

**IN THE SUPREME COURT OF INDIA  
CRIMINAL APPELLATE JURISDICTION  
SPECIAL LEAVE PETITION (CRL.) No. 4063-64 of 2022**

**IN THE MATTER OF**

**HRISHIKESH SAHOO**

**...PETITIONERS**

**VERSUS**

**UNION OF INDIA**

**...RESPONDENT**

**PRELIMINARY COUNTER AFFIDAVIT  
ON BEHALF OF UNION OF INDIA**

**ADVOCATE FOR THE RESPONDENT – A K SHARMA**

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**IN THE SUPREME COURT OF INDIA  
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And connected matters**

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**HRISHIKESH SAHOO**

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**VERSUS**

**UNION OF INDIA**

**...RESPONDENT**

**PRELIMINARY COUNTER AFFIDAVIT  
ON BEHALF OF UNION OF INDIA**

I, Sunil Kumar Singh aged about 40 Years, S/o Shri Dharam Pal Singh, currently working as Under Secretary, Ministry of Home Affairs, do hereby solemnly affirm and state as follows:

1. That I am the representative of the Respondent of the present case and I am well acquainted with the facts and circumstances of the case and as such I am authorised to affirm this Affidavit on behalf of the Respondent.
2. The respondent herein is dealing only with the averments and pleadings that are material to the issues as relevant to the respondent herein. Save what are matters of record, all other allegations and / or contentions to the contrary as contained in the Writ Petition filed by the petitioner are denied and disputed. The allegations in the aforesaid pleadings under objection which are not dealt with by herein below shall be deemed to have been denied and disputed as if the same had been set out and traversed in seriatim.

3. The deponent reserves liberty to file a further detailed affidavit if required.

4. The prayers in the various set of petitions before this Hon'ble Court, can be summarized as under :

S. NO.	NAME OF THE CASE	PRAYER SOUGHT
1.	<b>Youth for Equality v. Union of India</b>  WP (C) No. 1022/2019	Declare that Explanation 2 to Section 375 that reads as "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape" is ultra vires Articles 14, 19 and 21 of the Constitution of India and therefore void and inoperative.
2.	<b>Khushboo Saifi v. Union of India &amp; Anr.</b>  CA No. 6787/2022	Admit and allow the present Civil Appeal filed under Article 133 r/w Article 134A of the Constitution of India, and set aside the impugned final order dated 11.05.2022 passed by the Hon'ble High Court of Delhi at New Delhi to the extent of the judgement delivered by Hon'ble Mr. Justice C. Hari Shankar whereby the validity of MRE, Section 376B, IPC, 1860 and Section 198B, Criminal Procedure Code, 1973 was upheld in W.P. (Civil) 5858 of 2017 vide Judgement dated 11.05.2022;
3.	<b>Hridaya Nest of Family Harmony v. Union of India &amp; Anr.</b>  CA No. 6793/2022	Grant Special Leave to appeal against the judgement/order dated 11.05.2022 as passed by the High Court of Delhi at New Delhi by Hon'ble Justice Rajiv Shakdher in Writ Petition (C) No. 284 of 2015.

S. NO.	NAME OF THE CASE	PRAYER SOUGHT
4.	<b>All India Democratic Women's Association (AIDWA) v. Union of India</b> CA No. 4926/2022	Admit and allow the present appeal and set aside the Impugned Order & Judgement dated 11.05.2022 passed by the Hon'ble Delhi High Court in WP (C) 6024/2017 titled as <i>All India Democratic Women's Association v. Union of India</i> .
5.	<b>Men Welfare Trust v. RTI Foundation and Anr.</b> CA No. 6794/2022	Grant special leave to appeal against the impugned judgement dated 11.05.2022 passed by his Lordship, Hon'ble Justice Rajiv Shakti in W.P. (C.) 284/2015.
6.	<b>Ruth Manorama v. Union of India</b> WP(C) No. 1119/2022	Issue a writ of mandamus or other similar writ striking down MRE as it violates Article 14, 15, 19, and 21 of the Constitution of India, and consequently.  Issue a writ of mandamus or other similar writ striking down Section 376B of the Indian Penal Code, 1860, as also Section 198B of the Code of Criminal Procedure 1973 as violative of Article 14, 15, 19 and 21 of the Constitution of India;

5. In light of the above, Exception 2 of Section 375 of the Indian Penal Code, Section 376B and of the Indian Penal Code, 1860, as also

Section 198B of the Code of Criminal Procedure 1973, are jointly referred to as the “Impugned provisions”.

6. At the outset, it is submitted that to decide on the constitutionality of the impugned provision, a holistic approach and consultation with all the states needs to be undertaken after taking their views into consideration. This is more so since the issues involved has a direct bearing on the society in general and is a part of Concurrent List of the Seventh Schedule to the Constitution of India.

7. The issue involved in the present batch of matters is more of a social issue rather than a legal issue, therefore, it is submitted that the same cannot be decided without proper consultation with all the stakeholders or taking the views of all the states into consideration. Moreover, it is submitted that the outcome of the present petition will have a larger impact on the society, especially considering the concept of marriage in India, which creates social and legal rights on the part of both individuals and others in the family.

8. It is further submitted that the Central Government sought the view of all the States/Union Territories as well as the National Commission for Women vide its letter dated 10.02.2022, after which certain States/UTs gave their views and the others did not give any clear view.

A copy of letter dated 10.02.2022 written to all the State Governments and Union Territories is annexed and attached herewith as **Annexure A**. A tabulated chart indicating the views of each state is annexed and attached herewith as **Annexure B**. A copy of views of the

Ministry of Women and Child Development are also annexed and attached herewith as **Annexure C**.

