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

**(EXTRAORDINARY ORIGINAL JURISDICTION)**

**WRIT PETITION (CIVIL) NO. 284 OF 2015**

IN THE MATTER OF PUBLIC INTEREST LITIGATION

RIT FOUNDATION & ORS …….. PETITIONER

VERSUS

THE UNION OF INDIA & ORS …….RESPONDENT

MEN WELFARE TRUST ……. INTERVENOR/RESPONDENT

INDEX

| S. NO. | PARTICULARS | PAGE NO. |
|---|---|---|
| 1 | Written submissions of Mr. J. Sai Deepak, counsel on behalf of the intervenor, Men Welfare Trust | 1-31 |

**Place: New Delhi**

**Dated : 02.03.2022** **Through**

**MEN WELFARE TRUST**

Advocate for the Intervenors

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**WRITTEN SUBMISSIONS OF MR. J. SAI DEEPAK, COUNSEL ON BEHALF OF THE INTERVENOR, MEN WELFARE TRUST**

1. At the outset, it is humbly submitted that given the sensitive nature of the matter and the implications of the prayers sought by the Petitioners in the instant Writ Petition and connected Petitions, a few prefatory submissions are warranted on behalf of the Intervenor herein:
   i. The legitimate concerns of the Intervenor organisation cannot be and must not be brushed aside with *ad hominem* accusations of "patriarchy" since that has the effect of shutting down any sane and balanced discussion on an issue that could benefit from a plurality of diverse perspectives and inputs;
   ii. The issue at hand does not merit an adversarial treatment which has been the entire tone and tenor of the submissions made on behalf of the Petitioners. A "my way or the highway" approach on issues such as these rarely yields mature and effective outcomes;
   iii. The Intervenor herein has ***never*** been opposed to criminalisation of spousal sexual offences, specifically non-consensual sex between spouses or those in spousal-like relationships. In fact, as shall be seen hereinbelow, there already exists a legal/penal framework for spousal sexual offences. It is certainly *not* the case of the Intervenor organization that husbands/men have the right to impose themselves on their wives/spouses citing marriage as the be all and end all of consent. It is certainly the position of the Intervenor that trust, dignity and respect form the basis of a marriage and that it is a two-way street. That said, the issue at hand is not merely about consent, but also about context which the Petitioners refuse to see or acknowledge. The multi-layered and multi-variable nature of this equation has been reduced to the sole issue of "consent" which is precisely where the Petitioners and the

Intervenor disagree. The clear and calibrated position of the Intervenor may be summarized as follows:

A. That the prayers sought by the Petitioners are beyond the scope of any jurisdiction or power that this Hon'ble Court may wield under any law or the highest law, namely the Constitution, since if such prayers were granted, they would have the effect of creating a new class/species of offence, which is beyond the pale of the power of judicial review. In short, the prayers sought by the Petitioners require this Hon'ble Court to violate one of the most fundamental, sacrosanct and basic features of the Constitution, namely the doctrine of separation of powers and that too in the matter of criminalisation;

B. That the doctrine of separation of powers is not meant to be a mere transactional construct for division of territory/turf between the various organs, but is meant to preserve the right of the "Republic", meaning the people, to participate in law and policy-making, lest it becomes the preserve of the few. In this case, grant of the Petitioners' prayers would have the effect of keeping the Republic outside the pale of participation in law and policy making on such a sensitive social issue, thereby truncating fundamental rights as well as empowering an unelected body to undertake an exercise which is beyond its constitutional mandate and expertise. The creation of an offence, which is what the prayers sought will result in if granted, requires considerations of social impact followed by the creation of an entire ecosystem such as definition, process, safeguards, evidentiary standards and forum, among other things none of which a Court of law is either intended for or designed to prescribe, much less lay down;

C. That without prejudice to the above preliminary constitutional and jurisdictional objection, it is humbly submitted that a Court of law is not equipped to examine such issues, and is at any rate a sub-optimal forum for the consideration of a variety of perspectives which are social, cultural and *finally* legal. A Court, even a constitutional Court, is not designed for participation by multiple stakeholders, which is precisely why the creation of even a new class of offence is constitutionally beyond the remit of judicial review. The proceeding at hand is a textbook case in point since it has not allowed for inputs from

various legitimate stakeholders who are better qualified to weigh in on the subject beyond the narrow and incomplete confines of legality/constitutionality;

