State of U.P. & Anr.*** (2018) 10 SCC 472[60] in the context of Section 498A of the IPC.

195.1. The Supreme Court, however, concluded that some of the directions contained in ***Rajesh Sharma*** did not protect the interests of married women which was the avowed object of Section 498A of the IPC. Therefore, the Court, *inter alia*, did away with the direction issued for the constitution of a Family Welfare Committee under the aegis of the District State Legal Authority and the consequent powers that had got conferred upon it.

195.2. Pertinently, while doing so, the Supreme Court also recognized the fact that a court could, in certain cases, in furtherance of fundamental rights, issue directions in the absence of law. In this context, reference was made to ***Lakshmi Kant Pandey v. Union of India***, (1984) 2 SCC 244; ***Vishaka;*** and

Common Cause (A Registered Society) v. Union of India & Anr. (2018) 5 SCC 1.

196. ***State of Bihar & Ors. v. Bihar Distillery Ltd.***, (1997) 2 SCC 453, was cited by the intervenors to rely upon the dicta that the Court should presume the constitutionality of a statute enacted prior to the Constitution coming into force as it represented the will of the people. As alluded to above, even after having applied the presumption of constitutionality doctrine to MRE, I still could not bring myself to agree with the intervenors that MRE was not violative of Articles 14, 15, 19(1)(a) and 21 of the Constitution.

197. In ***Raja Ram Pal*** case**,** the Supreme Court was called upon to consider the following two issues: First, whether the two Houses of the Parliament in the exercise of powers, privileges and immunities, as contained in Article 105 of the Constitution, could expel their respective members from the membership of the House. Second, if such power existed, could it be made subject to judicial review and, if so, what was the scope of the judicial review.

197.1. Mr Kapoor had cited this judgment to contend that the motive of the Legislature in enacting a particular statute was beyond the scrutiny of the courts. One cannot quibble with this proposition, but what is important is the far reaching (and I would say seminal observations) that were made by the Constitution Bench in the ***Raja Ram Pal*** case. The bench enunciated the principle that where governance is rooted in the constitution, absolutism is abhorred and that while due deference has to be given to a co-ordinate organ such as the Parliament, its acts are amenable to judicial scrutiny.

> ***"431.*** *We may summarise the principles that can be culled out from the above discussion. They are:*
> *xxx* *xxx* *xxx*

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[60] In short "***Rajesh Sharma"***

(a) Parliament is a coordinate organ and its views do deserve deference even while its acts are amenable to judicial scrutiny;
(b) The constitutional system of government abhors absolutism and it being the cardinal principle of our Constitution that no one, howsoever lofty, can claim to be the sole judge of the power given under the Constitution, mere coordinate constitutional status, or even the status of an exalted constitutional functionaries, does not disentitle this Court from exercising its jurisdiction of judicial review of actions which partake the character of judicial or quasi-judicial decision;
xxx xxx xxx
(f) The fact that Parliament is an august body of coordinate constitutional position does not mean that there can be no judicially manageable standards to review exercise of its power;
xxx xxx xxx
(h) The judicature is not prevented from scrutinising the validity of the action of the legislature trespassing on the fundamental rights conferred on the citizens;
xxx xxx xxx
(s) The proceedings which may be tainted on account of substantive or gross illegality or unconstitutionality are not protected from judicial scrutiny;
(u) An ouster clause attaching finality to a determination does ordinarily oust the power of the court to review the decision but not on grounds of lack of jurisdiction or it being a nullity for some reason such as gross illegality, irrationality, violation of constitutional mandate, malafides, non-compliance with rules of natural justice and perversity."

[Emphasis is mine.]

198. The judgment in ***Sunil Batra v. Delhi Administration & Ors.*** (1978) 4 SCC 494[61] was relied upon by the intervenors to emphasize the observations which, in effect, conveyed that if certain provisions of law construed in one way would be consistent with the Constitution and, if another interpretation is placed, which would render them unconstitutional,

[61] In short "***Sunil Batra***"

the Court would lean in favour of the former construction.

198.1. To my mind, once again, I cannot but wholly agree with this enunciation of law as captured above. However, having concluded that MRE read in whichever way is not only unconstitutional and morally repugnant, the aforementioned observation, read out of context, will not help shore up the case of the intervenors. The judgment in ***Sunil Batra's*** case was rendered based on the letter written by the petitioner to the Supreme Court concerning the brutal assault by a Head Warder on another prisoner. It is in this backdrop that the court issued a slew of directions to the Delhi Administration in the interest of incarcerated persons.

199. A perusal of the judgment in ***Anuja Kapoor v. Union of India & Ors,*** in W.P.(C) No.7256/2019 passed on 09.07.2019 shows that directions were sought from the court to embed in law, marital rape, as a ground for divorce. It is in this context, that the petitioner sought the issuance of further directions for framing appropriate guidelines, laws and bye-laws. The court by a brief order dismissed the petition, *inter alia*, holding "*3. Drafting of the law is the function of Legislature and not of the Court. Court is more concerned in the interpretation of the law rather than the drafting of the laws…..This is a function of the Legislature ……..*"

199.1. The argument advanced on behalf of the petitioners is that only when the impugned provisions are struck down or removed from the statute can the Legislature take the next steps in the matter; I tend to agree with this submission.

199.2. The aforesaid order does not, in my view, by any stretch of the imagination, suggest that the court cannot examine the legal tenability of the impugned provisions or that a litigant oppressed by a provision in the statute should wait till such time the executive or the Legislature decides to act in

the matter.

200. In ***Mohd. Hanif Quareshi & Ors v. State of Bihar & Ors.,*** AIR 1958 SC 731[62], a challenge was laid to ban imposed in the States of Bihar, Uttar Pradesh and Madhya Pradesh concerning the slaughter of cows. A bunch of petitions under Article 32 of the Constitution were filed to strike down the ban. The Court in its judgment, reiterated the meaning, scope and effect of Article 14 of the Constitution. The Court also ruled, which is something that the intervenors lay stress on, as noticed above, that presumption of constitutionality doctrine should apply to a statute enacted by the Legislature and that, if the same is assailed, the burden lies upon one who brings the challenge to the Court. [See paragraph 15 of ***Mohd. Hanif Quareshi***.]

200.1. Pertinently, after having expounded on the scope and effect of Article 14, the Court upheld the Bihar Act insofar as it prohibited the slaughter of cows of all ages which included the calves but went on to declare as "void" the slaughter of she-buffaloes, breeding buffaloes and working buffaloes as the impugned provision did not prescribe a test or requirement as to their age or usefulness. This part of the Act was struck down as, according to the Court, it violated the petitioner's fundamental rights under Article 19(1)(g) of the Constitution. [See paragraph 45 of ***Mohd. Hanif Quareshi***.]

200.2. What emerges clearly from the judgment is that unless the differentia, based on which classification is made, meets the nexus test, such classification would not pass muster of the fundamental rights provided in the Constitution.

200.3. In the instant matters, the position is quite similar and, therefore, in my view, the judgment supports the contentions advanced by the petitioner.

201. Briefly, in ***Bombay Dyeing and Manufacturing Co. Ltd. v. Bombay***

[62] In short "***Mohd. Hanif Quareshi"***

Environmental Action Group & Ors., AIR 2006 SC 1489, the challenge laid, *inter alia*, concerned the interpretation that had to be accorded to the amended Development Control Regulation No.58, framed by the State of Maharashtra. A public interest petition was filed before the Bombay High Court by persons who claimed to be the residents of Mumbai and who were desirous of protecting open spaces in the city for preserving ecological balance and for providing public houses to the needy. The Bombay High Court while allowing the writ petition had, *inter alia*, held that amended DCR 58 which concerned open lands would also apply to the land which turned into open space after the demolition of the structures that were built upon such land. It is in this backdrop that the matter reached the Supreme Court. The Supreme Court made some telling observations, which once again, in my view, only re-emphasize the principle that constitutional courts are vested with the power to carry out judicial review of not only legislation and subordinate legislation but also policy decisions, *albeit*, with usual caveats. [See paragraphs 103 to 111 and 114 to 120.]

201.1. It needs to be stated that the Court accepted the dicta enunciated in its earlier judgment rendered in ***Anil Kumar Jha v. Union of India & Ors.*** (2005) 3 SCC 150 that it could interfere even with a "political decision", although, it may amount to entering the “political thicket”. Besides this, the observations made in paragraph 120 that where issues brought before the court concerned enforcement of human rights, the Court's interpretation and application of constitutional principles is not limited to the "black letter of [the] law".

201.2. The Court also observed that expansive meaning to such rights has been given by taking recourse to "creative interpretations” which, in the past has led to the creation of new rights. The principles adverted to by the

Supreme Court in this case only strengthen the cause of the petitioners.

202. ***Shri Ram Krishna Dalmia & Ors. v. Shri Justice S.R. Tendolkar & Ors.*** AIR 1958 SC 538 case was adverted to by the Supreme Court in ***Mohd. Hanif Quareshi's*** judgment. Apart from the reiteration of the principle that the constitutionality of a statute is to be presumed and that the burden lies upon the one who assails the same because the legislature understands the need of its own people, there were several other principles which were alluded to by the Court after examining the whole host of cases. Amongst others, two important principles the Court adverted to are set forth hereafter:

> *"11. xxx xxx xxx*
> *(f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and un-known reasons for subjecting certain individuals or corporations to hostile or discriminating legislation. ...*
> *12. xxx xxx xxx*
> *(ii) A statute may direct its provisions against one individual person or thing or to several individual persons or things but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. In such a case the court will strike down the law as an instance of naked discrimination, as it did in Ameerunnissa Begum v. Mahboob Begum [(1953) SCR 404] and Ramprasad Narain Sahi v. State of Bihar [(1953) SCR 1129]."*
>
> [Emphasis is mine.]

203. The facts obtaining in ***Beeru v. State NCT of Delhi*** 2014 [1] JCC 509 were briefly the following :

203.1. The allegation against the appellant accused was that he had raped a minor girl aged 14 years. The appellant accused was the uncle of the victim.

The trial court had convicted the appellant accused and imposed life imprisonment which was reduced to 10 years by the High Court while sustaining the conviction. The observations made in paragraph 36 of the judgment wherein reference is made to the difference in punishment imposed under sub-section (1) as against sub-section (2) of Section 376, in my view, only states a fact which is discernible upon a bare reading of the said provisions.

203.2. What would have to be borne in mind is whether or not rape in a particular set of circumstances can be classified as aggravated rape. Thus, punishment as provided under sub-section (2) of Section 376, may get attracted in a given case. I have already indicated above that in any case the offending husband will not fall within the ambit of Section 376(2)(f) of IPC.

204. ***Saregama India Ltd. v. Next Radio Ltd. & Ors.*** (2022) 1 SCC 701 case concerned a challenge to an interim order issued by a Division Bench of the Madras High Court in a bunch of appeals. Before the Madras High Court, appeals had been filed under Article 226 of the Constitution to assail the validity of Rule 29(4) of the Copyright Rules, 2013 [in short '2013 Rules']. The appellants before the Court were aggrieved by the interim directions issued by the Division Bench even while the main challenge was still pending before it. It was also the contention of the appellants that the High Court *via* an interim order had re-written the provisions of Rule 29(4) of the 2013 Rules. The Supreme Court, agreed with the contentions of the appellants and in that context, *inter alia*, observed that a court could not re-write a statute and/or transgress the domain of policy making. [See paragraphs 20 and 21.]

204.1. This apart, the Supreme Court reiterated its power of judicial review and, thus, *inter alia*, observed as follows :

> "*22. The court is entrusted by the Constitution of* [sic with] *the power of judicial review. In the discharge of its mandate, the court may evaluate the validity of a legislation or rules made under it. A statute may be invalidated if it is ultra vires constitutional guarantees or transgresses the legislative domain entrusted to the enacting legislature. ...."*
>
> [Emphasis is mine.]

204.2. The instant matters do not involve rewriting of the provision as is sought to be conveyed on behalf of the intervenors.

205. In the ***Shayara Bano*** case, there were two neat questions which arose for consideration before the Court. First, whether the Shariat Act recognized and enforced triple talaq as a rule of law to be followed by the Courts in India. Second, whether personal laws are outside the ambit of Article 13(1) of the Constitution. In this context, the correctness of the judgment rendered by the Bombay High Court in the ***State of Bombay v. Narasu Appa Mali,*** 1951 SCC OnLine Bom 72 was required to be examined.

205.1. Interestingly, the petitioners before the Supreme Court who lay challenge to the triple talaq [i.e. talaq-e-bidaat], as applicable to Sunnis, were supported by the Union of India. One of the arguments that is noted by the Court which was advocated by the Muslim Personal Law Board (and, those, who supported the said argument) while resisting the petitions filed before the Court was that because personal laws were beyond the pale of fundamental rights, they could not be struck down, and therefore, the Court should "fold its hands" and "send Muslim women and other women's organizations back to the legislature, as according to them, if triple talaq is to be removed as a measure of social welfare and reform under Article 25(2), the legislature alone should do so." Both the petitioner along with the Union of India opposed this plea.

205.2. Ultimately, the Court held that triple talaq was manifestly arbitrary, in the sense, that marital ties could be broken capriciously and whimsically by

a Muslim man without any attempt at reconciliation.

205.3. The Court went on to hold that triple talaq [i.e. talaq-e-bidaat] was violative of Article 14 of the Constitution. Accordingly, the Court declared Section 2 of the Shariat Act void to the extent it recognized and enforced triple talaq.

205.4. The argument advanced by Mr Sai Deepak that the Court only declared triple talaq as unconstitutional and did not criminalise it and, therefore, principles laid down in ***Shayara Bano's*** case will not apply to the instant matters is completely untenable. The judgment etched out in great detail the contours of Article 14 and in that context the court observed that the "thread of reasonableness runs through the entire fundamental rights Chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. ….." [See paragraph 230.]

205.5. Thus, merely because the consequential steps that should be taken upon triple talaq being struck down were not up for consideration before the court, would not have me conclude that the principles enunciated by the court concerning Article 14 cannot be taken recourse to in the instant matters.

206. The judgment in ***Kartar Singh v. State of Punjab,*** (1994) 3 SCC 569**,** to my mind, has no relevance to the issue at hand. Kartar Singh dealt with challenge laid in a bunch of petitions to various TADA Acts. The majority judgment upheld the legislative competence of the Parliament to frame the impugned laws. The Court also used the reading down tool [or should I say filled the gap] and went on to hold that the word "abet" as defined in Section 2(1)(a) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 [in short "1987 Act"] being vague and imprecise would mean "actual

knowledge or reason to believe" to bring the person within the ambit of the definition. Inter alia, the Court also struck down Section 22 of the 1987 Act on the ground that it violated Article 21 of the Constitution. Although, the intervenors placed reliance on paragraph 130 of the judgment in which an observation has been made that vague laws offend several important values and that unlawful zones in law should be clearly marked out; in my opinion, none of these observations has any bearing on the issue at hand.

207. In ***Indian Express Newspapers (Bombay) Pvt. Ltd. & Ors. v. Union of India & Ors.*** (1985) 1 SCC 641**,** the Court was considering the tenability of Section 32 petitions filed before it. The petitions assailed the imposition of import duty on news print. The case set up by the petitioners was that imposition of duty on news print which enjoyed total exemption till a particular date, had a direct and crippling effect on freedom of speech and expression guaranteed by the Constitution. The Court, ultimately, directed the government to reexamine the issue and consider the extent to which exemption ought to be granted in respect of news print imported in the period subsequent to March 1, 1981; *albeit*, after taking into account relevant matters.

207.1. In this context, certain other directions were also issued. Once again, to my mind, this judgment does not advance the case of the intervenors. The observations picked up from the judgment without reference to context can lead to conclusions which are untenable in law.

208. The judgment rendered in ***State of Tamil Nadu & Ors. v. Ananthi Ammal & Ors.,*** (1995) 1 SCC 519**,** in my opinion only reiterates the well-established principles enunciated by the Courts in various judgments concerning Article 14 of the Constitution. The observations on which, intervenors seek to rely are contained in paragraph 7 of the judgment. The

court therein has merely observed that when a statute is challenged as being violative of Article 14, it should be put to test on its own strength and although aid of another statute on a similar subject could be taken, it can at best be referred to indicate what is reasonable in a given context. One can have no quarrel with the proposition that is sought to be propounded on behalf of the intervenors based on observations made in paragraph 7 of the judgment.

208.1. Both sides have referred to statutes to explain their point of view. Complementary statutes can only aid the court in forensically examining a provision and testing its tenability.

209. The issue that arose for consideration in ***Arvind Mohan Sinha v. Amulya Kumar Biswas and Ors.*** 1974 (4) SCC 222 was whether the Probation of Offenders Act, 1958 [in short "1958 Act"] would apply to the respondents who were charged and convicted for possession of gold which was liable to be confiscated under Section 111 of the Customs Act, 1962. Thus, the court was called upon to rule whether the 1958 Act could apply to the offences adverted to in the Customs Act and Part XII-A of the Defence of India Rules, 1962. The Court held that there was no impediment in the 1958 Act being applied to the respondents. It is in this context that an observation was made in paragraph 12 with regard to the different punishments being meted out for similar offences. The observations made therein also drew attention to aspects such as antecedents as also to the physical and mental condition of the offenders, which, according to the court, had to be borne in mind while applying the provisions of the 1958 Act.

209.1. The point to be noted is, in the instant matters, there is a complete prohibition on triggering the criminal law *qua* one set of offenders on

account of the presence of the MRE in the main provision. The question concerning sentencing would arise, once, that prohibition is lifted.

210. To my mind, the case of ***Vidya Viswanathan v. Kartik Balakrishnan*** 2015 (15) SCC 21 has no applicability to the issue which arises for consideration in the present case. This was a case where the Supreme Court was called upon to rule on the issue as to whether mental cruelty could form the basis for seeking a decree for divorce. The Court, sustained the High Court judgment in the given set of facts and, thus, established that mental cruelty could form the basis for seeking a decree for divorce.

210.1. In this case, divorce was sought by the husband.

210.2. Mr Kapoor sought to rely upon the observations made in paragraph 12 of the judgment. The observations made in paragraph 12 allude to the proposition that denial of sexual intercourse could amount to mental cruelty. The issue at hand is entirely different. We are dealing with a question as to whether a husband can seek sexual communion with his wife without her consent and/or her willingness. The judgment, in my opinion, has no application to the instant matters.

211. In the case of ***Sant Lal Bharti v. State of Punjab,*** (1988) 1 SCC 366, the Supreme Court was called upon to rule whether the judgment of the High Court ought to be sustained since it had dismissed in *limine* the appellant's writ petition. The Court noted that the petition lacked material particulars and, therefore, it was not inclined to interfere with the judgment of the High Court. It appears what was assailed before the High Court, *albeit*, without setting out material particulars, was the vires of Section 4 of the East Punjab Urban Rent Restriction Act, 1949.

211.1. It is in this context that the Court had made the observations that Article 14 does not authorize striking down a statute of one State by

comparing a statute of another State on the same subject and, thus, establishing that the impugned statute was discriminatory. A close look at the observations made in the judgment would show that the appellant had sought to advert to the Rent Acts of other States i.e., Assam, Tripura and Haryana. Mr Kapoor has extrapolated this observation to contend that in examining the viability of the impugned provisions, this Court cannot look at the judgments and legislations of other jurisdictions on rape laws.

211.2. It is well accepted that Courts, while examining matters, take the aid of judgments rendered by other Courts only to help them reach a correct conclusion with regard to the impugned statute and/or provision. It is important to remind ourselves that our Constitution is based on ideas and provisions found in the Constitution of other countries such as the United States, Canada and Australia, and, therefore, to even suggest that one cannot look at views prevailing in other jurisdiction would be akin to an ostrich burying its face in sand.

212. The issue which arose for consideration in ***H.P. Gupta & Anr. v. Union of India & Ors*** (2002) 10 SCC 658 concerned grant of two advance increments to Junior Telecom Officers in the Telecommunication Department who acquired a degree in engineering while in service. Since the appellants before the Court already possessed a degree in engineering, they assailed the action of the respondents as being discriminatory. The Court, did not entertain the challenge and while dismissing the appeal observed that there cannot be "perfect equality" in any matter on an "absolute scientific basis". It went on to hold that there could be certain inequities. In my view, the observations made in the context of incentives granted to one set of employees for attaining a higher qualification while in service cannot be compared with the impairment of rights of married women who are exposed

to a criminal offence. This submission, in my opinion, has resulted from a complete misreading of the ratio of the judgment.

213. In ***Sushil Kumar Sharma v. Union of India & Ors.,*** (2005) 6 SCC 281, the Supreme Court was dealing with an Article 32 petition which sought a declaration to the effect that Section 498A of the IPC ought to be declared unconstitutional. The Court repelled the challenge. The Court observed that, if a provision of law is misused, it is for the legislature to amend, modify or repeal the same. This observation and the ratio of the judgment sustains the view that if MRE is struck down, its consequent misuse, if any, as is apprehended by the intervenors can, first of all, as indicated above, be dealt with by the Courts and, if deemed necessary, the legislature could step in to carry out corrective measures.

214. Mr Kapoor has cited ***Vishaka*** to establish that legal vacuum, if any, can only be filled by the Supreme Court by exercising powers under Article 142 of the Constitution. Once again, this is a proposition which one cannot but agree with. The point which arises in the instant matters is not about filling the legal vacuum but about doing away with the impugned provisions which violate the fundamental rights of married women.

215. ***Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan & Ors.*** (2009) 16 SCC 517 was cited by Mr Kapoor to support his submission that this Court could make recommendations to the executive and/or the legislature. In this context, observations made in paragraph 34 of the judgment are relied upon. This aspect, in my view, is matter specific.

215.1. Interestingly, on the one hand, it is contended on behalf of the intervenors that this Court should keep its hands off in respect of matters concerning MRE, and, on the other hand, it calls upon the Court to make recommendations. There is, if I may say so, some amount of incongruity in

the submission.

216. The observations made by the Supreme Court in ***Sivasankaran v. Santhimeenal*** 2021 SCC OnLine SC 702 concerning what constitutes a marriage, once again, are facets with which one cannot quarrel. That said, Mr Kapoor loses sight of the fact that the issue before us is whether the edifice of marriage would survive once a woman is subjected to marital rape.

217. The judgment in ***Amit Kumar v. Suman Beniwal*** 2021 SCC OnLine SC 1270 is cited by Mr Kapoor to take forth his argument that there are provisions available in other statutes such as HMA which can come to the aid of the wife. There is no gainsaying, as noted above, that there are statutes which provide for civil remedies for a married woman. However, as adverted to above, there is no remedy in law available to a married woman when she is subjected to rape by her husband.

XIII Summing up

218. Thus, if I were to capture how women view the subsisting inequity which gets displayed daily in their relationship with men generally, I could do no better than quote a short extract from an article contributed by Ms Marya Manes titled "The Power Men Have over Women"[63]:

> *"The power men have over women is that they wear neckties, use shaving cream and are usually bigger than we are. They are not necessarily brighter, but they usually have us where they want us.*
> *....*
> *....But here we come, I think, to the old and lingering inequity between the sexes. Everything in the long history of the male has conspired toward his self-assurance as a superior being. Everything in the long history of the female has conspired toward her adaptability to him, whether as [a] wife, lover or mother. We are bred to care for what he thinks, feels and needs more than he*

[63] [which forms part of a publication taken out by Reader's Digest Asia Ltd., HOW TO LIVE WITH LIFE, First Edition, at page 96 and 98]

is for what we think, feel and need. There is no valid comparison between a man's economic support of a woman and her hourly involvement in caring for him. We worry more when he looks seedy than he does when we do because we notice him more. We worry more when he looks bored at a party than he does when we do. (He doesn't see it, anyway.) We concern ourselves daily with what he would like to eat, whom he would like to see, where he would like to go..."

219. To sum up, the message that married women wish to convey to their husbands, (and in this regard I can, once again, do no better than quote the words used by late Ms Ruth Bader Ginsburg, former US Supreme Court Judge, when appearing as an amicus in ***Sharron A. Frontiero and Joseph Frontiero v. Elliot L. Richardson, Secretary of Defense, et al.***, 1973 SCC OnLine US SC 101[64], which, in turn, is attributed to Ms Sarah Moore Grimke, an abolitionist and rights activist): "*I ask no favour for my sex. All I ask of our brethren is that they take their feet off our necks.*"

219.1. This in a sense typifies the agony of women living in the 21st century. A journey of 300 years and more (since the time the Hale Doctrine was first enunciated) has been excruciating in terms of individual freedom. From the time when married women were considered as the property of the husband, to the time when they shed that shackle but were still not considered as individuals having a personality separate from their husbands, to the present times when they appear to be emasculated of their right to say "yes" or "no" to sexual communion with their husbands has been a journey marked by intellectual battles fought by valiant women before various forums. The sheer expanse of time should impel us to unshackle them and give them agency over their bodies.

220. Before I conclude, I must state that I agree with the submissions made

[64] Cited with approval in ***Anuj Garg***

by Ms John and Ms Nundy that the legislature needs to address matters concerning sentencing for the offence of rape. Their view, that a high minimum mandatory sentence does not necessarily result in greater conviction rates, needs to be examined by the concerned authorities, bearing in mind the relevant data on the subject.

220.1. That said, on sentencing, the following view of the Court of Appeal of New Zealand, needs to be captured.

> *"4.45 An example of a consistent approach to sentencing in a jurisdiction where marital rape has become a crime is to be found in the observations of the Court of Appeal of New Zealand in relation to sentencing under section 2 of the Crimes Amendment Act (No. 3) 1985, which abolished the marital immunity. The court rejected the suggestion that there should be a "separate regime of sentencing" for rape in cases where the parties were married, and said -*
>
> > *"Parliament has made no distinction in the penalties between spousal and other kinds of rape, and the sense of outrage and violation experienced by a woman in that position can be equally as severe...."*[65]
>
> [Emphasis is mine.]

221. It is evident, like in other foreign jurisdictions, the Executive may have to provide sentencing guidelines for trial court judges to ensure greater consistency. Likewise, I also tend to agree with the counsel for the intervenors i.e., Messrs Sai Deepak and Kapoor that the law should be gender-neutral. These are steps that are required to be taken by the Legislature/the Executive.

222. Having noticed this, I agree with the submission of Mr Gonsalves and Ms Nundy that reforms in this regard cannot be cited as an impediment in the court striking down the MRE which otherwise does not pass muster, as discussed above, of our constitutional provisions i.e., Articles 14, 15,

19(1)(a) and 21. These are the next steps in the matter which the legislature has to take up. The court's jurisdiction to examine the matter is not tied-in with these steps that the legislature may embark upon concerning sentencing and how investigation is to progress in matters involving marital rape. As and when such steps are taken, I am sure they will attract the public gaze and attention of all stakeholders and if escalated to the court, may also require judicial examination. However, these are not matters presently within the ken of the court.

222.1. But before all this is done, a married woman's right to bring the offending husband to justice needs to be recognized. This door needs to be unlocked; the rest can follow. As a society, we have remained somnolent for far too long. Deifying women has no meaning if they are not empowered. They are our equal half; some would delightfully say our better half. It is time that all stakeholders bite the bullet. It would be tragic if a married woman's call for justice is not heard even after 162 years, since the enactment of IPC. To my mind, self-assured and good men have nothing to fear if this change is sustained. If I were to hazard a guess, those amongst us who want *status quo* to continue would perhaps want to have the MRE struck down if the victim involved was his/her mother, sister or daughter.

223. As noticed right at the outset, the issue at hand raises concerns of enormous public importance, which has, both, legal and social connotations. This is demonstrable from the fact that it has already received the attention of different High Courts. [See the decision of the learned Single Judge of the Gujarat High Court in ***Nimeshbhai Bharatbhai*** and the Karnataka High Court in ***Hrishikesh Sahoo v. State of Karnataka***, 2022 SCC OnLine Kar 371.] Therefore, in my view, since the issue involves is a substantial

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[65] ***R v N*** [1987] 2 NZLR 268, 270, line 50.

question of general importance concerning fundamental rights of a large number of married women, it necessitates a decision by the Supreme Court. [See ***Chunilal V. Mehta and Sons Ltd. v. Century Spg. and Mfg. Co. Ltd.***, 1962 Supp (3) SCR 549 and ***State Bank of India v. S.B.I. Employees' Union***, (1987) 4 SCC 370.]

224. As would be evident from above, I have not adverted to the submissions of the respondents i.e., UOI and GNCTD. Insofar as UOI is concerned, Mr Tushar Mehta, learned Solicitor General stated before us in no uncertain terms that UOI does not wish to take a stand in the matter. In fact, affidavit(s) were filed to the effect that UOI would like to engage in consultation before moving further in the matter. On the other hand, while submissions were made at length by Ms Nandita Rao, who represented the GNCTD; on the last day, on instructions, she stated that she wished to withdraw the submissions which were made by her, in the course of the hearing, on behalf of GNCTD. Therefore, practically, the state made no case for or against the continuance of the impugned provisions on the statute.

225. That being said, the debate that ensued among the remaining counsel was rich, passionate and engaging; it would have been richer had Mr Mehta i.e., learned Solicitor General assisted the court in the matter.

225.1. I must place on record my deep appreciation for Mr Gonsalves, Mr Sai Deepak, Mr Kapoor, Ms Nundy and the two amicus curiae who appeared in the matter i.e., Ms John and Mr Rao. The wealth of material that they placed before us in the form of reports and judgments helped me in finding what I believe is the right conclusion in the matter. Regrettably, I was not able to persuade Hon'ble Mr Justice C. Hari Shankar to my point of view. He, perhaps, hears a beat of a different drummer. I respect that.

225.2. To the petitioners' and their ilk I would say it may seem that you

plough a lonely furrow today but it will change, if not now, some day. To the naysayers I would say that every dissent adds flavour and acuteness to the debate at hand, which assists the next court, if nothing else, in arriving at a conclusion which is closer to justice and truth.

Conclusion

226. For the foregoing reasons, I declare and hold :

(i) That the impugned provisions [i.e. Exception 2 to Section 375 (MRE) and Section 376B of the IPC as also Section 198B of the Code], insofar as they concern a husband/separated husband having sexual communion/intercourse with his wife (who is not under 18 years of age), *albeit*, without her consent, are violative of Articles 14, 15, 19(1)(a) and 21 of the Constitution and, hence, are struck down.

(ii) The aforesaid declaration would, however, operate from the date of the decision.

(iii) The offending husbands do not fall within the ambit of the expression "relative" contained in Section 376 (2)(f) of the IPC and, consequently, the presumption created under Section 114A of the Evidence Act will not apply to them.

(iv) Certificate of leave to appeal to the Supreme Court is granted under Article 134A(a) read with Article 133(1)(a)&(b) of the Constitution as the issue involved in this case raises a substantial question of law which, in my opinion, requires a decision by the Supreme Court.

(v) The writ petitions i.e., W.P.(C) Nos.284/2015; 5858/2017 and 6024/2017 are disposed of in the aforesaid terms. W.P.(Crl.)No.964/2017 is kept apart and will be listed by the Registry for appropriate orders on 26.08.2022.

(vi) Parties will bear their respective costs.

(RAJIV SHAKDHER)
JUDGE

MAY 11, 2022/aj

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* **IN THE HIGH COURT OF DELHI AT NEW ELHI**

Reserved on: 21st February, 2022

Decided on: 11th May, 2022

\+ **W.P.(C) 284/2015 & CM Nos.54525-26/2018**

RIT FOUNDATION **..... Petitioner**

Through: Ms Karuna Nundy with Mr Mukesh Sharma and Mr Raghav Awasthy, Advs

versus

THE UNION OF INDIA **..... Respondent**

Through: Mr Tushar Mehta, SG and Mr Chetan Sharma, ASG with Ms Monika Arora, CGSC along with Mr Vinay Yadav, Mr Amit Gupta, Mr Akshya Gadeock, Mr Rishav Dubey, Mr Rajat Nair, Mr Sahaj Garg and Mr R.V. Prabhat, Advs. for UOI.

Mr Rajshekhar Rao, Sr. Advocate/Amicus Curiae with Mr Karthik Sundar, Ms Mansi Sood and Ms Sonal Sarda, Advs. Ms Rebecca M. John, Sr. Adv. As Amicus Curiae with Mr Harsh Bora, Ms Praavita Kashyap, Mr Chinmay Kanojia, Mr Pravir Singh and Ms Adya R. Luthra, Advs. Mr Amit Lakhani and Mr Ritwik Bisaria as Intervenors for Men's Welfare Trust

+ **W.P.(C) 5858/2017 & CM No.45279/2021**

KHUSBOO SAIFI .... Petitioner

Through: Ms. Sneha Mukherjee and Ms Mugdha, Advs.

versus

THE UNION OF INDIA & ANR .... Respondent

Through Mr Ruchir Mishra, Mr Sanjiv Kumar Saxena, Mr Mukesh Kumar Tiwari and Mr Ramneek Mishra, Advs. for UOI. Mr Gautam Narayan, ASC, GNCTD with Ms Nikita Pancholi, Adv. Mr Rajshekhar Rao, Sr. Advocate/Amicus Curiae with Mr Karthik Sundar, Ms Mansi Sood and Ms Sonal Sarda, Advocates. Ms Rebecca M. John, Sr. Adv. As Amicus Curiae with Mr Harsh Bora, Ms Praavita Kashyap, Mr Chinmay Kanojia, Mr Pravir Singh and Ms Adya R. Luthra, Advs.
Mr R.K. Kapoor, Advocate for applicant in CM 19948/2016.

+ **W.P.(C) 6024/2017**

ALL INDIA DEMOCRATIC WOMEN'S ASSOCIATION ….Petitioner

Through : Ms. Karuna Nundy, Ms Ruchira Goel, Mr. Rahul Narayan, Mr Nitish Chaudhary, Ms Ragini Nagpal, Ms Muskan Tibrewala, Mr Utsav Mukherjee and Mr Shashwat Goel, Advs.

versus

THE UNION OF INDIA ..... Respondent

Through: Mr Chetan Sharma, ASG with Mr Anil Soni, CGSC along with Mr Devesh Dubey, Mr Vinay Yadav,

Mr Amit Gupta, Mr Akshya Gadeock, Mr Rishav Dubey, Mr Sahaj Garg and Mr R.V. Prabhat, Advs. for UOI. Mr. Rajshekhar Rao, Sr. Advocate/Amicus Curiae with Mr Karthik Sundar, Ms Mansi Sood and Ms Sonal Sarda, Advocates.

\+ **W.P.(CRL) 964/2017**

FARHAN **.... Petitioner**

Through Sahil Malik, Adv.

versus

STATE & ANR **….. Respondent**

Through: Ms Nandita Rao, ASC for State. Mr Rajshekhar Rao, Sr.Advocate/Amicus Curiae with Mr Karthik Sundar, Ms Mansi Sood and Ms Sonal Sarda, Advocates. Ms Rebecca M. John, Sr. Adv. As Amicus Curiae with Mr Harsh Bora, Ms Praavita Kashyap, Mr Chinmay Kanojia, Mr Pravir Singh and Ms Adya R. Luthra, Advs.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE C. HARI SHANKAR

% J U D G M E N T
11.05.2022

(per C. HARI SHANKAR, J.)

AN INDEXED VIEW OF THE JUDGEMENT

1. Having had the opportunity of poring through the illuminating opinion of my noble and learned brother Rajiv Shakdher, J., I must state, at the outset, that I cede place to none in my estimation of the intellectual integrity of my brother; it remains a matter of lasting regret, therefore, that our differences, regarding the outcome of these proceedings, appear irreconcilable. That, however, remains one of the travails of being a judge. One cannot compromise on one's convictions even if it is to sail with the tide, howsoever compelling the tide may be.

2. I am constrained, therefore, to place my dissenting views on record. In my considered opinion, the challenge to the *vires* of the second Exception to Section 375 and Section 376B of the Indian Penal Code, 1860 ("the IPC"), and Section 198B of the Code of Criminal Procedure, 1973 ("the Cr PC"), as raised in these petitions, must fail.

3. Arguments were principally advanced on the challenge to Exception 2 to Section 375, and incidentally on the other provisions under attack. I would, therefore, concentrate, mainly, on the former challenge, and would address the latter towards the later part of this

judgement.