9. It may be pertinent to mention here that the National Commission for Women also communicated its views in form of a Report on “*Review of Criminal Law – Improvement in Status of Women*” to the Central Government vide its letter dated 04.03.2022. It is submitted that the recommendations in the Report are as follows:

**“4. Recommendations**

**4.1. Exception to Section 375, Indian Penal Code, 1860**

**Recommendation:** *Exception II under Section 375 IPC should be retained. The decision of Hon'ble Supreme Court in Independent Thought v Union of India, regarding increasing the age of consent for married women to 18 years from 15 years should be codified in Indian Penal Code.*

**Rationale:** *This exception is based on intelligible differentia of marriage. The case of married woman cannot be treated in a similar manner as that of an unmarried woman. The consequences of punitive measures against husband may lead to destitution and vagrancy for wife and dependent children due to lack of a robust support system for a victim. The forceful act of sex by a husband violates the personal bodily autonomy of a woman and same should not remain without a remedy. However, bringing the act under the purview of section 375 may perpetrate more harm than good for married women. Alternate legal remedy already exist under section 498A IPC, Protection of Women from Domestic Violence Act, 2005 and recourse to matrimonial laws such as divorce on the ground of cruelty.”*

10. It is submitted that any question in the nature of criminalization or decriminalization of any act or omission by persons residing within the country form a part of the plenary legislative policy of the country which depends upon various socio-economic and political factors,

which often fall outside judicially manageable standards. Therefore, the scope, ambit, pervasiveness and rigorousness of judicial review in such cases, ought to be suitably tailored.

11. It is submitted that the Government of India is committed to fully and meaningfully protect the liberty, dignity and rights of every woman who are the fundamental foundation and a pillar of a civilized society. The Government attaches highest importance to ending all kinds of violence and offences causing physical, sexual, verbal, emotional and economic abuse including domestic violence against women.

12. It is submitted that the act colloquially referred to as 'marital rape' ought to be illegal and criminalized. The Central Government asserts that a woman's consent is not obliterated by marriage, and its violation should result in penal consequences. However, the consequences of such violations within marriage differ from those outside it. Parliament has provided different remedies, including criminal law provisions, to protect consent within marriage. Sections 354, 354A, 354B, 498A IPC, and the Protection of Women from Domestic Violence Act, 2005, ensure serious penal consequences for such violations.

#### **MARRIAGE – INSTITUTION OF RECIPROCAL OBLIGATIONS**

13. At the outset, it is submitted that nature of the institution of marriage is to be properly understood and appreciated before understanding the challenge to the presently Impugned provisions. The Black's Law Dictionary, defines marriage as follows:



“Marriage, as distinguished from the agreement to marry and from the act of becoming married, is the civil status, condition, or relation of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex. 1 Bish.Mar. & Div. § 3; Collins v. Hoag & Rollins, 121 Neb. 716, 238 N.W. 351, 355; Allen v. Allen, 73 Conn. 54, 46 A. 242, 49 L.R.A. 142.

*A contract, according to the form prescribed by law, by which a man and woman, capable of entering into such contract, mutually engage with each other to live their whole lives together in the state of union which ought to exist between a husband and wife. Shelf. Mar. & Div. 1; Seuss v. Schukat, 358 Ill. 27, 192 N.E. 668, 671, 95 A.L.R. 1461.*

*The word also signifies the act, ceremony, or formal proceeding by which persons take each other for husband and wife. Davis v. Davis, 119 Conn. 194, 175 A. 574, 575”*

14. Similarly, Halsbury’s Laws of England recognize the concept of marriage as under :

*“Marriage.  
Holy matrimony is the estate into which a man and a woman enter when they consent and contract to cohabit with each other and each other only.<sup>1</sup> The solemnisation of matrimony in church is on their part the attestation in the presence of God and of the Church of their consent and contract so to do, and on the Church’s part its blessing on their union<sup>2</sup>. According to the doctrine of the Church of England marriage is in its nature a union permanent and life-long, for better for*

<sup>1</sup>Book of Common Prayer, Form of Solemnization of Matrimony; Harrod v Harrod (1854) 1K & J 4.

<sup>2</sup> Book of Common Prayer, Form of Solemnization of Matrimony; Harrod v Harrod (1854) 1K & J 4. As to the celebration of Church of England marriages see PARA 57 et seq.

*worse, till death them do part, of one man and one woman, to the exclusion of all others on either side, for the procreation and nurture of children, for the hallowing and right direction of the natural instincts and affections, and for the mutual society, help and comfort which the one ought to have of the other, both in prosperity and adversity*<sup>3</sup>.

*It has been said that the only kind of marriage which English law recognises is one which is essentially the voluntary union for life of one man with one woman to the exclusion of all others*<sup>4</sup>.

*To be recognised by English law a marriage must at its inception be for life*<sup>5</sup> *and must not be illusory*<sup>6</sup>. *English law does not acknowledge the concept of a trial or temporary marriage.*<sup>7</sup>

15. It is submitted that the concept of marriage, across personal law and jurisdictions, once solemnised as per the prevailing societal rituals or legal requirements, creates reciprocal legal and social obligations on part of both individuals. It is submitted that at the same time, marriage creates social and legal rights on the part of both individuals and others in the family, in various domains of civil laws and even criminal law.
16. It is submitted that marriage creates rights in the civil domain relating to property rights, successions and adoption amongst other

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<sup>3</sup> Revised Canons Ecclesiastical, Canon B30 para 1. See also Canon B30 para 2, which states that the teaching of our Lord, affirmed by the Church of England, is expressed and maintained in the Form of Solemnization of Matrimony in the Book of Common Prayer. When application is made to a minister for a marriage in his church it is his duty to explain this doctrine to the parties: see Canon B30 para 3.

<sup>4</sup>Nachimson v Nachimson [1930] P 217, CA; Hyde v Hyde and Woodmansee (1866) LR 1 P & D 130; Re Bethell, Bethell v Hildyard (1888) 38 ChD 220; Sowa v Sowa [1961] P 70, [1961] 1 All ER 687, CA.

<sup>5</sup>See Nachimson v Nachimson [1930] P 217, CA; Cheni (otherwise Rodriguez) v Cheni [1965] P 85, [1962] 3 All ER 873.

<sup>6</sup>Kenward v Kenward (1951) P 124, [1950] 2 All ER 297, CA.

<sup>7</sup>See Dalrymple v Dalrymple (1811) 2 Hag Con 54

aspects of social life. Further, marriage creates rights, obligations and even punishments under criminal laws thereby creating an entire ecosystem of statutory laws, adequately protecting women living within the institution of marriage with key provisions in the Indian Penal code, 1860, the Evidence Act, 1872, the Protection of Women from Domestic Violence Act, 2005, etc. It is submitted that marriage is an institution that converges a delicate balance of rights, obligations, duties and conditions between a man and a woman, in order to regulate the relationship as husband and wife and the family that they create.

