IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/WRIT PETITION (PIL) NO. 146 of 2021

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JAIDEEP BHANUSHANKAR VERMA S/O BHANUSHANKAR VERMA
Versus
UNION OF INDIA

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Appearance:
MR SALIL M THAKORE(5821) for the Applicant(s) No. 1
ADVANCE COPY SERVED TO GOVERNMENT PLEADER for the Opponent(s) No. 2

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CORAM: **HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE NIRAL R. MEHTA

Date : 14/12/2021

ORAL ORDER
(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1. By this writ-application filed in public interest, the writ-applicant, a practicing advocate and a part-time lecturer at the M.S.University, Vadodara, has prayed for the following reliefs :

> "(A) That *the Hon'ble Court be pleased to issue a writ, order or direction declaring Exception 2 to Section 375 of the Indian Penal Code, 1860, to be arbitrary, unreasonable, unconstitutional, violative of Articles 14, 15, 19 and 21 of the Constitution of India, violative of inherent human rights recognised by the Constitution of India and violative of our constitutional morality and principles and be pleased to strike the same down;*
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> *(B) That the Hon'ble Court be pleased to issue a writ of or in the nature of mandamus commanding the police*

machinery of the State of Gujarat to register a First Information Report under Section 154 of the Code of Criminal Procedure, 1973 and conduct an investigation whenever a complaint is made that a man has committed or attempted to commit any of the acts mentioned in Section 375, 376 or 376A of the Indian Penal Code on his wife under the relevant provision of law;

(C) For such other and further reliefs as the Hon'ble Court may deem just and proper in the facts and circumstances of the case;"

2. Thus, the subject matter of challenge in the present writ-application filed in public interest is to the constitutional validity of Exception-2 to Section 375 of the Indian Penal Code on the grounds of being arbitrary, unreasonable, unconstitutional, violative of Articles 14, 15, 19 and 21 of the Constitution of India, violative of the inherent human rights recognized by the Constitution of India and violative of the constitutional morality and principles.

3. Exception-2 to Section 375 provides that when a man commits sexual intercourse or the acts mentioned in (a) to (d) on his own wife, it is not 'rape'. Therefore, when a man forces his wife to have sexual intercourse with him against her will or without her consent (or by obtaining her consent by putting her in fear of death or hurt) or forces her to commit any of the other acts mentioned in (a) to (d) '*with him or any other person*', such acts will fall outside the definition of 'rape' under law and consequently, the husband cannot be punished for rape.

4. Mr.Salil Thakore, the learned counsel vehemently submitted that by virtue of the exception, the protection granted by the law to a woman against forcible sexual intercourse is withdrawn and the wife is forced to surrender her bodily integrity, sexual autonomy (her right to say '*No*') and her right to bodily privacy to the husband. Exception-2 makes a woman's fundamental right to sexual autonomy subject to the whims of her husband. Exception-2 treats the woman as a subordinate of her husband, or to put it more plainly, as a chattel of her husband. Exception-2 to Section 375 of the Indian Penal Code is clearly anachronistic to the Constitution, offensive to human dignity, is manifestly arbitrary and incompatible with our constitutional morality. Exception-2 violates the following fundamental and inalienable rights which inhere in every human being by virtue of their existence and which have been recognized by the Supreme Court of India :

(a) The right to live with dignity and the right to fair, dignified and humane treatment,

(b) The right to personal liberty,

(c) The right to sexual autonomy i.e. the right to decide whether and when to engage in sexual activity – the right to refuse to engage in sexual activity and the right to bodily integrity,

(d) The right to reproductive choices (including the right to not procreate) (because the act subjects the woman to the risk of pregnancy against her will),

(e) The right to privacy,

(f) The right to not be subjected to confinement (which flows from the right to free movement),

(g) The right to freedom of speech and expression, expression being a wide term including various forms of expression,

(h) The right to the protection of the law against inhuman, violent and dangerous acts.

5. The Constitution of India has not created or conferred these rights but has recognized, guaranteed and protected what are inalienable inherent human rights by enacting Articles 14, 15, 19, 21 respectively and other Articles.

6. Mr.Thakore further submitted that Exception-2 exempts the husband not only from the acts punishable under Section 376(1) but also from the more aggravated forms of rape which are otherwise punishable under Sections 376(2) and Section 376A respectively with more severe punishments.

7. Mr.Thakore pointed out that Section 376 prescribes the punishment for rape. Section 376(1) provides punishments for those rapes which do not fall in Section 376(2). Section 376(2) enlists those aggravated forms of rape and prescribes a higher punishment for such acts. By virtue of Exception-2 to Section 375 (which totally excludes acts of rape committed by a man on his wife from the definition of 'rape'), the husband cannot be punished under Section 376(1). The husband cannot even be

punished if he commits the more grave and serious acts enlisted in Section 376(2) on his wife. Section 376 is reproduced hereinbelow :

> *"(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.*
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> *(2) Whoever,-*
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> *(a) being a police officer, commits rape-*
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> *(i) within the limits of police station to which such police officer is appointed; or*
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> *(ii) in the premises of any station house; or*
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> *(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or*
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> *(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*
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> *(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

(i) commits rape on a woman when she is under sixteen years of age; 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.

Explanation.- For the purposes of this sub-section,-

(a) *"armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;*

(b) *"hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;*

(c) *"police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861;*

(d) *"women's or children institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.*

(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."

8. Mr.Thakore further submitted that the acts treated as more grave and serious and for which a higher punishment is prescribed under Section 376 (2) include: a) rape by a police officer or a public servant of a woman in custody, b) rape committed by a member in the armed forces in the area where armed forces are deployed, c) rape by a person in charge of a hospital, jail, remand home, women's institution, children's institution, d) rape during communal violence, etc. By prescribing a higher punishment for more grave and serious

forms of rape, Section 376(2) acts as a deterrent against the same and gives a special protection to women against more serious forms of rape.

9. Mr.Thakore also submitted that along with the above acts, five other acts of rape are also treated as aggravated forms of rape and are subjected to a higher punishment under Section 376(2). These are listed in sub-clauses (h), (j), (l), (m) and (n) of Section 376(2). These five more aggravated forms of 'rape' are actually capable of being committed by a man on his wife. By virtue of Exception 2, acts committed by a man on his wife are excluded from the definition of 'rape'. Therefore, though the aforesaid 5 aggravated forms of 'rape' are actually capable of being committed by a man on his wife, the law does not treat them as 'rape' and exempts them altogether from Sections 375 and 376. Therefore, because of the exception carved out in Exception 2 to Section 375, the husband escapes punishment under Section 376(2) even where he commits any of the aforesaid five more aggravated acts of rape on his wife. The consequent effect is that the law totally excludes from the offence of rape the following gruesome acts though treated by law to be aggravated forms of rape :

(a) rape by a husband of his pregnant wife,

(b) rape by a husband of his wife incapable of giving her consent,

(c) rape by a husband of his wife who is suffering from mental or physical disability,

(d) rape by a husband that causes grievous bodily harm or maims or disfigures or endangers the life of his wife,

(e) repeated rapes by a husband of his wife.

10. Mr.Thakore thereafter invited the attention of this Court to Section 376A of the Code, which reads as under :

> *"376A. Whoever, commits an offence punishable under sub-section (1) or sub-section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, 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, or with death."*

11. Mr.Thakore submitted that because of the exception carved out in Exception-2 to Section 375, an act committed by the husband on his wife does not amount to 'rape' and is not an offence punishable under Section 376(1) or (2). The resultant effect of Exception-2 to Section 375 is that where a man rapes his wife and in the course of such commission inflicts an injury which causes the death of the wife or causes his wife to be in a persistent vegetative state, he cannot even be punished under Section 376A of the IPC.

12. His other submissions which may be recorded in brief are as under :

(i) Exception-2 to Section 375 exempts the husband from the offence even when he forces his wife to indulge in sexual acts with a third person

(ii) Exception-2 to Section 375 results in various anomalies, is grossly irrational and has no determining princple.

(iii) Forcible non-vaginal intercourse committed by a man on his wife is punishable but forcible vaginal intercourse committed by a man on his wife is exempted.

(iv) Forcible non-vaginal intercourse committed by a man on his wife is punishable but aggravated forms thereof are not subjected to higher punishment (though such aggravated acts are otherwise subjected to higher punishment.

(v) The half-protection afforded to the separated wife under Section 376B.

(vi) The Right to Sexual Autonomy – an inherent human right that flows from the fundamental rights to personal liberty, dignity privacy and bodily integrity recognized by the Supreme Court of India.