The challenge

4. Section 375 of the IPC, the second Exception to which is the subject matter of challenge, reads thus:

> "**375. Rape**. – A man is said to commit "rape" if he –
>
> (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
>
> (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
>
> (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
>
> (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,
>
> under the circumstances falling under any of the following seven descriptions –
>
> First. – Against her will.
>
> Secondly. – Without her consent.
>
> Thirdly. – With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.
>
> Fourthly. – With her consent, when the man knows that he is not her husband and that her consent is given

because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. – With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. – With or without her consent, when she is under eighteen years of age.

Seventhly. – When she is unable to communicate consent.

Explanation 1. – For the purposes of this section, "vagina" shall also include *labia majora*.

Explanation 2. – Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1. – A medical procedure or intervention shall not constitute rape.

Exception 2. – Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

The words "not being under fifteen years of age" stand replaced, by the judgement of the Supreme Court in ***Independent Thought v U.O.I.***[1], with the words "not being under eighteen years of age". The impugned Exception 2, therefore, effectively reads thus:

[1] **(2017) 10 SCC 800**

> "*Exception 2.* – Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape."

5. The issue at hand is fundamentally simple, as the principles for invalidating a statutory provision as unconstitutional are trite and well-recognized. They are, quite clearly, not *res integra*. All that the Court has to do is to apply these principles to the impugned Exception. A simple issue has, however, been made unreasonably complex, and has occupied weeks of precious Court time, merely because the issue was debated on the fundamentally erroneous premise that the husband, in having sex with his wife without her consent, *commits rape*, and the impugned Exception unconstitutionally precludes his wife from prosecuting him therefor. This presumption, as the discussion hereinafter would reveal, completely obfuscates the actual issue in controversy.

In precis

6. I deem it appropriate at the outset, that I am one with the learned Counsel for the petitioners that there can be no compromise on sexual autonomy of women, or the right of a woman to sexual and reproductive choice. Nor is a husband entitled, as of right, to have sex with his wife, against her will or consent. Conjugal rights, as learned Counsel for the petitioners correctly assert, end where bodily autonomy begins. No Court can, in this day and age, lend its imprimatur to any theory of a husband, by reason of marriage, being

entitled, as a matter of right, to engage in sexual relations with his wife, at his will and pleasure. Sexual activities between man and woman, within or outside marriage, require, in legalspeak, consensus *ad idem*.

7. Where I differ with learned Counsel for the petitioners and learned *amici curiae*, is in the sequitur that they perceive as naturally flowing from the wife's right to sexual and bodily autonomy. They would submit that the only logical consequence of grant of complete sexual autonomy to a woman, whether she be a wife or not, is outlawing of the impugned Exception. On that, I am unable to agree. The impugned Exception chooses to treat sex, and sexual acts, within a surviving and subsisting marriage differently from sex and sexual acts between a man and woman who are unmarried. It extends this distinction to holding that, within marital sexual relations, no "rape", as statutorily envisioned by Section 375, can be said to occur. I am firmly of the view that, in thus treating sexual acts between a husband and wife, whether consensual or non-consensual, differently from non-consensual sexual acts between a man and woman not bound to each other by marriage, the legislature cannot be said to have acted unconstitutionally. The distinction in my view, is founded on an intelligible differentia having a rational nexus to the object sought to be achieved by the impugned Exception, which fulfils not only a legal but also a laudatory object, and does not compromise any fundamental rights guaranteed by Part III of the Constitution.

8. Viewed more empirically, it becomes clear that the petitioners

seek merely to propound what, in their view, *should be* the law. The written submissions filed by Ms Karuna Nundy, in fact, acknowledge as much, by submitting that "an offence that *should* be rape, is undermined by being treated it as cruelty, grievous hurt or any other lesser offence …" This single submission, in itself, indicates that the petitioners are, proverbially, barking up the wrong legal tree. Other learned Counsel, too, including Ms Rebecca John, with her enviable knowledge of criminal law, have submitted that, while spousal sexual violence is punishable under various other statutory provisions, they are *insufficient* to punish *what the petitioners feel* is rape by the husband of his wife. There is, however, *not one iota of material* to which learned Counsel for the petitioners allude, to the effect that an act of sex by a husband with his wife, against her consent *is, legally,* rape. Nor is there any judicial pronouncement to the effect that every act of non-consensual sex by man with woman is rape. Given this position, I find it, frankly, astonishing that learned Counsel for the petitioners, almost in one voice, castigated the impugned Exception as unconstitutional because it "prevents a wife from prosecuting her husband for *committing rape*". The closest learned Counsel for the petitioners reach, in so seeking to contend, is in Ms Nundy's submission that, post-Constitution, "the object of rape law (is that) *no man* should be able to force a woman to have sex with him without her consent". The submissions of Ms Nundy do not, however, enlighten on the source of this "object of rape law", as she would seek to submit. Equally may the object of rape law be stated as "non-consensual sex by a woman, at the instance of a man who is not her husband, should be punishable as rape". These are all, however,

merely shots in the dark, which do not really aid at arriving at a finding regarding the constitutionality of the impugned Exception. Simply said, it is not open to anyone to contend that a statutory provision is unconstitutional merely because it is not what he feels it should be. *De lege lata*[2] connotes the law that binds, not *de lege feranda*[3]. Any legitimacy in the petitioners' claim, therefore, would have to be urged before another forum, not before a writ Court exercising jurisdiction under Article 226 of the Constitution of India.

Legislative history of the impugned Exception in Section 375

9. The IPC was enacted in 1860 by the Legislative Council of India and was based on a draft Penal Code prepared in 1837 by Lord Thomas B. Macaulay. Section 359 of the draft Penal Code which, later, was transmogrified into Section 375 of the IPC, read as under:

"OF RAPE

> **359. Rape. –** A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the 5 following descriptions:
>
> *First.* – Against her will.
>
> *Secondly.* – Without her consent, while she is insensible.
>
> *Thirdly.* – With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.
>
> *Fourthly* – With her consent, when the man knows that

[2] "The law as it is".
[3] "The law as it should be"

her consent is given because she believes that he is a different man to whom she is or believes herself to be married.

Fifthly. – With or without her consent, when she is under 9 years of age.

Explanation. – Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception. – Sexual intercourse by a man with his own wife is in no case rape."

10. Note B in the Notes on Clauses to the draft Penal Code dealt with the General Exceptions provided thereunder, and read thus:

"**NOTE B.**

ON THE CHAPTER OF GENERAL EXCEPTIONS.

This chapter has been framed in order to obviate the necessity of repeating in a very penal clause a considerable number of limitations.

Some limitations relate only to a single provision, or to a very small class of provisions. Thus the exception in favour of true imputations on character (clause 470) is an exception which belongs wholly to the law of defamation, and does not affect any other part of the Code. The exception in favour of the conjugal rights of the husband (clause 359) is an exception which belongs wholly to the law of rape, and does not affect any other part of the Code. Every such exception evidently ought to be appended to the rule which it is intended to modify."

11. The Indian Law Commissioners thereafter deliberated on the draft Penal Code and presented the "First Report on Penal Laws, 1844". Ms Rebecca John, learned *amicus curiae*, has provided extracts from the said Report which, however, essentially debate the

advisability of the age of 9 years envisaged in the draft Code. They do not reflect any deliberation on the Exception to Clause 359 which, later, metamorphosed into the impugned Exception in Section 375.

12. Consequent to these deliberations, the IPC was enacted in 1860. Section 375, as originally enacted, read thus:

> "**375. Rape. –** A man is said to commit "rape", who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the 5 following descriptions:
>
> *First.* – Against her will.
>
> *Secondly.* – Without her consent, while she is insensible.
>
> *Thirdly.* – With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.
>
> *Fourthly* – With her consent, when the man knows that her consent is given because she believes that he is a different man to whom she is or believes herself to be married.
>
> *Fifthly.* – With or without her consent, when she is under ten years of age.
>
> *Explanation.* – Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
>
> *Exception.* – Sexual intercourse by a man with his own wife, the wife not being under 10 years of age, is in no case rape."

Clause 359 of the draft Penal Code was, therefore, adopted, as it was proposed, as Section 375 of the IPC, the sole modification being that the age of 9 years, envisaged in clause "Fifthly" in Clause 359 was enhanced to 10 years in Clause "Fifthly" in Section 375, and a similar

stipulation, to the effect that the wife should not be under 10 years of age, was inserted in the Exception.

13. It is important to note, at this juncture, that there is nothing to indicate that the "marital exception to rape", contained in the Exception to Section 375 of the IPC, or even in the proposed Exception in Clause 359 of the draft Penal Code, was predicated on the "Hale dictum", which refers to the following 1736 articulation, by Sir Matthew Hale:

> "The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband, which she cannot retract."

Repeated allusion was made, by learned Counsel for the petitioners, to the Hale dictum. There can be no manner of doubt that this dictum is anachronistic in the extreme, and cannot sustain constitutional, or even legal, scrutiny, given the evolution of thought with the passage of time since the day it was rendered. To my mind, however, this aspect is completely irrelevant, as the Hale dictum does not appear to have been the *raison d'etre* either of Section 359 of the draft Penal Code or Section 375 of the IPC.

Post-Constitutional deliberations

14. The 42nd Report of the Law Commission of India ("the Law Commission"), dealing with the IPC and submitted in June, 1971, opined thus, with respect to the "marital exception to rape":

"**16.115 Exception- "rape" by husband**

The exception in section 375 provides that sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape. The punishment for statutory rape by the husband is the same when the wife is under 12 years of age, but when she is between 12 and 15 years of age, the punishment is mind, being imprisonment up to 2 years, or fine, or both. Naturally, the prosecution is for this offence are very rare. We think it would be desirable to take this offence altogether out of the ambit of section 375 and not to call it rape even in the technical sense. The punishment for the offence also may be provided in a separate section.

Under the exception, husband cannot be guilty of raping his wife, if she is above 15 years of age. This exception fails to take note 1 special situation, namely, when the husband and wife are living apart under a decree of judicial separation or by mutual agreement. In such a case, the marriage technically subsists, and if the husband has sexual intercourse with her against her will or without her consent, he cannot be charged with the offence of rape. This does not appear to be right. We consider that, in such circumstances, sexual intercourse by a man with his wife without her consent should be punishable as rape.

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16.117 Section 375 – revision recommended

In the light of the above discussion, section 375 may be revised as follows: –

"**375. Rape.** – A man is said to commit rape of a sexual intercourse with a woman, *other than his wife*, –

(a) against her will; or

(b) without her consent; or

(c) with her consent when it has been obtained by putting her in fear of death or of hurt, either to herself or to anyone presenting the place; or

(d) With her consent, knowing that it is given in the belief that he is her husband.

Explanation I. – Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Explanation II. – A woman living separately from her husband under a decree of judicial separation or by mutual agreement shall be deemed not to be his wife for the purpose of this section.

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16.119 Prohibition of intercourse by husband with child wife – The separate section penalising sexual intercourse by a man with his child wife may run as follows: –

"**376A. Sexual intercourse with child wife. –** Whoever has sexual intercourse with his wife, the wife being under 15 years of age, shall be punished –

(a) if she is under 12 years of age with rigorous imprisonment for a term which may extend to 7 years, and shall also be liable to fine; and

(b) in any other case, with imprisonment of either description for a term which may extend to 2 years or with fine, or with both."

15. The issue of the impugned Exception was again debated in the 172nd Law Commission Report on "Review of Rape Laws", released

in March 2000. Para 3.1.2.1 of the report, which addresses the issue, read thus:

> "3.1.2.1 Representatives of Sakshi wanted us to recommend the deletion of the Exception, with which we are unable to agree. Their reasoning runs thus: where a husband because of some physical injury to his wife, he is punishable under the appropriate offence and the fact that he is the husband of the victim is not an extenuating circumstance recognised by law; if so, there is no reason why concession should be made in the matter of the offence of rape/sexual assault whether wife happens to be above 15/16 years. *We are not satisfied that this Exception should be recommended to be deleted since that may amount to excessive interference with marital relationship*."
>
> (Emphasis supplied)

16. A Committee for proposing amendments to the criminal law was constituted under the chairmanship of Hon'ble Mr. Justice J.S. Verma, former Chief Justice of India, which has come to be known, popularly, as the "Verma Committee". The Verma Committee, in its recommendation dated 23rd January, 2013, recommended, in para 79 of its Report, thus:

> "79. We, therefore, recommended that:
>
> i. The exception for marital rape be removed.
>
> ii. The law ought to specify that:
>
> a. The marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation;
>
> b. The relationship between the accused and the complainant is not relevant to the enquiry into whether the complainant consented to the sexual activity;

> c. The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences or rape."

In arriving at these recommendations, the Verma Committee also comments, at the outset of its Report on "Marital Rape", on the "Hale doctrine". Thereafter, paras 73 to 78 of the Report deal with the manner in which the marital exception to rape has been outlawed in other jurisdictions.

17. The issue was thereafter deliberated on the floor of the House, resulting in the 167th Report of the Department-Related Parliamentary Standing Committee on Home Affairs" relating to the Criminal Law (Amendment) Bill, 2012. Para 5.9.1 of the Report read as under:

> "While discussing about Section 375, some Members felt that the word 'rape' should be kept within the scope of sexual assault. The Home Secretary clarified that there is a change of terminology and the offence of 'rape' has been made wider. Some Members also suggested that somewhere there should be some room for wife to take up the issue of marital rape. It was also felt that no one takes marriage so simple that she will just go and complain blindly. Consent in marriage cannot be consent for ever. *However, several Members felt that the marital rape has the potential of destroying the institution of marriage. The Committee felt that if a woman is aggrieved by the acts of a husband, there are other means of approaching the court. In India, for ages, the family system has evolved and it is moving forward. Family is able to resolve the problems and there is also a provision under the law for cruelty against women. It was, therefore, felt that if the marital rape is brought under the law, the entire family system will be under great stress and the Committee may perhaps be doing more injustice*."
>
> (Emphasis supplied)

18. The result was that, even while expanding the scope of "sexual acts" which, if non-consensual, would amount to rape, the Criminal Law (Amendment) Act, 2012, which came into effect from 3rd February, 2013, allowed the impugned Exception to remain unscathed.

19. With that prefatory discussion, I proceed to the submissions advanced at the Bar.

Rival Submissions

Submissions of learned Counsel who opposed the impugned Exception

Submissions of Ms Karuna Nundy, learned Counsel for RIT Foundation

20. Arguing for RIT Foundation, Ms. Nundy termed the challenge, to the impugned Exception, to be "about respecting the right of a wife to say no (or yes) to the husband's demand for sex and recognizing that marriage is no longer a universal licence to ignore consent".

21. Extensive reliance was placed, by Ms. Nundy, on the judgement of the Supreme Court in ***Independent Thought***[1] which, according to her, was binding for a number of propositions relevant to the present dispute and, in fact, was by itself sufficient to sustain the challenge. Though, for want of a challenge to the impugned Exception before it *per se*, the Supreme Court was constrained to restrict its

pronouncement to the validity of the "below 15 years of age" *caveat* in the Exception, she submits that "part of the *ratio decidendi* of ***Independent Thought***[1] is squarely applicable to the constitutionality of the whole of Exception 2 to Section 375". In order to demonstrate the applicability of the judgement in ***Independent Thought***[1] to the present controversy, Ms. Nundy has commended the "inversion test" for interpretation of precedents for the consideration of the Court. To explain this test, she cites ***State of Gujarat v. Utility Users Welfare***[4] and ***Nevada Properties Pvt Ltd v. State of Maharashtra***[5]. Applying the said test, Ms. Nundy, referring to specific paragraphs of ***Independent Thought***[1] for each, submits that the decision is an authority for the following propositions:

(a) A woman cannot be treated as a commodity having no right to say no to sexual intercourse with her husband. (Para 64)

(b) Marriage to the victim does not make a rapist and non-rapist. (Para 73)

(c) The impugned Exception creates an artificial distinction between married and unmarried women. (Para 77)

(d) The woman is not subordinate to and/or property of her husband. (Para 82)

(e) The impugned Exception is discriminatory as it creates

[4](2018) 6 SCC 21
[5](2019) 20 SCC 119

anomalous situations where the husband can be prosecuted for lesser offences, but not rape. (Paras 77)

(f) Removing the marital rape exception will not create a new offence since it already exists in the main part of the IPC. (Paras 81 to 85)

(g) The view that criminalising marital rape would destroy the institution of marriage is unacceptable, since marriage is not institutional but personal. Nothing can destroy the 'institution' of marriage except a statute that makes marriage illegal and punishable. (Para 90)

Reversing of each of these propositions would have resulted in ***Independent Thought***[1] not arriving at the conclusions at which it arrived; *ergo*, submits Ms. Nundy, the judgement is an authority for each of the said propositions.

22. Pre-constitutional legislations, submits Ms. Nundy, are not entitled to any presumption of constitutionality, even if they have been continued by Parliament post-independence, for which purpose she relies on ***Joseph Shine v. U.O.I.***[6] and ***Navtej Johar v. U.O.I.***[7]**.** Viewed in the light of the law expounded in these decisions, Ms Nundy submits that the inaction of Parliament in removing the impugned Exception from Section 375, despite the Verma

[6](2019) 3 SCC 39
[7](2018) 10 SCC 1

Commission report is merely a "neutral fact".

23. Ms Nundy emphatically contends that Article 13 of the Constitution obligates every Court to strike down a provision which is found to be unconstitutional, for which purpose she relies on ***Independent Thought***[1] and ***Peerless General Finance v. R.B.I.***[8]**.** The petitioners, she submits, seek extension, to the fundamental right of wife against forced sexual intercourse by their husbands, the full protection of the law, by labelling the offence as one of rape.

24. Ms Nundy contends, further, that the impugned Exception to Section 375 and Section 376B of the IPC and Section 198B of the Criminal Procedure Code, 1973 (the "Cr PC") violate Article 14 of the Constitution. Article 14, she submits, is infracted by a statute not only if it is discriminatory, but also if it is manifestly arbitrary. Arguments in support of retention of the impugned Exception, according to her, "crib, cabin and confine" the true meaning and scope of Article 14. The mere existence of an intelligible differentia is not sufficient to sustain the scrutiny of Article 14, she submits; the intelligible differentia is also required to have a rational nexus to the object of the statute, which itself must be legitimate. Furthering the argument of arbitrariness, Ms Nundy submits that, as the impugned Exception "provides immunity from prosecution for rape to a man for forcibly having sex with his wife, but not to a man forcibly having sex with a woman who is not his wife (but may, for instance be his live-in partner)", it is irrational and manifestly arbitrary. Equally arbitrary,

[8](2020) 18 SCC 625

she submits, would be any decision not to efface the impugned Exception in order to protect the "institution" of marriage, as the sanctity of an "institution" can never be accorded prominence over the rights of the individuals involved. Any such prominence, if accorded, would also reflect arbitrariness. She submits that, as the purported rationale of the impugned Exception has outlived its purpose, and does not square with constitutional morality as it exists, it is manifestly arbitrary. She relies, in this context, on para 102 of the report in ***Joseph Shine***[6]. Referring to paras 168, 169 and 181 of the said decision, Ms. Nundy submits that any provision of law that postulates a notion of marriage that subverts equality is manifestly arbitrary and bad in law. She points out that, in para 181 of the said decision, the Supreme Court had rejected the notion that, by marriage, a woman consents in advance to sexual relations with her husband, terming such a notion to be offensive to liberty and dignity, and having no place in the constitutional order. She submits that the impugned Exception traces its origin to Lord Hale's anachronistic notion that, by marriage, a woman surrenders her sexual autonomy. She submits that "it is difficult to discern any argument in relation to marriage that does not have its basis in the said dictum". "Protecting the institution of marriage", she submits, is not an adequate determining principle and had, in fact, been specifically rejected by the Supreme Court in para 74 of ***Independent Thought***[1] and para 212 of ***Joseph Shine***[6].

25. Ms. Nundy concedes that "there can be no doubt that there is an intelligible differentia between married, separated and unmarried

persons in all manner of laws that meets Article 14". She cites, for example, spousal privilege, conferred by Section 122[9] of the Indian Evidence Act, 1872 (the "Evidence Act"). Proceeding, however, to the issue of whether the said intelligible differentia has a rational nexus with the object sought to be achieved by the impugned Exception, Ms. Nundy submits that, before reflecting on the existence, or otherwise, of a rational nexus, the constitutionality of the object of the impugned Exception has to be examined. Relying on para 26 of the report in ***Nagpur Improvement Trust v. Vithal Rao***[10] and para 58 of the report in ***Subramaniam Swamy v. C.B.I.***[11], Ms. Nundy submits that an unconstitutional object invalidates the statute enacted on its basis as well.

26. Ms. Nundy then proceeds to advance submissions regarding the "pre-constitutional object" and the "post constitutional object" of the impugned Exception. The pre-Constitutional object, she submits, as per the notes of Lord Macaulay in the 1838, was the creation of an exception in favour of the conjugal rights of the husband. In this context, she draws attention to para 36 of the report in ***John Vallamattom v. U.O.I.***[12], which recognised the possibility of a provision which, though not unconstitutional on the day of its enactment or on the date when the Constitution came into force, becoming unconstitutional with the passage of time. In this context,

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[9]**122. Communications during marriage.** – No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

[10]**(1973) 1 SCC 500**

[11]**(2014) 8 SCC 682**

[12] **(2003) 6 SCC 611**

the Supreme Court has held that it would "be immoral to discriminate a woman on the ground of sex". The post-Constitutional amendments to Section 375 of the IPC, points out Ms. Nundy, indicate the object of rape laws to be protection of women from violence and preservation of their bodily integrity and sexual autonomy. "Inherent in this object", she submits, "is the foregrounding of the entire law on consent". Based on this premise, Ms. Nundy contends that the object of rape laws, post-Constitution, is that "no man should be able to force a woman to have sex with him without her consent". Proceeding from this submission, Ms. Nundy contends that the impugned Exception is unconstitutional as (i) it nullifies the object of the main provision, i.e., the object of rape laws, (ii) it places the privacy of marriage as an object above the privacy of the individual in the marriage and (iii) protection of conjugal rights, by not penalising as rape the forced sex of a wife, is not a legitimate object post Constitution, as it does not align with our post-Constitutional understanding of conjugal rights.

27. Ms. Nundy then proceeds to elaborate on each of these submissions. Regarding the first submission, i.e., that the impugned Exception nullifies the object of rape laws, she relies on the principle that an exception or a proviso cannot nullify or set at naught the real object of the main enactment, for which she relies on ***S. Sundaram Pillai v. V.R. Pattabiraman***[13] and ***Director of Education v. Pushpendra Kumar***[14]. The alleged object of the impugned Exception, she submits, of protection of conjugal rights and protection of the institution of marriage, would nullify the object of Section 375, of

[13] **(1985) 1 SCC 591**
[14] **(1998) 5 SCC 192**

criminalising rape. The impugned Exception, she submits, is unconstitutional as it "places the 'institution of marriage' as an object above the privacy and other Article 21 rights of an 'individual in the marriage' ". Protection of the 'institution of marriage', submits Ms. Nundy, cannot be a legitimate object to sustain the impugned Exception, such a contention having been specifically rejected by the Supreme Court in para 92 of the report in ***Independent Thought***[1]. The institution of marriage cannot, according to her, be accorded pre-eminence over the Article 21 rights of the wife. Even on facts, she submits, a marriage could be damaged or destroyed by rape, but not by a complaint of rape. According to her submissions, "an individual's right not to be raped cannot be held hostage to an imposed conception of marriage". Ms. Nundy relies on para 192 of the report in ***Joseph Shine***[6] to contend that privacy accorded to the 'institution' of marriage cannot override the privacy and other Article 21 rights of the individuals involved.

28. Protection of the conjugal rights of the husband, contends Ms. Nundy, is not a legitimate object to justify the impugned Exception in our post-Constitution era, as it does not align with our understanding of conjugal rights at present. Forced sexual intercourse, she submits, is not a conjugal right, as is apparent from the fact that a Court, when enforcing a decree for restitution of conjugal rights, can only direct the husband and wife to cohabit, and cannot forcibly direct them to have sexual intercourse. Sexual intercourse is not, therefore, a "conjugal right" of the husband. Conjugal rights, in her submission, begin and end at cohabitation and consortium, and anything beyond this is

merely a conjugal expectation, the remedy for denial of which is only divorce.

29. Further exemplifying the submission, Ms. Nundy contends that "by no means can insertion of an object, against the woman's will, or facilitating the rape of his wife by other persons, be a 'conjugal right' throwing in sharp relief the illegitimacy of the object". Husbands who indulge in such acts, she points out, stand exempted from the application of Section 375 by the impugned Exception. According to Ms. Nundy, "if a wife refuses to consent to sexual intercourse with her husband, the (impugned Exception) sanctions and indeed encourages the husband to have forced sexual intercourse with his wife". Such forced sexual intercourse by the husband becomes punishable only if the ingredients of lesser offences such as Section 354[15], or of related but distinct offences such as Section 498-A[16] of the IPC are fulfilled. By virtue of the "marital rape exception", therefore, "a husband can enforce his conjugal right (as he understands it) without going to a court of law." This, in her submission "encourages some husbands to do illegally that which cannot be done legally, on the purport that they are exercising their conjugal right". This submission is taken further

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[15]**354. Assault or criminal force to woman with intent to outrage her modesty. –** Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine.

[16]**498-A. Husband or relative of husband of a woman subjecting her to cruelty. –** Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation. —For the purposes of this section, "cruelty" means –

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

by contending that "allowing a husband to enforce his conjugal expectation to sex by permitting him to have forced sexual intercourse with his wife without penal consequences under Section 376 IPC[17], is akin to saying that a wife, who believes that she is entitled to maintenance from her husband, is permitted to sell her husband's personal belongings in property, without his consent, and appropriate the proceeds towards her maintenance". The only legitimate object of

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[17]**376. Punishment for rape. –**

(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which 383[shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever, -

(a) being a police officer, commits rape –

(i) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine."

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(3) Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this sub-section shall be paid to the victim.

anti-rape laws, submits Ms. Nundy, is the protection of bodily integrity and sexual autonomy of women.

30. Ms. Nundy proceeds, thereafter, to address the issue of the existence of an intelligible differentia, and its rational nexus with the object sought to be achieved by the impugned Exception. She has attempted to deal with the issue from the point of view of the "perpetrator", the "victim" and "the act".

31. Apropos the "perpetrator", Ms. Nundy concedes, frankly, that "there may be an expectation of, and even an in-principle arrangement to, sex in marriage, and indeed an intelligible differentia on this basis between a husband and non-husband". "However", she submits, "what the (impugned Exception) in fact protects, is not this expectation of sex, but elevates this to a husband's rights to forcible sexual intercourse with his wife at any given time, under any circumstances, irrespective of her consent to it". This, she submits, "has no rational nexus to any of the objects examined above". She has highlighted, in this context, para 75 of the report in ***Independent Thought***[1], especially the observation, in the said para, that "a rapist remains a rapist and marriage with the victim does not convert him into a non-rapist" and "rape is rape whether it is described as such or is described as penetrative sexual assault or aggravated penetrative sexual assault". Thus, submits Ms. Nundy, "the Marital Rape Exception privileges a man's right to exercise his sexual desire and nullifies his wife's right to not engage in sexual acts".

32. Ms. Nundy further submits that, "in rape, the spectrum of harm caused may vary, and is independent of the relationship between the parties". She has sought to exemplify this by contradistinguishing a situation in which the live-in partner of a woman has sex with her while she is sleeping, presuming consent, with a case in which the husband of a woman, with his friends, gang rapes her. The inequity in the impugned Exception, submits Mr. Nundy, is underscored by the fact that, in the former case, the live-in partner of the woman could be prosecuted for rape, whereas the husband, in the latter case, cannot.

33. Ms. Nundy further submits that the impugned Exception gives husbands a blanket immunity for any of the sexual acts enumerated in clauses (a) to (d) of Section 375, including the gross acts envisaged in clauses (c) and (d) thereof. Even in a case in which the rape would result in the victim being reduced to a permanent vegetative state, or where the act involves gang rape, she submits that the impugned Exception immunizes the husband from being prosecuted for rape. She submits that, therefore, "the Marital Rape Exception effectively nullifies consent to the specific act(s) of sexual intercourse including forced sex with another person, forced anal sex, and bundles such forced sexual acts with other, lesser offences such as cruelty, simple assault or grievous assault".

34. The impugned Exception, submits Ms. Nundy, "gives a license to husbands to force sex" and, "at the very least, condones a situation where a man forces his wife to have sex by calling it 'not rape'." "This", in her submission, "is nothing more than a license for a

husband to force his wife into sexual intercourse without penal consequences for rape (whether or not there are penal consequences for the lesser, cognate offences)." Ms. Nundy emphasises that marriage requires equality of partnership and love, and is inherently inimical to the concept of forced, non-consensual sexual relations. Even within the expectation or broad agreement of sexual relations and marriage, therefore, she submits that specific consent for sexual acts cannot be done away with. She seeks to exemplify this submission, and to highlight the perceived inequity in the impugned Exception, thus:

> "Currently, without specific consent for sexual acts there is sanction to situations where despite sickness, disease and injury, a wife is still forced to have sexual intercourse. She may object to having sex in public. Indeed, if the husband suffers from gonorrhoea, or if the wife is on her period, is busy at work, or just not in the mood, the Exception overrides that non-consent and says such forced sex will not be 'rape'."

In this backdrop, Mr. Nundy emphasises that, even where consent was not specifically to be found in the provision, the Supreme Court has made consent central and indispensable to criminal provisions concerning sexual relations, for which purpose she relies on ***Navtej Johar***[7] and ***Joseph Shine***[6]. Specifically, Ms. Nundy cites para 232 of the report in ***Navtej Johar***[7] and para 169 of the report in ***Joseph Shine***[6].

35. The necessity of fair labelling of the offence is, according to Ms. Nundy, the core of the case that the petitioners seek to espouse. It is no argument, according to Ms. Nundy, to contend that, when sexual acts, offensive to the wife, are perpetrated by the husband, he can be

prosecuted for grievous hurt, or for outraging her modesty. These offences, along with their gravamen and ingredients, she submits, are substantially different from rape. It would be impermissible to label an act of rape as an act of cruelty or grievous hurt. The need to call a rape a rape, she submits, is paramount. "The label of the offence,", she submits, "should represent the nature of the law-breaking by the offender". This, she submits, "is further represented in the defences, punishments and consequences of being convicted of the offence". Ms. Nundy relies on para 592 of the report in ***Navtej Johar***[7], in which the Supreme Court observed that the effect of conviction under Section 377[18] of the IPC was typecasting consensual sex of LGBTQIA+ persons on par with sexual offences like rape. Per corollary, she submits, an offence which should be rape cannot be permitted to be undermined by treating it as cruelty, grievous hurt or any other lesser offence. She contends that "not calling a rape within marriage, a rape, also has far-reaching consequences for the protection of the victims". According to her, "when it comes to married women, the State shirks responsibility and does not afford her the same level of care and protection that a woman raped by someone other than her husband is entitled to receive". "Women raped by their husbands do not", in her submission, "get protections under the law available to other rape victims" such as Section 357A (which provides for victim compensation), 357C (which provides for treatment of rape victims), 154 (relating to providing of information in cognizable cases), 164

[18]**377. Unnatural offences.** – Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
Explanation. —Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

(which sets out the procedure for recording of statements by the Magistrate), 309 (dealing with postponing of proceedings), 327 (deeming the criminal court to be an open court) and 164A (which deals with medical examination of the rape victim) of the Cr PC, Section 228A (proscribing disclosure of identity of any victim of rape) of the IPC and Section 146 (questions which may lawfully be asked in cross-examination) of the Evidence Act. These provisions, she submits, apply only where the accused is charged under Section 376 of the IPC. Adverting, once again, to her understanding of "fair labelling", Ms. Nundy submits that "the label 'rape' has an important role in expressing social disapproval of a certain sort of sexual wrong". Further, on the point of punishability under other provisions, of the act of a husband in compelling his wife into sexual intercourse without her consent, Ms. Nundy submits that the said provisions would apply only if their ingredients are fulfilled. The resultant anomaly, according to her, is that the specific act committed by the husband, the harm to his wife and indeed the *mens rea* to commit forced sexual intercourse remain unpunished. The husband, who has committed an act of forced sexual intercourse, she submits, ends up being prosecuted under provisions that do not seek to regulate forced sexual intercourse in the first place. On individual facts, she submits, where the specific ingredients of other offences do not exist, the victim-wife of an act of non-consensual sexual intercourse by the husband may not be able to prosecute him at all, if the impugned Exception is allowed to stay. At the end of the day, she submits, "it is not about punishing the husband, but is about punishing the act".

36. Ms. Nundy, thereafter, proceeds to submit that the impugned Exception infracts Article 21 of the Constitution. She submits that "the bodily integrity of women and indeed all humans, deserves the highest threshold of protection under Constitutional and criminal law". There should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity. This right to physical integrity, she submits, flows from the woman's right to life, dignity and bodily privacy under Article 21.

37. Ms. Nundy submits that Article 15 of the Constitution obligates the Court to strike down the impugned Exception, "which is founded on a stereotypical understanding of ascribed gender roles in a marriage", and "is coupled with an *ex facie* infringement of fundamental rights". She submits that "there is no compelling state interest in 'protecting the institution of marriage'", as the State would seek to contend. "Protecting husbands who facilitate the gang rape of their wives, or rape their wives by insertion of objects, or indeed have forced penile vaginal intercourse with their wives cannot be a way to further the institution of marriage or be called the 'conjugal rights' of a husband."

38. The impugned Exception, she further submits, also infringes Article 19(1)(a) of the Constitution and is, therefore, liable to be struck down even under the said provision. The expression of one's sexual desire, submits Ms. Nundy, is part of self-expression protected under the said sub-Article. At its heart, she submits that the Marital

Rape Exception fails to protect to the full extent of the law a woman's non-consent. In her words,

> "The impugned provisions of law do not recognise the right of a married woman to say no to sexual intercourse with her husband. As a corollary, the impugned provisions also take away a married woman's ability to say a joyful 'Yes' to sexual intercourse, both aspects of Exception 2 to Section 375 being contra Article 19(1)(a) and limiting a married woman's right to freedom of sexual expression and behaviour".

In Ms. Nundy's submission, the offshoot of the impugned Exception is that "the wives sexual desire and consent is reduced to nullity".

39. Addressing, thereafter, a substantially important issue, Ms. Nundy submits that, by striking down the impugned Exception, the Court would not be creating a new offence. Adverting to Section 40 of the IPC[19], Section 2(n) of the Cr PC[20] and Section 3(38) of the General Clauses Act, 1897[21], Ms. Nundy submits that an 'offence' pivots on the act or omission, and not on the offender *per se*. What is punishable by the IPC, she submits, is "the act or thing done", though "the parts of an offence may include a perpetrator, victim and the act". In her submission, "the 'offence' of rape under the IPC is the act of forcible/non-consensual intercourse (as described in sub-clauses (a) to (d) and Clauses firstly to sixthly), by a man upon a woman, which is

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[19] **40. "Offence" –** Except in the Chapters and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this Code.