17. It is submitted that over and above the same, it is settled law that as per Hindu Personal Law, especially concerning the Hindu Marriage Act, 1955, marriage is not just a union, it is sacrament. In other words, it is settled law that Hindu personal law attaches a greater degree of sanctity to the institution of marriage. It is submitted that other forms of personal laws recognise marriage in various other forms and therefore, it is clear that there exists a clear intelligible link between religious beliefs of persons and the institution of marriage.

18. It is submitted that the institution of marriage, as per the misconception and the wrong notion entertained by the Petitioners, is only a private institution. This understanding is incorrect as the marriage, in any societal setup, also entails numerous social and public aspects. It is submitted that regulation of the said institution of marriage, the codification of certain rights and obligations that are created by virtue of such institution being deeply rooted in the country/society, is the norm across jurisdictions. It is submitted that it

is the bounden constitutional duty of the State to regulate, by law, certain aspects of marriage and especially the ensuing rights, duties, obligations and consequences.

19. It is submitted that in effect, in addition to being a private and personal relationship between spouses, the institution of marriage also entails the following:

(a) It is a socially sanctioned voluntary union between a man and a woman;

(b) Institution of marriage plays a pivotal and fundamental role for the institution of family;

(c) Stable marriages and families promote fraternity and vitalise the social and cultural fabric of the society and the nation;

(d) It is believed and accepted as a permanent bond and not merely transient or temporary one;

(e) Cohabitation and consortium is a necessary concomitant of marriage; and

(f) Marriage creates reciprocal rights and obligations, often partaking a legal character or sanction, not just for the couple but their families and particularly the children born in the wedlock.

20. Considering the aforesaid, it is submitted that it is undeniable that the relationship of marriage creates an intelligible differentia which has a rational nexus with the object sought to be achieved. It would be incumbent upon the Petitioner to determine that whether or not such differential treatment manifests itself in arbitrary consequences. It is the submission of the answering respondent that

the impugned provisions are not manifestly arbitrary and ought not be struck down on this ground.

21. It may be pertinent to mention here that Hon'ble High Court of Delhi in the case of ***Harvinder Kaur v Harminder Singh*** [AIR 1984 Delhi 66] expounded upon some aspects of the issue and shed light of the approach of the constitutional Courts in such matters. The relevant paras are as hereunder:

*“49. The wisdom of the legislation the courts cannot question. It is the duty of the judges to give effect, as best as they can, to the laws as Parliament enacts them, whatever be their private opinions — or in some cases their religious beliefs. In my opinion the criticism of the attorney general is valid.... ”*

The above observations were made by the Hon'ble High Court in context of constitutionally being challenged of Section 9 of Hindu Marriage Act, 1955.

22. It is submitted that as stated above, the institution of marriage clearly has social aspects and implications and the regulation of the same, as per the standards recognised by the Legislatures or by laws having societal ramifications, cannot be faulted lightly. It is submitted that through the enactments under question, the State does not seek to violate the privacy of any individual.

#### **IMPUGNED PROVISIONS VIS-À-VIS ARTICLE 14 AND ARTICLE 21 OF THE CONSTITUTION OF INDIA**

23. At the outset, it is submitted that the present question as to the validity of Impugned Provisions pivots around the presence of an

*intelligible differentia*. It is a settled doctrine that a law which is premised on an intelligible differentia which is a rational nexus with the object sought to be achieved would not fall foul of Article 14.

24. It is well-established that Article 14 forbids class legislation but does not forbid classification. It is submitted that permissible classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and the differentia must have a rational relation to the object sought to be achieved by the statute in question.

25. It is submitted that it is settled law that a 'mathematical nicety' or 'perfect equality' are not required as per Article 14. Further, the constitutionality of a statute cannot be questioned on the basis of fortuitous circumstances arising out of peculiar situations. It is submitted that the Hon'ble Supreme Court in ***Kedar Nath Bajoria v. State of W.B.***, 1954 SCR 30 [5JB – J. Patanjali Sastri], held as under :

*"7. Now it is well settled that the equal protection of the laws guaranteed by Article 14 of the Constitution does not mean that all laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purposes of legislation. To put it simply all that is required in class or special legislation is that the legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain. If the classification on which the legislation is founded fulfils this requirement, then the differentiation which the legislation makes between the class of persons or things to which it applies and other persons or things left outside the purview of the legislation cannot be regarded as a denial of the equal*

*protection of the law, for, if the legislation were all-embracing in its scope, no question could arise of classification being based on intelligible differentia having a reasonable relation to the legislative purpose. The real issue, therefore, is whether having regard to the underlying purpose and policy of the Act as disclosed by its title, preamble and provisions as summarised above, the classification of the offences, for the trial of which the Special Court is set up and a special procedure is laid down, can be said to be unreasonable or arbitrary and therefore, violative of the equal protection clause.*

...

**9.** *Mr Chatterjee argues that the offences listed in the schedule do not necessarily involve the accrual of any pecuniary gain to the offender or the acquisition of other property by him or any loss to any Government, and that the classification cannot, therefore, be said to be based on that consideration. Counsel referred in particular to the offences included in the fifth paragraph, namely, forgery, making and possessing counterfeit seals, falsification of accounts, etc., as instances in point. It may, however, be observed that Section 9(1), which makes it obligatory on the Special Court to impose on persons tried and convicted by it an additional compensatory fine of the kind mentioned above, indicates that only those offences, which, either by themselves or in combination with others mentioned in the schedule, are suspected to “have resulted in such pecuniary gain or other advantage and, therefore, to merit the compensatory fine, are to be allotted to a Special Court for trial. It is well known that acts which constitute the offences mentioned in para 5 are often done to facilitate the perpetration of the other offences specified in the schedule, and they may well have been included as ancillary offences. **Article 14 does not insist that legislative classification should be scientifically perfect or logically complete and we cannot accept the suggestion***

**that the classification made in the Act is based on no intelligible principle and is, therefore, arbitrary."**

26. It is submitted that the same has been reiterated in *Ganga Ram v. Union of India*, (1970) 1 SCC 377 [6JB – J. I.D. Dua], *Anant Mills Co. Ltd. v. State of Gujarat*, (1975) 2 SCC 17; *Mohan Kumar Singhania v. Union of India*, 1992 Supp (1) SCC 594; *Venkateshwara Theatre v. State of A.P.*, (1993) 3 SCC 677; *Ombalika Das v. Hulisa Shaw*, (2002) 4 SCC 539; *Dharam Dutt v. Union of India*, (2004) 1 SCC 712; *Basheer v. State of Kerala*, (2004) 3 SCC 609.