(vii) Rape, a dehumanising act that causes emotional and psychological harm to the victim.

13. Mr.Thakore pointed out something very important in the form of the historical origin and the doctrine behind the exception carved out for marital rape. This aspect of the matter requires thorough consideration. He invited the attention of this Court to the averments made in paragraphs nos.4.21 to 4.27, which read thus :

> *"4.21 Exception 2 to Section 375 has existed in the Indian Penal Code since the time of its enactment by the British in 1860. Exception 2 is based on an archaic, outdated and extremely regressive principle whereunder the married woman is treated as subordinate to and bound by the dictates of the husband, where she is treated as a person devoid of basic human rights, her wishes and autonomy and as a person without a legal existence of her own and as a property of her husband.*
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> *4.22 In England, many centuries ago, there developed a common law principle known as the Doctrine of Coverture whereunder upon marriage, the woman lost her separate existence and was regarded as the property of and subordinate to her husband. By virtue of this doctrine, a married woman had no legal rights of her own as her legal rights got subsumed by those of her husband. She could not buy property, execute legal documents, enter into a contract or obtain an education against her husband's wishes. The married woman hardly had any autonomy of her own and was bound to obey the husband who was treated to be her 'ruler' or 'lord'. The doctrine has been described in a recent*

Supreme Court judgment (Joseph Shine v. Union of India reported at (2019) 3 SCC 39 – the Adultery judgment) as under :

> *"224 …In England, coverture determined the rights of married women, under Common Law. A "feme sole" transformed into a "feme covert" after marriage. "Feme covert" was based on the doctrine of "Unity of Persons" – i.e. the husband and wife were a single legal identity. This was based on notions of biblical morality that a husband and wife were "one in flesh and blood". The effect of "coverture" was that a married woman's legal rights were subsumed by that of her husband. A married woman could not own property, execute legal documents, enter into a contract, or obtain an education against her husband's wishes, or retain a salary for herself.*
>
> *225. The principle of "coverture" was described in William Blackstone's Commentaries on the Laws of England as follows:*
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> *"By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French a feme-covert; is said to be covert-baron, or under the protection and influence of her husband, her*

baron, or lord; and her condition during her marriage is called her coverture. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquires by the marriage. I speak not at present of the rights of property, but of such as are merely personal. For this reason, a man cannot grant anything to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself: and therefore it is also generally true, that all contracts made between husband and wife, when single, are voided by the intermarriage."

On this basis, a wife did not have an individual legal liability for her misdeeds, since it was legally assumed that she was acting under the orders of her husband, and generally a husband and wife were not allowed to testify either for, or against each other.

226. Medieval legal treatises, such as the Bracton, described the nature of "coverture" and its impact on married women's legal actions. Bracton (supra) states that husbands wielded power over their wives, being their "rulers" and "custodians of their property". The institution of marriage came under the jurisdiction of ecclesiastical courts. It made wives live in the shadow of their husbands, virtually "invisible" to the law.

228. In the Victorian Era, women were denied the exercise of basic rights and liberties, and had little autonomy over their choices. Their status was pari materia with that of land, cattle and crop; forming a part of the "estate" of their fathers as daughters prior to marriage, and as the "estate" of their husband post-marriage. ..."

4.23 In this context, para 136 of Joseph Shine v. Union of India reported at (2019) 3 SCC 39 is reproduced below :

"136. In his Commentaries on the Laws of England, William Blackstone wrote that under the common law, "the very being or legal existence of the woman [was] suspended during the marriage, or at least [was] incorporated and consolidated into that of the husband: under whose wing, protection and cover, she performe[d] everything" In return for support and protection, the wife owed her husband "consortium" of legal obligations, which included sexual intercourse."
(emphasis supplied)

4.24 In those times, by marriage, the wife was treated as having given up herself to her husband ("in marriage .. hath given up her body to her husband") and having given her irrevocable consent to sexual intercourse. Consequently, the husband could not be guilty of rape of his wife. The principle that a man cannot be guilty of raping his

wife is believed to have been first expressed in a passage contained in History of the Pleas of the Crown, a treatise on the criminal law of England. The treatise was written by Sir Mathew Hale who died in 1676 but was published in 1736. The relevant passage appears in Volume 1 (pg. 629) of the original edition in Old English. The passage is reproduced below with minor changes so as to make it readable in modern English to the extent possible :

> *"**But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract: the wife has given up herself in this kind unto her husband, which she cannot retract.***
>
> *A the husband of B intends to prostitute her to a rape by C against her will, and C accordingly doth ravish her, A. being present, and assisting to this rape: in this case three points were involved, I. That this was a rape in C. notwithstanding the husband assisted in it, for **tho in marriage the hath given up her body to her husband**, she is not to be by him prostituted to another. 2. That the husband being present, aiding and assisting, is also guilty as a principal in rape, and therefore, although the wife cannot have an appeal of rape against her husband, yet he is indictable for it at the king's suit as a principal. 3. That in this case the wife may be a witness against her husband, and accordingly she was admit-ted, and A. and C. were both executed." (emphasis supplied)*

Chapter LVIII of Volume 1 of the History of the Pleas of the Crown is annexed hereto and marked ***Annexure B****.*

4.25 The theory propounded by Sir Mathew Hale that on marriage a wife gave her body to her husband was accepted in Popkin v Popkin (1794) 1 Hag. Ecc. 765n, as stated by Lord Stowell at page 767: "The husband has a right to the person of his wife…".

4.26 The proposition propounded by Hale governed courts for many years in England. The same proposition emanated from Hume on Crimes (1797), a treatise on the criminal law of Scotland and governed courts in Scotland for many years. The relevant passage is at page 306: "This is true without exception even of the husband of the woman, ***who though he cannot himself commit rape on his own wife, who has surrendered her person to him in that sort****, may, however, be accessory to that crime….committed upon her by another."*

4.27 The principle that a man cannot be guilty of rape on his wife was for many years accepted and implemented in a large number of countries across the world."

14. Mr.Thakore would submit that the aforesaid doctrine is incompatible with the Indian Constitution which treats women as equal to men and considers marriage as an association of equals and not as a fiefdom of a husband over his wife. The doctrine has not been accepted in India. In India, a married woman has an independent existence and has her own legal

rights. She is not subordinate to the husband in any respect whatsoever. Unlike the woman of the times when the law of coverture applied, the woman under the Indian Constitution is free to enter into contracts, free to work or carry on any business or profession, free to buy property, free to vote and stand for elections, etc. whether she is married or unmarried. The wife is not treated as her husband's chattel. Under the Indian Constitution, the woman, whether married or not has autonomy over herself and her choices, decisions and actions. Exception 2 treats the wife as subordinate to her husband and subjects her right to sexual autonomy and her right to privacy to her husband's whims. The doctrine behind Exception 2 is incompatible with our Constitutional morality and is violative of natural inherent rights of the wife including the right to live with dignity, the right to personal liberty, the right to sexual autonomy and bodily integrity, the right to reproductive choices, the right to privacy and even the freedom of speech and expression, rights which are guaranteed and protected by the Constitution as fundamental rights under Articles 14, 15, 19, 21, etc. and recognised in Supreme Court judgments.

15. Sir Mathew Hale's three-century old principle that by marrying, the woman gives her irrevocable consent to sexual intercourse with her husband and, therefore, the husband cannot be guilty of a rape committed by him upon his wife, apart from being unconstitutional, is absurd, unreal and unacceptable in today's times. By marrying, no woman consents to her husband committing forcible sexual intercourse on her. The solemnisation of marriage implies at best an understanding that the couple would have a consensual sexual relationship as part

of their married life, not an understanding that the husband can force the wife into the act at his whim and against her consent. The assumption that by marrying, a woman consents to forcible sex by her husband is unreal, absurd, without any basis and incompatible with our Constitutional morality. To say that the solemnisation of marriage amounts to conferring on the husband the right to rape is a blot on the institution of marriage itself. Secondly, the principle essentially means that by marrying, the woman surrenders her right to sexual autonomy and her right to reproductive choices, etc. to her husband. These are natural human rights that inhere in every human being and are by their very nature inalienable human rights. Being inalienable, neither can such rights be surrendered nor can the law acknowledge or treat them as having been surrendered.