[20] **2. Definitions. –** In this Code, unless the context otherwise requires,—

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(n) "offence" means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under Section 20 of the Cattle Trespass Act, 1871 (1 of 1871);

[21] **3. Definitions. –** In this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context, -

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(38) "offence" shall mean any act or omission made punishable by any law for the time being in force;

entirely separate from the question of the relationship between the perpetrator and victim of the act.". "Thus", she submits, "any act falling within the ambit of the provision would constitute the offence of rape". The Marital Rape Exception, she submits, "grants immunity from prosecution to a particular class of offenders – i.e. husbands … which is rooted in the fiction of consent that India inherited from its colonial masters". Thus, according to Ms. Nundy, striking down the impugned Exception would not create a new offence, though a new class of offenders may be brought into the ambit of an existing offence. The impugned Exception, according to her, only provides an immunity from being prosecuted for the act of rape, which is already an offence in terms of Section 40 of the IPC. She relies, for this proposition, on paras 83 to 87 of the report in ***Independent Thought***[1], which held that, in rewriting the impugned Exception with respect to the age of the wife, it was not creating a new offence, but was merely creating a new class of offenders, as the act was already an offence in the main part of Section 375 and in the Protection of Children from Sexual Offences (POCSO) Act, 2012. In its judgement in ***Hiral P. Harsora v. Kusum Narottamdas Harsora***[22], the Supreme Court, she submits, "in effect created a whole new class of offenders by striking down the words 'adult male' from Section 2(q)[23] of the Protection of Women from Domestic Violence Act, 2005, which defines the term 'respondents'". She has also relied, for this purpose, on the decisions

[22] **(2016) 10 SCC 165**

[23] 2. **Definitions. –** In this Act, unless the context otherwise requires,—

(q) "respondent" means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act: Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner.

in ***Balram Kumawat v. U.O.I.***[24] and ***Devidas Ramachandra Tuljapurkar v. State of Maharashtra***[25], specifically citing paras 4, 5, 23, 36, 37 and 40 of the former, and paras 108 and 141 of the latter decision. She explains this submission thus:

> "A combined reading of the judgements in ***Harsora***[22], ***Devidas Ramachandra Tuljapurkar***[25] and ***Balram Kumawat***[24] show that there is a difference between 'creation' of a new offence (which may be an act of a positive nature), versus the interpretation of the constituents of an existing offence, which is the traditional 'negative' act of judicial review. If while adjusting the Constitutional validity of a provision, the Court finds that it is unconstitutional, it must strike it down. If the corollary of striking it down is that a class of offenders, who were earlier not included within the ambit of a provision, may now be charged under that provision: this is not the creation of a new offence, but only a byproduct of the Court fulfilling his duty under Article 13.… What would amount to creating a new offence, would be if the Court was asked to alter the main ingredients of the acts constituting the offence itself."

This principle, she submits, has also been applied in the context of the striking down of exemptions granted by taxing statutes, in which context she cites paras 26 and 28 of the report in ***Motor General Traders v. State of A.P.***[26] To highlight the mischief that would result if any other interpretation were to be accepted, Ms. Nundy hypothesises a situation in which the Exception to rape is not based on the relationship of the perpetrator with the victim, but on the time at which the act is committed. In such a situation, she submits that the Exception would undoubtedly be unconstitutional, and liable to be struck down, even if, thereby, the Court were to be creating an offence, by rendering the act, even if committed during the earlier

[24] **(2003) 7 SCC 628**
[25] **(2015) 6 SCC 1**
[26] **(1984) 1 SCC 222**

"excepted" times, offensive. That, she submits, cannot be a ground to refrain from striking down such an unconstitutional Exception.

40. Addressing, next, a submission, advanced in favour of retaining the impugned Exception, that, were the impugned Exception to be struck down, a husband would qualify as a "relative" for the purposes of Section 376(2)(f) and would, therefore, result in the burden of proof shifting to him to disprove the allegation of rape in view of Section 114-A[27] of the Evidence Act, Ms. Nundy seeks to allay the apprehension by contending that, in interpreting Section 376(2)(f), the "mischief" rule of statutory interpretation should be applied. One of the considerations, in applying the "mischief rule" is, according to her, the position in law prior to the enactment of the said provision. As Section 114A of the Evidence Act concerns only aggravated rape, absent such aggravating factors, an offender under Section 375 would not be subject to the rigour of the provisions of Section 376 which deal with aggravated rape. Another reason why Section 376(2)(f) would not apply to the husband, according to her, is because the word "relative", in the said provision, courts accompany with the words "guardian", "teacher" and "a person in a position of trust or authority". It is only, therefore, where the accused is in a position of power over the complainant, akin to a fiduciary trust, she submits, that Section 376(2)(f) would apply. On the other hand, if the impugned

[27] **114-A. Presumption as to absence of consent in certain prosecution for rape.** – In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m) or clause (n) of sub-section (2) of Section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

Explanation. – In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of Section 375 of the Indian Penal Code (45 of 1860).

Exception were to remain on the statute book, Ms. Nundy submits that husbands could get away with committing several forms of heinous and aggravated rape.

41. Concerns about the possibility of misuse of Section 375, were the impugned Exception to be struck down, submits Ms. Nundy, besides being unfounded, are irrelevant to the issue of its constitutionality. She has referred to statistics to attempt to submit that a very small proportion of marital rape cases are reported. That apart, she relies on ***Government of A.P. v. G. Jaya Prasad Rao***[28]and ***Indira Jaising v. Supreme Court of India***[29] to contend that the possibility of misuse cannot be a ground for regarding a provision to be constitutionally fragile.

42. Equally irrelevant, according to Ms. Nundy, are concerns regarding the "disproportionate" nature of the punishments envisaged by Section 376, were the impugned Exception to be struck down. Sentencing, she submits, is a matter of policy, regarding which there is a clear proscription on legislation by Courts. Thus, the quantum, the proportionality, or the disproportionality, of the minimum sentence envisaged by Section 376 cannot be a factor which could affect the decision of the Court concerned with the issue of constitutionality of the impugned Exception. If the impugned Exception fails to sustain constitutional scrutiny, she submits that it cannot survive, irrespective of the punishment that it may thereby entail, as prescribed in Section 376. That apart, she submits that the

[28] **(2007) 11 SCC 528**
[29] **(2017) 2 SCC 362**

petitioners have constantly highlighted their concerns about the disproportionately high sentences envisaged in Section 376. This problem, she submits, however, would apply to all cases of rape and, if the argument of the disproportionate nature of the sentence envisaged by Section 376 is to be taken as a defence by votaries of the impugned Exception, she submits that Section 375 would become vulnerable to being struck down in its entirety. She reasserts the essential position that "a rapist is a rapist irrespective of the relationship with the victim". While "recognizing that sentencing for rape (whether within or outside of marriage) must be proportionate to the gravity of the offence, the perpetrator, harm caused to the victim and other facts and circumstances of the case, and that the high mandatory minimum sentence presently prescribed for the offence may not meet such proportionality concerns", Ms. Nundy submits that this concern cannot be a ground for refusing to strike down the impugned Exception which, according to her, is *ex facie* unconstitutional. Once the impugned Exception is struck down, she submits that it would always be open to the Court to recommend to Parliament to reconsider the issue of sentencing for rape.

Submissions of Mr Colin Gonsalves, learned Senior Counsel for Khushboo Saifi

43. Interestingly, several of the submissions of Mr. Gonsalves mark a departure from the submissions advanced by Ms. Nundy.

44. Mr. Colin Gonsalves placed extensive reliance on the position

obtaining in foreign jurisdictions, particularly England and Wales, Canada, South Africa, Australia, the US, Thailand, Nepal, France, Germany, Belgium, Netherlands and Italy, and contended that the marital rape exception no longer remained in most of the developed, and indeed much of the developing world and that, therefore, it had outlived its welcome in India as well. He has also invited attention to the Justice Verma Committee, and the contents of its report, which advocated eradication of the impugned Exception. He has further invited attention to the large number of cases of marital rape which, according to him, take place in the country, and how they escape detection and punishment owing to the existence of the impugned Exception. He has quoted, copiously, from Working Paper 116 of the UK Law Commission (1991), which dealt with "Rape within Marriage".

45. Mr. Gonsalves submits that the unconstitutionality of the impugned Exception is *ex facie* apparent, for the reason that (i) it exempts married men from the charge of rape of their wives, where the husband insists on sex and engages in the act despite want of consent from his wife, (ii) it arbitrarily distinguishes between married and unmarried couples, and (iii) there is no rational nexus between the object sought to be achieved and the provision, which creates a demarcation between married and unmarried men, in so far as creating an exception to offence as grave as rape, is concerned.

46. According to Mr. Gonsalves, in adjudicating on the constitutionality of the impugned Exception, the Court should not be

concerned with the exact meaning and amplitude of the concepts of "consent" and "coercion". He has articulated this submission, in his written note, thus:

> "Some of the issues raised during these proceedings will be, and can be, resolved only in the Trial Courts where facts specific contests will bring enriched meaning to critical legal issues particularly (1) the meaning of the word "coercion" and (2) the meaning of "consent". This Court is not called upon after noticing the well accepted definitions of these two words, to thereafter proceed on the basis of various possible scenarios to connect this exercise with the adjudication of constitutionality. In what circumstances the conduct of the husband would amount to coercion and in what circumstances the conduct of the wife would amount to consent is not required to be adjudicated in these proceedings at all. In fact such an adjudication is impossible. It is only in the Trial Court's way these two complex issues are debated on the basis of evidence of the parties, that a clear picture will emerge of how the law will recognise and deal with marital rape."

47. Mr. Gonsalves further submits that this Court cannot desist from dealing with the constitutionality of the impugned Exception on the ground that it would be almost impossible for the woman to prove marital rape, as it takes place in the confines of the household and in private. He has also sought to respond to the argument that "for a married couple there exists a presumption in favour of regular sex and this is not so for rape cases outside marriage", which "gives the husband a greater degree of laxity regarding consent when engaging in sex with his wife". In response, Mr. Gonsalves cites ***State v. Pankaj Chaudhary***[30], which holds that, even if it were to be assumed that the prosecutrix was of easy virtue, she has a right to refuse to submit

[30] **(2019) 11 SCC 575**

herself to sexual intercourse with anyone."

48. The manner in which this Court should proceed with examining the issue of constitutionality of the impugned Exception is, according to Mr. Gonsalves, the following:

> "The High Court is only the institution of first instance. It cannot solve all the problems in one go. It takes the 1st step towards addressing the historic and extreme injustice that has been done to married women for centuries by doing away with the hateful Exception granting all husbands immunity in respect of, what has been characterised as, the most heinous crime. This is all that the High Court is called upon to do.
>
> After this is done, Parliament will be called upon to apply its collective mind as to how, if at all, the generic definition of caution and the generic definition of consent is to be elaborated by making law. It may also (regrettably) be called upon to decide as to whether if at all, a lesser punishment ought to be prescribed in the penal code, or whether the crime of marital rape ought to be compound double and capable of being settled between the couple. No part of this exercise is to be done in these proceedings. In what circumstances the husband's conduct would amount to coercion, and the wife's conduct amounts to consent has been discussed during these proceedings at length. They have enriched the discussion but they are, nevertheless, being made in the wrong institution. It is not within the adjudicating powers, rather the adjudicating capacity of the Writ Court to conjure up myriad circumstances of coercion and consent and bring such determination within the ambit of a constitutional challenge to a specific provision of the Code. Therefore, such submissions in proceedings must happen later (after the Exception is declared unconstitutional) and in a different forum."

49. Apropos the applicability of other provisions of the IPC, and other penal statutes, to sex by the husband with his wife against her consent or willingness, Mr. Gonsalves submits that it is not

permissible to contend that, in marital rape cases, other provisions of the IPC should be applied and not Section 375. "Punishment, in criminal law", he submits, "is not limited to the sentence alone", but "includes the stigmatising of the accused particularly when grave social crimes are committed so that, as in this case, the accused will be known and recognised as a rapist".

50. Possibility of misuse cannot, according to Mr. Gonsalves, restrain the Court from declaring the impugned Exception as unconstitutional, for which purpose he cites para 19 of the report in ***Sushil Kumar Sharma v. U.O.I.***[31]

51. Adverting, next, to the decision in ***Independent Thought***[1], Mr. Gonsalves submits that the disclaimer, contained in the said decision, clarifying that the Court had not made any observation with regard to marital rape of a woman who was of 18 years of age or above, even collaterally, cannot be regarded as binding on any authority which seeks to rely on the said decision. In this context, he has submitted thus:

> "In the first instance it is not part of the adjudication process at the delivery of the judgment for any court after concluding the adjudication and writing the judgment to say that the judgment would not operate as a precedent for whatever reason. reasoning in the judgment and the operative part of the order stand together as a whole and once delivered no judge may say that the others may not follow it for whatever reason. Once the judgment is delivered even with this caveat it belongs to the world and cannot bind the hands of judges, lawyers, members of the public as to its use. As to whether the judgment is dependent on the facts and circumstances of

[31] **(2005) 6 SCC 281**

> the case is for subsequent judges and others to determine what they cannot be told in advance that the judgment cannot be used in deciding other cases – that is for judges before whom such cases come to decide. Such observations are therefore not binding on any court or even coats subordinate to the Supreme Court may not follow such observations because they are not legitimate part of any judgment and outside the sphere of adjudication."

Mr. Gonsalves is cited, in support of these submissions, the judgement of the Supreme Court in ***Ramesh Bhavan Rathod v. Vishanbhai Hirabhai Makwana***[32] and the decision of the High Court of Bombay in ***D. Navinchandra& Co. v. U.O.I.***[33]

52. Mr. Gonsalves submits that there is no such thing as "expectation of sex" or "the right to have sex", absent consent of the other party. The resurrection of such an expectation, he submits, would amount to "resurrect the ghost of Lord Hale". Marriage, in Mr. Gonsalves's submission, merely makes socially acceptable sex between adults.

53. Mr. Gonsalves joins his colleagues in discrediting the contention that, by striking down the impugned Exception, the Court would be creating an offence. He submits that the offence of rape is already in place, in Section 375 of the IPC. Striking down the exception merely removes a "legislative block which prevents husbands from being prosecuted even when the crime is committed. All that the court is being called upon to do is to eliminate that block by declaring that exemption to be unconstitutional under Article 14

[32] **(2021) 6 SCC 230**
[33] **1989 (43) ELT 266**

and 21". He has endeavoured to articulate the contention "in another way" by seeking to submit that, "with the coming into force of the Constitution of India that legislative obstruction evaporates on its own because drafting which gives the husband immunity from the heinous crime of rape only on the basis of a marriage certificate is immediately violative of 14 and 21 and is manifestly arbitrary". The impugned Exception, therefore, in his submission, "dies with the coming into force of the Constitution", and all that this Court is required to do in the present case, is to "make a declaration for doing away even with the formal existence of the Exception". In his submission, "this horrific Exemption is already dead in the eyes of the Constitution, yet continues to torment married women…". The crime of rape, which "already exists, was kept on hold by an awful declaration of Common Law made centuries ago". Mr. Gonsalves would contend that this Court is required to release the crime from the hold of that "awful declaration of Common Law". By doing so, he submits that "what comes into force is the right to punish, not a new crime". There is, therefore, "no new offence … only a new and delightful right to prosecute or to correct the injustices of the past".

Submissions of MrRajshekhar Rao, learned *amicus curiae*

54. Mr. Rajshekhar Rao, learned *amicus*, commenced by highlighting the fundamentally inhuman nature of the act of rape, and the indelible mark that the act imprints, not only on the physical form, but also on the psyche, of the victim. (Needless to say, there can be no dispute on this score.) Rape, he submits, violates a woman's right

to equality, dignity and bodily integrity, personal and sexual autonomy, bodily and decisional privacy and reproductive choices. Inasmuch as the impugned Exception decriminalises non-consensual sexual intercourse, when perpetrated by a husband upon his wife, he submits that it is, *ex facie*, unconstitutional.

55. Mr. Rao, too, reiterates the aphorism, emphasised many times over by Ms. Nundy, that a rape is a rape and a rapist remains a rapist. The impugned Exception, he submits, "is "particularly egregious", as it denies the wife the ability to prosecute her husband for the act of 'rape', whereas if the same act were perpetrated by any other male, she would be entitled to do so". Such entitlement is available, he points out, to all other women, including women perceived to be "of easy virtue", and with whom sexual intercourse is, arguably, an expectation, such as a sex worker. A sex worker, too, he submits, is entitled to decline consent for sex and, if sex is forced on her without her consent, to prosecute for rape. Denying such a right to a wife, amounts to rendering the issue "of her consent, to sex, immaterial inasmuch as she cannot prosecute a husband for having non-consensual sexual intercourse with her, i.e., for the act of 'rape'." He submits that "There can be no greater indignity that the law can heap upon a woman than to deny her the right to prosecute for the violation of her bodily integrity, privacy and dignity and that too at the hands of her husband, who she would legitimately expect to receive love and affection from and who would be expected to safeguard her interest".

56. Mr. Rao echoes the primary contention of all learned Counsel

who have argued against the impugned Exception that the absence of consent is the foundation of the offence of 'rape' under Section 375 of the IPC. The impugned Exception, he submits, is based on the archaic belief that the very act of marriage implies 'consent' by the wife for sexual intercourse with the husband during the entire subsistence of the marital bond, i.e. the Hale dictum, or at least till the parties continue to cohabit. This notion, he submits, is outdated and obsolete, insofar as it understands the concept of marriage, and the role of a wife in it. Any such "presumption of consent", submits Mr. Rao, is inconsistent with applicable law, which guarantees equal protection of the law to married women, for which purpose he cites paras 73 to 75, 84 and 88 of ***Independent Thought***[1] and paras 62 to 63, 68 to 71 and 82 of ***ShayaraBano v. U.O.I.***[34].

57. Classification based on marital status, submits Mr. Rao, creates an anomalous situation, giving married women lesser protection against non-consensual sexual intercourse by their own husbands, as against strangers. This also results in lesser protection for them than is available to persons who are merely cohabiting or live-in partners. This discrepancy is particularly stark when one considers that Sections 376(2)(f) and 376C of the IPC recognises that the act, if perpetrated by a person in a position of trust, or in a fiduciary capacity, is more egregious than if done by a stranger.

58. Preservation of the institution of marriage, submits Mr. Rao, cannot justify retention of the impugned Exception. Mr. Rao, too,

[34] **(2017) 9 SCC 1**

points out, in this regard, that a decree for restitution of conjugal rights cannot compel the parties to have sexual intercourse, but may be enforced only by attachment of property, under Order XXI Rule 32 of the Code of Civil Procedure, 1980 (CPC). Non-consensual marital intercourse reflects, he submits, what a marriage ought not to be. While a marriage entails reasonable marital privileges for both spouses, these reasonable expectations or privileges cannot be equated with willingness or consent to sex, by default, in all situations. Mr. Rao advances, in this context, a somewhat radical submission that "marriage is no longer as sacred or sacrosanct as it was traditionally considered to be and legislative provisions for divorce and judicial separation support this conclusion". Procreation, he submits, is not the only purpose of marital sexual intercourse, which is why a marriage becomes voidable only in the event of impotence, rather than sterility. The wife, he submits, also has an expectation of a healthy sexual relationship from her spouse. Implicit in this is the presumption of the consensual nature of the relationship. He submits that the institution of marriage cannot be regarded as imperilled, even were the impugned Exception to be struck down, as the husband is, in the event of non-consensual sexual intercourse with his wife, liable to be prosecuted for several other offences in relation to the said act, for which purpose he cites para 92 of the report in ***Independent Thought***[1]. Referring to ***Joseph Shine***[6] and ***Independent Thought***[1], Mr. Rao submits that Courts have struck down, and read down, provisions pertaining to marriage, despite fears of breakdown of the marital institution in such an event.

59. Equally misconceived, in Mr. Rao's submission, are concerns that, by striking down the impugned Exception, the Court would be permitting interference in the private marital sphere, as such perceived interference is already permissible for other offences applicable to such a situation, such as Sections 354A to 354D, 319 and 339 of the IPC. He also submits that the Court cannot hold its hands back, from striking down the impugned Exception on the consideration of a possibility of a lack of evidence in such cases, as the same evidentiary yardstick, as applies to these provisions, would apply to non-consensual marital intercourse.

60. The legislative unwillingness to recognise the act of rape, when perpetrated by a husband upon his wife is, in Mr. Rao's submission, an affront to the dignity of the wife, which violates her fundamental right to life and liberty. Constitutional Courts are enjoined to strike down any provision of the law which, in their perception, violate fundamental rights, and this is rendered an imperative by Article 13[35] read with Article 226[36] of the Constitution of India. He also cites, for

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[35] **13. Laws inconsistent with or in derogation of the fundamental rights –**
(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void
(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void
(3) In this article, unless the context otherwise requires law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas
(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368 Right of Equality

[36] **226. Power of High Courts to issue certain writs -**
(1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari,

this purpose, paras 122, 268, 467 and 601 of the report in ***Navtej Johar***[7]. The need to act upon this obligation is augmented, he submits, where the legislature has been lethargic, despite multiple recommendations being made by law commissions and other bodies, to strike down the impugned Exception.

61. In deciding whether a provision of law is, or is not, unconstitutional, Mr. Rao submits that the Court is required to examine the effect of the legislation, and whether it creates "an artificial distinction between different classes of persons", in which context he cites paras 46 to 47 of ***Anuj Garg v. Hotel Association of India***[37] .

62. Mr. Rao, too, submits that striking down of the impugned Exception would not result in the creation of a new offence, but would merely remove a legal fiction which has resulted in an exemption which is discriminatory and unconstitutional. The act which would become punishable as rape, thereby, is already punishable as other offences under the IPC. He, therefore, submits that "no new behaviour is being criminalised", for which purpose he cites paras 190 to 194 of ***Independent Thought***[1]. As the decision to strike down the provision, if taken, would operate prospectively, Article 20(1)[38] of the Constitution, too, would not be violated. He cites ***Hiral P. Harsora***[22]

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or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose

[37] **(2008) 3 SCC 1**

[38] **20. Protection in respect of conviction for offences**
(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence

as an instance in which the Court has, by striking down the provision, removed the exemption granted to a class, and ***Mithu v. State of Punjab***[39] as an instance in which the Court has, by doing so, removed the differences in sentences for different classes. Judicial review of legislation, on the anvil of fundamental rights, he submits, is consistent with the doctrine of separation of powers, and not inconsistent therewith. Mr. Rao emphasises the "wider ambit" of Article 226 of the Constitution, vis-à-vis Article 32[40].

63. Mr. Rao has referred us to decisions rendered by courts abroad, which have removed the "marital exception to rape". He has provided a tabular chart of such decisions. While acknowledging that the applicable statutes, in the jurisdictions in the UK and in Nepal, did not contain a provision akin to the impugned Exception, Mr Rao submits that the statutory position applicable in the US, at the time of rendition of the decision in ***People v. Liberta***[41]contained a specific exception, from the offence of rape, where the victim was one's wife. The view, in the said decisions, that the marital rape exception was "repugnant and illogical", "an abuse of human rights" and "simply unable to withstand even the slightest scrutiny", he submits, applies, *mutatis mutandis*, to the impugned Exception.

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[39] **(1983) 2 SCC 277**

[40] **32. Remedies for enforcement of rights conferred by this Part**

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part

(3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution

[41] **(1984) 64 NY 2d 152**

64. Mr. Rao submits, finally, that the impugned Exception is in the teeth of India's obligations under Articles 1, 2, 5 and 16 of the Convention for Elimination of All forms of Discrimination against Women (CEDAW), which especially envisages elimination of discrimination against women in relation to marriage and repeal of penal provisions constituting such discrimination. Courts were, therefore, he submitted, bound to give effect to these obligations.

Submissions of Ms Rebecca John, *amicus curiae*

65. Ms Rebecca John submitted, with even greater fervour than Mr. Rao, that the impugned Exception could not sustain for an instant. Ms John acknowledged, at the outset, that the foundational basis for the impugned Exception is marriage. She points out that Note B in the Notes on Clauses in the chapter of General Exceptions in the draft IPC, per Lord Macaulay, clarified that the impugned Exception was "to protect the conjugal rights of the husband". Even prior to this statement, Ms. John submits that "the common law position excluded a wife's consent from the purview of the penal provision and its origin is traceable to the common law doctrines of Coverture and Implied Consent, under which the legal rights of a woman were subsumed by her husband after marriage." These doctrines declared that, by entering into marriage, a wife had granted irrevocable sexual consent to her husband. Ms John has also taken us to the history of the Marital Rape Exception.

66. The impugned Exception, submits Ms. John, "necessarily results in a complete and unequivocal disregard of the wife's right to consent to sex within a marriage", and its "consequence … is therefore that a provision which otherwise criminalises sex without the consent of the woman, exempts a husband from being prosecuted simply because he is married to her". She relies on the judgement of the Supreme Court in ***Justice K.S. Puttaswamy v. U.O.I.***[42] in which Dr. Chandrachud, J., in his concurring opinion, holds that "the validity of a law which infringes the fundamental rights has to be tested not with reference to the object of State action but on the basis of its effect on the guarantees of freedom". The impugned Exception, submits Ms. John, leaves married woman remediless for an offence of rape committed by her husband.

67. Ms John seeks to analogise the present case with ***Joseph Shine***[6]. In that case, she points out, the Supreme Court struck down Section 497[43] of the IPC and decriminalized adultery. The said decision, she points out, holds that the proposition "that a woman, by marriage consents in advance to sexual relations with her husband or to refrain from sexual relations outside marriage without the permission of her husband is offensive to liberty and dignity". As such, she submits that the impugned Exception represents an antiquated notion of marriage between unequals, contrary to the modern concept of marriage, as elucidated in ***Joseph Shine***[6].

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[42] **(2017) 10 SCC 1**

[43]**497. Adultery.** – Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

68. Supporting her colleagues, Ms. John also submits that the removal of the impugned Exception would not lead to creation of a new offence. She relies, for the purpose, on paras 190 and 194 of the report in ***Independent Thought***[1] which, in turn, relied on the judgement of the House of Lords in ***R v. R***[44], in which it was held that the striking down of the marital rape exception "…is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive…"

69. Ms John has, thereafter, even while acknowledging that, for atrocities or acts committed by a husband on his wife, the law provides remedies under Sections 304B[45], 306[46], 377[47] and 498A of the IPC, Section 3[48] of the Dowry Prohibition Act, 1961, to which the

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[44] **(1991) UKHL 12**

[45]**304B. Dowry death. –**

(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

Explanation. – For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

[46]**306. Abetment of suicide. –** If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[47]**377. Unnatural offences. –** Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation. – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

[48]**3. Penalty for giving or taking dowry. –**

(1)] If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable 2[with imprisonment for a term which shall not be less than 3[five years, and with fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry, whichever is more]: —1[(1)] If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable 2[with imprisonment for a term which shall not be less than 3[five years, and with fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry, whichever is more]\:" Provided that the Court may, for adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than 4[five years].] 5[(2) Nothing in sub-

presumptions under Sections 113A[49] and 113B[50] of the Indian Evidence Act apply, and Section 24 of the Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, as well as civil remedies under the Protection of Women from Domestic Violence Act, 2005 ("the DV Act"), sought to submit that these remedies do not address the issue of rape by a husband on his wife. She points out that Section 498A of the IPC cannot be used to prosecute forced, non-consensual sex as 'cruelty'. Besides, Section 498A(a) defines cruelty as "wilful conduct … likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman", and does not pertain to sexual violence by the husband upon his wife. The definition of "cruelty" in Section 498A(b), on the other hand, relates to a demand for dowry. In the codification of criminal law, Ms John submits that offences are separated and distinctly defined, and each

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section (1) shall apply to, or in relation to,— 1[(2) Nothing in sub-section (1) shall apply to, or in relation to,—"

(a) presents which are given at the time of a marriage to the bride (without any demand having been made in that behalf): Provided that such presents are entered in a list maintained in accordance with the rules made under this Act;

(b) presents which are given at the time of a marriage to the bridegroom (without any demand having been made in that behalf): Provided that such presents are entered in a list maintained in accordance with the rules made under this Act: Provided further that where such presents are made by or on behalf of the bride or any person related to the bride, such presents are of a customary nature and the value thereof is not excessive having regard to the financial status of the person by whom, or on whose behalf, such presents are given.]

[49]**113A**. Presumption as to abetment of suicide by a married woman.—When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.1[113A. Presumption as to abetment of suicide by a married woman.—When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband." Explanation.—For the purposes of this section, "cruelty" shall have the same meaning as in section 498A of the Indian Penal Code (45 of 1860)

[50]**113B**. Presumption as to dowry death.—When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. Explanation.—For the purposes of this section, "dowry death" shall have the same meaning as in section 304B, of the Indian Penal Code, (45 of 1860)

special statute created for the protection of married women against violence deals with specific crimes, particular thereto. "The crime of rape", she submits, "is outside the purview of these statutes".

70. Relying on ***Independent Thought***[1] and ***Vishaka v. State of Rajasthan***[51]**,** Ms John also emphasises India's obligations under the international conventions to which it is a party, specifically the CEDAW which, according to Ms. John, requires Exception 2 to Section 375 to be struck down. She has referred, in this context, to (i) paras 22 and 23 of the concluding comments on the CEDAW in its 37th Session, 2007, (ii) para 11(c) of the concluding observations in the 4th and 5th periodic reports of India in the 58th session of the CEDAW in 2014~~e~~ (iii) paras 22, 36, 69 and 70 to 72 of the UNSR on Violence Against Women, Dubravka Šimonović in its 47th session, 2021, (iv) para 17 of Article 2, Srl. No. (v) of UNSR on Violence Against Women, Dubravka Šimonović in its 47th session, 2021, (v) paras 49 to 50 and 78 of the 26th Session of the UNSR on Violence Against Women in 2014 and (vi) the Report of the Special Rapporteur on violence against women, its causes and consequences in the UNSR VAW - 52nd Session of the Commission on Human Rights in 1996.

71. Ms John submits that, even if it were to be assumed that the IPC recognised that the nature of the marital relationship was distinct from other contractual relationships, no rational nexus was discernible in the impugned Exception. The exact words used by her in the written submissions tendered during arguments are the following:

[51] **(1997) 6 SCC 241**

> "In comparison the nexus of Section 375 is to criminalise rape – in brief, nonconsensual or forced sexual penetration of a woman. For the purpose of argument, even assuming that there may be an intelligible differentia that the law recognises between the class of married and unmarried persons, there must be a rational nexus to that differentia. In the case of the crime of rape, can there be any difference in the consent that an unmarried or a married woman gives to the man committing rape upon her?"

72. Emphasising the fact that, in other common law jurisdictions, the marital rape exception stands removed from the law, Ms John submits that the continuance of the exception in India is an anachronism. She seeks to deconstruct Section 375 by submitting that, by including the impugned Exception therein, the IPC creates a fiction that the acts and circumstances described in Section 375 do not amount to rape where the parties are married. She also submits that Section 375 is required to be read along with clauses (n)[20] and (wa)[52] of Section 2 of the CrPC and Sections 33[53] and 44[54] of the IPC.

73. Ms John reiterates that "the woman's consent is central to making the act an offence". Consent, she submits, underlies the immunity contained in Exception 1 in Section 375. As against this, Exception 2, which is also couched in absolute terms, states that sexual intercourse or sexual acts by a man with his own wife is not rape. As such, the impugned Exception carves out an immunity which disregards the ingredients of the offence, which includes,

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[52] **[(wa)** "**victim**" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir;]

[53] **33. "Act", "Omission".** —The word "act" denotes as well a series of acts as a single act : the word "omission" denotes as well a series of omissions as a single omission.

[54] **44. "Injury".** —The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.

within its fold, any of the acts contemplated by clauses (a) to (d) of Section 375, if perpetrated without the consent of the woman.

74. Addressing, next, the aspect of "conjugal rights", Ms John submits that, undisputedly, "a marriage comes with reciprocal obligations and expectations of the spouses, including of sex". Thereafter, she proceeds to submit thus:

> "Marriage must be based upon mutual trust and respect. Exception 2 violates marital trust and the sexual decisional autonomy of the wife based on Macaulay's object of protecting a husband's conjugal rights alone. A wife's right to bodily autonomy will stand violated if the expectation (not a right) of sex by her husband translates into a physical act of forcible sex. The Exception, in effect, accords immunity to a husband disregarding his wife's non-consent, which cannot be the object of any provision, and therefore, it fails the test of constitutionality."

75. In order for a statutory provision to accord with Article 14 of the Constitution, Ms John submits that the classification created by the provision must be founded on an intelligible differentia, and the intelligible differentia must have a rational nexus to the object sought to be achieved by the legislation. If the object of the classification is illogical, unfair or unjust, the classification will be unreasonable. She has placed reliance on ***Navtej Johar***[7] and ***State of Tamil Nadu v. National South Indian River Interlinking Agriculturist Association***[55] to submit that Courts should be aware of the inadequacies of the above two-pronged test, and over emphasis on the objective of law instead of its effect, particularly when the objective was ostensible and

[55] **2021 SCC OnLine SC 1114**

did not further the true meaning of the equality clause as under the Constitution. The object of Section 375, she submits, is criminalisation of non-consensual or forced sex upon a woman. The marital status of the woman is not an intelligible differentia, therefore, to create a distinction for whether she can be subjected to sex against her will or consent. From this, she echoes her colleagues in asserting that "a rape is a rape regardless of the relationship between parties".

76. Adverting, next, to the existence of other provisions, under which sexual violence, by a husband on his wife, may be punished, she submits that they are insufficient to deal with rape as defined in Section 375.

77. Finally, Ms. John joins her colleagues in submitting that, if the impugned Exception were to be struck down, a new offence would not be created. She submits that the impugned Exception already stands diluted with the judgement in ***Independent Thought***[1], to para 190 of which she draws reference to contend that effacing of the impugned Exception from the statute does not "create a new offence but rather merely removes the immunity historically provided to a particular class of persons". She also relies, for this purpose, on the observations contained in the judgement of the House of Lords in ***R v R***[44]**.**

Submissions of learned Counsel who supported the impugned Exception

Submissions of Mr J Sai Deepak, Counsel for the Men's Welfare Trust

78. Mr. J Sai Deepak, who argued on behalf of the Men's Welfare Trust, commenced his submissions by clarifying that his client was not opposed to criminalisation of spousal sexual offences, including non-consensual sexual relationship. However, he submits, there already exists a legal/penal framework to deal with such offences. He submits that the issue at hand is not merely about consent, but also about context, which learned Counsel for the petitioners refuse to acknowledge. It would be erroneous, in Mr. Sai Deepak's submission, to reduce the ambit of the discussion merely to the aspect of "consent".

79. Mr. Sai Deepak seriously questions the jurisdiction and authority of this Court to grant the reliefs sought by the petitioners. Grant of such reliefs, he submits, would invariably result in creation of a new class/species of offence, which is outside the boundaries of Article 226 jurisdiction. It would also infract the doctrine of separation of powers, and that too, in the matter of criminalisation. Expanding on the aspect of separation of powers, Mr. Sai Deepak submits that the doctrine is intended to preserve the right of the people to participate in law and policy making. Grant of the reliefs sought in the petitions, he submits, would keep the people outside the pale of participation in law and policy making on such a sensitive social issue, which would invariably truncate fundamental rights and empower an unelected body, i.e. this Court, to undertake an exercise beyond its constitutional mandate and expertise. Creation of an offence, he points out, requires considerations of social impact, and

the creation of an entire ecosystem, involving a definition, process, safeguards, evidentiary standards and the forum which is to deal with the offence thus created, none of which are open to legislation by a Court of law. A Court of law, he submits, is ill-equipped to examine such issues, as it is not designed for enabling participation by multiple stakeholders, which is fundamental to a decision to regard an act is an offence. Besides, he submits, the consequences of grant of the reliefs sought in the petition are bound to be social and cultural, which is yet another reason as to why a judicial forum cannot undertake a policy decision of the kind that the petitioners seek. Designating an act as an offence, punishable under the criminal law, he submits, requires wide-ranging consultation with members of the public as well as subject matter experts, with an analysis of concrete data based on ground realities. It cannot be done in a peremptory manner, merely based on anecdotal evidence. A Constitutional Court, he submits, cannot dictate either the course of public cogitation or legislative deliberation. In support of his contention that constitutional morality and institutional independence would stand undermined were the petitioner's prayers to be granted, Mr. Sai Deepak relies on paras 40 to 41 of the report in ***Social Action Forum for Manav Adhikar v. U.O.I.***[56], para 37 of the report in ***Indian Drugs & Pharmaceuticals Ltd v. Workmen***[57], para 43 of ***Kalpana Mehta v. U.O.I.***[58], para 5 of ***Suresh Seth v. Commissioner, Indore Municipal Corporation***[59], para 23 to 26 of ***Census Commissioner v. R Krishnamurthy***[60], para 3 of ***Anuja Kapur***

[56](2018) 10 SCC 443
[57](2007) 1 SCC 408
[58] (2018) 7 SCC 1
[59] (2005) 13 SCC 287
[60] (2015) 2 SCC 796

v. U.O.I.[61] and para 5 of ***Madhu Kishwar v. State of Bihar***[62]. As against this, Mr. Sai Deepak submits, with respect to the judgements cited by learned Counsel for the petitioners, that

(i) ***Devidas Ramachandra Tuljapurkar***[25] was a case in which the Hon`ble Supreme Court sought to interpret Section 292 of the IPC, to assess if a prima facie case of obscenity was made out in the facts of that case and, in para~~s~~ 141~~(d) to (f)~~, the Hon`ble Supreme Court particularly noted that it was not creating a new offence,

(ii) ***Hiral P. Harsora***[22], too, involved purposive interpretation of the definition of "respondent" in Section 2(q) of the DV Act, to enlarge the scope of the words "adult male" as used in the said definition to include women and make it gender neutral, and did not involve any express exception, in the DV Act, providing immunity from prosecution for domestic violence and

(iii) ***Balram Kumawat***[24] involved a question of interpretation of whether the expression "ivory imported into India", as contained in the Wild Life (Protection) Act, 1972, would include mammoth ivory.