27. Therefore, it is clear that the differentiation is on the basis of a separate and specific definition of the relevant terms. It is submitted that the fact remains that criminal law enactments, across jurisdictions, create such classifications between application of preventive measures to some as opposed to the others. It is submitted that said classifications and legislative choices cannot be a mathematical nicety and it is the fairness of procedure and timely judicial interventions that ensure reasonability of the statutes. It is submitted that the same principles would apply in adjudging the constitutionality of the Impugned provisions.

28. In this regard, it is submitted that demographics of a marriage are sui generis. It is submitted that there exist plenty of examples of male-female relationships; however, the relationship between husband and wife, which emerges as a result of the tying of the matrimonial knot is distinct from each and all of these relationships. To ignore or even to seek to undermine this is to ignore plain reality.



29. Moreover, it is submitted that 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, it is submitted, marital vows are still regarded as inviolable.

30. It is submitted that 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. 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, it is submitted that it would not be appropriate for this Hon'ble Court to strike down the Exception.

31. In view of the above, it is submitted that the impugned provisions are based on the rationale of "intelligent differentia of marriage" and hence, the Impugned provisions should be sustained. The case of a married woman and her own husband cannot be treated in a exact same manner as that in other cases as there are other penal consequences that are arising from the said situation.

32. As far as Article 21 is concerned, it is submitted that unequivocally, both the parties to the marriage have the right to privacy and the right to dignity. It is submitted that if consent is obliterated, such claims of privacy and dignity would evaporate. However, in the instant case, the consent of the woman is not

evaporated rather breach of consent results in different penal consequences. It cannot be a fundamental right under Article 21 that breach of consent in all eventualities would necessarily entail the consequences of Section 375/376 of the IPC. If the breach of consent results in altered penal consequences thereby creating a sufficient deterrence, the said provision and the exception to Section 375 cannot be faulted.

33. Further, it is submitted that a husband certainly does not have any fundamental right to violate the consent of the wife, however, attracting the crime in the nature “rape” as recognised in India to the institution of marriage can be arguably considered to be excessively harsh and therefore, disproportionate. This Hon’ble Court has further adopted a balancing approach in order to reconcile in the perceivable engagement between fundamental rights.

34. In the recent landmark judgment of this Hon’ble Court in *Association for Democratic Reforms v. Union of India*, 2024 INSC 113, this Hon’ble court, has evolved a standard known as the Double Proportionality Standard. It is submitted that appreciating the value of consent and the constitutional rights of women under Article 14 and Article 21 when compared to women outside the institution of marriage, the Parliament, in its wisdom has provided different remedies including remedies in criminal law.

35. The judgment *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 clearly establishes that the right to privacy, is not absolute and could legitimately and in a limited fashion curtailed,

depending upon the situations. It is submitted that this Hon'ble Court has observed as under:

*“525. But most important of all is the cardinal value of fraternity which assures the dignity of the individual. [ In 1834, Jacques-Charles Dupont de l'Eure associated the three terms liberty, equality and fraternity together in the Revue Républicaine, which he edited, as follows:“Any man aspires to liberty, to equality, but he cannot achieve it without the assistance of other men, without fraternity.”Many of our decisions recognise human dignity as being an essential part of the fundamental rights chapter.*

.....

*The dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. And this development can only be if an individual has autonomy over fundamental personal choices and control over dissemination of personal information which may be infringed through an unauthorised use of such information. It is clear that Article 21, more than any of the other articles in the fundamental rights chapter, reflects each of these constitutional values in full, and is to be read in consonance with these values and with the international covenants that we have referred to. In the ultimate analysis, the fundamental right to privacy, which has so many developing facets, can only be developed on a case-to-case basis. Depending upon the particular facet that is relied upon, either Article 21 by itself or in conjunction with other fundamental rights would get attracted.*

*526. But this is not to say that such a right is absolute. This right is subject to reasonable regulations made by the State to protect legitimate State interests or public interest. However, when it comes to restrictions on this right, the drill of various articles to which the right relates must be scrupulously followed. For example, if the restraint on privacy is over fundamental personal choices that*

*an individual is to make, State action can be restrained under Article 21 read with Article 14 if it is arbitrary and unreasonable; and under Article 21 read with Article 19(1)(a) only if it relates to the subjects mentioned in Article 19(2) and the tests laid down by this Court for such legislation or subordinate legislation to pass muster under the said article. Each of the tests evolved by this Court, qua legislation or executive action, under Article 21 read with Article 14; or Article 21 read with Article 19(1)(a) in the aforesaid examples must be met in order that State action pass muster. In the ultimate analysis, the balancing act that is to be carried out between individual, societal and State interests must be left to the training and expertise of the judicial mind.”*

36. It is clear from the above submissions that while declaring right to privacy as a fundamental right enshrined under Article 21 of the Constitution, the Hon'ble Supreme Court has not been oblivious of the fact that the enforcement of such a right has to be on a case-to-case basis and that the said right is not absolute but is subject to reasonable restriction by the State in order to protect legitimate State interests or public interest.

37. It is submitted that the ultimate requirement is the balancing between individual, societal and State interests. However, these reasonable restrictions must pass the various tests that the Hon'ble Supreme Court has evolved through its various decisions and the rigors of Articles 14 and 19 of the Constitution. It is submitted that if this Hon'ble Court examines the provisions, weighs them on the various tests of validity it would ultimately hold the same within constitutionally permissible limits of classification in light of the

societal formulations of marriage and already existing penal provisions occupying the field.