16. Mr.Thakore thereafter invited the attention of this Court to the following case-law :

(i) Independent Thought vs. Union of India, (2017) 10 SCC 800;

(ii) Joseph Shine vs. Union of India, (2019) 3 SCC 39;

(iii) Navtej Singh Johar vs. Union of India, (2018) 10 SCC 1;

(iv) Regina vs. R., (1992) 1 AC 599;

(v) S. vs. Her Majesty's Advocate, (1989) LRC (Crim) 640;

(vi) Universal Declaration of Himan Rights, 1948;

(vii) International Convention on Civil and Political Rights, 1966;

(viii) Convention on the Elimination of All Forms of Discrimination Against Women, 1979.

17. What has been highlighted before us in public interest is something which is very very important. One of us (J.B.Pardiwala, J.) sitting as a Single Judge and while deciding a quashing application filed under Section 482 of the Code of Criminal Procedure in the case of Nimeshbhai Bharatbhai Desai vs. State of Gujarat (Criminal Misc. Application No.26957 of 2017 and allied matters, decided on 2nd April 2018) had the occasion to consider the subject of marital rape in details. We quote the relevant observations made in the said judgment thus :

> ***"MARITAL RAPE***:
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> *[90] As the learned counsel appearing for the victim has vociferously submitted a lot with regard to marital rape, I would like to say something in this regard. Marital rape is not an offence in our country as the belief is that it could become a potent tool or weapon in the hands of an unscrupulous wife to harass her husband and become a phenomenon which may destabilize the institution of marriage. Marital rape is a widespread problem for a woman that has existed for centuries throughout the world. This problem has received relatively little attention from the criminal justice system and the society as a whole. Marital rape is illegal in 50 American states, 3 Australian states, New Zealand, Canada, Israel, France, Sweeden, Denmark, Norway, Soviet Union, Poland and Czechoslovakia.*
>
> *[91] Marital rape is one of the acts of sexual intercourse with one's spouse without consent. It is a form of intercourse with one's spouse without consent. It is a form of domestic*

violence and sexual abuse. The controversy over the issue of marital rape stems from the failure of the Indian Penal Code to criminalize it. Marital rape is also known as spousal rape or inmate partner rape. According to Morton Hunt, an American Psychologist and Science Writer of U.S.A, "the typical marital rapist is a man who still believes that husbands are supposed to "rule" their wives. This extends, he feels, to sexual matters: when he wants her, she should be glad, or at least willing, if she is not , he has the right to force her. But in forcing her, he gains far more than a few minutes of sexual pleasure. He humbles her and reasserts, in the most emotionally powerful way possible, that he is the ruler and she is the subject."

[92] In December 1993, the United Nations High Commissioner for Human Rights published the Declaration on the Elimination of Violence against Women. This establishes marital rape as a human rights violation. This is not fully recognized by all the UN member States. In 1997, UNICEF reported that just 17 States had criminalized marital rape. In 2003, UNIFEM reported that more than 50 states did so. The countries like Poland (1932), Czechoslovakia (1950), Soviet Union (1960) were first to criminalize marital rape.

[93] U.S.A. Rape is defined as any nonconsensual sexual intercourse between non-spouses and it has always been illegal. However, until 1975, every state had a "marital exemption" that allowed a husband to rape his wife without fear of legal consequences. By 1993, largely in response to the women's rights and equality movement, every state and the District of Columbia had passed laws against marital rape. Since 1993, all 50 states and DC have enacted laws against marital rape. The only marital exemption that still exists in some states is for statutory rape. All states now recognize rape within the marriage as a crime, and most charge the crime in the same way that rape between the strangers, would be charged. The legal history of marital rape laws in the United States is a long and complex one, that spans over several decades. Traditional rape laws in the US defined rape as forced sexual intercourse by a male with a "female not his wife", making it clear that the statutes did not apply to the married couples. The 1962 Model Penal Code stated that "A male who has sexual intercourse with a

female not his wife is guilty of rape if: (...)".

[94] The criminalization of marital rape in the United States started in the mid-1970s and by 1993 marital rape was a crime in all the 50 states, under at least one section of the sexual offense codes. During the 1990s, most states differentiated between the way marital rape and non-marital rape were treated, through differences such as shorter penalties, or excluding situations where no violence is used, or shorter reporting periods. (Bergen, 1996; Russell, 1990). The laws have continued to change and evolve, with most states reforming their legislation in the 21st century, in order to bring marital rape laws in line with the non-marital rape, but even today there remain differences in some states. With the removal, in 2005, of the requirement of a higher level of violence from the law of Tennessee, which now allows for marital rape in Tennessee to be treated like any other type of rape, South Carolina remains the only US state with a law requiring excessive force/violence (the force or violence used or threatened must be of a "high and aggravated nature").

[95] In most states the criminalization has occurred by the removal of the exemptions from the general rape law by the legislature; or by the courts striking down the exemptions as unconstitutional. In some states, however, the legislature has created a distinct crime of spousal rape. This is, for example, the case in California, where there are two different criminal offenses: Rape (Article 261) and Spousal Rape (Article 262).

[96] U.K. The marital rape exemption was abolished in England and Wales in 1991 by the Appellate Committee of the House of Lords, in the case of R v. R. The exemption had never been a rule of statute, having first been promulgated in 1736 in Matthew Hale's History of the Pleas of the Crown, where Hale stated: "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract." Corresponding amendment to the statutory law was made through Section 147 of the Criminal Justice and Public Order Act, 1994. This judgment was also

affirmed by the European Court of Human Rights in the decision of SW v. UK. Although the issue of marital rape was highlighted by feminists in the 19th century, and was also deplored by thinkers such as John Stuart Mill and Bertrand Russell (see above section 'Feminist critique in the 19th century'), it was not until the 1970s that this issue was raised at a political level. The late 1970s also saw the enactment of Sexual Offences (Amendment) Act of 1976, which provided the first statutory definition of rape (prior to this rape was an offense at common law). The Criminal Law Revision Committee in their 1984 Report on Sexual Offences rejected the idea that the offense of rape should be extended to marital relations; writing the following:

> *"The majority of us ... believe that rape cannot be considered in the abstract as merely 'sexual intercourse without consent'. The circumstances of rape may be peculiarly grave. This feature is not present in the case of a husband and wife cohabiting with each other when an act of sexual intercourse occurs without the wife's consent. They may well have had sexual intercourse regularly before the act in question and, because a sexual relationship may involve a degree of compromise, she may sometimes have agreed only with some reluctance to such intercourse. Should he go further and force her to have sexual intercourse without her consent, this may evidence a failure of the marital relationship. But it is far from being the 'unique' and 'grave' offence described earlier. Where the husband goes so far as to cause injury, there are available a number of offences against the person with which he may be charged, but the gravamen of the husband's conduct is the injury he has caused not the sexual intercourse he has forced."*

[97] The Committee also expressed more general views on domestic violence arguing that "Violence occurs in some marriages but the wives do not always wish the marital tie to be severed" and reiterated the point that domestic incidents without physical injury would generally be outside the scope of the law: "Some of us consider that the criminal law should be kept out of the marital relationships between the cohabiting partners especially the marriage bed-except

where injury arises, when there are other offences which can be charged."

[98] Five years later, in Scotland, the High Court of Justiciary took a different view, abolishing marital immunity, in S. v. H.M. Advocate, 1989. The same happened in England and Wales in 1991, in R v R (see below). Very soon after this, in Australia, at the end of 1991, in R v L, the High Court of Australia would rule the same, ruling that if the common law exemption had ever been part of the Australian law, it no longer was (by that time most Australian states and territories had already abolished their exemptions by statutory law).

[99] The first attempted prosecution of a husband for the rape of his wife was R v Clarke. Rather than try to argue directly against Hale's logic, the court held that the consent in this instance had been revoked by an order of the court for non-cohabitation. It was the first of a number of cases in which the courts found reasons not to apply the exemption, notably R v O'Brien (the obtaining of decree nisi), R v Steele (an undertaking by the husband to the court not to molest the wife) and R v Roberts (the existence of a formal separation agreement).

[100] There are at least four recorded instances of a husband successfully relying on the exemption in England and Wales. The first was R v Miller, where it was held that the wife had not legally revoked her consent despite having presented a divorce petition. R v Kowalski was followed by R v Sharples, and the fourth occurred in 1991 in the case of R v J, a judgment made after the first instance decision of the Crown Court in R v R but before the decision of the House of Lords that was to abolish the exemption. In Miller, Kowalski and R v J the husbands were instead convicted of assault. The R v Kowalski case involved, among other acts, an instance of nonconsensual oral sex. For this, the husband was convicted of indecent assault, as the court ruled that his wife's "implied consent" by virtue of marriage extended only to vaginal intercourse, not to other acts such as fellatio. [At that time the offense of 'rape' dealt only with vaginal intercourse]

[101] In R v Sharples in 1990, it was alleged that the husband had raped his wife in 1989. Despite the fact that the wife had obtained a Family Protection Order before the alleged rape, the judge refused to accept that rape could legally occur, concluding that the Family Protection Order had not removed the wife's implied consent, ruling that: "it cannot be inferred that by obtaining the order in these terms the wife had withdrawn her consent to sexual intercourse".