D. That in view of the submissions of both Learned *amici* which lean in favour of the Petitioners' position, in the interest of balance and from the perspective of natural justice, inputs ought to have been sought from an additional *amicus*. In this regard, attention of this Hon'ble Court is drawn to the fact that there have been instances wherein two *amici* representing divergent positions have been appointed by the Hon'ble Supreme Court to assist it on matters of constitutional significance. It is clarified that the Intervenor does not in any way question the right of the existing Learned *amici* to hold and present their respective learned positions; however, since both Learned *amici* have been fairly forthcoming about their respective views on the issue at hand, an additional *amicus* holding a different view could have brought in a greater degree of balance to the representation of diverse perspectives;

E. That contrary to the Petitioner's contention, Exception 2 to Section 375 does not in any manner envisage or require a wife to submit to forced sex by the husband nor does it encourage the husband to impose himself on the wife. Also, it is untrue that there are no remedies whatsoever to address non-consensual sex between spouses. A clear reading of Sections 376B of the IPC along with Section 198B of the CrPC, Section 498A of the IPC and the Domestic Violence Act would clearly show that there is a clear legislative intent behind them and there exists a framework to criminally prosecute a husband who refuses to respect consent;

F. That the legislature through the Exception 2 to Section 375 of the IPC and through the creation of a separate legal ecosystem for dealing with spousal sexual violence has indeed criminalised it, without terming it "rape" within the meaning Section 375 of the IPC. The said distinction in labelling and treatment, which is grounded in respect for the complexity of the institution of marriage and not 'patriarchy', is both reasonable and based on intelligible differentia, thereby satisfying the touchstones of Articles 14, 15, 19 and 21;

G. That Section 376B of the IPC read with Section 198B of the CrPC and Section 498A of the IPC are proof of intelligible differentia underlying the existence of the said provisions as well as Exception 2 to Section 375, namely a legitimate and different treatment of offences committed within the bounds of a marriage or in the event of a legal or *de facto* separation. This demonstrates the satisfaction of Articles 14 and 21 by Section 376B of the IPC;

H. That *arguendo* the existing legal framework that criminalises spousal sexual violence is indeed inadequate, inadequacy does not constitute unconstitutionality, and it is certainly not for the Judiciary to remedy it since it falls within the exclusive preserve of the Legislature. The Judiciary and that too *only* the Hon'ble Supreme Court under Article 141, and no High Court under 226, can fill in a legal void or address obvious lacunae. Neither is this Hon'ble Court exercising jurisdiction under Article 141 (since it cannot), nor does the instant case involve a legal void or an obvious lacuna;

I. That Exception 2 to Section 375 is not 'colonial' although it was first enacted as part of the Code in 1860 since it has undergone the process of Indianization after the coming into force of the Constitution which is evident from several parliamentary cogitations and the amendments effected to the IPC along with the CrPC. In any case, Article 13(1) of the Constitution protects pre-Constitution laws so long as they pass muster on the anvils of the Constitution. This effectively preserves the presumption of constitutionality of laws enacted even before the Constitution unless the same is rebutted by a challenger such as the Petitioners. A law cannot be struck down merely because it predates the Constitution since going by that logic, the bulk of the Indian legal system must be presumed unconstitutional at the outset until established otherwise, which runs contrary to the language of and intent underlying Article 13(1);

J. That only the Legislature has the power and the right under the Constitution to undertake social experiments so long as they are not manifestly arbitrary, which cannot be interfered with by the Judiciary merely because the latter has a different and diametrically divergent point of view. In other words, the proclivities or leanings of the Judiciary or individual judges

cannot become the basis for exercise of the power of judicial review to strike down an exception to a specific class/category of offence which will have the direct effect of creating a new class of offence;

K. That in matters of dealing with spousal sexual violence, the Bharatiya Legislature has the power and freedom to ideate in consultation with a vast array of stakeholders taking into account the socio-cultural mores of this society without being pontificated to through and by the Petitioners in the name of "international norms and standards". Not only are such norms not binding on Indian Courts and hence unenforceable until specifically incorporated as part of the Indian legal framework, the exhortation by the Petitioners to conform to such "international norms and standards" reeks of *coloniality* and goes against the grain of their own submission that Exception 2 to Section 375 is less constitutional since it is "colonial". In other words, the Petitioners' position on what is 'colonial' and what is "international" is selective, convenient and constitutionally fallacious;

L. That even going by the Petitioners' erroneous call to authority citing "international norms and standards", the movement the world over has been towards gender-neutral laws in the realm of sexual violence. And yet, the irony of the case at hand is that the Intervenor which is named Men Welfare Trust has been actively campaigning for gender-neutral laws and preservation of the institution of marriage, whereas the Petitioners have sought gender-specific prayers and creation of a gender-specific offence at the expense of the marital institution;