80. Mr. Sai Deepak disputes the petitioner's contention that the impugned Exception either envisages, or requires, a wife to submit to forced sex by her husband, or that it encourages a husband to impose himself on his wife. He also disputes the contention that there are no remedies, available in law, to address non-consensual sex between

[61] **W.P.(C) 7256 OF 2019**
[62] **(1996) 5 SCC 125**

spouses. In this regard, he invites attention to Sections 376B and 498A of the IPC and Section 198B of the Cr PC, as well as the provisions of the DV Act. These provisions, *inter alia*, he submits, create a legislative framework within which a husband, who indulges in non-consensual sex with his wife, could be criminally prosecuted. By including the impugned Exception and creating, side by side, a separate legal ecosystem to deal with spousal sexual violence, which indeed criminalises such an act, albeit without terming it "rape" within the meaning of Section 375 of the IPC, he submits that the legislature has acted within its boundaries, and no judicial interference therewith would be justified. The distinction carved out by the legislature in labelling and treatment of spousal sexual violence, he submits, is "grounded in respect for the complexity of the institution of marriage", and is both reasonable and based on intelligible differentia, which satisfy Articles 14, 15, 19 and 21 of the Constitution. Sections 376B of the IPC read with Section 198B of the Cr PC, and Section 498A of the IPC, he submits, are sufficient proof of intelligible differentia, as is also the impugned Exception, which provides for a legitimate and different treatment of offences committed within the bounds of a marriage or in the event of a legal or *de facto* separation.

81. Mr. Sai Deepak further submits that the impugned Exception cannot be struck down on the ground that the existing remedies, against spousal sexual violence, are inadequate. Inadequacy, he submits, does not constitute unconstitutionality and, even if it exists, is a matter to be remedied by the legislature, and is outside the province of judicial intervention. He points out that this Court is exercising

jurisdiction under Article 226, and not under Article 141 of the Constitution.

82. Mr. Sai Deepak also refutes the contention, of the petitioners that the impugned Exception is in the nature of a colonial legislation. He submits that, though the impugned Exception was, no doubt, engrafted in the pre-Constitutional era, it has been subjected to several parliamentary cogitations and discussions after the Constitution was in place. He also relies on Article 13(1) of the Constitution, which protects pre-Constitutional laws so long as they pass muster on the anvil of the Constitution. This, he submits, effectively preserves the presumption of constitutionality of laws even if they were enacted prior to coming into force of the Constitution, unless rebutted by a successful challenger. In such circumstances, he submits that a Court cannot interfere with legislative wisdom merely because it has a different, or even a diametrically divergent, point of view, least of all when, by doing so, a new offence, or a new class of offences, is being created. Of all the prayers in all the petitions listed before this Court (redolent of a famous Bogart quote), Mr. Sai Deepak submits that the only prayer which may, constitutionally, be made, is prayer C in WP (C) 6217/2016, which seeks a direction to the Union of India to consider the issue raised in the petition, regarding the need to continue, on the statute book, the impugned Exception to Section 375 of the IPC. None of the remaining prayers, in any of the petitions, submits Mr. Sai Deepak, can be granted by the Court, if it is to remain within its Constitutional boundaries.

83. Were this Court to grant the prayers of the petitioners, submits Mr. Sai Deepak, the direct and intended consequence would be enlargement of the scope of the offence of rape and to recognise the commission of rape in the context of a marriage. This, he submits, is beyond the powers and authority of this Court under Article 226. Contradistinguishing the present case from ***Navtej Johar***[7] and ***Shreya Singhal v. U.O.I.***[63] , Mr. Sai Deepak submits that the present case does not relate to a constitutional challenge to a criminalizing provision. Any comparison of the present case with these decisions would, therefore, in his submission, be misguided. Equally misguided, according to Mr. Sai Deepak, is the reliance, placed by the petitioners on ***Shayara Bano***[34], in which, even while striking down the practice of *talaq-e-biddat* as unconstitutional under Section 2[64] of the Muslim Personal Law (Shariat) Application Act, 1937, the decision of whether to criminalise, or otherwise, the said practice was relegated to the legislature, specifically recognizing that criminalisation, or creation of an offence was the sole and executive preserve of the legislature. Despite the judgement of the Supreme Court, therefore, he submits that the practice of *talaq-e-biddat* would not be offensive in law, unless the legislature created an offence in that regard.

84. ***Independent Thought***[1], in Mr. Sai Deepak's submission, involved a very limited issue, as was set out in the opening paragraph

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[63] **(2015) 5 SCC 1**

[64] **2. Application of Personal Law to Muslims.—**Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

of the judgement, i.e. "whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape?". The reliance, by the petitioners, on the said decision, as an authority on the power of the judiciary to create a new species of offence was, therefore, in his submission, completely misplaced. Mr. Sai Deepak invites especial attention to para 190 of the decision, which clearly holds that a Court cannot create an offence. The issue before the Supreme Court in ***Independent Thought***[1], he points out, was whether the specification, in the impugned Exception in Section 375, making the Exception applicable where the wife was below the age of 15, was sustainable, as it was clearly in conflict with the provisions of the POCSO Act and the Prevention of Child Marriages Act, 2006 ("the PCMA"). To bring the impugned Exception in harmony with these statutes, and Section 198(6)[65] of the Cr PC, the Supreme Court read down the impugned Exception as being applicable where the wife was between 15 and 18 years of age. As the Supreme Court held, thereby, it was merely bringing in consistency between the impugned Exception and the POCSO Act and the PCMA. Mr. Sai Deepak also criticised the attempt, of Ms. Nundy, to treat ***Independent Thought***[1] as an authority on the aspect of the legality of the impugned Exception *in toto* by applying the inversion test. In his submission, the inversion test can have no application at all in the present case, as the Supreme Court clearly held that the issue under consideration, before it, in ***Independent Thought***[1], was the applicability of the impugned

[65] **198. Prosecution for offences against marriage.—**

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(6) No Court shall take cognizance of an offence under Section 376 of the Indian Penal Code (45 of 1860), where such offence consists of sexual intercourse by a man with his own wife, the wife being under [eighteen years of age], if more than one year has elapsed from the date of the commission of the offence.

Exception to girls between the age of 15 and 18, and also specifically excepted the applicability of the decision to marriage between adults. ***Independent Thought***[1], therefore, if anything, contends Mr. Sai Deepak, would support the upholding of the impugned Exception, rather than its evisceration.

85. Mr. Sai Deepak also disputes the petitioner's contention that the impugned Exception is a colonial provision which lacks the presumption of constitutionality. In his submission, Article 13(1) bridges the gap between pre-Constitutional laws and the Constitution, by clearly ordaining that pre-Constitutional laws would be void to the extent they are inconsistent with the provisions of Part III of the Constitution. Such inconsistency, he submits, cannot be presumed at the outset, but would have to be demonstrated by the person seeking to contend that the law is unconstitutional. Mr. Sai Deepak also submits that the statement of the law, in ***Navtej Johar***[7], that presumption of constitutionality does not attach to pre-Constitutional laws, is *per incuriam*, as the earlier decisions in ***Chiranjitlal Chowdhuri v. U.O.I.***[66], ***State of Bombay v. F.N. Balsara***[67] (by a Constitution Bench) and ***Reynold Raiamani v. U.O.I.***[68] hold otherwise. In his submission, given this difference of views, a case for referring, to the Supreme Court, the issue of whether the observation of the Supreme Court, in ***Navtej Johar***[7], that pre-Constitutional laws lack presumption of constitutionality, is correct, or not, exists.

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[66] **1950 SCR 869**
[67] **1951 SCR 682**
[68] **(1982) 2 SCC 474**

86. In any event, submits Mr. Sai Deepak, even after the enactment of the Indian Constitution, the legislature has not only retained the impugned Exception, but has also cited the institution of marriage and the existence of other criminal remedies as a reason for retaining it. The impugned Exception has received legislative attention several times after the coming into force of the Constitution, thereby entitling it to the same degree of presumptive constitutionality as a post-Constitutional enactment. Apropos the instances when the validity of the impugned Exception has come up for consideration and been deliberated upon, Mr. Sai Deepak cites para 5.9.1 of the 167th Parliamentary Standing Committee on the Criminal Law (Amendment) Bill, 2012, para 1.64 of the 19th Report of the Lok Sabha's Committee on Empowerment of Women and para 3.1.2.1 of the 172nd Law Commission Report (2000). It would, therefore, in his submission, be incorrect to contend that the impugned Exception is still in the nature of a colonial provision which retains the baggage of the English doctrine of coverture. Not a single document, he submits, has been placed on record by the petitioners, on the basis of which it could be said that the doctrine of coverture has operated as the justification for retaining the impugned Exception on the statute book.

87. Mr. Sai Deepak further submits that, if the impugned Exception were to be struck down, it would render otiose the "fourthly" clause in Section 375, which is predicated on natural conjugal relations between spouses. Husbands, he submits, have not been given a free pass with respect to unnatural offences under Section 377[16] or sexual cruelty under Section 498A, which encompasses non-consensual sex and

spousal sexual violence. It is, therefore, not correct to contend that the legal framework as it stands today does not recognise the need for consent in spousal sex. While recognising this necessity, Mr. Sai Deepak points out that the legislature has also recognised the need for differential treatment owing to the nature of the relationship between the parties and the difficulty in establishing lack of consent where there is no legal or effective separation within the meaning of Section 376B.

88. Rationalising the impugned provisions, Mr. Sai Deepak submits that the acts envisaged by clauses (a) to (d) of Section 375 become illegal, and amount to "rape" only in the event of satisfaction of any one of the seven circumstances enumerated in "firstly" to "seventhly" in the said provision and in the absence of consent between a separated couple in the case of Section 376B. Consent, therefore, he submits, is not the sole deciding factor, and is to be examined in the backdrop of the circumstances in which it is refused. It is practically impossible to establish the absence of consent if the issue arises within the peripheries of a marital relationship, given the nature of intimacy associated with the institution of marriage and the absence of eyewitness accounts. It is for this reason, submits Mr. Sai Deepak, that absence of consensual conjugal relations is easier to presume in the event of legal or *de facto* separation under Section 376B. This is also the reason, according to him, that a preliminary enquiry of sorts under Section 198B of the Cr PC is undertaken, to assess whether the couple is living apart although living under the same roof. The submission that all that matters is consent, and that marriage changes nothing is,

therefore, according to him, legally and factually baseless. Mr. Sai Deepak points out that the factum of marriage results in serious obligations on the part of the partners, from conjugal expectations and rights to financial obligations, mental health obligations and a duty towards progeny. In such circumstances, he submits that any contention that the institution of marriage cannot justify the impugned Exception is to deny the obvious.

89. A victim of spousal sexual violence, submits Mr. Sai Deepak, can invoke the DV Act, Section 3 of which includes any conduct of a sexual nature which abuses, humiliates, degrades or otherwise violates the dignity of the wife within the ambit of the expression "sexual abuse". This expression would, therefore, also embrace non-consensual sex. Mr. Sai Deepak also submits that the contention, of learned Counsel for the petitioners, that the DV Act provides only for civil remedies is misplaced in view of Section 19(2)[69] thereof. In fact, he points out, as a matter of practice, directions for registration of FIR under Sections 498A, 376B and 377 of the IPC are regularly passed in exercise of the power conferred by the said provision.

90. Inasmuch as the impugned Exception is based on treating spousal sexual violence as a species *sui generis*, and distinct from "rape" within the meaning of Section 375, Mr. Sai Deepak submits that the petitioners cannot seek to contend that striking down of the

[69] **19. Residence orders.—**

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(2) The Magistrate may impose any additional conditions or pass any other direction which he may deem reasonably necessary to protect or to provide for the safety of the aggrieved person or any child of such aggrieved person.

impugned Exception would merely result in enlarging the scope of offenders without creating a new offence or a species thereof. The difference between the impugned Exception and the rest of Section 375, he submits, is in the "offence", and not in the "offender". In the light of the legislative reticence to employ the expression "rape" in the context of spousal relations, Mr. Sai Deepak contends that the petitioner's argument that the prayers in the petition merely seek enlargement of the class of offenders is baseless. The judgements cited by learned Counsel for the petitioners, to the effect that a Court can enlarge the class of offenders are, therefore, inapplicable to the present case. In fact, in his submission, the reluctance of the legislature to use the expression "rape" in the context of a spousal relationship is not merely intended to protect the spouse, but also their families and the products/issues from the marriage, i.e. their progeny.

91. Protection of the marital institution, submits Mr. Sai Deepak, is a legitimate State interest in our society, and the mores and values of other societies or countries cannot be foisted on us. In any event, the current state of public morality on such issues, he submits, can only be determined by the legislature and not by the Court. Every policy disagreement cannot elevate itself to the level of unconstitutionality, which is a high threshold. Courts, he submits, cannot be used as instrumentalities to upset policy decisions merely because a cross-section of the society disagrees with them. He cites, in this context, paras 42 to 91 of ***Government of Andhra Pradesh v. P. Laxmi Devi***[70],

[70] **(2008) 4 SCC 720**

para 15 of ***Mohd Hanif Qureshi v. State of Bihar***[71], 39 of ***Sunil Batra v. Delhi Administration***[72] para 150 of ***Joseph Shine***[6], para 205 of ***Bombay Dyeing & Manufacturing Co. v. Bombay Environmental Action Group***[73] and paras 36 to 37 of ***Beeru v. State***[74].

92. Mr. Sai Deepak has, finally, distinguished the position as it obtains in India with that which obtains in overseas jurisdictions. In the Sexual Offences Act of 2003, in the UK, for example, he points out that Section 1 entitles the accused to defend himself on the ground that he was under the reasonable belief that sexual intercourse with the alleged victim was consensual. This, he submits, constituted an inbuilt safeguard to the accused. Further, Section 23 of the Sexual Offences Act exempted spouses and civil partners from the benefit of Sections 16 to 19, which dealt with abuse of a position of trust. The evidentiary standards and circumstances in which presumptions could be drawn are also exhaustively set out in the said Act, which also lays out the standard operating procedure for prosecution of such cases. Moreover, he submits, the Sexual Offences Act was a product of legislative, and not judicial, intervention, and was also gender neutral. The judgement of the European Court of Human Rights in ***C.R. v. the United Kingdom***[75] was rendered in the context of a separated couple, in which the estranged husband imposed himself on his former wife which situation, in India, would be covered by Section 376B. In

[71] **AIR 1958 SC 731**
[72] **(1978) 4 SCC 494**
[73] **(2006) 3 SCC 434**
[74] **2013 SCC OnLine Del 4995**
[75] **(1995) 21 EHRR 363**

Nepal, he submits that petitions, similar to the present, were dismissed; moreover, several procedural safeguards had been introduced by the law, when spousal sexual violence became criminalised, including the necessity of initiating a legal proceeding within 35 days of commission of the offence. Further, in Nepal, too, the law was gender neutral. In the US, he points out that different States have adopted different positions and, in each of the said States, the legislation was introduced by the legislature and not by the judiciary. None of these instances, therefore, he submits, addresses a situation such as the present in a gender neutral backdrop.

Submissions of Mr R.K. Kapoor, Counsel for HRIDEY

93. Mr. Kapoor, who appeared for one of the intervenors, draws attention, at the outset, to the deliberations, regarding the impugned Exception and the need for its retention or obliteration, by the Department-Related Parliamentary Standing Committee on Home Affairs in the Rajya Sabha on 1st March, 2013, in which the Parliamentary Standing Committee considered, *inter alia*, the 172nd Report on Review of Rape Laws given by the Law Commission of India, the draft Criminal Law (Amendment) Bill, 2012 and Verma Committee Report. After considering all these aspects and recommendations, Mr. Kapoor points out that the Parliamentary Standing Committee, nonetheless, recommended retention of the impugned Exception, as there was an apprehension that its evisceration could bring the family system under great stress and render vulnerable the institution of marriage, which could result in

more injustice than justice. Mr. Kapoor submits that the correctness of this view is not amenable to judicial review, as it had been reached after wide-ranging consultations with stakeholders – an exercise that the Court is ill-equipped to undertake. Reliance has been placed, by Mr. Kapoor, in this context, on para 409 of the report in ***Raja Ram Pal v. Hon'ble Speaker***[76]. He submits that Courts cannot go into the sufficiency of the object sought to be achieved, or the motive of the legislature in passing a statute or retain a provision, so long as there was an object in existence.

94. Mr. Kapoor also seeks to underscore the pernicious consequences that could result, were the impugned Exception to be struck down. He submits that cohabiting husbands would, in such a circumstance, be worse off than separated spouses under Section 376B, as they would be liable, in the case of conviction, to be imprisoned for 10 years, extendable to life, whereas Section 376B envisages punishment of not less than two years, extendable to seven years. Further, the husband would be subjected to the presumptive rigour of Section 114A of the Evidence Act, which does not apply to Section 376B. As a matter of fact, he submits, Section 376B is in the nature of an exception to Exception 2 to Section 375, setting out a separate and distinct class. This, too, in his submission, indicates that the legislature, in its wisdom consciously retained the impugned Exception, despite making spousal sexual violence an offence in a case where the spouses were judicially separated. The legislative wisdom in such cases cannot be tested by the Court, he submits,

[76] **(2007) 3 SCC 184**

relying on ***Sant Lal Bharti v. State of Punjab***[77]. Citing para 345 of the report in ***T.M.A. Pai Foundation v. State of Karnataka***[78], Mr. Kapoor submits that Article 14 frowns as much on meting out of equal treatment to unequals, as on discrimination between persons equally circumstanced. Absolute equality, he submits, relying on ***H.P. Gupta v. U.O.I.***[79], is often unattainable and, so long as there is a perceptible classification which serves a particular purpose, judicial interference therewith is to be avoided.

95. Mr. Kapoor points out that the issue under consideration is not whether spousal sexual violence is, or is not, to be punished as a criminal act, as Parliament has not condoned spousal sexual violence. It has merely stated that spousal sexual violence cannot be punished as "rape" under Section 376 of the IPC. Other remedies have been provided to deal with such situations, including Section 3 of the DV Act. The sufficiency of such other remedies, as a panacea to spousal sexual violence, he submits, is not judicially reviewable, and Exception 2 to Section 375 cannot be struck down on the ground that the remedies otherwise available to deal with cases of spousal sexual violence are insufficient. Denial of sex by the wife, in particular circumstances, he submits, also amounts to cruelty, which is a ground for divorce.

96. In fine, Mr. Kapoor submits that the socio-legal milieu in India is different, and distinct, from that which obtains in other jurisdictions,

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[77] **(1988) 1 SCC 366**
[78] **(2002) 8 SCC 481**
[79] **(2002) 10 SCC 658**

and there is no justification for requiring India to apply, to itself, decisions taken in other countries.

Analysis

Preliminary Observations

97. The discussions at the bar, in the present case, meandered into so many dusky pathways, into which the provision under challenge does not even pretend to venture, that, in the heat of the debate, the actual issue before the Court suffered obfuscation to a considerable degree. Meaningful art needs a clean canvas. It is necessary, therefore, to know what we are dealing with.

98. Sexual autonomy of women is non-compromisable. Women are morally, legally, spiritually, and in every other way that matters, equal to men. The chance chromosomal circumstance that makes one a man and the other woman has, with the passage of time, ceased to have any significance worth the name. The Hale dictum of 15th century vintage which might, when originally propounded, have reflected the mores and morals of the day has, with the passage of time, become almost bewilderingly anachronistic. Our attention was drawn, by learned Counsel, to the dictum, time and time again, to emphasise how outlandish it is. We – for, on this, I am at one with my eminent Brother – entirely agree. What I, personally, fail to understand, however, is as to *why* such emphasis was placed on the Hale dictum. There is nothing, whatsoever, to indicate that the impugned Exception,

either at the time of its original conception, or later when it came up for discussion on various occasions, was ever sought to be justified on the Hale dictum. To all intents and purposes, therefore, the Hale dictum is completely irrelevant to the issue at hand. Equally, I may note, there is nothing to indicate that the impugned Exception, or its continuance, is being sought to be justified on the basis of the doctrines of coverture or implied consent. Reference to these doctrines, which reflect the mores and morals of an age long past (and hopefully never to return) is, therefore, in my view, unjustified.

99. When one is dealing with a statutory provision of considerable vintage – as in the present case – the compulsions that might *originally* have prompted its enactment, or even retention, might, with the passage of time and changing social and societal perceptions, change. The Court cannot, in my view, test the constitutionality of such provisions solely by regarding their object to be what the original framers of the provisions deemed it to be. Where, especially, the issue of continuance, on the statute book, of the provision, has come in for constitutional deliberation even post enactment of the Constitution, the Court has to be alive *to the issue of whether the retention, or scrapping, of the provision would be advisable given the present socio-legal realities and perceptions, and the justifiability for retention of the provision as the legislature* <u>now</u> *perceives, even if it be different from that which originally provoked its enactment. There may be provisions which were enacted for a specific object and purpose which have, with the march of time, become unjustifiable. If, nonetheless, the provisions merit retention for* <u>other</u> *reasons even in*

the present day and age, the Court cannot shut its eyes thereto, and merely examine the justification for the provision at the time of its enactment. Legislation is, after all, intended, at all times, to maintain social order. Even assuming Macaulay has, therefore, outlived his welcome, the impugned Exception may nonetheless remain constitutional and valid.

100. Provisions that compromise on woman's right to freedom of sexual choice, either regarding the person with whom, or when, to have sex, or that prohibit a person from prosecuting an offender for having committed a statutory offence, or that violate any of the fundamental rights guaranteed by Part III of the Constitution of India, would necessarily be unconstitutional. The impugned Exception, however, does none of these things, though learned Counsel for the petitioners, who seek to have the provision done away with, would emphatically urge to the contrary.

101. Let us reproduce, here, once again, the impugned Exception, unshackled by Section 375:

> "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under 15 years of age, is not rape."

The words of the impugned Exception are plain, and admit of no ambiguity whatsoever. The impugned Exception is worded in absolute terms though, statutorily, it finds place as an Exception to Section 375. It merely states that sexual intercourse, or sexual acts committed by a man with his wife are not rape. In effect, therefore, the impugned Exception keeps rape, and the taint of rape, away from

the marital sphere. It immunizes, in effect, the marital relationship from the slur of rape, and the disgrace that comes with it, whatever be the nature of the sexual activity that takes place within the four corners of the relationship, and irrespective of whether the activity is consensual or non-consensual.

102. Is this unconstitutional? That is the issue before us. We are not, therefore, to judge on whether non-consensual sex within marriage ought, or ought not, to be punished or, if it is, to opine on the appropriate punishment that should visit the perpetrator of the act. We have only to decide whether, in excepting, from the sphere of marriage, any allegation of rape, the legislature has acted unconstitutionally.

103. At this juncture, it is necessary to underscore the most fundamental reason why, according to me, the petitioner's challenge is thoroughly misconceived. One may refer, in this context, to the following assertions, in the Written Submissions tendered by the learned Counsels for the petitioners:

Submissions of Ms Nundy:

> "The MRE suffers from irrationality and manifest arbitrariness inasmuch as it provides immunity from a prosecution for rape to a man for forcibly having sex with his wife, but not to man forcibly having sex with a woman who is not his wife …"

> "Thus, it is submitted that the alleged object of MRE –

protection of conjugal rights and the institution of marriage – would nullify the object of the main provision of criminalizing rape."

"As such, by virtue of the MRE, a husband can enforce his conjugal right (as he understands it) without going to a court of law. It encourages some husbands to do illegally that which cannot be done legally, on the purport that they are exercising their conjugal right."

"A rapist remains a rapist and marriage with the victim does not convert him into a non-rapist. Similarly, a rape is a rape whether it is described as such or is described as penetrative sexual assault or aggravated penetrative sexual assault."

"Prosecutions seeking conviction for rape in the guise of grievous hurt or cruelty are necessarily trying to fit a square peg in a round hole".

"Moreover, it is submitted that not calling a rape within marriage, a rape, also has far reaching consequences for the protection of its victims."

"Women raped by her husband do not get protections under law available to other rape victims."

Submissions of Ms Rebecca John:

"Given the intended consequence of Exception 2 to Section 375 in the Indian Penal Code, 1860 where a married woman is left remediless for an offence of rape committed by her husband."

(While dealing with the available of remedies under other statutes) "Each of the special statutes created for the protection of married women against violence deal with specific crimes. The crime of rape is outside the purview of these statutes."

> "In the case of the crime of rape, can there be any difference in the consent that an unmarried or a married woman gives to the man committing rape upon her?"
>
> "Other statutory provisions penalize crimes against married women, but are insufficient to deal with rape as defined in Section 375."

Submissions of Mr Rajshekhar Rao

> "In this backdrop, the Exception is particular egregious in as much as it a wife the ability to prosecute her husband for the act of 'rape' whereas if the same act were perpetrated by any other male, she would be entitled to do so."
>
> "However, the effect of the Exception is to render the wife's consent immaterial in as much as she cannot prosecute her husband for having non-consensual sexual intercourse with her, i.e., for the act of 'rape'."
>
> "The legislative unwillingness to recognize the act of 'rape' when perpetrated by a husband upon his wife is, in itself, an affront to her 'dignity' and, thereby, violates her fundamental right to life and liberty."

All the above submissions, without exception, proceed on the premise that the husband, in having sex with his wife against her will or consent, commits rape. This contention, in turn, is predicated on the premise that *every* act of non-consensual sex, by a man with a woman, is rape.

104. This submission, as made, besides being bereft of any sound legal foundation whatsoever, consigns, to immediate oblivion, the

impugned Exception. If this premise were to be accepted, i.e., of every act of non-consensual sex by a man with a woman were, in law and without exception, to be regarded as "rape", there would indeed be nothing left to examine. The petitioners appear, in so urging, to have failed to notice the distinction between the etymological and the legal. To urge that rape, per definition, is non- consensual sex by a man with a woman, is just as simplistic as the contention that murder, per definition, is the taking of the life of one man by another. Just as every incident of taking of the life by one, of another, is not murder, every incident of non-consensual sex of a man with a woman is not rape, howsoever much learned Counsel for the petitioners might want it to be. The foundation of the petitioners' case is, therefore, with all due respect to learned Counsel, fundamentally flimsy. A castle cannot be built on reeds. As most of the submissions proceeded on the premise that any and every act of sex by a man with a woman against her will is necessarily rape, irrespective of the circumstances in which they were situated, and the relationship between them, and then condemn the impugned Exception as ordaining otherwise, the main issue of whether, because it excepts sex and sexual acts within marriage from the ambit of "rape", the impugned Exception is unconstitutional, was lost in the clamour. The question of whether the unique demographics of marriage, which unquestionably extend to the sexual sphere as well, would, or would not, justify a differential treatment being extended to sexual acts within marriage, even if non-consensual, was not, I am constrained to observe, debated with the seriousness it deserves.

105. In this context, one may note a frank acknowledgement, in the written submissions dated 1st March, 2022 by Ms Nundy, otherwise one of the most vocal of the crusaders against the impugned Exception. She acknowledges, in so many words, that "there can be no doubt that there is an intelligible differentia between married, separated and unmarried persons in all manners of laws that meets Article 14". Of course, seized as we are with a constitutional challenge, we cannot abdicate our responsibility to examine, *ab initio*, whether such an intelligible differentia, in fact, exists. Ms Nundy, however, does not talk through her hat. She is intelligent and articulate, and clearly knows what she says. This frank and fair acknowledgement, by her, is therefore, entitled to the weight it deserves. Of course, Ms Nundy also submits, in the same breath, that this "intelligible differentia" cannot justify the impugned Exception; that, however, is a matter which I would discuss at greater length later in this judgement.

106. The petitioners would seek to urge that the impugned Exception is unconstitutional, as it violates three of the most sacred fundamental rights guaranteed by the Constitution, ensconced in Articles 14, 19(1)(a) and 21. Needless to say, if the impugned Exception violates even one of these Articles, it would be unconstitutional.

Re: Article 14

107. The petitioners are, undoubtedly, correct in urging that Article 14 of the Constitution would be violated by any provision which treats

equals as unequals (or, I may add, unequals as equals[80]), without any intelligible differentia having a rational nexus to the object sought to be achieved by the provision, or which is otherwise arbitrary.

108. The impugned Exception treats non-consensual sex between a husband and wife differently from non-consensual sex between strangers. By virtue of the impugned Exception, while the latter is rape, the former is not. The distinction is, therefore, *in the act*, and is predicated *on the relationship* of the parties, between whom the act occurs. The act of sex, when it takes place between parties who are joined by marriage, declares the impugned Exception, is in no case rape. The statutory proscription is absolute.

109. Applying the "intelligible differentia" test, the impugned Exception would, therefore, infract Article 14 only if the relationship of marriage, between the man and woman involved in the act, *does not provide* any intelligible differentia having a rational nexus to the object sought to be achieved by the impugned Exception.

110. The answer to this question is, to an extent, to be found even in the following words, from the submissions of Ms. Nundy, to part of which I have already alluded:

> "There can be no doubt that there is an intelligible differentia between married, separated and unmarried persons in all matters of lawsthat meets Article 14. For example, conversations in marriage are protected by spousal privilege under Section 122 of the Evidence Act that no spouse can be compelled to give evidence against the other. The 69th Report

[80] Ref. **State of Maharashtra v. Kamal S. Durgule, (1985) 1 SCC 234; U.O.I. v. Tulsiram Patel, (1985) 3 SCC 398; U.P. Power Corpn. Ltd. v. Ayodhya Prasad Mishra, (2008) 10 SCC 139.**

> of the Law Commission of India illustrates the rationale behind the Section: why the protection is not afforded on any theory of legal unity between the spouses, communications exchanged between them *is based on a higher degree of confidence* that goes with the marriage. Notably the report says: "the marital privilege under the section does not apply in proceedings between the spouses or proceedings in which one married person is prosecuted for any crime committed against the other."
>
> (Emphasis supplied)

While Ms Nundy emphasises the fact that spousal privilege also stops where the spouses are at war, so to speak, what is significant is the *raison d'etre* for the spousal privilege, being the "*higher degree of confidence* that goes with a marriage". Marriage is, therefore, a relationship which brings, with it, a higher degree of confidence, between the partners, than that which exists between persons who are not married.

111. Marriage, submits Mr. Nundy, is no ticket to sex. There is, she submits, no "conjugal right" to sex. Conjugal rights, in a marital relationship as understood in Indian law, extend only to cohabitation and consortium. Sex, in marriage is, therefore, merely a "conjugal expectation".

112. The focus slightly shifts. Does the higher degree of confidence, which distinguishes a marital relationship, coupled with the conjugal right to cohabitation and consortium (implying, at the least, a legally enforceable right to the company of each other), and what Ms Nundy calls a "conjugal expectation" of sex, not constitute justifiable basis for the differential treatment extended, by the legislature, to sex and

sexual acts within marriage, even if non-consensual, vis-à-vis non-consensual sexual acts between strangers? Equally importantly, if the legislature has deemed it appropriate to treat these two situations differently, to what extent can a Court, exercising jurisdiction under Article 226 of the Constitution of India, judicially review the legitimacy of the legislative view?

The 'institution of marriage', and the intelligible differentia that results

113. The demographics of a marriage are *sui generis*. The marriage may be between equals or unequals; it may be good or bad; it may be happy or sad; in every case, however, the factum of marriage, and the relationship between the parties that emerges consequent to the solemnisation of marriage, have their own distinct and identifiable indicia, not to be found in any other relationship between any two individuals. Myriad are the examples of male-female relationship; they may be mother and son, sister and brother or, less platonically, girlfriend and boyfriend, or fiancée and fiancé. The relationship between husband and wife, which emerges as a result of the tying of the proverbial matrimonial knot is, however, distinct from each and all of these relationships. To ignore, or even to seek to undermine, this, is to ignore plain reality. Equally plain, and real, is the fact that the primary distinction, which distinguishes the relationship of wife and husband, from all other relationships of woman and man, is the carrying, with the relationship, as one of its inexorable incidents, of a *legitimate expectation* of sex.

114. This aspect of the matter has been correctly emphasised by Mr. Sai Deepak, and I find myself entirely in agreement with him. The petitioners, in my view, have completely failed to note the uniqueness of marriage as an institution, its peculiar demographics and incidents, and the emotional, psychological, social and other complex equations that exist between a wife and a husband. As Ms Nundy herself acknowledges, there are several legislations which recognise the inherent differences that arise in the context of a marital relationship. The submissions of the petitioners effectively consign all unique incidents of a marital relationship to obscurity. This is particularly evident from a somewhat surprising submission that Mr. Rao, learned *amicus*, sought to advance. Mr. Rao sought to visualise four situations; the first in which the man and woman are strangers, the second in which the man and woman are not yet married, but are five minutes away from marriage, the third in which the man and woman have been married five minutes earlier and the fourth in which the man and woman, though married, are separated. Mr. Rao sought to contend that the incongruity in the impugned Exception was manifest from the fact that while, in the first, the second and the fourth instance, non-consensual sex by the man with the woman would amount to rape, it would not, in the third instance. What was rape ten minutes earlier, therefore, submits Mr. Rao, is not treated as rape ten minutes later, though the act is the same and there is want of consent on both occasions.

115. The error in the submission is self-evident. The submission completely consigns, to the backdrop, the marriage that took place

between the man on the woman, during the momentous ten minutes between the second and the third instance. It is this fundamental error of perception that colours nearly all the submissions advanced by those who seek to oppose the continuance of the impugned Exception on the statute book. Learned Counsel for the petitioners, I am constrained to observe, have, in their submissions, regarded the existence of a marital relationship between the man and the woman as just another incident, which does not really amount to anything much. Ms Nundy has, in her submissions, in fact, referred to it as an "imposed conception of marriage". She submits that "an individual's right not to be raped cannot be held hostage to an imposed conception of marriage". In the first place, I do not understand as to how marriage can be treated as an "imposed conception", or even a "conception" at all. It is a real and salutary institution, which, in a healthy instance, reflects complete emotional and psychological unity between the man and the woman. In a similar vein, Ms. John has submitted that the consequence of the impugned Exception is therefore "that a provision which otherwise criminalises sex without the consent of the woman, exempts a husband from being prosecuted *simply because he is married to her*".

116. Marriage is neither a playground, nor a gladiatorial arena. It is the most pristine institution of mankind, on which the entire bedrock of society rests. The importance of marriage, and the relationship between a husband and wife joined in holy matrimony – Mr Rao's submission that marriage is no longer considered sacred in law being, to my mind, completely unacceptable – cannot be undermined.