[102] R v. R in 1991 was the first occasion where the marital rights exemption had been appealed as far as the House of Lords, and it followed the trio of cases since 1988 where the marital rights exemption was upheld. The leading judgment, unanimously approved, was given by Lord Keith of Kinkel. He stated that the contortions being performed in the lower courts in order to avoid applying the marital rights exemption were indicative of the absurdity of the rule, and held, agreeing with earlier judgments in Scotland and in the Court of Appeal in R v R, that "the fiction of implied consent has no useful purpose to serve today in the law of rape" and that the marital rights exemption was a "common law fiction" which had never been a true rule of English law. R's appeal was accordingly dismissed, and he was convicted of the rape of his wife.

Aftermath

[103] By 1991, when the exemption was removed, the Law Commission in its Working Paper of 1990 was already supporting the abolition of the exemption, a view reiterated in their Final Report that was published in 1992; and international moves in this direction were by now common. Therefore, the result of the R v R case was welcomed. But, while the removal of the exemption itself was not controversial, the way through which this was done was; since the change was not made through usual statutory modification. The cases of SW v UK and CR v UK arose in response to R v R; in which the applicants (convicted of rape and attempted rape of the wives) appealed to the European Court of Human Rights arguing that their convictions were a retrospective application of the law in breach of Article 7 of the European Convention on Human Rights. They claimed that at the time of the rape there was a common law

exemption in force, therefore their convictions were post facto. Their case was not successful, with their arguments being rejected by the European Court of Human Rights, which ruled that the criminalization of marital rape had become a reasonably foreseeable development of the criminal law in the light of the evolution of social norms; and that the Article 7 does not prohibit the gradual judicial evolution of the interpretation of an offense, provided the result is consistent with the essence of the offense and that it could be reasonably foreseen.

[104] A new definition of the offense of 'rape' was created in 1994 by the section 142 of the Criminal Justice and Public Order Act 1994, providing a broader definition that included anal sex; and an even broader definition was created by the Sexual Offences Act 2003, including oral sex. The law on rape does not-and did not ever since the removal of the marital exemption in 1991-provide for any different punishment based on the relation between parties. However, in 1993, in R v W,1993 14 CrAppR(S) 256, the court ruled: "It should not be thought a different and lower scale automatically attaches to the rape of a wife by her husband. All will depend upon the circumstances of the case. Where the parties are cohabiting and the husband insisted upon intercourse against his wife's will but without violence or threats this may reduce sentence. Where the conduct is gross and involves threats or violence the relationship will be of little significance."

[105] At the time of R v R, rape in Northern Ireland was a crime at common law. Northern Ireland common law is similar to that of England and Wales, and partially derives from the same sources; so any (alleged) exemption from its rape law was also removed by R v R. In March 2000, a Belfast man was convicted for raping his wife, in the first case of its kind in Northern Ireland.

[106] Until 28 July 2003, rape in Northern Ireland remained solely an offense at common law that could only be committed by a man against a woman only as vaginal intercourse. Between 28 July 2003 and 2 February 2009 rape was defined by the Criminal Justice (Northern Ireland) Order 2003 as "any act of non-consensual intercourse by a

man with a person", but the common law offense continued to exist, and oral sex remained excluded. On 2 February 2009 the Sexual Offences (Northern Ireland) Order 2008 came into force, abolishing the common law offense of rape, and providing a definition of rape that is similar to that of the Sexual Offences Act 2003 of England and Wales. The Public Prosecution Service for Northern Ireland has the same policy for marital rape as for other forms of rape; it states in its Policy for Prosecuting Cases of Rape document that: "The Policy applies to all types of rape, including marital and relationship rape, acquaintance and stranger rape, both against male and female victims".

[107] Some European Countries-Belgium was one of the countries who criminalized marital rape very early. In 1979 the Brussels Court of Appeal stated that the husbands have a right to sex with their wives but they can't use violence to claim it. Therefore in 1989, the definition of rape was widened and marital rape was treated same as rape. Finland outlawed marital rape in 1954. The case of Finland was in limelight because Finland is a country where women have equal rights and opportunities. In 1979, the Brussels Court of Appeal recognized marital rape and found that a husband who used serious violence to coerce his wife into having sex against her wishes was guilty of the criminal offense of rape. The logic of the court was that, although the husband did have a 'right' to sex with his wife, he could not use violence to claim it, as Belgian laws did not allow people to obtain their rights by violence. In 1989 laws were amended, the definition of rape was broadened, and marital rape is treated the same as other forms of rape.

[108] Germany criminalized marital rape in 1997. Before 1997, the definition of rape was" Whoever compels a woman to have extramarital intercourse with him, or with a third person, by force or the threat of present danger to life or limb, shall be punished by not less than two years' imprisonment".Then in 1997 there were changes made to the definition and marital rape was outlawed in Germany. Germany outlawed spousal rape in 1997, which is later than other developed countries. Female ministers and women's rights activists lobbied for this law for over 25 years. Before 1997, the definition of rape was : "Whoever compels a woman to have extramarital intercourse with him,

or with a third person, by force or the threat of present danger to life or limb, shall be punished by not less than two years' imprisonment". In 1997 there were changes to the rape law, broadening the definition, making it genderneutral, and removing the marital exemption. Before, marital rape could only be prosecuted as "Causing bodily harm" (Section 223 of the German Criminal Code), "Insult" (Section 185 of the German Criminal Code) and "Using threats or force to cause a person to do, suffer or omit an act" (N tigung, Section 240 of the German Criminal Code) which carried lower sentences and were rarely prosecuted.

[109] Before a new Criminal Code came into force in 2003, the law on rape in Bosnia and Herzegovina also contained a statutory exemption, and read: "Whoever coerces a female not his wife into sexual intercourse by force or threat of imminent attack upon her life or body or the life or body of a person close to her, shall be sentenced to a prison term of one to ten years". In Portugal also, before 1982, there was a statutory exemption.

[110] Marital rape was criminalized in Serbia in 2002; before that date rape was legally defined as forced sexual intercourse outside of marriage. The same was true in Hungary until 1997.

[111] In 1994, in Judgment no. 223/94 V, 1994, the Court of Appeal of Luxembourg confirmed the applicability of the provisions of the Criminal Code regarding rape to marital rape.

[112] Marital rape was made illegal in the Netherlands in 1991. The legislative changes provided a new definition for rape in 1991, which removed the marital exemption, and also made the crime gender-neutral; before 1991 the legal definition of rape was a man forcing, by violence or threat of thereof, a woman to engage in sexual intercourse outside of marriage.

[113] In Italy the law on rape, violenza carnale ('carnal violence', as it was termed) did not contain a statutory

exemption, but was, as elsewhere, understood as inapplicable in the context of marriage. Although Italy has a reputation of a male dominated traditional society, it was quite early to accept that the rape law covers forced sex in marriage too: in 1976 in Sentenza n. 12857 del 1976, the Supreme Court ruled that "the spouse who compels the other spouse to carnal knowledge by violence or threats commits the crime of carnal violence" ("commette il delitto di violenza carnale il coniuge che costringa con violenza o minaccia l'altro coniuge a congiunzione carnale").

[114] Cyprus criminalized marital rape in 1994. Marital rape was made illegal in Macedonia in 1996. [88] [89] In Croatia marital rape was criminalized in 1998.

[115] In 2006, Greece enacted Law 3500/2006, entitled "For combating domestic violence", which punishes marital rape. It entered into force on 24 October 2006. This legislation also prohibits numerous other forms of violence within marriage and cohabiting relations, and various other forms of abuse of women.

[116] Liechtenstein made marital rape illegal in 2001.

[117] In Colombia, marital rape was criminalized in 1996, in Chile in 1999.

[118] Thailand outlawed marital rape in 2007. The new reforms were enacted amid strong controversy and were opposed by many. One opponent of the law was legal scholar Taweekiet Meenakanit who voiced his opposition to the legal reforms. He also opposed the making of rape a gender neutral offense. Meenakanit claimed that allowing a husband to file a rape charge against his wife is "abnormal logic" and that wives would refuse to divorce or put their husband in jail since many Thai wives are dependent on their husbands.