38. Moreover, it may be noted here that it is a settled law that while assessing the while examining 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 its practical application [**K.S. Puttaswamy vs Union of India (supra)**]. The relevant paragraph of the said judgment is reproduced hereinbelow:

“**DR D.Y. CHANDRACHUD, J.** (*On behalf of Khehar, C.J., Agrawal, J., himself and Nazeer, J.; Chelameswar, J., Bobde, J., Nariman, J., Sapre, J. and Kaul, J. concurring*)—

24. *The decisions in M.P. Sharma [M.P. Sharma v. Satish Chandra, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077] and Kharak Singh [Kharak Singh v. State of U.P., AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332] adopted a doctrinal position on the relationship between Articles 19 and 21, based on the view of the majority in Gopalan [A.K. Gopalan v. State of Madras, 1950 SCC 228 : AIR 1950 SC 27 : 1950 SCR 88] . This view stands abrogated particularly by the judgment in Cooper [Rustom Cavasjee Cooper v. Union of India, (1970) 1 SCC 248] and the subsequent statement of doctrine in Maneka [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] . The decision in Maneka [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] , in fact, expressly recognised that it is the dissenting judgment of Subba Rao, J. in Kharak Singh [Kharak Singh v. State of U.P., AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332] which represents the exposition of the correct constitutional principle. The jurisprudential foundation which held the field sixty-three years ago in M.P. Sharma [M.P.*

*Sharma v. Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077] and fifty-five years ago in *Kharak Singh* [*Kharak Singh v. State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332] has given way to what is now a settled position in constitutional law. Firstly, the fundamental rights emanate from basic notions of liberty and dignity and the enumeration of some facets of liberty as distinctly protected rights under Article 19 does not denude Article 21 of its expansive ambit. Secondly, 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. Thirdly, the requirement of Article 14 that State action must not be arbitrary and must fulfil the requirement of reasonableness, imparts meaning to the constitutional guarantees in Part III.”

39. Further, it may be noted here that this Hon’ble Court in *Puttaswamy supra* in the aforesaid paragraphs effectively reiterated what was held, as far back as in 1978, in *Maneka Gandhi vs Union of India* (1978) 1 SCC 248. Para 20 in this regard is relevant which is reproduced hereinbelow:

“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 unquantifiable 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).”*

40. In view of the above, it is submitted that it is not 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.

41. Hence, it is submitted that the perceived consequences of Impugned Provisions, as pointed out by the petitioners, cannot be the reason to strike the provision down, them not being the direct and inevitable effect of its operation. The said alleged consequences include the value of consent for sex diminishing to zero, encouraging husband to have forced sex with his wife. In this regard, it is submitted that a perusal of the impugned provision would show that its only effect is that the sexual acts between a husband and a wife would not

constitute 'a crime of rape'. The consent of the woman within the marriage is statutorily protected albeit with a different penal scheme.

42. It is submitted that the right to life under Article 21, subsumes the right to a healthy conjugal relationship between spouses within the institution of marriage, the present question of criminalization of the lack of consent in case of an act within the institution of marriage, requires the legislature and the Court to construct a delicate balance thereby protecting the constitutional right of all parties involved. It is submitted that considering the social impact involved, the intimate familial relations being the subject matter and ground realities prevailing in different parts of society of this large, populous and diverse country, taking a decision merely based upon the arguments of the PIL Petitioners, may not serve the ends of justice.

43. It is submitted that if the argument of the Petitioners is accepted that all forms of sexual violence or breach of consent would have to be treated in the exact same manner any classification [even aggravating the offence – like the Protection of Children from Sexual Offences Act, 2012] would fall foul of Article 21 and Article 14. It is submitted that the said approach is unidimensional and does not appreciate the varying situations in which sexual abuse/violence may occur. In fact, the Legislature in Section 375/376/376B itself recognised “rapes” or sexual abuse or violence of various forms and classified them accordingly. It is therefore submitted that it is open for the Legislature to classify various forms of sexual abuse in varying situations differently.

**SUFFICIENT/ADEQUATE REMEDY IS PROVIDED TO THE VICTIM OF A  
“MARITAL RAPE” IN OTHER LAWS**



44. It is submitted that appreciating the value of consent and the constitutional rights of women under Article 14 and Article 21 when compared to women outside the institution of marriage, the Parliament, in its wisdom has provided different remedies including remedies in criminal law. A perusal of Sections 354, 354A and 354B and 498A of IPC and the Protection of Women from Domestic Violence Act, 2005 makes it amply clear that the consent of a woman even within the institution of marriage is legislatively protected and the violation of the same results in serious penal consequences. The above stated provisions relevant in this regard are reproduced hereinbelow:

**“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 there by 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.*

**354A. Sexual harassment and punishment for sexual harassment.**— *(1) A man committing any of the following acts— (i) physical contact and advances involving unwelcome and explicit sexual overtures; or (ii) a demand or request for sexual favours; or (iii) showing pornography against the will of a woman; or (iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment. (2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both. (3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.*

**354B. Assault or use of criminal force to woman with intent to disrobe.**—Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.

**Section 498A. 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”

### **SECTION 3 OF PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005**

**3. Definition of domestic violence.** — For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it—

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes **causing physical abuse, sexual abuse**, verbal and emotional abuse and economic abuse; or

(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related

to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

**Explanation I.**—For the purposes of this section, —

- (i) **“physical abuse” means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;**
- (ii) **“sexual abuse” includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;**
- (iii) **“verbal and emotional abuse” includes—**
  - (a) *insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and*
  - (b) *repeated threats to cause physical pain to any person in whom the aggrieved person is interested;*
- (iv) **“economic abuse” includes—**
  - (a) *deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;*
  - (b) *disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like*

*or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and*

- (c) *prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.*

***Explanation II.*** —*For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes “domestic violence” under this section, the overall facts and circumstances of the case shall be taken into consideration.”*

45. It is submitted that a perusal of abovesaid provisions would show that Sections 354, 354A and 354B and 498A of IPC and the Protection of Women from Domestic Violence Act, 2005 provide for a sufficiently adequate remedy which includes penal consequences thereby protecting the right and dignity of a woman even within the institution of marriage. In essence, the right of a woman and the consent of a woman within the institution of marriage is legislatively protected, respected and given its due regard, providing for reasonably stringent consequences in case of violation of the same. These consequences represent the delicate balance that the Parliament has sought to draw and, therefore, merely concentrating on the Impugned provisions while ignoring other aspects of the matter would do grave injustice.