Between a husband and wife, who spend their days and nights together, living in a house which, by the dint of their joint effort, they make a home, there exists a bond which defies, and indeed transcends, all known and identifiable parameters. In our country, marital vows are still regarded as inviolable, and marital fidelity is, fortunately, still the norm, profligacy being the exception (even if adultery is no longer a criminal offence). The sexual aspect is but one of the many facets of the relationship between husband and wife, on which the bedrock of their marriage rests. Care, consideration, and an understanding of one other's likes and dislikes, hopes and aspirations, are fundamental to the sustenance of a marriage that is to abide. There can be no comparison, whatsoever, between the relationship between a husband and a wife, with any other relationship between man and woman. It is for *this* reason that there is an enforceable legal right – which even Ms Nundy acknowledges – of each party in a marriage, to cohabit with, and for the consortium of, the other. Fostering the sustenance of a marriage is, in the law as it exists in this country, not just advisable; it is, even for courts, a binding legal obligation. A court hearing a petition for divorce, even by mutual consent is, in our legal system, not entitled to grant divorce straightaway, even if both parties appear to be irreconciliably at odds. The judge is bound, by his oath, to confer and interact with the warring couple, and to make every possible effort to save, rather than sever, the marital bond.

117. Of marriage, the Supreme Court spoke thus, in ***Mr X v. Hospital Z***[81]:

[81] **(1998) 8 SCC 296**

> "Marriage is the sacred union, legally permissible, of two healthy bodies of opposite sexes. It has to be mental, psychological and physical union. When two souls thus unite, a new soul comes into existence. That is how, life goes on and on on this planet."

In somewhat greater detail, ***Chetan Dass v. Kamla Devi***[82] observes thus:

> "Matrimonial matters are matters of delicate human and emotional relationship. *It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse*. The relationship has to conform to the social norms as well. The matrimonial conduct has now come to be governed by statute framed, keeping in view such norms and changed social order. *It is sought to be controlled in the interest of the individuals as well as in broader perspective, for regulating matrimonial norms for making of a well-knit, healthy and not a disturbed and porous society. The institution of marriage occupies an important place and role to play in the society, in general.* Therefore, it would not be appropriate to apply any submission of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case."
>
> (Emphasis supplied)

Indra Sarma v. V.K.V. Sarma[83], too, examines the institution of marriage in considerable detail:

> "**24.** Marriage is often described as one of the basic civil rights of man/woman, which is voluntarily undertaken by the parties in public in a formal way, and once concluded, recognises the parties as husband and wife. Three elements of common law marriage are (1) agreement to be married (2) living together as husband and wife, (3) holding out to the public that they are married. *Sharing a common household and duty to live together form part of the consortium omnis vitae which obliges spouses to live together, afford each other reasonable marital privileges and rights and be honest and*

[82] **(2001) 4 SCC 250**
[83] **(2013) 15 SCC 755**

faithful to each other. One of the most important invariable consequences of marriage is the reciprocal support and the responsibility of maintenance of the common household, jointly and severally. Marriage as an institution has great legal significance and various obligations and duties flow out of marital relationship, as per law, in the matter of inheritance of property, successionship, etc. Marriage, therefore, involves legal requirements of formality, publicity, exclusivity and all the legal consequences flow out of that relationship.

25. Marriages in India take place either following the Personal Law of the religion to which a party belongs or following the provisions of the Special Marriage Act. Marriage, as per the common law, constitutes a contract between a man and a woman, in which the parties undertake to live together and support each other. Marriage, as a concept, is also nationally and internationally recognised. ***O'Regan, J., in Dawood v. Minister of Home Affairs***[84] noted as follows:

> "*Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well.*
>
> *The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to*

[84] **(2000) 3 SA 936 (CC)**

moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends…."

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32. We have referred to, *in extenso*, about the concept of "marriage and marital relationship" to indicate that *the law has distinguished between married and unmarried people, which cannot be said to be unfair when we look at the rights and obligations which flow out of the legally wedded marriage. A married couple has to discharge legally various rights and obligations, unlike the case of persons having live-in relationship or, marriage-like relationship or de facto relationship*.

33. Married couples who choose to marry are fully cognizant of the legal obligation which arises by the operation of law on solemnisation of the marriage and the rights and duties they owe to their children and the family as a whole, unlike the case of persons entering into live-in relationship. This Court in ***Pinakin Mahipatray Rawal v. State of Gujarat***[85] held that *marital relationship means the legally protected marital interest of one spouse to another which include marital obligation to another like companionship, living under the same roof, sexual relation and the exclusive enjoyment of them, to have children, their upbringing, services in the home, support, affection, love, liking and so on.*

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52. Tipping, J. in ***Thompson v. Deptt. of Social Welfare***[86] listed few characteristics which are relevant to determine relationship in the nature of marriage as follows:

[85] **(2013) 10 SCC 48**
[86] **(1994) 2 NZLR 369 (HC)]**

"(1) Whether and how frequently the parties live in the same house.

(2) Whether the parties have a sexual relationship.

(3) Whether the parties give each other emotional support and companionship.

(4) Whether the parties socialise together or attend activities together as a couple.

(5) Whether and to what extent the parties share the responsibility for bringing up and supporting any relevant children.

(6) Whether the parties share household and other domestic tasks.

(7) Whether the parties share costs and other financial responsibilities by the pooling of resources or otherwise.

(8) Whether the parties run a common household, even if one or other partner is absent for periods of time.

(9) Whether the parties go on holiday together.

(10) Whether the parties conduct themselves towards, and are treated by friends, relations and others as if they were a married couple."

(Emphasis supplied)

118. Learned Counsel for the petitioners have, in my considered opinion, completely failed to accord, to the marital relationship, the status and importance it deserves. It has been characterized, by learned Counsel, even in their written submissions as "an institution", to which, according to them, "individual rights" cannot be subservient. Marriage, the submissions fail to take into account, is not a brick-and-

mortar institution. It is an institution which epitomizes, at the highest level, the most sublime relationship that can exist between man and woman. Decidedly, it is *not* an "imposed conception".

119. In this relationship, given its unique character and complexity, the legislature has, advisedly, felt that no allegation of "rape" has place. Sex between a wife and a husband is, whether the petitioners seek to acknowledge it or not, sacred. In no subsisting, surviving and healthy marriage should sex be a mere physical act, aimed at gratifying the gross senses. The emotional element of the act of sex, when performed between and wife and husband, is undeniable. The marital bedroom is inviolable. A legislation that seeks to keep out, from the parameters of such a relationship, any allegation of 'rape', in my view, is completely immune to interference.

120. Introducing, into the marital relationship, the possibility of the husband being regarded as the wife's rapist, if he has, on one or more occasion, sex with her without her consent would, in my view, be completely antithetical to the very institution of marriage, as understood in this country, both in fact and in law. The daughter born of such an act would, if the petitioner's submissions are to be accepted, be a product of rape. Though the child has been born out of wedlock, and out of a perfectly legitimate sexual act between her parents, she would be the child of a rapist because her mother was, on the occasion when she had sex with her father, been unwilling. Her father, as a rapist, would be liable to suffer the punishment stipulated in Section 376, were her mother to prosecute. The sequelae, were the

submissions of the petitioners to be accepted, are mind boggling.

121. The submission, of learned Counsel for the petitioners, that, as the impugned Exception accords sanctity to the institution over the rights of the individuals involved in the institution, it is unconstitutional is, therefore, fundamentally flawed. Marriage, as already noted, is not a brick and mortar institution. The "institution" of marriage represents the cohesive and sanctified union of the individuals in the marriage. The individuals, therefore, make the institution. If the institution is imperilled, the individuals are imperilled. Moreover, in advancing this submission, learned Counsel seem to overlook the fact that, in a marriage, there are two individuals involved. Sustenance of the marital institution, therefore, involves sustenance of the rights of every husband and every wife in the country, united by a bond of marriage. Protection of the institution of marriage is, therefore, a sanctified constitutional and social goal. Preservation of the marital institution being the avowed object of retaining the impugned Exception on the statute book, the submission, of learned Counsel for the petitioners, that it has outlived its use is also completely bereft of substance. This is quite apart from the fact that, as I observe elsewhere in this judgement, the impugned Exception results in no prejudice, at all, to the fundamental rights of wives.

122. It is sanctified, in law, that public interest trumps private interest. Given the nature of the marital institution in our socio-legal milieu, if the legislature is of the view that, for preservation of the

marital institution, the impugned Exception should be retained, the Court would not be in a position to strike down the Exception unless it were to hold, *per contra*, that the view of the legislature is incorrect. That, however, we cannot do, as it would amount to substituting our value judgement for the value judgement of the legislature, which, in a democracy, is unquestionably entitled to precedential preference, as the voice of the legislature is, classically and constitutionally, the voice of the people.

123. Learned Counsel for the petitioners have emphasised that marriage does not entitle a husband to have forceful sex with his wife, against her willingness or consent. The proposition is unexceptionable. It is in presuming the sequitur to this proposition to be that the impugned Exception is unconstitutional, that learned Counsel for the petitioners, in my considered opinion, err. To my mind, in fact, the proposition is really tangential to the issue at hand.

124. Marriage, unquestionably, does not entitle a husband to coerce his wife into sex, if she is not inclined. The impugned Exception does not, however, either expressly or by necessary implication, confer, on the husband in a marriage, an entitlement to insist on sex with his wife, against her willingness or consent (This aspect would be examined, in somewhat greater detail, a little later.) All that it says is that sexual intercourse and sexual acts – which one may, for the purposes of convenience, refer to, generally, as "sex" – by a husband with his wife, is not rape. By extrapolation, it may be inferred that the impugned Exception also excepts, from the scope of "rape", a

situation in which the wife is not willing or does not consent. Any further extrapolation, to imply that the provision *encourages*, or even sanctions or permits, non-consensual sex by a husband with his wife would, in my opinion, would be completely unwarranted.

125. The Supreme Court, half a century ago in the celebrated decision of ***Dastane v. Dastane***[87], observed that "sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfillment". On similar lines, the following observations of a Division Bench of this Court in ***Rita Nijhawan v. Balkrishan Nijhawan***[88] were cited, with approval, by the Supreme Court in ***Vinita Saxena v. Pankaj Pandit***[89]:

> "22. In the present case the marriage took place in 1954. Barring the pregnancy in 1958 which according to the appellant was the result of part improvement, right from the day of marriage till 1964, there has never been any normal sexual life, and the respondent has failed to give sexual satisfaction. The marriage has really been reduced to a shadow and a shell and the appellant has been suffering misery and frustration. In these days it would be unthinkable proposition to suggest that the wife is not an active participant in the sexual life and therefore, the sexual weakness of the husband which denied normal sexual pleasure to the wife is of no consequence and therefore, cannot amount to cruelty. Marriage without sex is an anathema. Sex is the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue for long. It cannot be denied that sexual activity in marriage has an extremely favourable influence on a woman's mind and body. The result being that if she does not get proper sexual satisfaction it will lead to depression and frustration. It has

[87] **(1975) 2 SCC 326**
[88] **AIR (1973) Del 200**
[89] **(2006) 3 SCC 778**

> been said that the sexual relations when happy and harmonious vivifies woman's brain, develops her character and trebles her vitality. It must be recognized that nothing is more fatal to marriage than disappointments in sexual intercourse."

Significantly, the Supreme Court, in ***Vinita Saxena***[98], recognises sex to be a "matrimonial obligation". Irrespective, therefore, whether "conjugal rights" extend to a right to have sex, sex remains a conjugal obligation, even if not mandatorily enforceable by a decree of Court.

126. Marriage, as a sociological instrument, confers legitimacy to sexual activity between man and woman. A child "born of wedlock", therefore, is "legitimate"; one born out of wedlock is not. One of the grassroots justifications for marriage is, unquestionably, the right to engage in sexual activity without societal disapprobation. Neither member of an unmarried couple has *a right* to seek sex from the other nor does either member *have a right to expect* sex from the other. At the highest, even in the case of a live-in couple, there is no right to expect sex; as the highest, the expectation of sex is merely a hope.

127. The expectation of sex of the husband, with his wife is, therefore, a legitimate expectation, a healthy sexual relationship being integral to the marital bond. Unjustified denial of sexual access, by either spouse to the other, is not, therefore, sanctified or even condoned by law. It may not invite criminal action; it, nonetheless, entitles the spouse, to whom sexual access has been unjustifiably denied, to seek a separation by way of divorce. The integrity of a subsisting social equation between wife and husband as a necessary

ingredient of a sustainable marriage stands, thereby, recognised by law. Divorce, unquestionably, visits both the spouses with civil and societal, as well as personal and psychological, consequences. The law, too, therefore, recognises the legitimacy of the desire of either spouse to have meaningful sexual relations with the other, as not only a civil, *but a legal obligation*. This aspect is, in fact, acknowledged by Ms. John when in her submission, she admits that "a marriage comes with reciprocal *obligations* and expectations of the parties, *including of sex*".

128. The fact that the obligation may be enforceable, by law, to a greater, or a lesser, degree, does not detract from its character as an obligation. Unreasonable denial of sex to a spouse has also been held, in several decisions, to amount to "cruelty"[90]. Cruelty, needless to say, can never be something which the law sanctifies.

129. Viewed in this backdrop, let us compare a situation of sex, without a woman's consent or willingness, being forced upon her by a stranger, with a situation in which the man is her husband. The stranger is a violator without right, who does not even have an expectation, which may be regarded as legitimate, of sex with the woman. The woman, in such a situation, surrenders her sexual autonomy, and freedom of choice, to a complete stranger, with whom she has no relationship that legally entitles the man to seek sex from her. It is an assault on her independence, and on her right to choose

[90] **Rita Nijhawan v. BalkrishanNijhawan *supra*; Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511; Vidhya Viswanathan v. Kartik Balakrishnan, (2014) 15 SCC 21**

her sexual partner. The man, in turn, acts in total disregard of the right of the woman to independent sexual choice. It is for this reason that rape, which is often regarded as a crime of lust, is actually a crime of power.

130. Contradistinguish, now, this situation, with a situation of a husband forcing his wife to have sex with him, despite her unwillingness. That what he is doing is wrong, no one can deny. The distinction between the two situations is that, where the parties are married, the woman has consciously and willingly entered into a relationship with the man in which sex is an integral part. She may not, therefore, as Lord Hale thought, have cleaved unto the man for life, or surrendered her sexual autonomy to the will of the man. She has, nonetheless, by her decision to marry the man, given, to him, the right to expect meaningful conjugal relations with her. If, therefore, the man, in such a situation, requests her, on a particular occasion, to have sex, he is exercising a right that vests in him by marriage, and requests his wife to discharge an obligation which, too, devolves on her by marriage. If the wife refuses, and the husband, nonetheless, has sex with her, howsoever one may disapprove the act, it cannot be equated with the act of ravishing by a stranger. Nor can the impact on the wife, in such a situation, be equated with the impact of a woman who is raped by a stranger. Any assumption that a wife, who is forced to have sex with her husband on a particular occasion when she does not want to, feels the same degree of outrage as a woman raped by a stranger, in my view, is not only unjustified, but is *ex facie* unrealistic. Disagreements, in married life, are but natural and, on

occasion, may even lend strength to the marital bond. These disagreements could also extend to the bedroom. A husband may, on occasion, compel his wife to have sex with him, though she may not be inclined. Can it be said, with even a modicum of propriety, that her experience is the same as that of a woman who is ravaged by a stranger? Equally, can it be said, reasonably, that a wife, *in a subsisting and surviving marriage with her husband with whom she cohabits* who, on one or even more, occasions, has had to have sex with her husband despite her reluctance and unwillingness, would want to drag her husband to court for rape, seeking his incarceration under Section 376? The petitioners may contend in the affirmative; in my opinion, though there is no basis for such a contention. It cannot even be assumed, in my view, that the perceptions of the petitioners reflect the views of the majority of Indian women. Any such contention would, at the very least, be purely presumptive in nature. This aspect is important. As Mr Tushar Mehta, learned Solicitor General correctly submitted, the impugned Exception, and its evisceration from the statute book, are not issues of merely legal import; the issue has wide societal and sociological ramifications, which cannot be ignored. The perception of the teeming millenia of this country cannot, therefore, be regarded as an illegitimate consideration, while examining the need, or otherwise, to retain the impugned Exception in Section 375 of the IPC.

131. The extent to which, if the concept of 'rape' were to be introduced into the marital equation, the institution of marriage, or family, would be affected, is not something on which this Court can

opine. The legislature feels that it does. In arriving at this conclusion, the legislature has, at its command, the vast arsenal of State resources. Legislation is not an overnight exercise, least of all when it involves the decision to define an act as an offence. If, therefore, the legislature, after interaction with stakeholders and after conscious deliberation and debate, forms the opinion that introduction of the concept of 'rape' into the marital sphere may imperil the institution of marriage, this Court, at the instance of arguments of Counsel, howsoever gifted, would, in my opinion, be thoroughly ill-equipped to hold otherwise. Even if the legislature were merely to decide not to 'take chances', that, too, in my view, would not be an illegitimate consideration. This Court cannot, therefore, substitute its view for that of the legislature, and hold, definitively, that treating non-consensual sex by a husband with his wife would *not* imperil, or threaten, the marital institution. Neither do we have the wherewithal, or the resources, to undertake an incursive study into the issue, nor, for that matter, can we legitimately do so. The consideration and the concern of the legislature are legitimate. The legislation must, ergo, be upheld.

132. Acts of physical violence by a husband on his wife, needless to say, are a different matter altogether, and cannot be the lodestone on the basis of which we test the vires of the impugned Exception. Rape encompasses all acts, from a single act of unwilling or non-consensual sex to the grossest act of non-consensual sexual violence. The constitutionality of the impugned Exception cannot be tested by referring only to gross acts of sexual assault such as that which appear

to have, unfortunately, visited the petitioner in WP (C) 5858 of 2017, for the simple reason that the consequence of our striking down the impugned Exception would be that even a single act of non-consensual sex, or of sex by a husband with his wife without unwillingness, would qualify as "rape". Can it be said, in such circumstances, that in distinguishing between such acts, when they occur between a husband and wife, with an act of rape by a stranger on a stranger, the legislature has acted either arbitrarily, or that there is no intelligible differentia between the two cases, which bears a rational nexus to the object sought to be achieved by the impugned Exception?

133. Our task, here, is not to pronounce on whether the husband, in acting as he does, commits, or does not commit, an actionable wrong. We may assume, *arguendo*, that he does. Our task is to adjudicate on whether, in desisting from treating him as a rapist, who has committed "rape" within the meaning of Section 375, punishable under Section 376, the legislature can be said to have acted arbitrarily or unconstitutionally. Given the unquestionable qualitative distinction which exists between sexual relations in a marriage, vis-à-vis sexual relations between strangers, if the legislature has, in its wisdom, decided to treat non-consensual sex by a man with a woman, where the woman is a stranger, as rape, and non-consensual sex by a husband with his wife, as not rape, I am unable to subscribe to the submission that the distinction violates Article 14 of the Constitution of India.

Re. the argument that the impugned Exception creates "three classes

of victims"

134. Among the contentions advanced by Ms. Nundy is the contention that the impugned Exception violates Article 14 as it creates three classes of victims, though the act committed is the same. In other words, Ms. Nundy submits that the same act of non-consensual sexual intercourse, when committed by a stranger, by a husband or by a husband who has parted ways with his wife, is differently treated. This, according to her, is unconstitutional, and violates Article 14.

135. The contention, to my mind, is completely bereft of substance. There is no principle, in law, that the same act, when committed by different persons, or by perpetrators differently situated vis-à-vis the victim, or in different circumstances, cannot be differently treated. Legally, there is no infirmity in treating the act as a crime in one circumstance, and perfectly condonable in another. A father slapping a son is not a criminal offence, whereas a stranger who slaps a child may well be committing a crime. Robbery, otherwise chargeable under Section 390 of the IPC, becomes, when conjointly committed or attempted to be committed by five or more persons, dacoity, punishable under Section 391. Even within the definition of rape, if the act is committed in one of the circumstances envisaged by Section 376(2), it is treated as "aggravated" rape, entailing a higher punitive sentence.

135 A Every offence has, essentially, four indicia; the perpetrator, the

victim, the act and the punishment. The four, together, assimilate into what a statute regards as a particular offence. It is not possible to vivisect the offence, as a statutory conception of the legislature, and start viewing these four indicia as individual components, unrelated to each other. An "act" cannot be divorced from its actor. Offences are not committed by insubstantial phantasms. An act of non-consensual sex, as committed by a complete stranger, cannot, therefore, be equated with an act of non-consensual sex by a husband. The extent of outrage felt by the wife, in the two cases, is also distinct and different. It would be artificial to assume that the degree of outrage felt by a wife who is compelled to have sex on a particular occasion with her husband, despite her unwillingness, is the same as the degree of outrage felt by a woman who is ravaged by a stranger against her will. Even when viewed from the point of view of the perpetrator, who is, after all, the statutory offender, and who has to suffer the punishment prescribed for the act, the legitimate expectation of sex, that the husband has, is, in my view, a factor which may legitimately be regarded as mitigating the culpability, as the perpetrator of the act of non-consensual sex, vis-à-vis a stranger who has no such legitimate expectation, much less a right. There is, therefore, an intelligible differentia in the two cases. From the point of view of the victim, it would be equally unrealistic to presume that a wife, on whom a husband forces sex, against her will on a particular occasion, would suffer the same degree of violation as a woman who is ravaged by a stranger. From the point of view of the victim, too, there is, therefore, an intelligible differentia. One of the most significant distinctions between the two situations is that, in the case of an act of non-

consensual sex between a husband and wife, there is no societal ramification whatsoever, unlike in the case of a woman raped by a stranger, as the act takes place within the privacy of the marital bedroom and, more empirically, because the man and the woman are married.

'Conjugal right' versus 'conjugal expectation'

136. It has been repeatedly emphasised by learned Counsel for the petitioners that the "conjugal expectation of sex" does not extend to sex against the will of the spouse. As Ms. Nundy felicitously puts it, conjugal rights end where bodily autonomy begins. I am entirely in agreement with the submission. Where, however, I cannot agree with learned Counsel for the petitioners is in their further submission that, for this reason, the impugned Exception deserves to be struck down. The impugned Exception does not, either directly or by necessary implication, state that, by reason of marriage, a husband has a right to have sex with the wife against her will or consent. All that it says is that, if he does so, he, unlike a stranger committing such an act, cannot be treated as a rapist. There is a clear intelligible differentia between the two situations, viewed from the point of view of the act, the perpetrator, the victim, the degree of culpability and the degree of outrage that the victim would feel once the act is perpetrated. At the very least, if the legislature has chosen to treat the two situations differently, there is no justification, whatsoever, in my view, for a Constitutional court, exercising jurisdiction under Article 226 of the Constitution, to interfere with the view of the legislature, even if its

sensitivities impel it to think otherwise.

137. For this reason, the emphasis, placed by learned Counsel for the petitioners, on the fact that a decree for restitution of conjugal rights can merely restitute consortium and cohabitation, and cannot include any direction to the parties to have sex, is completely off the point. The impugned Exception does not seek, directly or indirectly, to enforce a non-enforceable conjugal right, or even a conjugal expectation. The existence of such a conjugal expectation, to normal sexual relations, read with the unique relationship of marriage, however, provides an intelligible differentia, having a rational nexus to the object of the impugned Exception, as well as to the object of Section 375 itself. The extent to which a decree for restitution of conjugal rights can extend, or can be enforced is not, therefore, a legitimate consideration, in assessing the constitutionality of the impugned Exception.

Is the impugned Exception arbitrary?

138. Learned Counsel for the petitioners also contended that the frontiers of Article 14, with the development of the law, have expanded beyond mere discrimination, and that any act, whether it be of the legislature or of the executive, which is "arbitrary" infracts Article 14. By this standard, learned Counsel contended that the impugned Exception, in excepting husbands, who have non-consensual sex with their wives, from the rigour of "rape", is arbitrary.

139. Invidious discrimination and arbitrariness, as considerations that would render a legislative, or executive, act unconstitutional, actually overlap to some degree. Though "arbitrariness", as a jurisprudential concept, may have myriad complexions and contours, the Supreme Court, in ***Sharma Transport v. Govt of A.P.***[91], defines the expression "arbitrarily" as meaning an "act done in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgement, depending on the will alone". The manner in which the considerations of arbitrariness and invidious discrimination, vis-à-vis Article 14 of the Constitution, dovetail into one another, is well explained in the following passage from the well-known decision of the Supreme Court in ***R.K. Garg v. U.O.I.***[92]:

> "That takes us to the principal question arising in the writ petitions namely, whether the provisions of the Act are violative of Article 14 of the Constitution. The true scope and ambit of Article 14 has been the subject-matter of discussion in numerous decisions of this Court and the propositions applicable to cases arising under that Article have been repeated so many times during the last thirty years that they now sound platitudinous. The latest and most complete exposition of the propositions relating to the applicability of Article 14 as emerging from "the avalanche of cases which have flooded this Court" since the commencement of the Constitution is to be found in the judgment of one of us (Chandrachud, J., as he then was) in ***In re The Special Courts Bill, 1978***[93] . It not only contains a lucid statement of the propositions arising under Article 14, but being a decision given by a Bench of seven Judges of this Court, it is binding upon us. That decision sets out several propositions delineating the true scope and ambit of Article 14 but not all

[91] **(2002) 2 SCC 188**
[92] **(1981) 4 SCC 675**
[93] **(1979) 1 SCC 380**

of them are relevant for our purpose and hence we shall refer only to those which have a direct bearing on the issue before us. They clearly recognise that classification can be made for the purpose of legislation but lay down that:

> "1. The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia must have a rational relation to the object sought to be achieved by the Act.
>
> 2. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. *In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense above mentioned*."

It is clear that Article 14 does not forbid reasonable classification of persons, objects and transactions by the legislature for the purpose of attaining specific ends. What is necessary in order to pass the test of permissible classification under Article 14 is that *the classification must not be "arbitrary, artificial or evasive*" but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature. The question to which we must therefore address ourselves is whether the classification made by the Act in the present case satisfies the aforesaid test or it is arbitrary and irrational and hence violative of the equal protection clause in Article 14."

Arbitrariness, as an abstract concept, cannot, therefore, constitute the basis for striking down a legislative provision as unconstitutional, or as violative of Article 14. It has to be remembered that Article 14, after all, pertains to a fundamental right to equality. If a provision is to be struck down as violative of Article 14 on the ground that it is arbitrary, therefore, the arbitrariness must be in relation to the manner in which it creates a distinction between persons or things who appear, otherwise, to be similarly situated. It is for this reason that, in ***In re. Natural Resources Allocation***[94] and ***State of M.P. v. Rakesh Kohli***[95], the Supreme Court holds that the law may not be struck down merely on the ground that it is arbitrary; it is also necessary to establish that it is constitutionally infirm. Else, the concept of "arbitrariness" may lead to a perplexing degree of subjectivity. What may appear to be arbitrary to one may not appear arbitrary to another – the present case being a stellar example. There are no cut and dry indicia of arbitrariness. If arbitrariness alone is to be the basis, the legislation would become subject to the vagaries of judicial thinking. So long as justice is administered by judges, and not automatons, arbitrariness *per se* would, therefore, be too slender a thread on which to hang a statutory provision, in order to test its constitutionality.

140. In this context, the following declaration of the legal position, to be found in para 11 of the judgement of the Supreme Court in ***Ameerunnissa Begum v. Mahboob Begum***[96] , which recognises the

[94] **(2012) 10 SCC 1**
[95] **(2012) 6 SCC 312**
[96] **AIR 1953 SC 91**

arduous nature of the task faced by the legislature, and the latitude enjoyed by the legislature in classifying persons, objects or situations differently, requires to be noticed:

> "**11.** The nature and scope of the guarantee that is implied in the equal protection clause of the Constitution have been explained and discussed in more than one decision of this Court and do not require repetition. *It is well settled that a legislature which has to deal with diverse problems arising out of an infinite variety of human relations must, of necessity, have the power of making special laws to attain particular objects; and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate. Mere differentiation or inequality of treatment does not per so amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislature has in view*."
>
> (Emphasis supplied)

The statement of the law contained in the afore extracted passage from ***Ameerunnissa Begum***[96] may well be regarded as Article 14 in its ultimate distilled form, purified of all extraneous impurities and considerations. The Court, seized with a challenge to a statutory provision as unconstitutional on the ground that it violates Article 14, is required to remain acutely conscious, at all times, of the nature of the task before the legislature, democratically elected, and the latitude that the law grants it, to classify persons, situations and objects differently. The fact that such a classification is made is no ground, therefore, for a Court to tinker with it. The mere fact that persons are treated differently or unequally, is not, *per se* discriminatory. What has to be established is that the differentiating factor is non-existent, or that, even if it exists, it bears no rational nexus to the object sought

to be achieved by the statutory provision concerned.

141. In this, the Court is also required to keep in mind the distinction between the object sought to be achieved by the statutory provision and the rationale for the object. With respect to the impugned Exception, this distinction is important. The object sought to be achieved by the impugned Exception is transparently obvious even from the Exception itself. It is to treat sex and sexual acts, between a husband and wife, differently from such acts committed between strangers, insofar as Section 375 is concerned. The rationale for this object which, as originally envisaged by Macaulay, may have been protection of the "conjugal rights of the husband" has evolved over a period of time and, today, if the legislature hesitates from it, admittedly, is to preserve the marital institution. The contention, of Ms. Nundy, that such an object is illegal is, to my mind, with respect, absurd, and merits outright rejection. She has, in this context, cited para 74 of the report in ***Independent Thought***[1] and para 212 of the report in ***Joseph Shine***[6]. I cannot agree. ***Independent Thought***[1], expressly (as would be discussed at greater length later in this judgement) was examining the issue of whether preservation of the marital institution was a justification in the case of *marriage with a girl child who, statutorily, was even incapable of giving meaningful consent*. It was in the backdrop of the unique dynamics of the constitutional duty to preserve and protect the girl child that the observations in ***Independent Thought***[1] were returned. ***Joseph Shine***[6], too, dealt with the legitimacy of punishing adultery as a crime, given the decision right of a wife to decide on her sexual partner. Neither of

these cases, therefore, dealt with the issue of whether introduction, within the matrimonial ambit, of the concept of "rape", would imperil its sustenance as an institution of pre-eminent socio-legal importance, the preservation of which is a constitutional imperative. The issue before us is *sui generis*, and reliance on judgements which did not deal with it can hardly help.

142. Preservation of the marital institution is in eminent public and societal interest, and it is preposterous to contend that such an object is not legal. The decisions of the Supreme Court that expound on marriage, cited *supra*, bear testimony to this legal position. If preservation of the marital institution is the object of the impugned Exception, to my mind, extending, to non-consensual sexual acts committed within marriage, a treatment different from that extended to non-consensual sexual acts committed outside marriage, clearly bears a rational nexus to the object.

143. That there is an intelligible differentia between the two situations, learned Counsel for the petitioners themselves acknowledge. Once, thus, there is an intelligible differentia, a legal object that the impugned Exception seeks to achieve, and a rational nexus between the differentia and the object, the scope of the enquiry by the Court ends there. It is not open to a Court to examine, further, whether the object of the legislation is *sufficient* to justify the differentia. A writ Court, venturing into that territory, would clearly be exceeding the boundaries of its authority under Article 226. That is an arena in which the legislature must be freely allowed to peregrinate

as, else, the task of legislation would become well-nigh impossible to discharge. Once the legislature adopts the view that there is an object X that it seeks to achieve (protection of the marital institution), which is legal, and that, in order to achieve that object, it seeks to distinguish between A and B, if the distinction thus drawn between A and B (on the basis of marriage) has a rational nexus with object X, the legislation is *ipso facto intra vires*. The Court cannot proceed to enquire any further into the matter. The Court cannot tell the legislature, "Though you feel that treating non-consensual sex between husband and wife as rape would threaten the marital institution, we do not think so." Else, the distinction between the legislature and the judiciary would stand obliterated, which would imperil, near fatally, in turn, the principle of separation of powers on which our democratic edifice stands. In this context, the following passages from ***Aravali Golf Club v. Chander Hass***[97] are amply evocative of the legal position:

> "**17.** Before parting with this case we would like to make some observations about the limits of the powers of the judiciary. We are compelled to make these observations because we are repeatedly coming across cases where judges are unjustifiably trying to perform executive or legislative functions. In our opinion this is clearly unconstitutional. In the name of judicial activism judges cannot cross their limits and try to take over functions which belong to another organ of the State.
>
> **18.** Judges must exercise judicial restraint and must not encroach into the executive or legislative domain, vide ***Indian Drugs & Pharmaceuticals Ltd. v. Workmen***[98] and ***S.C. Chandra v. State of Jharkhand***[99].

[97] **(2008) 1 SCC 683**
[98] **(2007) 1 SCC 408**
[99] **(2007) 8 SCC 279**

19. Under our Constitution, the legislature, the executive and the judiciary all have their own broad spheres of operation. Ordinarily it is not proper for any of these three organs of the State to encroach upon the domain of another, otherwise the delicate balance in the Constitution will be upset, and there will be a reaction.

20. Judges must know their limits and must not try to run the Government. They must have modesty and humility, and not behave like emperors. There is broad separation of powers under the Constitution and each organ of the State –the legislature, the executive and the judiciary – must have respect for the other and must not encroach into each other's domains.

21. The theory of separation of powers first propounded by the French thinker Montesquieu (in his book The Spirit of Laws) broadly holds the field in India too. In Chapter XI of his book The Spirit of Laws Montesquieu writes:

> "When the legislative and executive powers are united in the same person, or in the same body of Magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> *Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.*
>
> There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."
>
> (emphasis supplied)

We fully agree with the view expressed above. Montesquieu's

warning in the passage abovequoted is particularly apt and timely for the Indian judiciary today, since very often it is rightly criticised for "overreach" and encroachment into the domain of the other two organs.

23. In ***Ram Jawaya Kapur v. State of Punjab***[100] a Constitution Bench of this Court observed :

> "12. … The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity *but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.*"
>
> (emphasis supplied)

24. Similarly, in ***Asif Hameed* v. *State of J & K***[101] a three-Judge Bench of this Court observed : (SCC pp. 373-74, paras 17-19)

> "17. Before adverting to the controversy directly involved in these appeals we may have a fresh look at the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. *No organ can usurp the functions assigned to another*. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, the two facets of people's will, they have all the powers including that of finance. Judiciary has no power over sword or the

[100] **AIR 1955 SC 549**
[101] **1989 Supp (2) SCC 364**

purse nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self-imposed discipline of judicial restraint.

18. Frankfurter, J. of the US Supreme Court dissenting in the controversial expatriation case of ***Trop v. Dulles***[102] observed as under : (US pp. 119-20)

> *'... All power is, in Madison's phrase, "of an encroaching nature". Judicial power is not immune against this human weakness*. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint….

Rigorous observance of the difference between limits of power and wise exercise of power – between questions of authority and questions of prudence –requires the most alert appreciation of this decisive but subtle relationship of two concepts that too easily coalesce. No less does it require a disciplined will to adhere to the difference. It is not easy to stand aloof and allow want of wisdom to prevail, to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorised the Judges to sit in judgment on the wisdom of what Congress and the executive branch do.'

19. When a State action is challenged, the function of the

[102] **356 US 86 : 2 L Ed 2d 630 (1958)**

court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the Constitution and if not, the court must strike down the action. While doing so the court must remain within its self-imposed limits. The court sits in judgment on the action of a coordinate branch of the Government. While exercising power of judicial review of administrative action, the court is not an appellate authority. The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonise qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers."

(Emphasis supplied)

31. If the legislature or the executive are not functioning properly it is for the people to correct the defects by exercising their franchise properly in the next elections and voting for candidates who will fulfil their expectations, or by other lawful methods e.g. peaceful demonstrations. The remedy is not in the judiciary taking over the legislative or executive functions, because that will not only violate the delicate balance of power enshrined in the Constitution, but also the judiciary has neither the expertise nor the resources to perform these functions.

33. Judicial restraint is consistent with and complementary to the balance of power among the three independent branches of the State. It accomplishes this in two ways. First, judicial restraint not only recognises the equality of the other two branches with the judiciary, it also fosters that equality by minimising inter-branch interference by the judiciary. In this analysis, judicial restraint may also be called judicial respect, that is, respect by the judiciary for the other coequal branches. In contrast, judicial activism's unpredictable results make the judiciary a moving target and thus decreases the ability to maintain equality with the co-branches. Restraint stabilises the judiciary so that it may better function in a system of inter-branch equality.

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> **35.** The constitutional trade-off for independence is that judges must restrain themselves from the areas reserved to the other separate branches. Thus, judicial restraint complements the twin, overarching values of the independence of the judiciary and the separation of powers."