[119] Papua New Guinea criminalized merital rape in 2003. Nambia outlawed marital rape in 2000.

[120] Recent countries to criminalize marital rape include Zimbabwe (2001), Turkey (2005), Cambodia (2005), Liberia (2006), Nepal (2006), Mauritius (2007), Ghana (2007), Malaysia (2007), Thailand (2007), Rwanda (2009), Suriname (2009), Nicaragua (2012), Sierra Leone (2012),South Korea (2013), Bolivia (2013), Samoa (2013), Tonga (1999/2013), Human rights observers have criticized a variety of countries for failing to effectively prosecute marital rape once it has been criminalized. South Africa, which criminalized in 1993, saw its first conviction for marital rape in 2012.

[121] Australia-In Australia marital rape was criminalized from late 1970s to early 1990s.Earlier the law of rape in Australia was based on the English common law offence of rape. In the late 1970s the discussion commenced to criminalize marital law but until 1989 that it was criminalized. In 1991, in the case of R v L, the High Court of Australia ruled that the exemption provided to marital rape in common law was no longer a part of the Australian law. The criminalization of marital rape in Australia occurred in all states and territories, by both statutory and case law, from the late 1970s to the early 1990s. In Australia, the offense of rape was based on the English common law offense of rape, being generally understood as "carnal knowledge", outside of marriage, of a female against her will. Some Australian states left rape to be defined at common law, but others had statutory definitions, with these definitions having marital exemptions. The definition of rape in Queensland, for instance, was: "Any person who has carnal knowledge of a woman or girl, not his wife, without her consent, or with her consent, if the consent is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime, which is called rape."[154] Discussions of criminalization of marital rape were already taking place in the late 1970s in Queensland,[154] but it was not until 1989 that it was criminalized.

[122] The first Australian state to deal with marital rape

was South Australia. The changes came in 1976, but these were only partly removing the exemption. The Criminal Law Consolidation Act Amendment Act 1976 read:[156] "No person shall, by reason only of the fact that he is married to some other person, be presumed to have consented to sexual intercourse with that other person". Nevertheless, the laws did not go as far as equating marital with non-marital rape; the law required violence, or other aggravating circumstances, in order for an act of marital intercourse to be rape; which remained law until 1992. The first Australian jurisdiction to completely remove the marital exemption was New South Wales in 1981. The same happened in Western Australia, Victoria, and ACT in 1985; and Tasmania in 1987. In 1991, in R v. L, the High Court of Australia ruled that if the common law exemption had ever been part of the Australian law, it no longer was.

[123] According to the UN Population Fund, more than twothird of the married women in India, aged between 15 and 49, are severely beaten, or forced to provide sex. In 2011, the International Men and Gender Equality Survey revealed that one in five had forced their wives or partner to have sex. The United Nations published a report stipulating that 69% of the Indian women believe that occasional violence is resorted to when a meal hasn't been prepared in time or when sex has been refused. Further statistical research reveals that 9 to 15% of the married women are subjected to rape by their husbands, a staggering and sobering statistic.

[124] Marital rape is common but it is only an un-reported crime. In a study conducted by the Joint Women Programme, an NGO found that one out of seven married women had been raped by their husband at least once. They frequently do not report these rapes because the law does not support them.

[125] A woman in this country can protect her right to life and liberty, but not her body, within her marriage. If the husband lays an assault on her wife, then that would constitute an offence under the IPC. If the very same husband lays an assault and forces his wife to have sexual intercourse, he would be liable for assault but not for an

offence of rape only because there is a valid marriage between the two.

[126] The 172nd Law Commission report had made the following recommendations for a substantial change in the law with regard to rape.

> *1. 'Rape' should be replaced by the term 'sexual assault'.*
>
> *2. 'Sexual intercourse as contained in section 375 of IPC should include all forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.*
>
> *3. In the light of Sakshi v. Union of India and Others, 2004 5 SCC 518, 'sexual assault on any part of the body should be construed as rape.*
>
> *4. Rape laws should be made gender neutral as custodial rape of young boys has been neglected by law.*
>
> *5. A new offence, namely section 376E with the title 'unlawful sexual conduct' should be created.*
>
> *6. Section 509 of the IPC was also sought to be amended, providing higher punishment where the offence set out in the said section is committed with sexual intent.*
>
> *7. Marital rape: explanation (2) of section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence. On the same reasoning, section 376 A was to be deleted.*
>
> *8. Under the Indian Evidence Act, when alleged that a victim consented to the sexual act and it is denied, the court shall presume it to be so.*

[127] Marital rape is in existence in India, a disgraceful offence that has scarred the trust and confidence in the institution of marriage. A large population of women has faced the brunt of the non-criminalization of the practice.

[128] Marital Rape refers to "unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent. It is a non-consensual act of violent perversion by a husband against the wife where she is abused physically and sexually.

[129] Types of Marital Rape:- Marital rape may be broadly classified into following two categories;

(I) Sexual coercion by non-physical means- this form of coercion involves social coercion in which the wife is compelled to enter into sexual intercourse by reminding her of her duties as a wife. This form of coercion entails applying non-physical techniques and tactics like verbal pressure in order to get into sexual contact with a non-consenting female. The most commonly used non-physical techniques include making false promises, threatening to end the marital relationship, lies, not conforming to the victim's protests to stop, etc. Such acts of sexual coercion by the use of non-physical stunts though considered less severe in degree as compared with physically coercive sexual acts are widespread and pose a threat to the women' right in the society.

(II) Forced Sex:-this involves the use of physical force to enter into sexual intercourse with an unwilling woman. It can be further classified into the following three categories;

(a) Battering Rape:-this form of rape involves the use of aggression and force against the wife. The women are either battered during the sexual act itself or face a violent aggression after the coerced sexual intercourse. The beating may also occur before the sexual assault so as to compel her into sexual intercourse.

(b) Force Only Rape:- in this form of rape, the husband does not necessarily batter the wife,

but uses as much force as is necessary to enter into sexual intercourse with the unwilling wife.

(c) Obsessive Rape:- this form of rape involves the use of force in sexual assault compiled with the perverse acts against the wife. It involves a kind of sexual sadistic pleasure enjoyed by the husband.

[130] The Justice Verma Committee notes: "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." Clearly, rather than the Justice Verma Committee's desire to raise awareness among women on their right to autonomy and physical integrity, the government is more keen on "moral and social awareness" which is a euphemism for appearing to patriarchal notions of honour that tell men to respect women and do the right thing.

[131] Justice Verma Committee was constituted by the Central Government on 23rd December, 2012 after the rape of a 23 year old student. The committee comprised of Justice J.S Verma, (Former Chief Justice of India), Justice Leila Seth (Former Judge High Court of Delhi) and Mr. Gopal Subramanium (Solicitor General of India). The committee was asked to look into the possible amendments in the criminal laws related to sexual violence against women. The committee was conscious of the recommendations in respect of the India made by the U.N. Committee on the Elimination of Discrimination against women. (CEDAW Committee) in February, 2007. The CEDAW Committee recommended that the country should " widen the definition of rape in its Penal Code to reflect the realities of sexual abuse experienced by women and to remove the exception of marital rape from the definition of rape..." The Verma Committee report points out a 2010 study suggesting that 18.8% of the women are raped by their partners on one or more occasion. The rate of reporting and conviction also remains low; aggravated by the prevalent beliefs that the marital rape is acceptable or is less serious than the other types of rape. The recommendation of Justice Verma Committee regarding

deleting exception of marital rape was not included in the Criminal Law Amendment Bill, 2013 passed by the Lok Sabha on 19th March, 2013 and by the Rajya Sabha on 21st March, 2013. The bill received Presidential assent on 2nd April, 2013 and deemed to come into force from 3rd February, 2013. The word rape has been replaced with sexual assault in section 375 IPC.

[132] Rashida Manjoo, the UN Special Repporteur on violence against women said that the Justice Verma Committee's recommendation and subsequent legislation was a "golden moment for India" but the recommendations on marital rape age of consent for sex, etc. were not adopted in the legislation. The government is hesitant to criminalize the marital rape because it would require them to change the laws based on the religious practices, including the Hindu Marriage Act, 1955 which says a wife is duty bound to have sex with her husband. The parliamentary panel examining the Criminal Law (Amendment) Bill 2012, said that " In India", for ages, the family system has evolved... Family is able to resolve the (marital) problems and there is also a provision under the law for cruelty against women. It was, therefore, felt that if 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.