**CONCEPT OF 'CONSENT' IS NOT DONE AWAY WITH BY THE IMPUGNED PROVISION**

46. It is submitted that the Parliament has enacted The Protection of Women from Domestic Violence Act, 2005 (PWDVA) to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family. Section 3 of the PWDVA defines the domestic violence which includes, any act, omission or commission or conduct of the respondent (husband or family members) in case it harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse. This includes "sexual abuse" that is any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman. Thus, there are adequate protections available under the law to protect women from sexual abuse of any kind, including those by husband.

47. It is submitted that since marriage is an institution which creates reciprocal conjugal rights, it therefore renders it incomparable to the concept of "consent" in any other situation outside the marriage. The Parliament, after appreciating this subtlety and variation in the concept of "consent" within a marital relationship, has approved the presence of the Impugned provisions while providing for other suitable remedies recognizing the constitutional right of the parties to the marriage.

48. It is submitted that marriage does not obliterate the concept of consent but the understanding and the judicial elucidation of the concept of “consent” would vary in case of a marital relationship when compared to any other relationship (or lack thereof) outside the institution of marriage.

49. In this regard, it is submitted that in an institution of marriage, there exists a continuing expectation, by either of the spouse, to have reasonable sexual access from the other. Though these expectations do not entitle the husband to coerce or force his wife into sex, against her or his will. At the same time, it is submitted, these obligations, expectations and considerations, which are completely absent in the case of a stranger who seeks sexual congress, or even from any other intimate relationship, constitutes as a sufficient basis for the Legislature to distinguish qualitatively between an incident of non-consensual sex within the marital sphere and without it.

50. In furtherance of the above submission, it is submitted that due to the implicit nature of conjugal relationship within the institution of marriage, the question of framing a law which tackles the breach of consent within the institution of marriage becomes a question of delicate legislative balance considering the competing positions.

51. It ought to be appreciated that the law framed in this regard, while protecting the cherished concept of consent by a woman even within the confines of marriage, would also have to balance the competing position of the potential accused husband, especially in light of the tweaked understanding of consent within the marital

institution after the amendments made to criminal laws [IPC, Evidence Act and CrPC] in 2013.

The relevant portion of the said amendments is quoted as under :

### IPC AMENDMENTS

9. For sections 375, 376, 376A, 376B, 376C and 376D of the Penal Code, the following sections shall be substituted, namely:-

'375. A man is said to commit "rape" if he-

(o) 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.'**

*Section 376.*

*(1) Whoever, except in the cases provided for in subsection (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall **not be less than seven years**, but which may extend to imprisonment for life, and shall also be liable to fine.*

**Section 376B.**



Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine. Explanation.-In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

### CRPC AMENDMENTS

19. After section 198A of the Code of Criminal Procedure, the following section shall be inserted, namely:-

"198B. No Court shall take cognizance of an offence punishable under section 376B of the Indian Penal Code where the persons are in a marital relationship, except upon prima facie satisfaction of the facts which constitute the offence upon a complaint having been filed or made by the wife against the husband."

### EVIDENCE ACT AMENDMENTS

25. After section 53 of the Indian Evidence Act, 1872 (hereafter in this Chapter referred to as the Evidence Act), the following section shall be inserted, namely:-

"53A. In a prosecution for an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D or section 376E of the Indian Penal Code or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent."

26. For section 114A of the Evidence Act, the following section shall be substituted, namely:-

**'114A. 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, 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.'**

28. In section 146 of the Evidence Act, for the proviso, the following proviso shall be substituted, namely:-

**"Provided that in a prosecution for an offence under section 376, section 376A, section 376B, section 376C, section 376D or section 376E of the Indian Penal Code or for attempt to commit any such offence, where the question of consent is an issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to the general immoral character, or previous sexual experience, of such victim with any person for proving such consent or the quality of consent."**

52. It is submitted that Section 375 IPC, especially in its amended form post the recommendations of the J.S. Verma Committee, along with the amendments in procedural law and the law of evidence, provides an extraordinarily rigorous legal process against the accused

persons. Section 375, along with other procedural provisions applicable to the same, is therefore, a *stringent provision* enacted and amended as a matter of serious deterrence considering the ghastly nature of the crime that the said provision seeks to outlaw.

53. Considering the nature of Section 375, its legislative strength and its strong punitive attributes, the Legislature sought to exclude the application of such a drastic provision to the context of marriage while providing a suitable provision for the context of marriage. In essence, Section 375, and its legislative universe surrounding it, is designed in a manner that *it envisages a relationship [or lack thereof] other than one of marriage* between a man and a woman.

54. In this regard, it is further submitted that Section 376 of the IPC provides for minimum punishment for the offence of rape under Section 375, as against other Sections in the IPC which generally provide for only the maximum punishment. Section 376 is reproduced, hereinbelow, for ready reference:

**“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 shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.”**

A perusal of the above provision would show that along with the maximum punishment for the offence under Section 375, Section 376 provides for minimum punishment which the Courts are obliged to impose on the persons convicted under Section 376, which is generally not provided for under other provisions in the IPC. It is submitted that

this substantiates the earlier submission of the answering respondent that this is a *drastic provision*.

55. In light of the above, the only question that requires adjudication is *whether the exclusion of the applicability of Section 375 to a marital relationship while providing for a remedy under the requisite provisions of the Indian Penal Code and the Protection of Women from Domestic Violence Act, 2005 in case of a woman being legally wedded to a man, results into a consequence which can be termed as manifestly arbitrary of resulting in breach of life and liberty without a just, fair and reasonable procedure.*

56. It is the submission of the Central Government that considering the intelligible differentia of marriage, the tweaked understanding of consent within a marital relationship, the place that conjugal relations have within the institution of marriage, the present subject is a delicate and sensitive societal issue and the Section 375/376 IPC being an especially drastic provision framed as a manner of grave deterrence for a specific situation, the exclusion of Section 375 from the institution of marriage does not *manifest* itself in arbitrary consequences or results in violation of *life and liberty without a just, fair and reasonable procedure.*

57. It is submitted that the non-application of the drastic penal and procedural rigours of Section 375 IPC and Section 376 IPC within the relationship of marriage is a reasonable classification as the law provides other penal consequences for the violation of consent of a woman even within the relationship of marriage, as shown in the preceding paragraphs. It is not the case that the said acts remain

unpunished or untouched by the force of law. The assertion that the concept of consent within a marriage is done away by the Legislature through Exception 2 to Section 375 IPC is based on an erroneous reading of the law.