144. One may also refer, in this context, to the following illuminating passage from ***Chiranjit Lal Chowdhury*** [66]:

> "**86.** The only other ground on which the Ordinance and the Act have been challenged is that they infringe the fundamental rights guaranteed by Article 14 of the Constitution. "Equal protection of the laws", as observed by Day, J. in ***Southern Railway Company v. Greene***[103] "means subjection to equal laws, applying alike to all in the same situation". The inhibition of the article that the State shall not deny to any person equality before the law or the equal protection of the laws was designed to protect all persons against legislative discrimination amongst equals and to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. It does not, however, mean that every law must have universal application, for all persons are not, by nature, attainment or circumstances, in the same position. *The varying needs of different classes of persons often require separate treatment and it is, therefore, established by judicial decisions that the equal protection clause of the Fourteenth Amendment of the American Constitution does not take away from the State the power to classify persons for legislative purposes. This classification may be on different bases. It may be geographical or according to objects or occupations or the like. If law deals equally with all of a certain well-defined class it is not obnoxious and it is not open to the charge of a denial of equal protection on the ground that it has no application to other persons, for the class for whom the law has been made is different from other persons and, therefore, there is no discrimination amongst equals. It is plain that every classification is in some degree likely to produce some inequality, but mere production of inequality is not by itself enough. The inequality produced, in order to encounter the challenge of the Constitution, must be "actually and palpably*

[103] **216 US 400**

unreasonable and arbitrary". Said Day, J. in ***Southern Railway Company v. Greene***[104] "While reasonable classification is permitted, without doing violence to the equal protection of the laws, *such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and the classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification*". Quite conceivably there may be a law relating to a single individual if it is made apparent that, on account of some special reasons applicable only to him and inapplicable to anyone else, that single individual is a class by himself. In ***Middleton v. Texas Power and Light Company***[105] it was pointed out that *there was a strong presumption that a legislature understood and correctly appreciated the needs of its own people, that its laws were directed to problems made manifest by experience and that the discriminations were based upon adequate grounds.* It was also pointed out in that case that the burden was upon him who attacked a law for unconstitutionality. In ***Lindsley* v. *Natural Carbonic Gas Company***[106] it was also said that one who assailed the classification made in a law must carry the burden of showing that it did not rest upon any reasonable basis but was essentially arbitrary. *If there is a classification, the Court will not hold it invalid merely because the law might have been extended to other persons who in some respects might resemble the class for which the law was made, for the legislature is the best judge of the needs of the particular classes and to estimate the degree of evil so as to adjust its legislation according to the exigency found to exist. If, however, there is, on the face of the statute, no classification at all or none on the basis of any apparent difference specially peculiar to any particular individual or class and not applicable to any other person or class of persons and yet the law hits only the particular individual or class it is nothing but an attempt to arbitrarily single out an individual or class for discriminating and hostile legislation.* The presumption in favour of the legislature cannot in such a case be legitimately stretched so as to throw the impossible onus

[104] **220 US 61**
[105] **249 US 152**
[106] **220 US 61**

> on the complainant to prove affirmatively that there are other individuals or class of individuals who also possess the precise amount of the identical qualities which are attributed to him so as to form a class with him. As pointed out by Brewer, J. in the ***Gulf, Colorado and Santa Fe'Railway v. W.H. Ellis***[107] while good faith and a knowledge of existing conditions on the part of a legislature was to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation was to make the protecting clause a mere rope of sand, in no manner restraining State action."

This judgement, again, emphasises and underscores the manner in which arbitrariness and invidious discrimination, as considerations to strike down a statutory provision, intermix. It also underscores the necessary latitude that the legislature would always have, to classify persons and situations differently, for the applicability of law, and delineates the task of the Court seized with the issue of determining the constitutionality of such classification. When such classification would merit judicial interference stands tellingly exposited in the following passage from ***State of W.B. v. Anwar Ali Sarkar***[108]:

> "**44.** It can be taken to be well settled that the principle underlying the guarantee in Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances [***(1950) SCR 869***[109]] . It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed [***Old Dearborn Distributing Co. v. Seagram Distillers Corporation***[110]] . Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another

[107] **165 US 150**
[108] **AIR 1952 SC 75**
[109] **Charanjit Lal Chowdhury,** ***ibid***
[110] **299 US 183**

> if as regards the subject-matter of the legislation their position is substantially the same. This brings in the question of classification. As there is no infringement of the equal protection rule, if the law deals alike with all of a certain class, *the legislature has the undoubted right of classifying persons and placing those whose conditions are substantially similar under the same rule of law, while applying different rules to persons differently situated*. It is said that *the entire problem under the equal protection clause is one of classification or of drawing lines* [*Vide* Dowling – Cases on Constitution Law, 4th edn. 1139]. In making the classification the legislature cannot certainly be expected to provide "abstract symmetry". *It can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even "degrees of evil". [Vide* ***Skinner* v. *Oklahoma***[111]], but *the classification should never be arbitrary, artificial or evasive. It must rest always upon real and substantial distinction bearing a reasonable and just relation to the thing in respect to which the classification is made; and classification made without any reasonable basis should be regarded as invalid* [***Southern Railway Co. v. Greene***[104]]."
>
> (Emphasis Supplied)

The legislature is free, therefore, even while defining offences, to recognise "degrees of evil". A classification based on the degree of evil, which may otherwise be expressed as the extent of culpability, would also, therefore, be valid. It is only a classification which is made *without any reasonable basis* which should be regarded as invalid. While the Court may examine whether the basis of classification is reasonable, once it is found to be so, the right of the legislature to classify has to be respected. Where there is no discernible basis for classification, however, or where the basis, though discernible, is unreasonable or otherwise unconstitutional, the provision would perish.

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[111] **316 US 535**

145. More recently, the following passage from ***K. Thimmappa v. Chairman, Central Board of Directors, SBI***[112] expresses much the same sentiment, thus:

> "**3.** … Before we deal with the respective contentions of the parties it would be appropriate for us to notice that *what Article 14 prohibits is class legislation and not reasonable classification for the purpose of legislation. If the rule-making authority takes care to reasonably classify persons for a particular purpose and if it deals equally with all persons belonging to a well-defined class then it would not be open to the charge of discrimination.* But *to pass the test of permissible classification two conditions must be fulfilled:*
>
> > *(a) that the classification must be founded on an intelligible differentia which distinguishes persons or things which are grouped together from others left out of the group; and*
> >
> > *(b) that the differentia must have a rational relation to the object sought to be achieved by the statute in question.*
>
> *The classification may be founded on different basis and what is necessary is that there must be a nexus between the basis of classification and the object under consideration. Article 14 of the Constitution does not insist that the classification should be scientifically perfect and a court would not interfere unless the alleged classification results in apparent inequality*. When a law is challenged to be discriminatory essentially on the ground that it denies equal treatment or protection, *the question for determination by court is not whether it has resulted in inequality but whether there is some difference which bears a just and reasonable relation to the object of legislation. Mere differentiation does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any*

[112] **(2001) 2 SCC 259**

rational basis having regard to the object which the legislature has in view. If a law deals with members of a well-defined class then it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. It is for the rule-making authority to determine what categories of persons would embrace within the scope of the rule and merely because some categories which would stand on the same footing as those which are covered by the rule are left out would not render the rule or the law enacted in any manner discriminatory and violative of Article 14. It is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases. ***It depends on the object of the legislation, and what it really seeks to achieve***."

(Emphasis supplied)

Another perspective

146. View the matter from another angle. What does the impugned Exception say? It says, in significantly omnibus terms and without any *caveat* or condition attached, that sexual acts and sexual intercourse, by a man with his wife, are not rape. It does not refer to consent, or the lack of consent. It does not refer to force, pressure or injury. It refers, plainly and simply, to "sexual acts and sexual intercourse". Unlike judgments, every word used in a statute is to be treated as deliberately and consciously used. The manner in which a statutory provision is structured is of pre-eminent importance in understanding the scope and ambit of the provision. Just as tautology, and superfluity, can never be attributed to a legislative provision[113], equally, the omission, on the part of the legislature, to use a particular expression which, otherwise, might have been expected to form part

[113] **(1975) 1 SCC 76**

of the provision, has also to be taken note of, as reflective of the legislative intent. Where, therefore, the legislature has not used the expression "non-consensual", "forced", or any other expression indicating absence of willingness or consent, in the impugned Exception, that omission has to be accorded its due significance. *The obvious intent of the legislature, in using the omnibus expression "sexual intercourse and sexual acts", without referring to presence, or absence, of consent, is to exclude, from the marital sphere, any allegation of rape. Expressed otherwise, what the legislature intends, quite clearly, is that an allegation of rape should find no place in a relationship of marriage. The taint of rape, in other words, according to the legislature, should never discolour a marital relationship between man and woman.*

147. Is this unconstitutional? Is it violative of Article 14? Where the husband and wife are separated – even where they stay separately even if in the same house – the legislature has, in Section 376B, regarding non-consensual sexual intercourse as punishable and applies, to it, the provisions of Section 375 *mutatis mutandis*. The impugned Exception, therefore, applies to subsisting and surviving marriages, where the husband and wife are together, and not separated. In a subsisting, and surviving, marriage, where the husband and wife are staying together and cohabiting, if the legislature feels that an allegation of rape – and, consequently, the chance of the husband being called a rapist – should find no place even if, on one occasion or the other, the wife is compelled to have sex with the husband without willingness or consent, can it be said that the

legislature acts unconstitutionally? The distinction is made because of the peculiar nature of the marital institution, and its unique contours and demographics. It is for this reason that the legislature has regarded the preservation of the marital institution as the *raison d' etre* for continuing to retain the impugned Exception, despite several legal luminaries advising against it. Viewed thus, it is apparent that the impugned Exception, far from being unconstitutional, serves a laudatory purpose, and is in pre-eminent public interest, aimed at preservation of the marital institution, on which the entire bedrock of society rests. Absent a subsisting and surviving marriage, neither would learned Counsel have been here to argue the matter with the proficiency they exhibited, nor would we be here to pass judgement thereon.

148. The somewhat skewed angle from which learned Counsel who opposed the continuance of the impugned Exception on the statute book, view the legal position, is apparent from the submission of Ms. Nundy that Article 14 stands violated by the impugned Exception as it provides immunity from prosecution for rape to a man who has forcible sex with his wife, but not to a man who has forcible sex with another woman. The proposition circles upon itself. A man who has non-consensual, or even forcible, sex with his wife, is not prosecuted for it is precisely because the offence is not rape, statutorily. One cannot be prosecuted for what is not an offence. In exempting a man who has forcible, or non-consensual, sex with his wife, from being prosecuted for rape, therefore, the extant statutory position is merely being implemented. It is not, therefore, as though the two men are

being treated unequally. One has committed a statutory offence, *ergo* he is prosecuted; the other has not, *ergo* he is not.

149. Again, the submission proceeds on the principle – which, learned Counsel for the petitioners apparently feel is not open to debate – that if the act of forcible, or non-consensual, sex by a man with a woman is necessarily rape. If it were so, then, undoubtedly, any provision which accepts a person from being prosecuted for having committed an offence would, *ex facie*, be arbitrary. Where the learned Counsel for the petitioners err in their submission is in the presumption that every act of non-consensual, or forced, sex by a man with a woman has necessarily to be regarded as rape. The moment learned Counsel proceed on this premise, the controversy in issue in the case before us, and the challenge laid in the petition is immediately brushed aside, for the simple reason that, if non-consensual, or forced, sex between a man and woman *is* rape, the impugned Exception, which says that it is not, *is already regarded as illegal.* The issue in controversy before us, then, does not survive for consideration, and the dialogue takes off on a tangent which has nothing to do with the *lis*. By proceeding on this fundamentally erroneous premise, learned Counsel for the petitioners conveniently avoid the issue which actually falls for decision, *viz*., whether, in treating sex and sexual acts by a husband with his wife is not rape, the legislature has acted illegally or arbitrarily.

150. I am constrained to observe that, from the very commencement of proceedings in this matter before this Bench, I attempted to

repeatedly suggest to learned Counsel for the petitioners, both *amici* and the petitioner's Counsel, that the discussion that was taking place at the Bar had really little to do with the controversy at hand. There was, I must state, scant discussion on the precise issue before us, which is whether, in carving out an exception, from the offence of rape, to sexual acts committed within marriage, the legislature has, or has not, acted unconstitutionally. I also attempted to point out that there was, clearly, an intelligible differentia in the sexual relations, and the sexual equation, between a man and a woman who are not married, and between a man and woman who are married, and sought to elicit submissions from Counsel as to how, in view of the existence of such intelligible differentia – the existence of which Ms. Nundy has, in her written submissions, belatedly conceded – the legislature could be said to have acted unconstitutionally in treating non-consensual sexual acts committed within marriage differently from non-consensual sexual acts committed outside marriage. I have yet to obtain a satisfactory answer.

151. The foregoing discussion also demonstrates the fallibility in the submission, of learned Counsel for the petitioners, that, as it defeats the object of Section 375, of criminalising rape, the impugned Exception is arbitrary. The contention is obviously incorrect. Once again, it proceeds on the erroneous premise that a husband, in having sex with his wife without her consent, *has* committed rape; *ergo*, contend learned Counsel, in exempting the husband from prosecution for rape – which he has committed – the impugned Exception is unconstitutional. The submission is so fundamentally illogical that

one finds oneself at a loss as to how to deal with it. It glosses over the fact that the impugned Exception is precisely that, i.e. *an exception* to Section 375. It, therefore, *excepts* the applicability of the main part of Section 375, in the situation envisaged by the Exception. It is futile to contend that, as it is contrary to the main provision, an Exception is unconstitutional, for every Exception is intended to refer to a situation in which the main provision would not apply. It is only, therefore, where the Exception, when applied, operates *against the object* of the main provision, or *nullifies* the applicability of the main provision altogether, that the Exception can be treated as unconstitutional on that ground. *The impugned Exception 2 to Section 375 states that sexual intercourse and sexual acts by a husband with his wife are not rape. Its validity cannot be tested, therefore, by presuming that the act is rape, which appears to be the fundamental premise on which learned Counsel for the petitioners substantially rest their case*. What has to be seen is as to whether, in excepting sexual intercourse and sexual acts by a husband with his wife from Section 375, the impugned Exception is unconstitutional. It is completely illogical, therefore, to contend that the impugned Exception defeats the object of the main part of Section 375, which seeks to criminalise rape, for the simple reason that the impugned Exception states that the acts envisaged therein *are not rape*.

152. The object of Section 375 is, no doubt, criminalisation of rape. 'Rape', as defined in Section 375, refers to the sexual acts envisaged therein, done in any of the circumstances covered by "firstly" to "seventhly". Section 375, necessarily, has to be read with Section

376, as Section 376 stipulates the punishment for the offence covered by Section 375. Read in conjunction, Section 375 and 376 provide for punishment of persons who commit rape. 'Rape' relates to non-consensual sexual acts, of the kind referred to in Section 375. I have already opined, earlier, that there is an intelligible differentia between sexual acts committed within the confines of marriage, vis-à-vis sexual acts committed between strangers. This differentia does not stand diluted merely because the act is non-consensual. Once such a differentia is found to exist, and the differentia is predicated on the *sui generis* nature of the relationship between the wife and the husband, in excepting acts done within such a relationship from the rigour of rape, the impugned Exception actually fosters and furthers the object of Section 375, which is to punish a grossly criminal act, that compromises the sexual autonomy and integrity of a woman. It cannot be forgotten that a fixation of the label of 'rapist' attaches, to a man, a stigma that lasts to his dying day. Where the man is the husband of the woman concerned, and the two are in a subsisting marital relationship, staying together, excepting the man from the possibility of being so labelled, in fact, subserves the object and intendment of Section 375.

153. The approach of the legislature on this issue, in enacting and continuing to retain, on the statute book, the impugned Exception 2 to Section 375, is not open to judicial reappraisement. A Court may differ in its view; that cannot, however, be a basis to overturn the legislative perception, which represents the perception of the entire national populace. In fact, treating a husband, and a stranger, who

commit such an act, on an equal footing, would amount to equalising of unequals which, too, it is trite, infracts Article 14.

154. Yet another ground on which it is sought to be contended that the impugned Exception is arbitrary is that it exempts husbands who commit gross acts of sexual violence against their wives. Ms. Nundy submits, in this regard, that exempting such acts from the ambit of 'rape' cannot ever be regarded as subserving the object either of the impugned Exception or of Section 375. Nor, she submits, can it be said to foster the 'conjugal rights' of the husband.

155. This argument, too, is fallacious. The impugned Exception operates in an omnibus fashion, to all acts covered by Section 375. It does not condone such acts. It merely states that such acts, if committed within marriage, would not be 'rape'. The submission, in fact, overlooks the main concept behind Section 375. At the cost of repetition, Section 375 covers all acts, from a single act of unwilling sex to gross perversion. They are all covered under one umbrella. Even the grossest of acts envisaged by the first part of Section 375, would not amount to 'rape', if it does not fall within one of the circumstances stipulated in clauses "firstly" to "seventhly" in the provision; broadly, if it were consensual. Ms. Nundy refers to insertion of objects in the body of the woman, and requiring the woman to have sex with third persons. Viewed any which way, these are, undoubtedly, acts of gross perversion. That said, if they take place with the consent of the woman, they are not 'rape' under Section 375. Nothing substantial can, therefore, result in favour of the stand

adopted by learned Counsel for the petitioners, by emphasising gross acts covered by Section 375. Whatever be the nature of the act, the guiding philosophy behind Section 375 is, quite obviously, recognition of the sexual autonomy of the woman and her power of choice, and penalising the man who violates that autonomy or that right of choice, by charging him with rape and labelling him a rapist. If, therefore, the legislature desires to exempt, from the rigour of such a charge, and such a label, husbands, vis-à-vis their wives, given the intelligible differentia that exists in a marital relationship vis-à-vis other relationships, it is not open to a Court, exercising jurisdiction under Article 226 of the Constitution, to sit in appeal over the decision and proclaim that acts committed by husbands vis-à-vis wives, if they otherwise conform to the main part of Section 375, *should* be rape.

The approach of the Court

156. It merits repetition that this Court cannot approach the issue before it with a view of pronouncing on whether non-consensual sex within marriage ought to be punished, or not, and, if it feels that it should, find a way of doing so. That is exclusively the province of the legislature. We are concerned with the *vires*, and the constitutional validity of the impugned Exception 2 to Section 375, and with nothing more. If the provision is *intra vires*, it would be upheld; if *ultra vires*, it would be quashed.

157. I may extend to the principle further. If the result of upholding the impugned Exception, applying the well settled principles

governing testing of constitutionality of statutes, is that an act which, according to the Court, ought to be criminally punished as rape, ends up as not being so punished, that is entirely irrelevant, as a consideration for the Court examining the issue. The subjective view of a Court that an act bears criminal character, and ought to be criminally punished, is no ground for it to strike down the legislative provision, by operation of which the act is not so punishable. If it does so, it completely effaces and obliterates the distinction between the legislature and the judiciary. At the highest, all that the Court can do in such a situation, is to recommend, to the legislature, to take a view in the matter, setting out what, in the perception of the Court, is the right approach. The legislature would not be bound to agree with the Court, or to follow the view suggested, for the simple reason that the legislature is a microcosm of the 130 crores that constitute the populace of the country, and represents their collective will and wisdom. It is not permissible for one person, or even a number of persons, clothed in silken robes, to superimpose their will and wisdom over the will and wisdom of the proletariat, as represented by the members of the legislature.

Consent and the 'effect doctrine'

158. At this juncture, I deem it appropriate to deal with the submission, of learned Counsel for the petitioners, that the impugned Exception compromises on the wife's right to consent, or to refuse consent, to her husband's request for sex. Learned Counsel have sought to contend that, even if the impugned Exception does not

expressly refer to the aspect of consent as one of the fundamental aspects of the offence of rape, it effectively nullifies, and abrogates, the right of the wife to say no, or to say yes. To bring this point home, learned Counsel have emphasised the fact that, while assessing the constitutionality of a statutory provision, the Court is required to examine not just the provision as empirically worded, but the effect of the provision in practical application. If the effect of the provision is to violate the fundamental rights of individuals, learned Counsel submitted that the provision becomes unconstitutional. For this purpose, they have cited ***Puttaswamy***[42].

159. ***Puttaswamy***[42], overruling the earlier view expressed in ***A.K. Gopalan v. State of Madras***[114], clearly holds that, in assessing the constitutionality of a statutory provision, the Court is not required to restrict itself to the wording of the provision, or even to its objects and reasons, but is also required to examine the effect of the provision, in practical application. If, therefore, a statutory provision operates unconstitutionally, or, in its operation, derogates from the fundamental rights of citizens, it would be unconstitutional. To that extent, the submission of learned Counsel for the petitioners is unexceptionable.

160. In so emphasising the effect of a statutory provision, as a consideration to be borne in mind while assessing its constitutionality, ***Puttaswamy***[42] effectively reiterates what was held, as far back as in 1978, in ***Maneka Gandhi v. U.O.I.***[115] which, in turn, relied on earlier leading authorities on the point, starting with ***Express Newspapers (P)***

[114] **AIR 1950 SC 27**
[115] **(1978) 1 SCC 248**

Ltd v. U.O.I.[116], through ***Sakal Papers (P) Ltd v. U.O.I.***[117], till the ***Gopalan***[114] enunciation of the law finally met its Waterloo in ***R.C. Cooper v. U.O.I.***[118] These decisions, however, clarified that what mattered was the "*direct and inevitable effect*", as "*intended by the legislature*", and not every distant consequence. Paras 17 to 20 of the leading report in ***Maneka Gandhi***[115], authored by Bhagwati, J. (as he then was), are of stellar significance:

> "**17.** We think it would be proper at this stage to consider the approach to be adopted by the Court in adjudging the constitutionality of a statute on the touchstone of fundamental rights. What is the test or yardstick to be applied for determining whether a statute infringes a particular fundamental right? The law on this point has undergone radical change since the days of ***A.K. Gopalan case***[114] . That was the earliest decision of this Court on the subject, following almost immediately upon the commencement of the Constitution. The argument which arose for consideration in this case was that the preventive detention order results in the detention of the applicant in a cell and hence it contravenes the fundamental rights guaranteed under clauses (*a*), (*b*), (*c*), (*d*), (*e*) and (*g*) of Article 19(1). This argument was negatived by Kania, C.J., who pointed out that: "The true approach is only to consider the directness of the legislation and not what will be the result of the detention, otherwise valid, on the mode of the detenue's life..... Any other construction put on the article.... will be unreasonable." These observations were quoted with approval by Patanjali Sastri, J., speaking on behalf of the majority in ***Ram Singh v. State of Delhi***[119] [AIR 1951 SC 270 : 1951 SCR 451 : 52 Cri LJ 904] . There, the detention of the petitioner was ordered with a view to preventing him from making any speeches prejudicial to the maintenance of public order and the argument was that the order of detention was invalid as it infringed the right of free speech and expression guaranteed under Article 19(1)(*a*). The Court took the view that the direct object of the order was

[116] AIR 1958 SC 578
[117] AIR 1962 SC 305
[118] (1970) 1 SCC 248
[119] AIR 1951 SC 270

preventive detention and not the infringement of the right of freedom of speech and expression, which was merely consequential upon the detention of the detenue and upheld the validity of the order. The decision in *A.K. Gopalan case* [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] , followed by *Ram Singh case* [(1971) 3 SCC 864] , gave rise to the theory that the object and form of State action determine the extent of protection which may be claimed by an individual and the validity of such action has to be judged by considering whether it is "directly in respect of the subject covered by any particular article of the Constitution or touches the said article only incidentally or indirectly". The test to be applied for determining the constitutional validity of State action with reference to fundamental rights is : what is the object of the authority in taking the action: what is the subject-matter of the action and to which fundamental right does it relate? This theory that "the extent of protection of important guarantees, such as the liberty of person and right to property, depend upon the form and object of the State action and not upon its direct operation upon the individual's freedom" held sway for a considerable time and was applied in ***Naresh Shridhar Mirajkar v. State of Maharashtra***[120] to sustain an order made by the High Court in a suit for defamation prohibiting the publication of the evidence of a witness. This Court, after referring to the observations of Kania, C.J., in ***A.K. Gopalan case*** and noting that they were approved by the Full Court in ***Ram Singh case*** pointed out that the *object* of the impugned order was to give protection to the witness in order to obtain true evidence in the case with a view to do justice between the parties and if incidentally it overrated to prevent the petitioner from reporting the proceedings of the Court in the press, it could not be said to contravene Article 19(1)(*a*).

18. But it is interesting to note that despite the observations of Kania, C.J., in ***A.K. Gopalan case*** and the approval of these observations in ***Ram Singh case*** there were two decisions given by this Court prior to ***Mirajkar case*** which seemed to deviate and strike a different note. The first was the decision in ***Express Newspapers (P) Ltd. v. Union of India***[116] where N.H. Bhagwati, J., speaking on behalf of the Court, referred to the observations of Kania, C.J., in ***A.K.***

[120] **AIR 1967 SC 1**

Gopalan case and the decision in ***Ram Singh case*** but *ultimately formulated the test of direct and inevitable effect* for the purpose of adjudging whether a statute offends a particular fundamental right. The learned Judge pointed out that all the consequences suggested on behalf of the petitioners as flowing out of the Working Journalists (Conditions of Service) and Miscellaneous Act, 1955, namely, "the tendency to curtail circulation and thereby narrow the scope of dissemination of information, fetters on the petitioners' freedom to choose the means of exercising the right, likelihood of the independence of the press being undermined by having to seek government aid, the imposition of penalty on the petitioners' right to choose the instruments for exercising the freedom or compelling them to seek alternative media etc.", would be remote and depend upon various factors which may or may not come into play. "Unless these were the direct or inevitable consequences of the measures enacted in the impugned Act", said the learned Judge, "it would not be possible to strike down the legislation as having that effect and operation. A *possible eventuality* of this type would not necessarily *be the consequence which could be in the contemplation of the legislature while enacting a measure of this type* for the benefit of the workmen concerned". Then again, the learned Judge observed, ".... if the intention or the proximate effect and operation of the Act was such as to being it within the mischief of Article 19(1)(*a*), it would certainly be liable to be struck down. *The real difficulty, however, in the way of the petitioners is that neither the intention nor the effect and operation of the impugned Act is to take away or abridge the right of freedom of speech and expression enjoyed by the petitioners".* Here we find the germ of the doctrine of *direct and inevitable* effect, which necessarily must be effect intended by the legislature, or in other words, what may conveniently and appropriately be described as the doctrine of intended and real effect. So also in ***Sakal Papers (P) Ltd. v. Union of India***[117] while considering the constitutional validity of the Newspaper (Price and Page) Act, 1956 and Daily Newspaper (Price and Page) Order, 1960, this Court applied the test of direct and immediate effect. This Court, relying upon the decision in ***Dwarkadas Shrinivas v. Sholapur Spinning & Weaving Co. Ltd***[121] pointed out that "it is the substance and the

[121] **AIR 1954 SC 119**

practical result of the act of the State that should be considered rather than its purely legal aspect" and "the correct approach in such cases should be to enquire as to what in substance is the loss or injury caused to the citizen and not merely what manner and method has been adopted by the State in placing the restriction". Since "the direct and immediate effect of the order" would be to restrain a newspaper from publishing any number of pages for carrying its news and views, which it has a fundamental right under Article 19(1)(*a*) to do, unless it raises the selling price as provided in the Schedule to the Order, it was held by this Court that the order was violative of the right of the newspapers guaranteed by Article 19(1)(*a*). Here again, the emphasis was on the direct and inevitable effect, of the impugned action of the State rather than on its object and form or subject-matter.

19. However, it was only ***R.C. Cooper case***[118] that the doctrine that the object and form of the State action alone determine the extent of protection that may be claimed by an individual and that the effect of the State action on the fundamental right of the individual is irrelevant, was finally rejected. It may be pointed out that this doctrine is in substance and reality nothing else than the test of pith and substance which is applied for determining the constitutionality of legislation where there is conflict of legislative powers conferred on Federal and State Legislatures with reference to legislative lists. The question which is asked in such cases is: what is the pith and substance of the legislations; if it "is within the express powers, then it is not invalidated if incidentally it effects matters which are outside the authorised field". Here also, on the application of this doctrine, the question that is required to be considered is : what is the pith and substance of the action of the State, or in other words, what is its true nature and character; if it is in respect of the subject covered by any particular fundamental right, its validity must be judged only by reference to that fundamental right and it is immaterial that it incidentally affects another fundamental right. Mathew, J., in his dissenting judgment in ***Bennett Coleman & Co. v. Union of India***[122] recognised the likeness of this doctrine to the pith and substance test and pointed out that "the pith and substance

[122] **(1972) 2 SCC 788**

test, although not strictly appropriate, might serve a useful purpose" in determining whether the State action infringes a particular fundamental right. But in ***R.C. Cooper case*** which was a decision given by the full Court consisting of eleven Judges, this doctrine was thrown overboard and it was pointed out by Shah, J., speaking on behalf of the majority : (SCC pp. 288 & 290, paras 49, 50 & 55)

> "..... it is not the object of the authority making the law impairing the right of a citizen, nor the form of action that determines the protection he can claim; it is the effect of the law and of the action upon the right which attract the jurisdiction of the Court to grant relief. If this be the true view, and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the legislature nor by the form of the action, but by its direct operation upon the individual's rights.
>
> ... We are of the view that the theory that the object and form of the State action determine the extent of protection which the aggrieved party may claim is not consistent with the constitutional scheme.....
>
> In our judgment, the assumption in ***A.K. Gopalan case*** that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct".

The decision in ***R.C. Cooper case*** thus overturned the view taken in ***A.K. Gopalan case*** and, as pointed out by Ray, J., speaking on behalf of the majority in ***Bennett Coleman case*** it laid down two inter-related propositions, namely : (SCC p. 812, para 41),

> "First, it is not the object of the authority making the law impairing the right of the citizen nor the form of

> action that determines the invasion of the right. Secondly, it is the effect of the law and the action upon the right which attracts the jurisdiction of the court to grant relief. The direct operation of the Act upon the rights forms the real test."

The decision in ***Bennett Coleman case*** followed upon ***R.C. Cooper case*** and it is an important and significant decision, since it elaborated and applied the thesis laid down in ***R.C. Cooper case***. The State action which was impugned in ***Bennett Coleman case*** was newsprint policy which *inter alia* imposed a maximum limit of ten pages for every newspaper but without permitting the newspaper to increase the number of pages by reducing circulation to meet its requirement even within the admissible quota. These restrictions were said to be violative of the right of free speech and expression guaranteed under Article 19(1)(a) since their direct and inevitable consequence was to limit the number of pages which could be published by a newspaper to ten. The argument of the Government was that the object of the newsprint policy was rationing and equitable distribution of imported newsprint which was scarce commodity and not abridgement of freedom of speech and expression. The subject-matter of the import policy was "rationing of imported commodity and equitable distribution of newsprint" and the newsprint policy did not directly and immediately deal with the right mentioned in Article 19(1)(*a*) and hence there was no violation of that article. This argument of the Government was negatived by the majority in the following words (SCC p. 812, para 39):

> "Mr Palkhivala said that the tests of pith and substance of the subject-matter and of direct and of incidental effect of the legislation are relevant to questions of legislative competence but they are irrelevant to the question of infringement of fundamental lights. In our view this is a sound and correct approach to interpretation of legislative measures and State action in relation to fundamental rights. The true test is whether the effect of the impugned action is to take away or abridge fundamental rights. If it be assumed that the direct object of the law or action has to be direct abridgement of the right of free speech by the

> impugned law or action it is to be related to the directness of effect and not to the directness of the subject-matter of the impeached law or action. The action may have a direct effect on a fundamental right although its direct subject-matter may be different. A law dealing directly with the Defence of India or defamation may yet have a direct effect on the freedom of speech. Article 19(2) could not have such law if the restriction is unreasonable even if it is related to matters mentioned therein. Therefore, the word 'direct' would go to the quality or character of the effect and not to the subject-matter. …"

The majority took the view that it was not the object of the newsprint policy or its subject-matter which was determinative but its direct consequence or effect upon the rights of the newspapers and since "the effect and consequence of the impugned policy upon the newspapers" was direct control and restriction of growth and circulation of newspapers, the newsprint policy infringed freedom of speech and expression and was hence violative of Article 19(1)(a). The pith and substance theory was thus negatived in the clearest term and the test applied was as to what is the direct and inevitable consequence or effect of the impugned State action on the fundamental right of the petitioner. It is possible that in a given case the pith and substance of the State action may deal with a particular fundamental right but its direct and inevitable effect may be on another fundamental right and in that case, the State action would have to meet the challenge of the latter fundamental right. The pith and substance doctrine looks only at the object and subject-matter of the State action, but in testing the validity of the State action with reference to fundamental rights, what the court must consider is the direct and inevitable consequence of the State action. Otherwise, the protection of the fundamental rights would be subtly but surely eroded.

20. It may be recalled that the test formulated in ***R.C. Cooper case*** merely refers to "direct operation" or 'direct consequence and effect' of the State action on the fundamental right of the petitioner and does not use the word "inevitable" in this connection. But there can be no doubt, on a reading of the relevant observations of Shah, J., that such

> was the test really intended to be laid down by the Court in that case. If the test were merely of direct or indirect effect, it would be an open-ended concept and in the absence of operational criteria for judging "directness", it would give the Court an unquantitiable discretion to decide whether in a given case a consequence or effect is direct or not. Some other concept-vehicle would be needed to quantify the extent of directness or indirectness in order to apply the test. And that is supplied by the criterion of "inevitable" consequence or effect adumbrated in the *Express Newspapers case*. This criterion helps to quantify the extent of directness necessary to constitute infringement of a fundamental right. Now, if the effect of State action on fundamental right is direct and inevitable, then *a fortiori* it must be presumed to have been intended by the authority taking the action and hence this doctrine of direct and inevitable effect has been described by some jurists as the doctrine of intended and real effect. This is the test which must be applied for the purpose of determining whether Section 10(3)(*c*) or the impugned order made under it is violative of Article 19(1)(*a*) or (*g*)."
>
> (Italics in original; underscoring supplied)

It is not, therefore, every perceived consequence, or effect, which would be of relevance while examining the constitutionality of a statutory provision. The Court is required to take into consideration only those effects which are direct, inevitable, and within the contemplation of the legislature when the provision was enacted.

161. Viewed thus, can it be said that the effect of the impugned Exception is to nullify, abrogate, or even compromise the right of the wife to refuse consent to sex?

162. Inherent in the object of Section 375, according to learned Counsel for the petitioners, is the "foregrounding" of the entire law of consent. *Arguendo*, assuming this to be the position, how does the

impugned Exception, in its direct and inevitable effect, compromise the right of the wife to consent, or refuse consent, to sexual relations with her husband?

163. On this aspect, Ms. Nundy avers that the impugned Exception "effectively nullifies consent to the specific acts of sexual intercourse…" and that it "does give a license to husbands to force sex". According to her, the impugned Exception does, "at the very least, condone a situation where a man forces his wife to have sex by calling it 'not rape' (which) is nothing more than a license for a husband to force his wife into sexual intercourse without penal consequences for rape". She further contends that "even with the expectation or broad agreement of sexual relations in marriage, specific consent for the sexual acts cannot be done away with". More specifically, dealing with the aspect of consent, Ms. Nundy submits, in the passage reproduced in para 103 *supra*, that the impugned Exception (i) does not protect to the full extent of the law a woman's non-consent, (ii) does not recognise the right of a married woman to say no to sexual intercourse with her husband, (iii) takes away a married woman's ability to say a joyful 'yes' to sexual intercourse" and (iv) reduces, to a nullity, the wife's sexual desire and consent. Mr. Rajshekhar Rao, in his submissions, contends that the impugned Exception "decriminalises non-consensual intercourse by a husband upon his wife". He seeks to point out that "every other woman, including a woman who is socially perceived as of easy virtue, is entitled to the aforesaid rights and entitled to decline consent and prosecute for rape". As against this, according to Mr. Rao, "the effect

of the Exception is to render the wife's consent immaterial inasmuch as she cannot prosecute her husband for having non-consensual sexual intercourse with her i.e., for the act of 'rape'." (This last contention has already been disabused by me earlier; the impugned Exception does not state, either expressly or by necessary implication, that the wife is disentitled from prosecuting her husband for the act of rape, for the simple reason that it states that the act itself would not be rape.) Thereafter, Mr. Rao proceeds to echo the submissions advanced by his colleagues, predicated on the premise that the impugned Exception is founded on the Hale dictum, i.e. "the archaic belief that the very act of marriage contemplates 'consent' by the wife for sexual intercourse with a husband for all times to come, i.e., during the existence of the matrimonial relationship…" "Such a presumption of consent", submits Mr. Rao, "is inconsistent with applicable law". Ms. John submits that "the consequence of Exception 2 to Section 375 necessarily results in a complete and unequivocal disregard of the wife's right to consent to sex within a marriage". Further, in her submissions, she states that the impugned Exception, "in effect, accords immunity to a husband disregarding his wife's non-consent".