[133] Does the concept of matrimonial cruelty vary in accordance with the religious persuasions of individuals? Is a spouse bound to suffer greater amount of matrimonial cruelty because the spouse belong to a religion which considered marriage as indissoluble? Can the secular constitutional repulic recognize and accept the existence of different varities of matrimonial cruelty-Hindu cruelty, Christian Cruelty, Muslim cruelty and secular cruelty? Should not matrimonial cruelty entitling a spouse for divorce yield to a uniform conceptualisation notwithstanding the different semantics employed in different pieces of matrimonial legislations applicable to different religions ?

[134] The above are the questions which were posed by a Division Bench of the Kerala High Court for its consideration in the case of Sandeep Mohan Varghese vs. Anjana, MAT. Appeal. Nos. 99 & 152 of 2009, decided on 15th September,

2010.

[135] The concept of crime, undoubtedly, keeps on changing with the change in the political, economic and social set-up of the country. The constitution, therefore, confers powers both on the Central and State Legislature to make laws in this regard. Such right includes the power to define a crime and provide for its punishment. It is high time that the legislature once again intervenes and go into the soul of the issue of marital rape. Marital rape is a serious matter though, unfortunately, it is not attracting serious discussions at the end of the Government.

[136] Uptil now, the stance of the Government has been that the term "marital rape" is oxymoron. The analogy which is sought to be applied by the government hinges on the statement that to get married is to give all time consent forever to sex with your spouse. To put it differently, though when you join the army, you only have to join the army once. You don't get the choice to consent to obey the orders every single time an order is given. In certain arrangements, and marriage is one of them, the agreement is a lasting one. What is in the mind of the legislature is that marital rape is completely unprovable. A wife accusing her husband of rape and pressing charges only demonstrates that the marriage is irrevocably over.

[137] I am of the view that even if the wife initiates proceedings under the provision of the Domestic Violence Act, the marriage could be said to be irrevocably over. Therefore, this logic or analogy, which is sought to be applied by the Government, does not appeal to me in any manner.

[138] In the aforesaid context, I may refer to and rely upon a decision of the Supreme Court in the case of Independent Thought vs. Union of India & Anr., Writ Petition (Civil) No.382 of 2013, decided on 11th October, 2017. His Lordship Justice Madan B. Lokur made few very pertinent observations as regards the martial rape. The observations are extracted hereunder;

"[88] We must not and cannot forget the existence of Article 21 of the Constitution which gives a fundamental right to a girl child to live a life of dignity. The documentary material placed before us clearly suggests that an early marriage takes away the self esteem and confidence of a girl child and subjects her, in a sense, to sexual abuse. Under no circumstances can it be said that such a girl child lives a life of dignity. The right of a girl child to maintain her bodily integrity is effectively destroyed by a traditional practice sanctified by the IPC. Her husband, for the purposes of Section 375 of the IPC, effectively has full control over her body and can subject her to sexual intercourse without her consent or without her willingness since such an activity would not be rape. Anomalously, although her husband can rape her but he cannot molest her for if he does so he could be punished under the provisions of the IPC. This was recognized by the LCI in its 172nd report but was not commented upon. It appears therefore that different and irrational standards have been laid down for the treatment of the girl child by her husband and it is necessary to harmonize the provisions of various statutes and also harmonize different provisions of the IPC inter-se.

[89] We have also adverted to the issue of reproductive choices that are severely curtailed as far as a married girl child is concerned. There is every possibility that being subjected to sexual intercourse, the girl child might become pregnant and would have to deliver a baby even though her body is not quite ready for procreation. The documentary material shown to us indicates that there are greater chances of a girl child dying during childbirth and there are greater chances of neonatal deaths. The results adverted to in the material also suggest that children born out of early marriages are more likely to be malnourished. In the face of this material, would it be wise to continue with a practice, traditional though it might be, that puts the life of a girl child in danger and also puts the life of the baby of a girl child born from an early marriage at stake? Apart from constitutional and statutory provisions, constitutional morality forbids us from

giving an interpretation to Exception 2 to Section 375 of the IPC that sanctifies a tradition or custom that is no longer sustainable.

[90] 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."

[139] Although, the learned Judges, in the above referred decision, made themselves very clear that their Lordships were not going into the issue of "marital rape", yet, what has fallen from the Court with regard to the marital rape speaks for itself.

[140] A woman is no longer the chattel-antiquated practices labeled her to be. A husband who has sexual intercourse with his wife is not merely using a property, he is fulfilling a marital consortium with a fellow human being with dignity equal to that he accords himself. He cannot be permitted to violate this dignity by coercing her to engage in a sexual act without her full and free consent.

[141] Further, the delicate and reverent nature of sexual intimacy between a husband and wife excludes cruelty and coercion. Sexual intimacy brings spouses wholeness and oneness. It is a gift and a participation in the mystery of creation. It is a deep sense of spiritual communion. It is a function which enlivens the hope of procreation and ensures the continuation of family relations. It is an expressive interest in each other's feelings at a time it is needed by the other and it can go a long way in deepening marital relationship. When it is egoistically utilized to despoil

marital union in order to advance a felonious urge for coitus by force, violence or intimidation, the same should be made punishable to protect its lofty purpose, vindicate justice.

[142] Besides, a husband who feels aggrieved by his indifferent or uninterested wife's absolute refusal to engage in sexual intimacy may legally seek the court's intervention to declare her psychologically incapacitated to fulfill an essential marital obligation. But he cannot and should not demand sexual intimacy from her coercively or violently.

[143] Moreover, to treat the marital rape cases differently from the non-marital rape cases in terms of the elements that constitute the crime and in the rules for their proof, infringes on the equal protection clause. The Constitutional right to equal protection of the laws ordains that similar subjects should not be treated differently, so as to give undue favor to some and unjustly discriminate against the others; no person or class of persons shall be denied the same protection of laws, which is enjoyed, by other persons or other classes in like circumstances.

[144] The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Women do not divest themselves of such right by contracting marriage for the simple reason that human rights are inalienable.

[145] Rape is a crime that evokes global condemnation because it is an abhorrence to a 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.

[146] Husbands need to be 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.

[147] 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 not sexual coercion or imposition.

[148] Among the duties assumed by the husband are his duties to love, cherish and protect his wife, to give her a home, to provide her with the comforts and the necessities of life within his means, to treat her kindly and not cruelly or inhumanely. He is bound to honor her. it is his duty not only to maintain and support her, but also to protect her from oppression and wrong. (see People of the Philipines vs. Edgar Jumawan, Repubilc of the Philipines Supreme Court, Baguio City S.R. No.187495 dtd. 21.04.2014)

[149] I am conscious of the fact that the marital rape may be used as a tool to harass the innocent husbands and this is what of the Parliament is worried about. In this regard, let it be stressed that the safeguards in the criminal justice system are in place to spot and scrutinize fabricated or false marital complaints, and any person who institutes untrue and malicious charges, can be made answerable in accordance with law. However, this fear, by itself, is not sufficient to just ignore the marital rape.

[150] In 2005, the Protection of Women from Domestic Violence Act, 2005 was passed which although did not consider marital rape as a crime, yet did consider it as a form of domestic violence. Under this Act, if a woman has undergone marital rape, she can go to the court and obtain judicial separation from her husband. This is only a piecemeal legislation and much more needs to be done by

the Parliament in regard to marital rape.

[151] The basic argument which is advanced in favour of these so-called 'laws' is that consent to marry in itself encompasses a consent to engage into sexual activity. But, an implied consent to engage into sexual activity does not mean consent to being inflicted with sexual violence. It is often felt that as in sadomasochistic sexual acts, in marital rape women are presumed to have consented to the violence. However Rape and sex cannot be distinguished on the basis of violence alone.

[152] Various authors, over a period of time, have come up with different theories regarding the occurrence of marital rape in the society;

[153] The Feminist Theory:- this theory considers marital rape as a tool in the hands of the patriarchal society that is used to exercise control over the women. They consider that the exemption given in cases of marital rape is a remnant of the earlier laws regarding women that considered them to be the property of the husband. The feminists are of the view that marital rape is nothing but a result of a power play by the male spouse in the marriage. Radical feminists have gone to the extent of arguing that any form of heterosexual intercourse is based mainly on the basis of the man and is another form of oppression on women.

[154] The Social Constructionism Theory:- the believers in the theory of social constructionism are of the view that men have dominated the society in law making and the political arena since time memorial. Law thus came as a reflection of the interest of men. Such laws considered women to be their husband's property after marriage and hence, marital rape was considered an offence of lesser degree as compared to rape. Some jurisprudence even considered that rape in a marriage is not rape at all. The social construcionism believe that marital rape is a means through which men try to assert themselves over their wives so as to retain their long gained power over their property.