58. It is further submitted that 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, which, it is submitted, also 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.
59. It is, therefore, submitted that the consent of a woman stands protected even within the institution of marriage. The only distinguishing feature is the different consequences that flow in law in case such consent is violated within the institution of marriage and outside it. The consequences of breach of consent within the institution of marriage are excluded from the purview of Section 375 owing to the distinguishing features mentioned hereinabove.

60. It is submitted that in order to ensure that reasonable consequences follow for the violation of consent within the marriage, the provisions of Sections 354, 354A and 354B and 498A of IPC and Protection of Women from Domestic Violence Act, 2005 have been enacted to specifically include sexual activity with the wife by a husband without her consent within the institution of marriage. It is submitted that this shall ensure that the action/mischief of “*marital rape*”, as contemplated by the Petitioners, results in appropriate legal and penal consequences.

61. It is submitted that the non-application of the drastic penal and procedural rigours of Section 375 IPC and Section 376 IPC within the relationship of marriage is a reasonable classification as the law provides other penal consequences for the violation of consent of a woman even within the relationship of marriage. It is not the case that the said acts remain unpunished or untouched by the force of law and in effect – *the breach of consent of woman, even within the institution of marriage, already has penal consequences outside the paradigm of Section 375 IPC*. The assertion that the concept of consent within a marriage is done away by the Legislature through Exception 2 to Section 375 IPC is based on an erroneous reading of the law.

62. It is submitted that to declare that the Section 375/376 of IPC, to be applicable to the institution of marriage would result in unsettling the delicate balance and sensitivity of the issue at hand. It is therefore submitted that if the said approach is adopted, the rights of all stakeholders would be appropriately balanced whilst especially

protecting the right of *consent* of a woman within the institution of marriage.

#### PLENARY SOCIAL POLICY

63. It is submitted that any question in the nature of criminalization or decriminalization of any act or omission by persons residing within the country form a part of the plenary legislative policy of the country which depends upon various socio-economic and political factors, which often fall outside judicially manageable standards. Therefore, the scope, ambit, pervasiveness and rigorousness of judicial review in such cases, ought to be suitably tailored.

64. It is submitted that the Government of India is committed to fully and meaningfully protect the liberty, dignity and rights of every woman who are the fundamental foundation and a pillar of a civilized society. The Government attaches highest importance to ending all kinds of violence and offences causing physical, sexual, verbal, emotional and economic abuse including domestic violence against women.

65. Furthermore, it is submitted that striking down the Exception 2 of Section 375 of IPC on the ground of its constitutional validity will have a far-reaching effect on the institution of marriage if sexual intercourse or sexual acts by a man with his own wife is made punishable as “rape”. It may severely impact the conjugal relationship and may lead to serious disturbances in the institution of marriage. In the fast growing and ever changing social and family structure, misuse of the amended provisions can also not be ruled out, as it would be

difficult and challenging for a person to prove whether consent was there or not.

66. In view of the above, it is submitted that the question involved in the petition may not be treated merely as a question concerning constitutional validity of a statutory provision as the subject matter has and will have very far-reaching socio-legal implications in the country. The matter, therefore, needs a comprehensive approach rather than a strictly legal approach.

67. It may be noted here that Section 375 covers within its ambit all acts, from single act of unwilling sex to gross perversion. In other words, Section 375 is a well thought of provision, which tries to cover every act of sexual abuse by a man on a woman within its four walls. Therefore, it is respectfully submitted that if the legislature decides 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, the said decision and discretion should be respected and not interfered with especially when a separate suitably tailored penal remedy is provided by the Legislature.

68. It is submitted that Sections 354, 354A, 354B and 498A and the Protection of Women from Domestic Violence Act, 2005 provide for a *sufficiently adequate remedy* which includes penal consequences thereby protecting the right and dignity of a woman even within the institution of marriage. This distinction, premised upon the obvious societal and logical difference between the actions taking place within the institution of marriage as opposed to actions outside the marital



institution, is a *justifiably reasonable consequence*, which cannot be termed to be falling foul of Article 14 and/or Article 21 of the Constitution.

69. In essence, the right of a woman and the consent of a woman within the institution of marriage is legislatively protected, respected and given its due regard, providing for *reasonably stringent consequences* in case of violation of the same. These consequences represent the delicate balance that the Parliament has sought to draw and, therefore, merely concentrating on the impugned provisions while ignoring other aspects of the matter would do grave injustice.

70. It is, submitted that in matters falling squarely within the domain of the regulation of marital relationship between spouses, thereby being a societal issue, due deference be exercised while testing the validity of legislative choice made by the Parliament. In such situations, the Parliament makes a choice on *factors which may be beyond the judicial realm*, the basis of such choice being the Parliament being body directly elected by the people and thereby presumed to be aware of the needs and the understanding of the people on such delicate and sensitive issues.

71. It is submitted that while exercising such judicial review on such subjects, it is to be appreciated that the present question is not only a constitutional question, but *essentially a social question* on which the Parliament, after being apprised and being aware of all sides of the opinion on the present issue, has taken a position.

72. The Parliament, after being apprised and being aware of all sides of the opinion on the present issue (successive opinions of various Law

Commissions and the Justice J.S. Verma Committee Report), has decided to retain the Exception 2 to Section 375 of IPC in 2013 while amending the said section in the year 2013.

73. It is submitted that while other recommendations in the abovesaid report were substantially adopted and necessary amendments were carried out in various statutes, however, the Legislature in its wisdom after considering the socio-economic impact of such recommendation, deliberately withheld from deleting the impugned provision from the statute books. In this regard, it is further submitted that the said discretion exercised by Parliament of the country should be respected and ought not be interfered by the Courts exercising the power of judicial review.

74. It is submitted that the Law Commission in its 172<sup>nd</sup> Report on Review of Rape Laws in relation to Exception 2 of Section 375 of IPC has observed that *“We are not satisfied that this Exception should be recommended to be deleted since that may amount to excessive interference with the marital relationship”*.