164. Applying the effect doctrine, can it be said that the perceived consequences of the impugned Exception, as outlined in para 160 supra, are the direct and inevitable effect of its operation?

165. Plainly read, it is clear that there is nothing in the impugned Exception which obligates a wife to consent to having sex with her

husband, wherever he so requests. All that it says is that sexual acts by a husband with his wife are not rape. It does not even obliquely refer to consent, or want of consent.

166. That, however, does not answer the issue, according to learned Counsel for the petitioners. Examine the effect of a wife's refusing consent, they exhort the court. Does the impugned Exception "condone", in any manner, a husband forcing sex on his wife without her consent? Does it say that a husband has a right to have sex with his wife, whenever he desires, irrespective of whether she consents, or does not consent, to the act? Does the impugned Exception control the wife's decisional autonomy, in such a situation? Clearly, the answer to all these questions has necessarily to be in the negative. What the learned Counsel for the petitioners seek to urge is that, somehow, by not regarding the act of the husband having sex with his wife, without her will or consent, as 'rape' within the meaning of Section 375, thereby making it punishable as rape under Section 376, the impugned Exception condones the act and compromises on the wife's right to grant, or refuse, consent. This contention, if it were to be accepted, would require acceptance of the premise that, in the first instance, the act of the husband in having sex with his wife against her will or consent *is rape, or should be regarded as rape,* and, in the second, that the impugned Exception restraints the victim-wife from prosecuting her husband for having committed rape upon her. In other words, the inability of the wife to prosecute her husband for rape is treated, by learned Counsel for the petitioners, as compromising on the wife's right to grant, or refuse, consent to a request for sex, when

made by the husband. Learned Counsel for the petitioners would, therefore, seek to contend that there is an inherent right in the wife, in such a situation, to prosecute her husband for rape and nothing short of rape, and that, in compromising this right, her decisional autonomy, regarding whether to grant, or refuse, consent, also stands compromised.

167. To my mind, that is stretching the impugned Exception to a vanishing point. Every *perceived* consequence of the applicability of a statutory provision cannot be regarded as its *direct and inevitable effect*. What the petitioners seek to urge, in principle, is that, *because* the wife, in the event of the husband's compelling her to have sex against her consent, cannot prosecute him for rape, *therefore* the wife would be compelled to consent to the act. The conclusion does not flow from the premise. The mere fact that, if the wife, on a particular occasion, were not to grant consent for sex with her husband, and if, nonetheless, the husband were to compel her to have sex, the act committed by him would not qualify as 'rape' within the meaning of Section 375 cannot, in my view, be regarded as disregarding, altogether, the wife's right to grant, or refuse, consent. It does not follow as a direct and inevitable effect of the operation of the impugned Exception.

168. In this context, the submissions of Ms. Nundy, reproduced in para 103 *supra*, are more cautious. She submits that the impugned Exception "encourages a husband to have forced sexual intercourse with his wife" and "encourages *some husbands* to do illegally that

which cannot be done legally, on the purport that they are exercising their conjugal right". To my mind, the impugned Exception cannot be said to do the former and, if it does the latter, would not invalidate it. The impugned Exception does not encourage *any* husband to force sex on his wife, unmindful of her consent. If *some husbands* do feel so encouraged, that would be attributable solely to their own perverse predilections, and is certainly not the direct and inevitable effect of operation of the impugned Exception. All that the impugned Exception does, at the cost of repetition many times over, is not to label, as 'rape', sexual activities between a husband and wife. To contend that, by extreme extrapolation, the effect of this provision would be that a wife would never be able to refuse consent to sex, when her husband demands it, is to visualise an eventuality which even the legislature, at the time of enacting the provision or even in the post-Constitutional period, could not legitimately be said to have envisaged.

169. There is another, and more important, infirmity in the "consent" argument advanced by the petitioners, and why it, essentially, obfuscates the main issue in controversy. Grant, or refusal, of consent by anyone, to any act, is a physical fact. If a man seeks sexual relations with a woman, and the woman refuses consent, that refusal, as a physical fact, is independent of any relationship between the man and woman. By emphasising on this physical fact, which remains the same irrespective of whether the man and woman are married, or unmarried, what the petitioners seek to do, effectively, is to obfuscate all other distinguishing features between the two situations. In other

words, in the two situations between which the legislature seeks to draw a distinction, i.e., of non-consensual sex between a man and a woman, where the man is a stranger, and where the man is married to the woman, the petitioners seek to contend that there is no legitimate basis for drawing such a distinction as, in either case, the woman had refused consent. Any distinction between the two cases, according to learned Counsel for the petitioners, would amount to "disregarding" and "reducing to a nullity", the woman's non-consent. In so foregrounding the aspect of want of consent, learned Counsel conveniently disregards all other distinguishing circumstances, including the circumstances in which the request was made, the relationship between the parties, the legitimate conjugal expectations of the man, as the husband of the woman and the reciprocal obligations of the wife, the peculiar demographics and incidents of marriage, vis-à-vis all other relationships between man and woman, and all other legitimate considerations to which I have already referred, and which justify extending, to sexual intercourse and sexual acts within marriage a treatment different from such acts committed outside the marital sphere.

170. Unjustified denial of sex by either spouse, within a marital relationship is, even as per the petitioners, "cruelty", entitling the other spouse to seek divorce on that ground. A Division Bench of this Court has, in a recent decision in ***Rishu Aggarwal v. Mohit Goyal***[123], held that it tantamounts to "matrimonial misconduct" and, equally, may "certainly constitute 'hardship'" to the spouse to whom sex has

[123] **MANU/DE/1231/2022**

been denied. Learned Counsel for the petitioners, themselves, acknowledge the existence of an *in praesenti* and continuing obligation, of either spouse, to provide reasonable sexual access to the other. The existence, in each spouse, of a legitimate conjugal expectation of meaningful sexual relations with the other is also acknowledged and admitted.

171. *The importance of these obligations and expectations are completely undermined, in the submissions advanced by learned Counsel for the petitioners. These obligations, or expectations,* ***do not****, needless to say,* ***entitle*** *the husband to coerce or force his wife into sex, against her, or his, will, which learned Counsel for the petitioners erroneously seem to assume to be the implication of the impugned Exception. At the same time, these obligations, expectations and considerations, which are* ***completely absent*** *in the case of a stranger who seeks sexual congress,* ***do constitute a sufficient basis for the legislature to distinguish qualitatively between an incident of non-consensual sex within the marital sphere and without it.*** *In view of these several distinguishing features that mark out the relationship between a husband and wife, and its dynamics both within and outside the confines of the bedroom, as sui generis, if the legislature has desired not to characterize husbands as rapists, I completely fail to see how the Court can hold otherwise.*

172. What learned Counsel for the petitioners seek to contend is that, because the right of the wife to her bodily autonomy is so inviolable and sacred, *every act that transgresses or violates such right must of*

necessity be "fairly labelled" as rape. That is not, however, how the law works. The submission is, conceptually, not too distanced from the contention that, because the right to human life is inviolable and sacred, every act of the taking of life, by one person of another, must, of necessity, be fairly labeled as murder. Besides the fact that (i) as a Court exercising jurisdiction under Article 226 of the Constitution of India, we are not empowered to return any such proclamation, which would amount to unsconscionable encroachment on the legislative sphere and (ii) there is, even otherwise, no basis for assuming every act of non-consensual sexual intercourse between man and woman to be rape, except the petitioners' own personal idea of what the legal position *should* be, the legislature is perfectly within its rights to treat, for the purposes of legal liability whether criminal or civil, an act differently, depending on the circumstances in which it is committed, the identity of the perpetrator, and the identity of the victim. All that is required is the existence of an intelligible differentia having a rational nexus to the object of making of the distinction. Present these, there can be no constitutional infirmity in the legislative dispensation.

173. The impugned Exception, therefore, neither compromises on, nor disregards, the aspect of consent of the woman to a sexual advance by the man. As against this one aspect which is common to non-consensual sex between the man and the woman, whether they be situated in a marital, or a non-marital, setting, the impugned Exception, taking into consideration other differentiating factors, and the element of overwhelming public interest in preserving the marital

institution, treats the two situations as different and unequal and, therefore, extends, to them, different treatments. This, in my view, is entirely in sync with Article 14, and its mandate, as it refuses to treat, as equal, two situations which are clearly not comparable with each other.

174. The submissions of learned Counsel for the petitioners, to the effect that the impugned Exception compromises on the right of the wife to grant, or refuse, consent to sex, or reduces her decisional autonomy, in that regard, "to a nullity" is, therefore, completely bereft of substance.

175. Mr. Gonsalves had advanced the contention that, in examining the constitutionality of the impugned Exception, this Court should not enter into the aspects of "consent" and "coercion", but should allow the jurisprudence, on these aspects, to develop once the impugned Exception is struck down as, in his submission, these aspects would vary on a case-to-case basis. The submission, according to me, merits rejection outright. As learned Counsel for the petitioners stated, the aspect of want of consent is one of the necessary ingredients of the offence of 'rape', as defined in Section 375, IPC. It is not possible, therefore, for a Court to deal with the provision, without understanding the concept of 'consent'. Having said that, as I have already expressed, foregrounding of the concept of consent is really not justified in the backdrop of the controversy in issue, as consent is a static fact, irrespective of the other differentiating factors that exist in non-consensual sex between strangers, vis-à-vis non-consensual sex

between husband and wife, and what the Court is required to examine is whether these differentiating factors are sufficient to validate, constitutionally, the different treatment to non-consensual sex between husband and wife, as envisioned by the impugned Exception. The common factor of non-consent, therefore, really does not aid the discussion.

In the proverbial 'nutshell'

176. *The impugned Exception retains, intact, the wife's decisional autonomy in the matter. She still has the right to either say no, or, as Ms. Nundy chooses to express it, "a joyful yes". The impugned Exception does not compromise her right, to do so, in any manner. In fact, the impugned Exception does not even come in for application, at that stage. It applies only if, despite the wife's "no", her husband nonetheless compels her to have sex. In such a situation, the impugned Exception, for reasons which are perfectly valid and in sync with Article 14, holds that the husband cannot be convicted for rape. There is no inherent fundamental right, in the wife, to have her husband convicted for rape, relatable to Article 21, Article 19, or to any other Article in the Constitution. (More on that presently.) Nor do learned Counsel for the petitioners, or the learned amici, for that matter, even so suggest. The impugned Exception does not treat the offence as condonable; it merely disapproves the use of the "rape" vocabulary in the context of marital sexual relations. The wife, if aggrieved, has her remedies, criminally, under Sections 304B, 306, 377 and 498A of the IPC and Section 3 of the Dowry Prohibition Act,*

1961, civilly, by seeking divorce on the ground of cruelty (if it amounts to such), and under the DV Act both civilly and criminally. The petitioners' grievance that these statutes do not punish the act of non-consensual sex, by the husband with his wife, as rape, holds no water, simply because the act is not rape. There is no inflexible legal principle that every act perpetrated by one human being on another has necessarily to invite criminal consequences. In the event that the act of the husband, in having sex with his wife against her will or consent, satisfies the ingredients of any of the criminal statutory provisions aforenoted, he would be criminally liable. Else, he would not. This Court cannot, in exercise of its jurisdiction under Article 226 of the Constitution, hold that he should be criminally liable, even in such a situation, much less that he should be held as having committed rape. We cannot legislate, or rewrite the statute. Nor can we label, as an offence of rape, an act which, when committed in certain circumstances having an intelligible differentia to all other circumstances, the legislature does not see fit to call rape. Ms. Nundy would call it "fair labelling". While, personally, I am unable to concur with her, even assuming, for the sake of argument, that it were, it is the legislature, that represents the will of the teeming millions in the country, which would have to be so convinced; not us. We cannot label, as particular offences, acts that the legislature has consciously not chosen to so label. Where, in so choosing, the legislature has not acted in derogation of the Constitution, we have to step back. Any further foray, by us, into this disputed realm, would partake of the character of judicial legislation, which is completely proscribed by law. Empirically, even if the legislature has, qua a particular act,

decided to make it only subject to civil, and not criminal, action, we cannot tinker with the statute and strike down a provision so as to render the act criminally liable, even if we feel that it should be a crime. It is only if the provision which deems the act not to be an offence is constitutionally infirm, applying the indicia well-established in that regard, that we can strike the provision down. (Even there, our power to do so would be conditioned by the consideration that, by doing so, we should not be "creating and offence", regarding which I discuss, in greater detail, later.) If, therefore, the petitioners feel that the act of a husband compelling, or even forcing, his wife to have sex with him, against her will or consent, should amount to "rape", and should attract Section 375, or that the other applicable provisions in civil and criminal law are insufficient to deal with such a situation, they would have to take up the issue in Parliament, not in Court. Should the legislature be convinced of their case, the petitioners' grievances may well be met. Should they be met, and should the IPC be amended as they would seek, perhaps, hypothetically, any challenge to such amendment may also be largely impervious to judicial challenge, if it conforms to Constitutional standards, and absent any Constitutional infirmity. We cannot express any opinion either way.

177. Given the unique demographics of a marriage, the legislature has, in several statutory provisions, carved out exceptions, or special dispensations[124], which have stood the test of time. Exception 2 to Section 375 is essentially another manifestation of the same

[124] **Refer Section 122 of the Indian Evidence Act, 1872, etc.**

philosophy. It is eminently in public interest. There is a *sui generis* entitlement, of the marital sphere, to its own privacy. This cannot be compromised. The contention of the petitioners that the impugned Exception unconstitutionally accords preference, to the privacy of the marital institution, over the privacy of the individuals involved (particularly the wife) does not, I am constrained to say, make sense, as the impugned Exception does not compromise, in any manner, with the "privacy of the individuals involved". It, on the other hand, advises against unwarranted judicial, or executive, incursions into the privacy of the marital bedroom and, in doing so, cannot, in my view, be regarded as sanctioning an unconstitutional dispensation. Imaginary conceptions of the affront that wives may feel if compelled to have sex with their husbands against their will or consent cannot predominate public interest, which is entitled to overarching pre-eminence. What may make, or mar, a marriage, cannot be predicted by us. We cannot return a value judgement that, in regarding the removal, from the marital demographic, any suggestion of 'rape', as necessary for preservation and protection of the institution of marriage, and is in its best interests, the legislature has erred. That, in my view, would amount to no less than our sitting in appeal over the wisdom of the democratically elected legislature, which is completely and irrevocably proscribed by law.

178. Ms Nundy had sought to point out that, by operation of the impugned Exception, a husband would stand immunized from prosecution for rape, even if he were to commit one or more of the gross acts of perversion envisaged by the first part of Section 375.

The submission, essentially, misses the wood for the trees. Section 375 is widely worded. It covers all manners of sexual acts, committed under one or more of the seven enumerated circumstances envisaged by clause as "Firstly" to "Seventhly". The decision not to apply, to sexual acts committed within marriage, the concept of 'rape' would, but of necessity, cover all the acts envisaged by Section 375. The fact that, in so doing, acts of gross perversion would also stand covered, cannot operate to invalidate the impugned Exception. There are other provisions that criminally penalise, to an equal if not greater degree, such acts, especially where they result in physical injury to the woman. These provisions, therefore, serve to differentiate gross acts, among those contemplated by Section 375, with "milder" offences. If the case of the petitioners – which appears to be one of the lines of argument advanced by Ms Rebecca John – is that these provisions only cater to specific circumstances, such as cruelty, attempted to commit suicide, grievous hurt, and the like, and do not cover simple cases of a husband compelling his wife to have sex without her willingness or consent, that, then, would be a case which they would have to take up before the Parliament, seeking enactment of a law to cover all cases of non-consensual sexual intercourse or sexual acts between husband and wife. The Parliament is empowered to legislate and frame a new law for the said purpose. Equally, the Parliament may also deem it appropriate to do away with the impugned Exception. We, however, cannot do so, unless the impugned Exception is constitutionally vulnerable. That, in my considered opinion, it is not.

'Fair labelling'

179. Before closing the discussion on Article 14, I may deal with the submission, of Ms Nundy, that "fair labelling" of an act of non-consensual sex, forced by a husband on his wife, would require the act to be "labelled" as rape. No perceptible foundation, for this submission, is forthcoming, save and except the personal perception of Ms Nundy (and of other learned counsel espousing the same cause). This submission is predicated, in turn, on the essentially faulty premise that every act of non-consensual sex by a man with a woman, irrespective of the relationship between them, the circumstances in which they are situated, and every other distinguishing feature, is necessarily to be regarded as rape. I have already disabused this submission, in the earlier part of the discussion. Absent this presumption, there is no basis, whatsoever, for the submission, of Ms Nundy, that an act of non-consensual sex by a husband with his wife, if it is to be fairly labelled, is necessarily to be regarded as rape. The plea of "fair labelling", advanced by Ms Nundy has, therefore, in my view, to be rejected

Article 19(1)(a)

180. Learned Counsel for the petitioners have chosen to submit that the impugned Exception compromises the wife's right of sexual self-expression, by compromising on her right to consent, or deny consent, to sex with her husband. Clearly, it does not. The foregoing

discussion sufficiently answers the point which, therefore, to my mind, is completely misconceived.

Article 21

181. One of the main planks of the submission, by learned Counsel for the petitioners, regarding infraction, by the impugned Exception, of the rights of a wife under Article 21, predicated on the notion that the impugned Exception completely disregards the decisional autonomy of the wife regarding sex, has already been dealt with hereinabove. Upon going through the submissions advanced by learned Counsel, as well as learned *amici*, there is, really nothing more, which could be said to be substantial, with respect to the submission that the impugned Exception violates the Article 21 rights of women. Ms. Nundy submits that any restraint, on a woman's right to refuse participation in sexual activity, compromises her bodily integrity and, resultantly, her rights under Article 21. I have already opined that the impugned Exception does not, directly or indirectly, affect the woman's right to refuse participation in sexual activity. I have also pointed out that there is no fundamental right, either in Article 21 or in any other article of the Constitution, to a woman to prosecute a man, who has sex with her without her consent, *for rape*. Such a right *does* exist, if the act falls within Section 375, and is *not covered by* either of the Exceptions thereto. There is no right, relatable to any of the provisions of Part III of the Constitution, in the woman to prosecute the man for rape *even if the man happens to be her husband* and, therefore, is entitled to the protection of the

impugned Exception. Had there existed a right, constitutional even if not fundamental, entitling every woman to prosecute any man who had sex with her against her willingness or consent, irrespective of the relationship of the man with her, then, unquestionably, there would be substance in the contention of learned Counsel for the petitioners that the impugned Exception, in doing away with this right, is unconstitutional. No such right, however, exists; *ergo*, there is no constitutional invalidity, either, in the impugned Exception.

182. The opening paragraph of the written submissions tendered by Mr. Rajshekhar Rao make, in this context, for interesting reading. Mr. Rao has titled the paragraph "The Exception violates Article 21". Thereafter, the actual paragraph reads thus:

> "The act of non-consensual sexual intercourse or 'rape' is abhorrent and inherently violative of the basic right to life and liberty guaranteed by Article 21 in any context. It is the infliction "not merely (of a) physical injury but the deep sense of some deathless shame" and causes deep psychological, physical and emotional trauma, thereby "degrading the very soul" of the victim. As such, it is an offence not just against the victim but society at large. It also violates a woman's right to (a) equality and equal status of all human beings; (b) dignity and bodily integrity; (c) personal and sexual autonomy; (d) bodily any additional privacy; and (e) reproductive choices viz. procreation (and abstention from procreation). Exception 2 to Section 375, IPC decriminalises such non-consensual intercourse by a husband upon his wife and is, therefore, unconstitutional."

183. This passage invites several comments. The observations, in the said paragraph, relating to the abhorrent nature of the offence of rape, and its deleterious effects on the victim, are, needless to say,

unexceptionable. I have had occasion to express much the same sentiment, in my decision in ***Shree Bhagwan v. State***[125], thus:

> "Rape devastates, irreversibly and irreparably. It is a vicious expression of subjugation of woman by man, where the perpetrator seeks to take brute advantage of what is, at best, a chance chromosomal circumstance. It is an anachronism, which, decidedly, cannot be tolerated, in a day and age in which the sexes march arm in arm, matching stride for stride. Rape is, in the ultimate eventuate, a crime not of passion but of power, and when committed by an adult on an innocent child, a crime of unmentionable perversity."

On this, clearly, there can be no two opinions.

184. If one were to apply, practically, what has been said by Mr. Rao of the crime of "rape", the entire *raison d'etre* of the impugned Exception becomes apparent. As Mr. Rao correctly states, rape inflicts, on the woman, a "deep sense of some deathless shame", and results in deep psychological, physical and emotional trauma, degrading the very soul of the victim. When one examines these aspects, in the backdrop of sexual assault by a stranger, vis-à-vis non-consensual sex between husband and wife, the distinction in the two situations becomes starkly apparent. A woman who is waylaid by a stranger, and suffers sexual assault – even if it were to fall short of actual rape – sustains much more physical, emotional and psychological trauma than a wife who has, on one, or even more than one, occasion, to have sex with her husband despite her unwillingness. It would be grossly unrealistic, in my considered opinion, to treat these two situations as even remotely proximate. Acts which, when committed by strangers, result in far greater damage and trauma,

[125] **2018 SCC OnLine Del 7605**

cannot reasonably be regarded as having the same effect, when committed by one's spouse, especially in the case of a subsisting and surviving marriage. The gross effects, on the physical and emotional psyche of a woman who is forced into non-consensual sex, against her will, by a stranger, cannot be said to visit a wife placed in the same situation vis-à-vis her husband. In any event, the distinction between the two situations is apparent. If, therefore, the legislature does not choose to attach, to the latter situation, the appellation of 'rape', which would apply in the former, the distinction is founded on an intelligible differentia, and does not call for judicial censure.

185. Interestingly, all the features are enumerated, in the afore-extracted opening paragraph of Mr. Rao's submissions, are features of rape, and not of the impugned Exception. While all the effects, enumerated by Mr. Rao, may be said about victims of rape, that cannot be a ground to contend that, in regarding a husband, who has non-consensual sex with his wife, as not a 'rapist', the impugned Exception is rendered unconstitutional. Mr. Rao's submission that the impugned Exception is unconstitutional as it "decriminalises *such* non-consensual intercourse by a husband upon his wife" cannot, as stated, be accepted, for the simple reason that there is an intelligible distinction between non-consensual sexual intercourse by a husband with his wife, and non-consensual sexual intercourse by a stranger with a stranger.

186. In my view, therefore, Article 21 of the Constitution does not even come in for discussion in the present case. Its invocation, by

learned Counsel for the petitioners is, therefore, in my opinion, fundamentally misconceived.

The aspect of "creation of an offence"

187. I am of the considered opinion that, apart from all other considerations, and even if it were to be assumed that the impugned Exception does infract any right guaranteed to wives by Part III of the Constitution, the Court would, nonetheless, not be in a position to strike down the impugned Exception, as doing so would result in creation of an offence.

188. Learned counsel for the petitioners emphatically contend otherwise. According to them, the "offence of rape" already exists, in Section 375, and all that striking down of the impugned Exception would achieve is removal of an unconstitutional restraint on the operation of the main Section. According to them, while removal of the impugned Exception may enlarge the class of offenders liable to be prosecuted for an offence under Section 375, it would not create a new offence. Ms. Nundy has sought to draw a distinction between creation of an offence and enlargement of the class of persons who would be regarded as offenders. That apart, learned Counsel for the petitioners have also sought to contend that, once a statutory provision is found to be unconstitutional, Article 13 of the Constitution mandates that the Court strikes it down, even if, as a consequence, a new offence is created. Learned Counsel have also placed considerable reliance on the decision in ***Independent Thought***[1], to

buttress their contention that, by striking down the impugned Exception, the Court would not be creating an offence.

189. ***Independent Thought***[1] being the precedential backbone of submissions of learned Counsel for the petitioners, it would be appropriate, at this point, to deal with that decision.

Independent Thought[1]

190. Any reference to the decision in ***Independent Thought***[1] as a precedent to decide on the validity of the issue in controversy in the present case, in my considered opinion, be not only unjustified, but would be outright improper. The Supreme Court has taken pains, in the said decision, to clarify, at several points, that the decision is *not* an authority on the aspect of constitutionality of the impugned Exception, insofar as it relates to sex between an adult husband and wife. That apart, the issue in controversy in ***Independent Thought***[1] was as to whether the impugned Exception could be allowed to remain as it is, insofar as it specified the wife as being not below 15 years of age, as that would render the impugned Exception in conflict with the main part of Section 375 as well as the POCSO Act and the PCMA. Pervading, through the entire fabric of the judgement, is the keen sensitivity that the Supreme Court has extended to the rights of the girl child. One may refer, illustratively, merely to the following passages, which underscore the reason why any reliance, on the decision, as a precedent, much less an authoritative precedent, for the issue in controversy before us, would be thoroughly misguided:

(per Lokur, J.)

"The issue before us is a limited but one of considerable public importance – *whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape?* Exception 2 to Section 375 of the Penal Code, 1860 (IPC) answers this in the 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 IPC 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 is definitely not in the best interest of the girl child. The artificial distinction is contrary to the philosophy and ethos of Article 15(3) of the Constitution as well as contrary to Article 21 of the Constitution and our commitments in international conventions. It is also contrary to the philosophy behind some statutes, the bodily integrity of the girl child and her reproductive choice. What is equally dreadful, the artificial distinction turns a blind eye to trafficking of the girl child and surely each one of us must discourage trafficking which is such a horrible social evil.

2. *We make it clear that we have refrained from making any observation with regard to the marital rape of a woman who is 18 years of age and above* since that issue is not before us at all. Therefore we should not be understood to advert to that issue even collaterally.

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47. The duality therefore is that having sexual intercourse with a girl child between 15 and 18 years of age, the husband of the girl child is said to have not committed rape as defined in Section 375 IPC but is said to have committed aggravated penetrative sexual assault in terms of Section 5(*n*) of the POCSO Act.

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48. There is no real or material difference between the definition of "rape" in the terms of Section 375 IPC and

"penetrative sexual assault" in the terms of Section 3 of the POCSO Act. The only difference is that the definition of rape is somewhat more elaborate and has two Exceptions but the sum and substance of the two definitions is more or less the same and the punishment [under Section 376(1) IPC] for being found guilty of committing the offence of rape is the same as for penetrative sexual assault (under Section 4 of the POCSO Act). Similarly, the punishment for "aggravated" rape under Section 376(2) IPC is the same as for aggravated penetrative sexual assault under Section 6 of the POCSO Act. Consequently, it is immaterial if a person is guilty of the same sexual activity under the provisions of the POCSO Act or the provisions of IPC—the end result is the same and only the forum of trial changes. In a violation of the provisions of the POCSO Act, a Special Court constituted under Section 28 of the said Act would be the trial court but the ordinary criminal court would be the trial court for an offence under IPC.

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49. At this stage it is necessary to refer to Section 42-A inserted in the POCSO Act by an amendment made on 3-2-2013. This section reads:

> "**42-A. Act not in derogation of any other law**.—The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency."

The consequence of this amendment is that the provisions of the POCSO Act will override the provisions of any other law (including IPC) to the extent of any inconsistency.

50. One of the questions that arises for our consideration is whether there is any incongruity between Exception 2 to Section 375 IPC and Section 5(n) of the POCSO Act and which provision overrides the other. To decide this, it would be necessary to keep Section 42-A of the POCSO Act in mind as well as Sections 5 and 41 IPC …

51. These two provisions are of considerable importance in resolving the controversy and conflict presented before us.

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53. It is obvious from a brief survey of the various statutes referred to above that a child is a person below 18 years of age who is entitled to the protection of her human rights including the right to live with dignity; if she is unfortunately married while a child, she is protected from domestic violence, both physical and mental, as well as from physical and sexual abuse; if she is unfortunately married while a child, her marriage is in violation of the law and therefore an offence and such a marriage is voidable at her instance and the person marrying her is committing a punishable offence; the husband of the girl child would be committing aggravated penetrative sexual assault when he has sexual intercourse with her and is thereby committing a punishable offence under the POCSO Act. The only jarring note in this scheme of the pro-child legislations is to be found in Exception 2 to Section 375 IPC which provides that sexual intercourse with a girl child between 15 and 18 years of age is not rape if the sexual intercourse is between the girl child and her husband. Therefore, the question of punishing the husband simply does not arise. A girl child placed in such circumstances is a child in need of care and protection and needs to be cared for, protected and appropriately rehabilitated or restored to society. All these "child-friendly statutes" are essential for the well-being of the girl child (whether married or not) and are protected by Article 15(3) of the Constitution. These child-friendly statutes also link child marriages and sexual intercourse with a girl child and draw attention to the adverse consequences of both.

72. If such is the traumatic impact that rape could and does have on an adult victim, we can only guess what impact it could have on a girl child—and yet it is not a criminal offence in the terms of Exception 2 to Section 375 IPC but is an offence under the POCSO Act only. An anomalous state of affairs exists on a combined reading of IPC and the POCSO Act. An unmarried girl below 18 years of age could be a victim of rape under IPC and a victim of

penetrative sexual assault under the POCSO Act. Such a victim might have the solace (if we may say so) of prosecuting the rapist. A married girl between 15 and 18 years of age could be a victim of aggravated penetrative sexual assault under the POCSO Act, but she cannot be a victim of rape under IPC if the rapist is her husband since IPC does not recognise such penetrative sexual assault as rape. Therefore such a girl child has no recourse to law under the provisions of IPC notwithstanding that the marital rape could degrade and humiliate her, destroy her entire psychology pushing her into a deep emotional crisis and dwarf and destroy her whole personality and degrade her very soul. However, such a victim could prosecute the rapist under the POCSO Act. We see no rationale for such an artificial distinction.

73. While we are not concerned with the general question of marital rape of an adult woman but only with marital rape of a girl child between 15 and 18 years of age in the context of Exception 2 to Section 375 IPC, it is worth noting the view expressed by the Committee on Amendments to Criminal Law chaired by Justice J.S. Verma (Retired). In Paras 72, 73 and 74 of the Report it was stated that the outdated notion that a wife is no more than a subservient chattel of her husband has since been given up in the United Kingdom. Reference was also made to a decision [***C.R.* v. *United Kingdom***[75]] of the European Commission of Human Rights which endorsed the conclusion that "a rapist remains a rapist regardless of his relationship with the victim". The relevant paragraphs of the Report read as follows:

> "72. The exemption for marital rape stems from a long outdated notion of marriage which regarded wives as no more than the property of their husbands. According to the common law of coverture, a wife was deemed to have consented at the time of the marriage to have intercourse with her husband at his whim. Moreover, this consent could not be revoked. As far back as 1736, Sir Matthew Hale declared: '*The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract*.'

73. This immunity has now been withdrawn in most major jurisdictions. In England and Wales, the House of Lords held in 1991 that the status of married women had changed beyond all recognition since Hale set out his proposition. Most importantly, Lord Keith, speaking for the Court, declared, '*marriage is in modern times regarded as a partnership of equals*, and no longer one in which the wife must be the subservient chattel of the husband'. [***R. v. R***.[44]]

74. Our view is supported by the judgment of the European Commission of Human Rights in ***C.R.* v. *United Kingdom***[75] which endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim. Importantly, it acknowledged that this change in the common law was in accordance with the fundamental objectives of the Convention on Human Rights, the very essence of which is respect for human rights, dignity and freedom. This was given statutory recognition in the Criminal Justice and Public Order Act, 1994."

(Emphasis in original)

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75. On a combined reading of ***C.R.* v. *United Kingdom***[75] and ***Eisenstadt v. Baird***[126], it is quite clear that a rapist remains a rapist and marriage with the victim does not convert him into a non-rapist. Similarly, a rape is a rape whether it is described as such or is described as penetrative sexual assault or aggravated penetrative sexual assault. A rape that actually occurs cannot legislatively be simply wished away or legislatively denied as non-existent.

Harmonising IPC, the POCSO Act, the JJ Act and the PCMA

76. There is an apparent conflict or incongruity between the provisions of IPC and the POCSO Act. The rape of a married girl child (a girl child between 15 and 18 years of age) is not rape under IPC and therefore not an offence in view of Exception 2 to Section 375 IPC thereof but it is an

[126] **1972 SCC OnLine US SC 62 : 31 L Ed 2d 349 : 92 S Ct 1029 : 405 US 438 (1972)**

offence of aggravated penetrative sexual assault under Section 5(*n*) of the POCSO Act and punishable under Section 6 of that Act. This conflict or incongruity needs to be resolved in the best interest of the girl child and the provisions of various complementary statutes need to be harmonised and read purposively to present an articulate whole.

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92. The view that marital rape of a girl child has the potential of destroying the institution of marriage cannot be accepted. Marriage is not institutional but personal — nothing can destroy the "institution" of marriage except a statute that makes marriage illegal and punishable. A divorce may destroy a marriage but does it have the potential of destroying the "institution" of marriage? A judicial separation may dent a marital relationship but does it have the potential of destroying the "institution" of marriage or even the marriage? Can it be said that no divorce should be permitted or that judicial separation should be prohibited? The answer is quite obvious.

93. Looked at from another perspective, the PCMA actually makes child marriages voidable and makes the parties to a child marriage (other than the girl child) punishable for an offence under the said Act. For someone who supports the institution of marriage, nothing could be more destructive of the institution of marriage than the PCMA which makes a child marriage voidable and punishable on the one hand and on the other, it otherwise collaterally legitimises the pernicious practice of child marriages. It is doubtful if the Parliamentary Standing Committee intended such a situation along with its attendant adverse and detrimental impacts and so we leave it at that.

94. Assuming some objective is sought to be achieved by the artificial distinction, the further question is : what is the rational nexus between decriminalising sexual intercourse under IPC with a married girl child and an unclear and uncertain statutory objective? There is no intelligible answer to this question particularly since sexual intercourse with a married girl child is a criminal offence of aggravated

penetrative sexual assault under the POCSO Act. Therefore, while the husband of a married girl child might not have committed rape for the purposes of IPC but he would nevertheless have committed aggravated penetrative sexual assault for the purposes of the POCSO Act. The punishment for rape (assuming it is committed) and the punishment for penetrative sexual assault is the same, namely, imprisonment for a minimum period of 7 years which may extend to imprisonment for life. Similarly, for an "aggravated" form of rape the punishment is for a minimum period of 10 years' imprisonment which may extend to imprisonment for life (under IPC) and the punishment for aggravated penetrative sexual assault (which is what is applicable in the case of a married girl child) is the same (under the POCSO Act). In other words, the artificial distinction merely takes the husband of the girl child out of the clutches of IPC while retaining him within the clutches of the POCSO Act. We are unable to understand why this is so and no valid justification or explanation is forthcoming from the Union of India.

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Harmonious and purposive interpretation

101. The entire issue of the interpretation of the JJ Act, the POCSO Act, the PCMA and Exception 2 to Section 375 IPC can be looked at from yet another perspective, the perspective of purposive and harmonious construction of statutes relating to the same subject-matter. Long ago, it was said by Lord Denning that when a defect appears, a Judge cannot fold his hands and blame the draftsman but must also consider the social conditions and give force and life to the intention of the legislature. It was said in ***Seaford Court Estates Ltd. v. Asher***[127] [affirmed in ***Asher* v. *Seaford Court Estates Ltd.***[128]**]** that :

> "… A Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the Judges

[127] **(1949) 2 KB 481 (CA)**
[128] **1950 AC 508 (HL)**

> trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature."