[155] The Sex-Role Socialization Theory:- these theorists believe that it is the particular gender roles which guide the sexual interactions between the spouses in a marriage. In a marriage, women are always taught to be calm and passive, submissive whereas, men are trained to be dominant and aggressive. Care and love are attributed to women, Man, on the other hand, are the major perpetrators of sexual entertainment with violent themes. Sex role socialists are of the view that marital rape is nothing but an expression of the traditional perceptions of sex roles.

[156] A decision of the House of Lords in the case of Regina and R., 1992 1 AC 599, is worth taking note of. The question of law and general public importance involved in this decision was "is a husband criminally liable for raping his wife?". Some of the observations are extracted hereunder;

> *"The appeal arises out of the appellant's conviction at Leicester Crown Court on 30 July 1990, upon his pleas of guilty, of attempted rape and of assault occasioning actual bodily harm. The alleged victim in respect of each offence was the appellant's wife. The circumstances of the case were these. The appellant married his wife in August 1984 and they had one son born in 1985. On 11 November 1987 the couple separated for about two weeks but resumed cohabitation at the end of that period. On 21 October 1989 the wife left the matrimonial home with the son and went to live with her parents. She had previously consulted solicitors about matrimonial problems, and she left at the matrimonial home a letter for the appellant informing him that she intended to petition for divorce. On 23 October 1989 the appellant spoke to his wife on the telephone indicating that it was his intention also to see about a divorce. No divorce proceedings had, however, been instituted before the events which gave rise to the charges against the appellant. About 9 p.m. on 12 November 1989 the appellant forced his way into the house of his wife's parents, who were out at the time, and attempted to have sexual intercourse with her against her will. In the course of doing so he assaulted her by squeezing her neck with both hands. The appellant was arrested*

and interviewed by police officers. He admitted responsibility for what had happened. On 3 May 1990 a decree nisi of divorce was made absolute. The appellant was charged on an indictment containing two counts, the first being rape and the second being assault occasioning actual bodily harm. When he appeared before Owen J. at Leicester Crown Court on 30 July 1990 it was submitted to the judge on his behalf that a husband could not in law be guilty as a principal of the offence of raping his own wife. Owen J. rejected that proposition as being capable of exonerating the appellant in the circumstances of the case. His ground for doing so was that, assuming an implicit general consent to sexual intercourse by a wife on marriage to her husband, that consent was capable of being withdrawn by agreement of the parties or by the wife unilaterally removing herself from cohabitation and clearly indicating that consent to sexual intercourse had been terminated. On the facts appearing from the depositions either the first or the second of these sets of circumstances prevailed. Following the judge's ruling the appellant pleaded guilty to attempted rape and to the assault charged. He was sentenced to three years' imprisonment on the former count and to eighteen months imprisonment on the latter.

The appellant appealed to the Court of Appeal (Criminal Division) on the ground that Owen J.:

"made a wrong decision in law in ruling that a man may rape his wife when the consent to intercourse which his wife gives in entering the contract of marriage has been revoked neither by order of a court nor by agreement between the parties."

On 14 March 1990 that Court (Lord Lane C.J., Sir Stephen Brown P., Watkins, Neill and Russell L.JJ.) delivered a reserved judgment dismissing the appeal but certifying the question of general public importance set out above and granting leave to appeal to your Lordships' House, which the appellant now does. Sir Matthew Hale, in his History of the Pleas of the Crown, 1736 1 Ch 58, p. 629, wrote:

> *"But the husband cannot be guilty of a rape committed byhimself 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."*

There is no similar statement in the works of any earlier English commentator. In 1803 East, in his Treatise of the Pleas of the Crown, Vol. 1 ch. X, p. 446, wrote:

> *"... a husband cannot by law be guilty of ravishing his wife, on account of the matrimonial consent which she cannot retract.*
>
> *"In the first edition (1822) of Archbold, A Summary of the Law Relative to Pleading and Evidence in Criminal Cases, at p. 259 it was stated, after a reference to Hale, "A husband also cannot be guilty of a rape upon his wife."*

For over 150 years after the publication of Hale's work there appears to have been no reported case in which judicial consideration was given to his proposition. The first such case was Reg. v. Clarence,1888 22 QBD 23, to which I shall refer later. It may be taken that the proposition was generally regarded as an accurate statement of the common law of England. The common law is, however, capable of evolving in the light of changing social, economic and cultural developments. Hale's proposition reflected the state of affairs in these respects at the time it was enunciated. Since then the status of women, and particularly of married women, has changed out of all recognition in various ways which are very familiar and upon which it is unnecessary to go into detail. Apart from property matters and the availability of matrimonial remedies, one of the most important changes is that 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. Hale's proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the

state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable.

In S. v. H.M. Advocate,1989 SLT 469, the High Court of Justiciary in Scotland recently considered the supposed marital exemption in rape in that country. In two earlier cases, H.M. Advocate v. Duffy,1983 SLT 7, and H.M. Advocate v. Paxton,1985 SLT 96, it had been held by single judges that the exemption did not apply where the parties to the marriage were not cohabiting. The High Court held that the exemption, if it had ever been part of the law of Scotland, was no longer so. The principal authority for the exemption was to be found in Baron Hume's Criminal Law of Scotland, first published in 1797. The same statement appeared in each edition up to the fourth, by Bell, in 1844. At p. 306 of vol. 1 of that edition, dealing with art and part guilt of abduction and rape, it was said:

> *"This is true without exception even of the husband of the woman; who although he cannot himself commit a rape on his own wife, who has surrendered her person to him in that sort, may however be accessory to that crime ... committed on her by another."*

It seems likely that this pronouncement consciously followed Hale:

The Lord Justice-General, Lord Emslie, who delivered the judgment of the court, expressed doubt whether Hume's view accurately represented the law of Scotland even at the time when it was expressed and continued, at p. 473:

> *"We say no more on this matter which was not the subject of debate before us, because we are satisfied that the Solicitor Genral was well founded in his contention that whether or not the reason for the husband's immunity given by Hume was a good one in the 18th and early 19th senturies, it has since disappeared altogether. Whatever Hume meant to encompass in the concept of a wife's 'surrender of her*

> *person' to her husband 'in that sort' the concept is to be understood against the background of the status of women and the position of a married woman at the time when he wrote. Then, no doubt, a married woman could be said to have subjected herself to her husband's dominion in all things. She was required to obey him in all things. Leaving out of account the absence of rights of property, a wife's freedoms were virtually non-existent, and she had in particular no right whatever to interfere in her husband's control over the lives and upbringing of any children of the marriage.*

By the second half of the 20th century, however, the status of women, and the status of a married woman, in our law have changed quite dramatically. A husband and wife are now for ail practical purposes equal partners in marriage and both husband and wife are tutors and curators of their children. A wife is not obliged to obey her husband in all things nor to suffer excessive sexual demands on the part of her husband. She may rely on such demands as evidence of unreasonable behaviour for the purposes of divorce. A live system of law will always have regard to changing circumstances to test the justification for any exception to the application of a general rule. Nowadays it cannot seriously be maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances. It cannot be affirmed nowadays, whatever the position may have been in earlier centuries, that it is an incident of modern marriage that a wife consents to intercourse in all circumstances, including sexual intercourse obtained only by force. There is no doubt that a wife does not consent to assault upon her person and there is no plausible justification for saying today that she nevertheless is to be taken to consent to intercourse by assault. The modern cases of H.M. Advocate v. Duffy and H.M. Advocate v. Paxton show that any supposed implied consent to intercourse is not irrevocable, that separation may demonstrate that such consent has been withdrawn, and that in these circumstances a relevant charge of rape may lie against a husband. This development of the law since Hume's time immediately prompts the question: is revocation of a wife's implied consent to intercourse, which is revocable, only capable of being established by the act of

separation? In our opinion the answer to that question must be no. Revocation of a consent which is revocable must depend on the circumstances. Where there is no separation this may be harder to prove but the critical question in any case must simply be whether or not consent has been withheld. The fiction of implied consent has no useful purpose to serve today in the law of rape in Scotland. The reason given by Hume for the husband's immunity from prosecution upon a charge of rape of his wife, if it ever was a good reason, no longer applies today. There is now,accordingly, no justification for the supposed immunity of a husband. Logically the only question is whether or not as matter of fact the wife consented to the acts complained of, and we affirm the decision of the trial judge that charge 2(b) is a relevant charge against the appellant to go to trial.