The Department Related Standing Committee on Home Affairs in its 167 Report in para-5.9.1 dated 26th February, 2013, has observed that in India, for ages, *“the family system has evolved and it is moving forward and is able to resolve the problems raised in a relationship. Further, there is also a provision under the law for cruelty against women and in case marital rape is brought under law, it may have potential to destroy the institution of marriage and the entire family system will be under great stress. Broken families would further lead to insecurity among women of these families.”*

75. From the above, it is submitted that, apart from the fact that the parliament in its wisdom has retained the Exception 2 of Section 375 of IPC, it is clear that different commissions have taken divergent views on this subject over different points in time.

76. The prayers as made for by the Petitioner are vehemently denied in totality and in view of the submissions made by the answering Respondent.

77. I further submit that the Respondent No. 1 reserves the right to file a more detailed affidavit with the leave of this Hon'ble Court, if necessary, at a later stage.

78. The present affidavit is bonafide and in the interest of justice.

**DEPONENT**

**VERIFICATION**

I, the above-named deponent, do hereby verify and declare that the facts stated in Para 01 to 78 of my above affidavit are true and correct to the best of my knowledge and belief and no part of it is false and no material has been concealed therefrom.

Verified at New Delhi on this the 3<sup>rd</sup> day of October, 2024.

**DEPONENT**



As it is a Court matter and the hearing is fixed on 25<sup>th</sup> February, 2022, top most priority may please be accorded to this.

Yours faithfully,

*Shri Prakash*

**(Shri Prakash)**

Joint Secretary to the Government of India

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**Copy to:**

1. The Secretary, Ministry of Women & Child Development, Shastri Bhawan, New Delhi-110001;
2. The Secretary, Legislative Department, Ministry of Law and Justice, Shastri Bhawan, New Delhi-110001;
3. The Chairperson, National Commission for Women, Plot -21, Jasola Institutional Area, New Delhi-110025;

with the request to send the comments on the issue urgently.

*Shri Prakash*  
**(Shri Prakash)**

Joint Secretary to the Government of India

# Annexure B 45

**Views of the State Governments / UT Administrations on Exception 2 of section 375 of IPC in response to the letter dated 10.2.2022 (Reminders sent on 19.4.2022 & 29.9.2023)**

<b><u>Sl. No.</u></b>	<b><u>State/UT</u></b>	<b><u>Whether in favour of the existing provisions or not</u></b>
1.	Andaman and Nicobar	It is a substantial question of law.
2.	Assam	YES
3.	Chandigarh Administration	YES
4.	Chhattisgarh	YES
5.	Mizoram	Not clear view
6.	Dadra & Nagar Haveli and Daman and Diu	Not clear view
7.	Delhi	NO
8.	Goa	YES
9.	Meghalaya	We may await the Court for deciding the issue whether a law is constitutional or not
10.	Sikkim	No clear comments. Highlighted advantages & disadvantages.
11.	Tripura	NO
12.	U.P.	YES
13.	Gujarat	YES
14.	Madhya Pradesh	YES
15.	Manipur	YES
16.	Uttarakhand	YES
17.	Karnataka	NO
18.	Ladakh	YES
19.	Himachal Pradesh	No clear view

- i. **National Commission for Women recommended for retaining Exception 2 of section 375 of IPC.**
- ii. **Ministry of Women & Child Development is of the opinion that Exception 2 of section 375 of IPC should be retained.**

File No: WW/20/2022-WW(E-98660)  
Government of India  
Ministry of Women and Child Development  
Women Welfare Division

\*\*\*\*\*

Room No. 313, 3<sup>rd</sup> Floor.  
A-Wing, Shastri Bhawan, New Delhi  
Dated: 20.05.2022

**Office Memorandum**

**Subject: Comments of MWCD in the matter of WP(C) No. 284 of 2015 RIT Foundation v/s UoI in the Hon'ble High Court of Delhi. - regarding.**

The undersigned is directed to refer to letter No. 10/17/2015-Judl.Cell-I(Part-I), dated 10.02.2022 received from Ministry of Home Affairs on the subject cited above and to state that this Ministry attaches highest importance to ending all kinds of violence and offences causing physical, sexual, verbal, emotional and economic abuse including domestic violence against women and is committed to protect the liberty, dignity and rights of every woman in the country.

2. The Government has enacted 'The Protection of Women from Domestic Violence Act, 2005 (PWDVA)' to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto. Section 3 of the act defines the domestic violence which includes, any act, omission or commission or conduct of the respondent (husband or family members) in case it harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse. This includes "sexual abuse" that is any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman. Thus, there are adequate protections available under the law to protect women from Sexual Abuse of any kind including those by husband.

3. It is further stated that in the instant matter, the question involved does not merely concern striking down the exception 2 of Section 375 of IPC on the ground of its constitutional validity, but will have a far reaching effect on the institution of marriage if sexual intercourse or sexual acts by a man with his own wife is made punishable under law. If that happens, it may severely impact the conjugal relationship and may lead to serious disturbances in the institution of marriage and the family as well as its adverse impact on children, social disruption and socio-legal implications in the country. In the fast growing and ever changing social and family structure, misuse of the amended provisions can also not be ruled out, as it would be difficult and challenging for a person to prove whether consent was there or not.


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4. Further, the Department Related Standing Committee on Home Affairs in its 167 Report in para-5.9.1 dated 26th February, 2013, has rightly observed that in India, for ages, the family system has evolved and it is moving forward and is able to resolve the problems raised in a relationship. Further, there is also a provision under the law for cruelty against women and in case marital rape is brought under law, it may have potential to destroy the institution of marriage and the entire family system will be under great stress. Broken families would further lead to insecurity among women of these families.

5. MWCD agrees with the views of the Department Related Standing Committee on Home Affairs on the above issue.

6. This issues with the approval of the HMWCD

  
20.5.2022  
(Daya Shankar)

Deputy Secretary to the Govt. of India

Ph: 011-23381970,

To,  
Secretary,  
Ministry of Home Affairs  
[Kind Atten: Shri Prakash, JS, Judicial Wing],  
North Block, New Delhi