108. *We make it clear that we have not at all dealt with the larger issue of marital rape of adult women* since that issue was not raised before us by the petitioner or the intervener.

(per Deepak Gupta, J.)

111. "Whether Exception 2 to Section 375 of the Penal Code, insofar as it relates to girls aged 15 to 18 years, is unconstitutional and liable to be struck down?" is the question for consideration in this writ petition.

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114. A husband who commits rape on his wife, as defined under Section 375 IPC, cannot be charged with the said offence as long as the wife is over 15 years of age. It may be made clear that this Court is not going into the issue of "marital rape" of women aged 18 years and above and the discussion is limited only to "wives" aged 15 to 18 years. A man is guilty of rape if he commits any act mentioned in Section 375 IPC, without the consent of the woman if she is above 18 years of age. If a man commits any of the acts mentioned in Section 375 IPC, with a girl aged less than 18 years, then the act will amount to rape even if done with the consent of the victim. However, as per Exception 2 of Section 375 IPC, if the man is married to the woman and if the "wife" is aged more than 15 years then the man cannot be held guilty of commission of the offence defined under Section 375, whether the wife consented to the sexual act or not.

115. Section 375 IPC creates three classes of victims:

(i) The first class of victims are girls aged less than 18 years. In those cases, if the acts contemplated under Section 375 IPC are committed with or without consent of the victim, the man committing such an act is guilty of rape.

(ii) The second class of victims are women aged 18 years or above. Such women can consent to having consensual sex. If the sexual act is done with the consent of the woman, unless the consent is obtained in circumstances falling under clauses Thirdly, Fourthly and Fifthly of Section 375 IPC no offence is committed. The man can be held guilty of rape, only if the sexual act is done in absence of legal and valid consent.

(iii) The third category of victims is married women. The Exception exempts a man from being charged and convicted under Section 375 IPC for any of the acts contemplated under this section if the victim is his "wife" aged 15 years and above.

To put it differently, under Section 375 IPC a man cannot even have consensual sex with a girl if she is below the age of 18 years and the girl is by law deemed unable to give her consent. However, if the girl child is married and she is aged above 15 years, then such consent is presumed and there is no offence if the husband has sex with his "wife", who is above 15 years of age. If the "wife" is below 15 then the husband would be guilty of such an offence.

116. The issue is whether a girl below 18 years who is otherwise unable to give consent can be presumed to have consented to have sex with her husband for all times to come and whether such presumption in the case of a girl child is unconscionable and violative of Articles 14, 16 and 21 of the Constitution of India.

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168. Therefore, the principle is that normally the courts should raise a presumption in favour of the impugned law;

however, if the law under challenge violates the fundamental rights of the citizens, the law is arbitrary, or is discriminatory, the courts can either hold the law to be totally unconstitutional and strike down the law or the court may read down the law in such a manner that the law when read down does not violate the Constitution. While the courts must show restraint while dealing with such issues, the court cannot shut its eyes to the violations of the fundamental rights of the citizens. Therefore, if the legislature enacts a law which is violative of the fundamental rights of the citizens, is arbitrary and discriminatory, then the court would be failing in its duty if it does not either strike down the law or read down the law in such a manner that it falls within the four corners of the Constitution.

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184. There can be no dispute that a law can be set aside if it is discriminatory. Some elements of discrimination have already been dealt with while dealing with the issue of arbitrariness. However, there are certain other aspects which make Exception 2 to Section 375 IPC insofar as it deals with the girl child totally discriminatory. The law discriminates between a girl child aged less than 18 years, who may be educated and has sexual intercourse with her consent and a girl child who may be married even before the age of 15 years, but her marriage has been consummated after 15 years even against her consent. This is invidious discrimination which is writ large. The discrimination is between a consenting girl child, who is almost an adult and non-consenting child bride. To give an example, if a girl aged 15 years is married off by her parents without her consent and the marriage is consummated against her consent, then also this girl child cannot file a criminal case against her husband. The State is talking of the reality of the child marriages. What about the reality of the rights of the girl child? Can this helpless, underprivileged girl be deprived of her rights to say "yes" or "no" to marriage? Can she be deprived of her right to say "yes" or "no" to having sex with her husband, even if she has consented for the marriage? In my view, there is only one answer to this and the answer must be a resounding "NO". While interpreting such a law the interpretation which must be preferred is the one which protects the human rights of the

child, which protects the fundamental rights of the child, the one which ensures the good health of the child and not the one which tries to say that though the practice is "evil" but since it is going on for a long time, such "criminal" acts should be decriminalised.

185. The State is entitled and empowered to fix the age of consent. The State can make reasonable classification but while making any classification it must show that the classification has been made with the object of achieving a certain end. The classification must have a reasonable nexus with the object sought to be achieved. In this case the justification given by the State is only that it does not want to punish those who consummate their marriage. The stand of the State is that keeping in view the sanctity attached to the institution of marriage, it has decided to make a provision in the nature of Exception 2 to Section 375 IPC. This begs the question as to why in this Exception the age has been fixed as 15 years and not 18 years. As pointed out earlier, a girl can legally consent to have sex only after she attains the age of 18 years. She can legally enter into marriage only after attaining the age of 18 years. When a girl gets married below the age of 18 years, the persons who contract such a marriage or abet in contracting such child marriage, commit a criminal offence and are liable for punishment under the PCMA. In view of this position there is no rationale for fixing the age at 15 years. This age has no nexus with the object sought to be achieved viz. maintaining the sanctity of marriage because by law such a marriage is not legal. It may be true that this marriage is voidable and not void ab initio (except in the State of Karnataka) but the fact remains that if the girl has got married before the age of 18 years, she has the right to get her marriage annulled. Irrespective of the fact that the right of the girl child to get her marriage annulled, it is indisputable that a criminal offence has been committed and other than the girl child, all other persons including her husband, and those persons who were involved in getting her married are guilty of having committed a criminal act. In my opinion, when the State on the one hand, has, by legislation, laid down that abetting child marriage is a criminal offence, it cannot, on the other hand defend this classification of girls below 18 years on the ground of sanctity of marriage because such classification has no nexus with the object sought to be

achieved. Therefore, also Exception 2 insofar as it relates to girls below 18 years is discriminatory and violative of Article 14 of the Constitution.

186. One more ground for holding that Exception 2 to Section 375 IPC is discriminatory is that this is the only provision in various penal laws which gives immunity to the husband. The husband is not immune from prosecution as far as other offences are concerned. Therefore, if the husband beats a girl child and has forcible sexual intercourse with her, he may be charged for the offences under Sections 323, 324, 325 IPC, etc. but he cannot be charged with rape. This leads to an anomalous and astounding situation where the husband can be charged with lesser offences, but not with the more serious offence of rape. As far as sexual crimes against women are concerned, these are covered by Sections 354, 354-A, 354-B, 354-C, 354-D IPC. These relate to assault or use of criminal force against a woman with intent to outrage her modesty; sexual harassment and punishment for sexual harassment; assault or use of criminal force to woman with intent to disrobe; voyeurism; and stalking respectively. There is no exception clause giving immunity to the husband for such offences. The Domestic Violence Act will also apply in such cases and the husband does not get immunity. There are many other offences where the husband is either specifically liable or may be one of the accused. The husband is not given the immunity in any other penal provision except in Exception 2 to Section 375 IPC. It does not stand to reason that only for the offence of rape the husband should be granted such an immunity especially where the "victim wife" is aged below 18 years i.e. below the legal age of marriage and is also not legally capable of giving consent to have sexual intercourse. Exception 2 to Section 375 IPC is, therefore, discriminatory and violative of Article 14 of the Constitution of India, on this count also.

187. The discrimination is absolutely patent and, therefore, in my view, Exception 2, insofar as it relates to the girl child between 15 to 18 years is not only arbitrary but also discriminatory, against the girl child.

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Relief

196. *Since this Court has not dealt with the wider issue of "marital rape*", Exception 2 to Section 375 IPC should be read down to bring it within the four corners of law and make it consistent with the Constitution of India.

197. In view of the above discussion, I am clearly of the opinion that Exception 2 to Section 375 IPC insofar as it relates to a girl child below 18 years is liable to be struck down on the following grounds:

(i) it is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Articles 14, 15 and 21 of the Constitution of India;

(ii) it is discriminatory and violative of Article 14 of the Constitution of India; and

(iii) it is inconsistent with the provisions of the POCSO Act, which must prevail.

Therefore, Exception 2 to Section 375 IPC is read down as follows:

> "*Exception 2*.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape."

It is, however, made clear that this judgment will have prospective effect.

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199. *At the cost of repetition, it is reiterated that nothing said in this judgment shall be taken to be an observation one way or the other with regard to the issue of "marital rape*"."

(Emphasis supplied)

191. The Supreme Court has, times without number[129], ruled that judgements are not to be lightened to Euclid's theorems, and are to be understood and applied, as precedents, keeping in view the controversy before the Supreme Court, and the issue that it was called

[129] **Ref. State of Orissa v. Mohd Ilyas, (2006) 1 SCC 275, Bharat Petroleum Ltd v. N.R. Vairamani, (2004) 8 SCC 578 and C.C.E. v Srikumar Agencies, (2009) 1 SCC 469, among others**

upon to decide. In its judgement in ***Independent Thought***[1], *the Supreme Court went to the extent of cautioning and clarifying, not once but four times, that it was not dealing with the issue of marital rape, i.e. non-consensual sex between adults who were married and that the judgement was not to be treated as an expression of opinion on the said issue, even collaterally.* To my mind, any attempt to treat the decision as an authority, even collaterally, on the issue of constitutionality of the impugned Exception to the extent it applies to a marriage between adults, whether directly or by employing interpretative calisthenics predicated on the "inversion test" or any other test, for that matter, would not only be thoroughly misguided, but would also amount to a conscious disregard of the words of caution and clarification used by the Supreme Court itself. I am also not inclined, obviously, to agree with Mr. Gonsalves' submission that the Supreme Court could not, in its judgement, have indicated the scope of its application. I am unaware of any legal principle that would support this somewhat extreme contention. Mr. Gonsalves has cited some decisions dealing with cases in which judgements contained a caveat that they were not to be construed as precedents. The extent to which one may rely on an earlier pronouncement by a superior court, where the pronouncement contains an omnibus caveat that it is not to be considered as a precedent, is somewhat nuanced and, in my view, open to debate. Perhaps, if the facts of a particular case are identical to those in the precedent concerned, a court, lower in the judicial hierarchy, may deem it advisable not to chart a course opposed to that charted by the Supreme Court. We need not, however, enter into that debate, for the simple reason that the caveat,

to be found in ***Independent Thought***[1], is not that it is not to be treated as a precedent, but that the Supreme Court was not, in the said decision, concerned with the constitutionality of the impugned Exception, to the extent it applied to a marriage between adults, and had not expressed any opinion, even collaterally, regarding that issue. The Supreme Court was, in fact, merely harmonising the stipulation of the age of the wife, in the impugned Exception, as 15 years and above, with the main part of Section 375, as well as the provisions of the POCSO Act and the PCMA, which envisaged the act to be an offence when committed with the woman of 18 years of age and below. This was an obvious disharmony, which the Supreme Court, by reading down the impugned Exception, remedied.

192. I am of the opinion, therefore, that learned Counsel for the petitioners are completely unjustified in relying upon ***Independent Thought***[1] as a precedent for the issue in controversy before us, i.e., the constitutional validity of the impugned Exception as it stands today, i.e. as modified by ***Independent Thought***[1].

193. ***Independent Thought***[1] is not, however, without its share of home truths, even insofar as the present case is concerned. For one, the Supreme Court has, in the following passages, usefully expounded on the power of a Court to interfere with a legislative provision, apropos its constitutionality:

> "**161.** It is a well-settled principle of law that when the constitutional validity of the law enacted by the legislature is under challenge and there is no challenge to the legislative competence, the court will always raise a presumption of the constitutionality of the legislation. The courts are reluctant to

strike down laws as unconstitutional unless it is shown that the law clearly violates the constitutional provisions or the fundamental rights of the citizens. The courts must show due deference to the legislative process.

162. There can be no dispute with the proposition that courts must draw a presumption of constitutionality in favour of laws enacted by the legislature. In ***Sub-Divisional Magistrate, Delhi v. Ram Kali***[130], this Court observed as follows : (AIR p. 3, para 5)

> "5. … The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, and its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds."

163. Thereafter, in ***Pathumma v. State of Kerala***[131], this Court held that the Court would interfere only when the statute clearly violates the rights of the citizens provided under Part III of the Constitution or where the Act is beyond the legislative competence or such similar grounds. The relevant observations are as follows : (SCC p. 9, para 6)

> "*6.* It is obvious that the legislature is in the best position to understand and appreciate the needs of the people as enjoined by the Constitution to bring about social reforms for the upliftment of the backward and the weaker sections of the society and for the improvement of the lot of poor people. The Court will, therefore, interfere in this process only when the statute is clearly violative of the right conferred on the citizen under Part III of the Constitution or when the Act is beyond the legislative competence of the legislature or such other grounds. It is for this reason that the Courts have recognised that there is always a presumption in favour of the constitutionality of a statute and the onus to prove its invalidity lies on the party which assails the same."

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[130] (1968) 1 SCR 205: AIR 1968 SC 1: 1968 Cri LJ 82
[131] (1978) 2 SCC 1

164. In ***State of A.P. v. P. Laxmi Devi***[132], this Court held thus:

> "66. As observed by the Privy Council in ***Shell Co. of Australia v. Federal Commr. of Taxation***[133]:
>
> > '… unless it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will…'
>
> 67. Hence if two views are possible, one making the provision in the statute constitutional, and the other making it unconstitutional, the former should be preferred vide ***Kedar Nath Singh* v. *State of Bihar***[134]. Also, if it is necessary to uphold the constitutionality of a statute to construe its general words narrowly or widely, the court should do so *vide* G.P. Singh's Principles of Statutory Interpretation, 9th Edn., 2004, p. 497."

165. In ***Subramanian Swamy v. CBI***[11], a Constitution Bench of this Court laid down the following principle: (SCC p. 722, para 49)

> "**Court's approach**
>
> 49. Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognised by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative

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[132] **(2008) 4 SCC 720**
[133] **1931 AC 275 : 1930 All ER Rep 671 (PC)**
[134] **AIR 1962 SC 955 : (1962) 2 Cri LJ 103**

> of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognised and these are : (*i*) discrimination, based on an impermissible or invalid classification, and (*ii*) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders—if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is." "

These passages delineate, authoritatively, the scope of judicial review with legislative provisions. There is a presumption that the legislation is constitutional. Though ***Puttaswamy***[42] seems to restrict the applicability of this principle in the case of pre-Constitutional legislations, there is substance in Mr. Sai Deepak's contention that, where the validity, and the need for continuance, of the legislation has, been considered for discussion and debate on the floor of Parliament and otherwise, in the post-Constitutional era, a vestige of constitutionality would certainly attach to the legislation. It would be, therefore, for the challenger, challenging the validity of the provision, to establish, positively, that it is unconstitutional. Further, the afore-extracted passages from ***Independent Thought***[1] confirm and clarify that (i) Courts must show due deference to the legislative process, (ii)

Courts should interfere only when the statute clearly violates the fundamental rights guaranteed by Part III of the Constitution, or where the provision is bad for want of legislative competence or for some similar ground, (iii) faced with a choice of interpreting the provision in a manner which would render it constitutional, vis-à-vis one which would render it unconstitutional, the Court must necessarily lean in favour of the former interpretation, even if, for that purpose, the words have to be construed narrowly or widely, (iv) legislation does not become unconstitutional merely because an alternate view, to the view expressed by the legislature in the legislation, is possible, or because there is another, or more effective, remedy for the ill that the legislation seeks to address and (v) this would be applicable, especially, in the case of issues of *social or economic policy*. Even so, ***Independent Thought***[1] does hold, as learned Counsel for the petitioners have unexceptionably contended that, where a statutory provision is violative of fundamental rights of citizens, the Court would strike down.

194. To my mind, however, that need does not arise in the present case, as the impugned Exception does not violate any fundamental right, guaranteed by Part III of the Constitution of India.

195. Another significant takeaway from ***Independent Thought***[1] is to be found in para 190 of the report, which reads thus:

> "**190.** One of the doubts raised was if this Court strikes down, partially or fully, Exception 2 to Section 375 IPC, is the Court creating a new offence. *There can be no cavil of doubt that the courts cannot create an offence*. However, there can be no manner of doubt

> that by partly striking down Section 375 IPC, no new offence is being created. The offence already exists in the main part of Section 375 IPC as well as in Sections 3 and 5 of the POCSO Act. What has been done is only to read down Exception 2 to Section 375 IPC to bring it in consonance with the Constitution and the POCSO Act."

It is significant that the afore-extracted para 190 figures, in the judgement in ***Independent Thought***[1] *after* paras 161 to 168, in which the Supreme Court has endorsed the authority of the Court to strike down a legislative provision as unconstitutional if it violates any provision of Part III, or is legislatively incompetent, among other things. Even while, thus, affirming the power of a Court to strike down the statutory provision as unconstitutional for valid grounds, the Supreme Court, nonetheless, went on to enter a caveat to this proposition, by clarifying that there could be "no cavil of doubt that the courts cannot create an offence". Having so clarified, the Supreme Court, applying the principle to the case before it, held that it was not creating an offence as the age of 18, for the woman, already found place in the main part of Section 375, and was punishable under the PCMA as well as the POCSO Act, in the latter case as penetrative sexual assault which, held the Supreme Court, was merely another expression for rape. Inasmuch as it was merely harmonising the impugned Exception with other statutory provisions, failing which there would have been a disconnect among them, the Supreme Court held that it was not creating any offence and was not, thereby, transgressing the frontiers of its legitimate jurisdiction.

196. To my mind, *the proscription on Courts creating an offence by*

judicial fiat operates as a restraint even on the exercise of the power to strike down a legislative provision as unconstitutional. In other words, if a provision is found to be unconstitutional, the Court may strike it down *provided, by doing so, it is not creating an offence*. *If, by its judgement, the Court creates an offence, there is an absolute proscription, even if the provision is otherwise unconstitutional.* If this were not the legal position, there was no occasion, at all, for the Supreme Court, having held that a case for reading down the impugned Exception existed, to examine whether, by doing so, it was creating an offence.

197. While the proscription on creation of an offence by judicial action is, in a way, a mere extrapolation of the principle that Courts cannot legislate, or take over the function of the legislature, the principle, even otherwise, accords with common sense, as well as the realities of the legislative process. Legislation is a complex exercise, especially where it involves designation of an act as an offence. Inasmuch as the decision would have nationwide repercussions, it cannot be undertaken by a body which is possessed neither of the wherewithal, nor the resources, to undertake it. Judges sitting in courts cannot, on the basis of arguments of Counsel, howsoever persuasive, create offences, or pass judgements which would result in an act, otherwise not an offence, being rendered an offence. The effect of designating an act as a criminal offence, on all who may commit that act, cannot be forgotten. For that reason, extensive consultation with all stakeholders, especially given the fact that India is a country of diverse cultures, religions, beliefs and social and societal realities,

is absolutely necessary. We cannot undertake that exercise, and our oath does not authorise us to do so, either.

198. Yet another reason why the Court cannot create an offence, is because a Court cannot legislatively stipulate the punishment for the offence. In the present case, for example, there is no stipulated punishment for an act of non-consensual sex, by a husband with his wife, as it is does not amount to 'rape' and, consequently, Section 376 would not apply to it. If the impugned Exception was to be struck down, we would make, *ipso facto*, the punishments envisaged by Section 376, applicable to such a husband, where the legislature never intended these punishments to apply to him. We, therefore, would be doing something which was never within the contemplation of the legislature, which may be even worse, jurisprudentially, than judicial legislation itself. If the Court is not empowered to prescribe punishments, equally, the Court cannot, by its order, convert an act which, prior thereto, was not an offence, into an offence.

199. To this, learned Counsel submit that the Court should strike down the impugned Exception as unconstitutional and recommend, to the legislature, to consider modulating or reducing the punishments prescribed in Section 376 to cater to cases of non-consensual sex within marriage which would, thereby, qualify as 'rape'. To my mind, the suggestion bears rejection, outright. That, in fact, is one of the reasons *why* Courts cannot, by judicial fiat, create offences. Creation of an offence would entail, in its wake, prescribing of a punishment, and that, most definitively, the Court *cannot* do. Equally,

therefore, the Court cannot strike down a provision where, by doing so, an offence would come into being, and leave the legislature to think of the appropriate punishment that would visit the offender. What happens to cases which come up in the interregnum?

200. But, assert learned Counsel for the petitioners, by striking down the impugned Exception, this Court *would not* be creating an offence. They rely, for this purpose, on ***Independent Thought***[1], in which it was held that the Supreme Court was not creating an offence by reading down the impugned Exception to apply to women below the age of 18.

201. The analogy is between chalk and cheese. The situation that presents itself before us is not even remotely comparable to that which was before the Supreme Court in ***Independent Thought***[1]. We are not called upon to harmonise the impugned Exception with any other provision. The petitioners contend that the impugned Exception is outright unconstitutional and deserves to be guillotined. Would we not, by doing so, be creating a new offence?

202. The answer, in my opinion, has necessarily to be in the affirmative. Section 40 of the IPC defines an "offence" as "a thing made punishable by this Code". As things stand today, an act of non-consensual sex, by a husband with his wife, is not rape. Were we to allow these petitions, it would, thereafter, be rape. As things stand today, if a wife lodges an FIR against her husband for having raped her, the husband need not contest the case that would result, or prove

his innocence; he may, straightaway, seek recourse to Section 482 of the Cr PC and seek that the FIR be quashed, for the simple reason that, even if the act alleged had been committed by him, it is, statutorily, *not rape*. Any allegation of rape by a husband of his wife is, therefore, anathema to the IPC, and directly contrary to the impugned Exception. Were, however, we to agree with the petitioners, and strike down the impugned Exception and, thereafter, if a wife was to lodge an FIR against her husband for having raped her, Section 482 would, ordinarily, not be available to the husband, who would have to contest the trial and establish his innocence, as the act that he committed would, with the evisceration of the impugned Exception, become an offence of rape. We would, therefore, be designating the act of the husband, vis-à-vis his wife, as rape, where, earlier, it was not.

203. The contention, of Ms Nundy, that the Court would not be creating an offence, but would be merely enlarging the class of offenders, is obviously fallacious. This contention is predicated on the premise that the specification, in the impugned Exception, excepting husbands, vis-à-vis their wives, from the scope of an allegation of 'rape' is something *apart* from the main Section 375. I am unable to agree. To my mind, as I have already observed earlier, every offence consists of four ingredients, i.e., the act, the perpetrator, the victim and the punishment. Offences may legitimately be made perpetrator-specific or victim-specific. In the present case, Section 375, read as a whole, makes the act of 'rape' perpetrator-specific, by excepting, from its scope, sexual acts by a husband with his wife.

Though this stipulation finds its place in the impugned Exception, it might, just as well, have figured in the main part of Section 375. The legislature might, just as well, have worded Section 375 thus:

> "A man is said to commit 'rape' if he –
>
> (a) *******; or
>
> (b) *******; or
>
> (c) *******; or
>
> (d) *******,
>
> *not being the husband of the woman*, under the circumstances falling under any of the following seven descriptions: – ……"

The specification of the identity of the man, and his relationship vis-à-vis the woman, which presently finds place in the impugned Exception might, therefore, just as well have been part of the main provision, and I am not inclined to regard the placement of this stipulation, in the impugned Exception as anything more than a device of legislative convenience. It does not detract from the fact that the stipulation, contained in the impugned Exception is one of the *ingredients* of the offence of 'rape'. 'Rape' would not, therefore, under Section 375, apply to acts committed by a husband with his wife.

204. Viewed thus, it is obvious that, by eviscerating the impugned Exception, the Court would be altering, altogether, the stipulation regarding the perpetrator of the offence of 'rape', by covering all men thereunder, save and except those who would be entitled to the benefit of the first Exception in Section 375, which applies to medical procedures. This also follows from the fact, already noted by me

hereinabove, that, by striking down the impugned Exception, this Court would be denying, to the husband, the benefit of Section 482 of the Cr PC which, as the statutory position stands today, is available to him, in view of the impugned Exception.

205. The submission of Ms Nundy – and other learned Counsel – is, in fact, essentially yet anoher fallout of their fundamentally fallacious premise that every act of non-consensual sex by a man with a woman is, *of necessity*, "rape". This erroneous premise is extrapolated to treating the impugned Exception as merely *exempting a class of offenders* from the rigour of Section 375. This, as I have held, is a clear misreading of the impugned Exception. The impugned Exception does not say that husbands would be *exempted*, or *excepted*, from being prosecuted for rape; it says, rather, that, sexual acts between a husbanad and wife *are not rape*. The offence of rape, therefore, *does not exist*, where the man and woman are married. Where there is no offence, there can, axiomatically, be no offender. The impugned Exception does not, therefore, *exempt a category of offenders* from the purview of Section 375 who, by eviscerating the Exception, we would be bringing within the four corners of the provision. Rather, by striking down the impugned Exception, we would be pronouncing that an act of non-consensual sex between a husband and a wife *is rape*, where, as the statutory position stands now, *it is not*.

206. If this does not amount to creation of an offence, I, frankly, fail to see what would.

207. The submission that, were we to strike down the impugned Exception, we would not be creating an offence is, therefore, unequivocally rejected.

208. As, by allowing the petitioners' pleas, we would be creating an offence, I am of the opinion that, irrespective of and in addition to all other contentions advanced by the petitioner, and all other considerations that arise in this case, it is impossible for this Court to grant the reliefs sought by the petitioners, as it would result in creation of an offence, which is completely proscribed in law.

The impact of Section 376(2)(f) and (n)

209. There may also be substance in the contention, of learned Counsel for the respondents that, by striking down the impugned Exception, one may expose husbands to the rigour of Section 376(2)(f), which envisages rape, by a relative, or a person in a position of trust or authority towards the woman, as aggravated rape, subject to a higher degree of punishment of rigourous imprisonment of not less than 10 years, extendable to life. He may, equally, stand exposed to enhanced punishment under Section 376(2)(n), if there have been more than one instance of non-consensual sexual intercourse with his wife.

210. Learned counsel for the petitioners have not been able to satisfactorily meet the point. The submission of Ms. Nundy, that,

applying the "mischief rule" of interpretation, the husband could escape Section 376(2)(f) would, in my view, be highly arguable, as there can be no gainsaying the fact that a husband is a relative of his wife, as well as a person in a position of trust towards his wife. Criminal statutes are, it is trite, to be strictly construed.

211. Clearly, therefore, even in stipulating the punishments for rape, in Section 376, the legislature, consciously, does not intend to extend its ambit to husbands, vis-à-vis their wives. The stipulated punishments have factored in the impugned Exception. Were we to strike down the impugned Exception, we would be doing precisely what the legislature forbore from doing. The resulting prejudice to public interest would be incalculable and immense.

Section 114A of the Indian Evidence Act, 1872 and its Significance

212. Another serious concern expressed by learned Counsel proposing the striking down of the impugned judgment is predicated on Section 114A[135] of the Evidence Act.

213. It is sought to be contended that, if non-consensual sex within marriage is to be treated as rape, it would become near impossible for the accused husband to establish want of consent, and Section 114A of the Evidence Act would operate to ensure, in almost every case, a

[135]**114A.Presumption as to absence of consent in certain prosecutions for rape**.—In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of section 376 of the Indian Penal Code, (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

conviction. Learned Counsel for the petitioners sought to contend that the effect of Section 114A of the Evidence Act would apply equally to rape outside marriage as to rape within marriage.

214. To my mind, the concern, predicated on Section 114A of the Evidence Act, is legitimate. Section 114A presumes want of consent on the part of the prosecutrix, in every case of prosecution for rape. If "rape" is to apply even to non-consensual sex within marriage, and a wife is to allege want of consent, it may conceivably become extremely difficult, if not impossible, for the husband to discharge the onus cast on him, by Section 114A, to prove existence of consent, as the act has taken place within the confines of the bedroom.

215. I do not propose to express any final opinion on this aspect as it would be a matter for the concerned Court, seized with prosecution proceedings alleging the Marital Rape (if the impugned Exception is ultimately to perish) to deliberate upon a case-to-case basis. Suffice it to state that the manner in which the effect of Section 114A, if non-consensual sex within marriage is to be treated as rape, would operate, is a valid consideration and, if it has also weighed with the legislature in its decision not to remove the impugned Exception, the concern is legitimate. This would operate as yet another reason why the Court cannot, in exercise of its jurisdiction under Article 226 of the Constitution of India, trump the legislative wisdom and strike down the impugned Exception.

216. This also throws, into sharp relief, an extremely important

aspect of the present controversy to which, I am constrained to note, no sufficient importance was attributed during the proceedings. An offence does not exist in isolation or *in vacuo*. A provision creating an offence carries, with it, its entrails and its viscerae. If, hypothetically, the legislature were, on the persuasion of the opponents of the impugned Exception, to do away with it, that would also necessitate, in its wake, other legislative changes. Quite possibly, the punishments provided in Section 376 may have to be duly modified in order to deal with the newly created offence of "marital rape". Equally, changes may also be required to be incorporated in Section 114A of the Evidence Act. These are all imponderables. What is being sought of this Court is that, oblivious of all the other statutory changes which removal of the impugned Exception would necessarily entail, the Court should telescope its view merely to concentrate on the impugned exception and strike it down.

217. In my view, this is not permissible. This Court does not have the competence or the authority to envision or carry out all other concomitant legislative changes which removal of the impugned Exception would necessitate. This is yet another reason why, if a case for removal of the impugned Exception is to be pleaded, that has to be pleaded before the legislature which, if it is convinced with the plea, would not only remove the impugned Exception but would also deliberate on other resultant legislative changes which have to be undertaken. In my view, it would be a complete misadventure for the Court to strike down the impugned Exception and, thereafter, leave it to the legislature to effect other necessary legislative amendments

consequent to the verdict of the Court, allowing a situation of chaos to prevail in the interregnum.

Other submissions

218. Considerable reliance was placed, by learned Counsel for the petitioners, as well as by learned *amici curiae*, on the position in foreign jurisdictions, as well as on recommendations contained in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Insofar as the position existing in foreign jurisdictions is concerned, according to me, it is largely irrelevant to the issue at hand. We are concerned, here, with the issue of whether to strike down the impugned Exception as unconstitutional. That has to be decided on the basis of our Constitution, and the principles well enunciated by Courts, time and again, regarding constitutionality of statutes. It is obviously not open to us to strike down the impugned Exception as unconstitutional merely because similar provisions, in other jurisdictions, may not exist, or may have been outlawed, judicially or legislatively. Expressed otherwise, it is not open to any Court in India to strike down the legislative provision as unconstitutional merely so as to conform to what, according to the petitioners, may be the international sentiment. That is quite apart from the fact that the socio- economic and ground realities that obtain in India, with its complex diversity of peoples and cultures, are not comparable with the situation that applies in other countries.

219. Insofar as the recommendations in the 37th Session of the CEDAW in 2007 are concerned, they are merely recommendations. They do not bind even the legislature to legislate in accordance with the recommendations. Even otherwise, and that the cost of repetition, recommendations made by the CEDAW cannot constitute an~~d~~ additional ground to strike down a statutory provision as unconstitutional. ***Puttasamy***[42] observers thus, in this regard (in para-103 of the report):

> "In the view of this Court, international law has to be construed as a part of domestic law in the absence of legislation to the contrary and, perhaps more significantly, the meaning of constitutional guarantees must be illuminated by the content of international conventions to which India is a party."

Puttasamy[42] further holds, in para 154 of the report, that "~~w~~here there is a contradiction between international law and a domestic statute, the Court would give effect to the latter". Krishna Iyer, J., expressed the position pithily when he held, in ***Jolly George Varghese v. Bank of Cochin***[136], that "the positive commitment of the States parties ignites legislative action at home but does not automatically make the Covenant an enforceable part of the *corpus juris* of India." Where covenants in international conventions are in line with municipal law in India it is open to a Court to rely on international conventions to enforce municipal obligations.[137] There is, however, no existing position, in law, envisaging the evisceration, by a Court, of a statutory provision on the ground that it is not in sync with the

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[136] **(1980) 2 SCC 360**

[137] **Refer Nilabati Behra ~~Alias~~ v. State of Orissa, (1993) 2 SCC 746 and Vishakha v. State of Rajasthan, (1997) 6 SCC 241**

recommendations contained in international conventions. Any argument for altering the statutory scenario, predicated on recommendations in international conventions would, therefore, necessarily have to be made before the legislature, and cannot be urged is a ground to strike down a statutory provision as unconstitutional. Unconstitutionality would vitiate a statutory provision only if, either, it is beyond the competence of the legislature which has enacted it or infracts one or more of the fundamental rights enshrined in Part III of the Constitution.

The sequitur

220. As, therefore,

(i) the petitioners' case is premised on a fundamentally erroneous postulate, for which there is no support available, either statutory or precedential, that *every act of non-consensual sex by any man with any woman is rape*,

(ii) the impugned Exception does not violate Article 14, but is based on an intelligible differentia having a rational nexus with the object both of the impugned Exception as well as Section 375 itself,

(iii) the impugned Exception does not violate Article 19(1)(a),

(iv) the impugned Exception does not violate Article 21,

(v) none of the indicia, on which a statutory provision may be struck down as unconstitutional, therefore, can be said to exist, and

(vi) in such circumstances, the Court cannot substitute its subjective value judgement for the view of the democratically elected legislature,

I am of the considered opinion that the challenge, by the petitioners, to the constitutional validity of Exception 2 to Section 375 of the Constitution of India, cannot sustain.

Section 376B of the IPC and Section 198B of the Cr PC

221. The discussion hereinabove also answers the challenge, by the petitioners, to Section 376B of the IPC and Section 198B of the Cr PC.

222. Section 376B of the IPC is obviously predicated on the fact that, when separated, the demographics that otherwise apply to a subsisting and surviving marriage between the couple are absent. It is important to note that Section 376B does not characterise the act of non-consensual sexual intercourse by the man with the woman, in such a situation, as 'rape'. It treats it as a distinct and different offence altogether, with a different punishment stipulated for its commission. Where marital ties have severed, even if short of an actual divorce, then, absent consent, the husband has no reasonable conjugal expectation of sex with his wife. The unique indicia that apply to a healthy, subsisting and surviving marriage, therefore, have ceased to apply. This, again, is a situation which is qualitatively distinct from a situation of sex between strangers, as also from one of sex between a husband and wife who are cohabiting with one another.

While, therefore, it cannot be equated with sex between strangers, it is, nonetheless, also not alike to sex between a couple who stay and cohabit together. An advisable middle path has, therefore, been carved out by the legislature to cater to such cases, and I see no reason to interfere with the dispensation. Of course, it would be for the court to see, in every case, as to whether the couple is, in fact, "living separately". As the marriage is, nonetheless, subsisting, though the couple is not together, the legislature has chosen to prescribe a suitable lesser punishment for the offence. The exercise of legislative discretion is entirely in order, and, to my mind, the challenge to the *vires* of the provision has no legs, whatsoever, to stand on.

223. Section 198B merely sets out the procedure to deal with complaints filed under Section 376B. No occasion, therefore, arises, to strike down the provision.

Conclusion

224. For all the above reasons, I am of the considered opinion that the petitions, as well as the challenges laid by the petitioners to the constitutional validity of Exception 2 to Section 375 and Section 376B of the IPC, and Section 198B of the Cr PC, have to fail.

225. The petitions, therefore, in my view, deserve to be dismissed, albeit without costs.

226. I concur with my esteemed brother in his decision to grant

certificate of leave to appeal to the Supreme Court in the present matter as it involves substantial questions of law, of which the Supreme Court is presently in *seisin*.

C. HARI SHANKAR, J.

MAY 11, 2022