I consider the substance of that reasoning to be no less valid in England than in Scotland. On grounds of principle there is now no justification for the marital exemption in rape.

[157] The Supreme Court, in the case of Suchita Srivastava & Anr. vs. Chandigarh Administration, 2009 9 SCC 1, in para-22, had recognized a woman's right to make her reproductive choices as a dimension of " personal liberty" as understood under Article 21 of the Constitution of India. The observations of the Supreme Court go a long way if one tries to understand the problem of marital rape. The observations are extracted hereunder;

> *"There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilisation*

procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children."

[158] The Supreme Court, in Githa Hariharan Dr. Vandana Shiva vs. Reserve Bank of India: Jayanta Bandhopadhiyaya, 1999 2 SCC 228, had made important observations in regard to the dignity of women. While examining the constitutional validity of section 6 of the Hindu Minority & Guardianship Act, 1956, Umesh Chandra Banerjee, J. (as his lordship then was) observed;

"Though nobility and self-denial coupled with tolerance mark the greatest features of Indian womanhood in the past and the cry for equality and equal status being at a very low ebb, but with the passage of time and change of social structure the same is however no longer dormant but presently quite loud. This cry is not restrictive to any particular country but world over with variation in degree only. Article 2 of the Universal Declaration of Human Rights [as adopted and proclaimed by the General Assembly in its resolution No.217A(III)] provided that everybody is entitled to all rights and freedom without distinction of any kind whatsoever such as race, sex or religion and the ratification of the convention for elimination of all forms of discrimination against women (for short CEDAW) by the United Nations Organisation in 1979 and subsequent acceptance and ratification by India in June 1993 also amply demonstrate the same. We the people of this country gave ourselves a written Constitution, the basic structure of which permeates equality of status and thus negates gender bias and it is on this score, the validity of Section 6 of the Hindu Minority and Guardianship Act of 1956 has been challenged in the matters under consideration, on the ground that dignity of women is a right inherent under the Constitution which as a matter of fact stands negatived by Section 6 of the Act of 1956."

[159] Outlawing the traditional notion that the husband cannot be guilty of a rape committed by himself upon his

lawful wife, for by their mutual matrimonial consent and contract, the wife is deemed in law to have given herself up in this kind unto her husband which she cannot retract, Justice Brennan of the Australian High Court observed in 1991 that "the common law fiction has always been offensive to human dignity and incompatible with the legal status of a spouse (R v. L,1991 HCA 48)." The research indicates that the marital rape has severe and long lasting consequences for women, both physical and psychological. The physical effects include injuries to the private organs, miscarriages, stillbirths, bladder infections, infertility and the potential contraction of sexually transmitted diseases like HIV/AIDS. Women raped by their partners also suffer severe psychological consequence such as flashbacks, sexual dysfunction and emotional pain for years after violence.

[160] My final conclusion is summarized as under :

[161] The husband cannot be prosecuted for the offence of rape punishable under section 376 of the IPC at the instance of his wife as the marital rape is not covered under section 375 of the IPC. The husband cannot be prosecuted for the offence of rape at the instance of his wife in view of Exception-II in section 375 of the IPC, which provides that sexual intercourse or sexual acts by a man with his own wife, the wife not being under 18 years of age, is not rape.

[162] A wife can initiate proceedings against her husband for unnatural sex under section 377 of the IPC. Section 377 IPC does not criminalize a particular class of people or identity or orientation. It merely identifies certain acts, which if committed, would constitute an offence. Consent is not a determining criterion in the case of unnatural offences and rather any offence which is against the order of nature and can be described as carnal penetration would constitute an offence under section 377 of the IPC.

[163] Except the sexual perversions of sodomy, buggery and bestiallity, all other sexual perversions, would not fall within the sweep of section 377 IPC.

[164] More than a prima facie is made out having regard to the nature of the allegations so far as the offence under section 498A of the IPC is concerned.

[165] As discussed above, a prima facie case to proceed against the accused-husband for outraging the modesty of his wife could also be said to have been made out. Although section 354 is not one of the offences in the FIR, yet I am of the view that the investigation in this direction is necessary.

[166] The exemption given to marital rape, as Justice Verma noted, "stems from a long out-dated notion of marriage which regarded wives as no more than the property of their husbands". Marital rape ought to be a crime and not a concept. Of course, there will be objections such as a perceived threat to the integrity of the marital union and the possibility of misuse of the penal provisions. It is not really true that the private or domestic domain has always been outside the purview of law. The law against domestic violence already covers both physical and sexual abuse as grounds for the legal system to intervene. It is difficult to argue that a complaint of marital rape will ruin a marriage, while a complaint of domestic violence against a spouse will not. It has long been time to jettison the notion of 'implied consent' in marriage. The law must uphold the bodily autonomy of all women, irrespective of their marital status.

[167] Way back in the 1800s, almost around 125 years back, there was a situation that brought forth to the law makers. A girl aged 11 years was brutally raped by her 35 year old husband. The then colonial government proposed to amend the age of consent for a girl from 10 to 12 years, yet, this idea was criticized at large but only after much acrimony and argument, the same was amended in 1891. In the words of Dr. B.R. Ambedkar, "realizing depth of the degradation to which the so-called leaders of the peoples had fallen.... could any sane man, could any man, with a sense of shame, oppose so simple a measure? But it was opposed..." Dr. B.R. Ambedkar referred to the idea of necessity in the law that has been needed since then. I wonder how Dr. B.R. Ambedkar would have seen the present day scenario when no one is willing to even discuss to reform the criminalization of marital rape. A law that does

not give married and unmarried women equal protection creates conditions that lead to the marital rape. It allows the men and women to believe that wife rape is acceptable. Making wife rape illegal or an offence will remove the destructive attitudes that promote the marital rape. Such an action raises a moral boundary that informs the society that a punishment results if the boundary is transgressed. The Husbands may then begin to recognize that marital rape is wrong. Recognition coupled with the criminal punishment should deter the husbands from raping their wives. Women should not have to tolerate rape and violence in the marriage. The total statutory abolition of the marital rape exemption is the first necessary step in teaching societies that dehumanized treatment of women will not be tolerated and that the marital rape is not a husband's privilege, but rather a violent act and an injustice that must be criminalized."

18. We confronted Mr.Thakore, the learned counsel appearing for the writ-applicant first with the decision of the Supreme Court in the case of Guruvayoor Devaswom Managing Committee and another vs. C.K.Rajan and others, reported in (2003) 7 SCC 546, wherein the Supreme Court has evolved the principles which should be kept in mind while entertaining a writ-application filed in public interest. We invited the attention of Mr.Thakore to category (xi) in paragraph 50, which reads thus:

"(xi) Ordinarily, the High Court should not entertain a writ petition by way of public interest litigation questioning the constitutionality or validity of a statute or a statutory rule."

19. We thereafter brought to the notice of Mr.Thakore that the present PIL does not seem to be based on any factual matrix. The enactment of a law is a legislative policy decision. If the Parliament, in its wisdom, was of the opinion that different sets

of provisions need to be enacted for dealing with different sets of circumstances, then the question is, whether this Court is empowered to direct the Parliament to amend the law. Obviously, the answer has to be in the negative because the legislative policy decision should not be interfered lightly by the courts. However, it is high time that a writ court undertakes the exercise of considering, whether the Exception-2 to Section 375 of the IPC could be termed as manifestly arbitrary and makes a woman's fundamental right to sexual autonomy subject to the whims of her husband. There are many other larger issues raised in the present litigation which needs to be considered in details.

20. RULE returnable on 19th January 2022. Mr.Thakore, the learned counsel shall furnish one set of his entire paper-book to Mr.Devang Vyas, the learned Additional Solicitor General of India at the earliest as Mr.Vyas would be appearing for the Union of India.

21. Since the consitutional validity of Exception-2 to Section 375 of the IPC has been questioned, let NOTICE be issued to the learned Attorney General of India through the Secretary, Ministry of Law and Justice, New Delhi.

22. Let NOTICE be also issued to the State of Gujarat.

23. Direct Service is permitted. The service to the learned Attorney General shall be through SPEED POST, RPAD as well as by EMAIL, over and above the Direct Service.

24. As we have heard Mr.Thakore for quite sometime in the first-half of the session, we treat this matter as Part-Heard. To be notified before this Bench on the returnable date.

(J. B. PARDIWALA, J.)

(NIRAL R. MEHTA, J.)

/MOINUDDIN