M. That in view of several judgements of High Courts and the Supreme Court recognising the extent of abuse of existing provisions such as Section 498A of the IPC by alleged victims, the law on sexual violence itself needs an overhaul, introduction of gender-neutrality being but one aspect of it. To add to this crucible by striking down Exception 2 to Section 375 would be to add to existing inequities and injustice. The promulgation of a law requires the formulation of a policy which is informed at the very least by a baseline study, and not merely legal arguments. Therefore, the appropriate forum, namely the Legislature must be directed to expedite the process

of consultation. That said, given that this Hon'ble Court itself has taken up the matter after seven years of its filing and has taken over two months to hear only legal submissions, surely the Legislature can and must be afforded sufficient time to undertake consultation with the States and various public interest groups and organisations which operate in this space; and

N. That there does not exist a single judgement either in Bharat or elsewhere wherein a Court of law has granted the kind of prayers sought by the Petitioners herein and no amount of semantic jugglery or misrepresentation of case law can refute this fact. At best, a Court of law can prod the Legislature into expediting the process of consultation and legislation *if the legislature deems it necessary,* but under no circumstances can a Court of law direct the direction or outcome of the process. In fact, the Court cannot even influence the process by issuing an advisory opinion on matters which are outside the scope of its constitutional remit. Only the Supreme Court has the power to issue an advisory opinion under Article 143 *if* the Hon'ble President of Bharat so seeks it. There is no such power vested in the High Court under Article 226 to issue an advisory opinion to the Legislature, either Central or State.

Each of the above enumerated submissions shall be elaborated upon hereinbelow with reference to case law, parliamentary material and foreign legislative material, along with rebuttals to the submissions made by the other side, namely the Petitioners and the *amici*. For the ease of convenience of the Court, the relevant pages of the material being relied upon by the Intervenor have been annexed herewith as part of the convenience compilation.

**A. The Constitutional Jurisdictional Objection**

2. To place the submissions of the Intervenor on the issue of jurisdiction, extracted below are the prayers sought by the Petitioners in the instant Petition and the connected matters:
   i. Page 18 of *RIT Foundation v Union of India,* W.P. (C) No. 284/2015- *(a) A declaration that Section 375 of the Indian Penal Code insofar as it discriminates against married women sexually assaulted by their own husband, is violative of Articles 14 and 21 of the Constitution of India;*

   ii. Pages 17-18 of *Abdulla Khan v. Union of India & Ors.,* W.P. (C) No. 6217/2016- *A. Issue an appropriate Writ/Order thereby declaring that,*

*after amendment in Section 375 of IPC vide the Criminal Law (Amendment) Act, 2013, the penal law of our country has become uncertain and inconsistent to prosecute the man for unnatural sex with his own wife, wife not being under the age of fifteen years of age.*

*B. Issue an appropriate Writ/Order thereby declaring that the amendment made by Respondent No. 1, in Section 375 of IPC vide the Criminal Law (Amendment) Act, 2013, is incorrect, improper, inconsistent with Section 377 of IPC and unconstitutional qua legally wedded citizens of our country.*

*C. Issue an appropriate Writ/Order thereby directing the Respondent No. 3 to consider the legal issue raised in the present petition (i.e. whether qua the legally wedded citizens of our country, amendment made in Section 375 IPC vide the Criminal Law (Amendment) Act, 2013, is incorrect, improper, inconsistent with Section 377 of IPC, Anti Wives and unconstitutional, or nor?) and take appropriate steps as per law within fixed time frame.*

*D. Issue an appropriate Writ/Order thereby declaring that the registration of FIR No. 247/14 dated 20.04.2014 under section 376/377 IPC at P.S. Jaitpur, by Respondent No. 2 on the basis of complaint of Respondent No. 3 as well as the emanating proceedings there from against the petitioner is contrary to existing penal law.*

iii. Page 16 of *Farhan v. State & Anr.*, W.P. (C) No. 964/2017- *A. Quash the FIR bearing No. 204/2016 dated 25.11.2016 was registered at Hauz Qazi, Delhi under Sections 376/363/342 IPC read with Section 3/4 POCSO Act and proceedings therein, in the interest of justice.*

iv. Page 26 of *Khushboo Saifi v. Union of India & Anr.*, W.P. (C) No. 5858/2017- *1. Issue a writ of mandamus declaring exception 2 to section 375, Indian penal code, 1860 to be null and void on grounds of being unconstitutional and all case of rape by husband of wife be also tried as rape as defined by section 375, Indian penal code.*

*2. Pass an order declaring section 376B, Indian penal code, 1860 to be null and void on grounds of being unconstitutional and all cases of rape by a husband of his wife during separation be tried as rape as defined by section 375, Indian penal code.*

v. Page 32 of *All India Democratic Women's Association v. Union of India,* W.P. (C) No. 6024/2017- *A. Issue a writ of mandamus or other similar writ striking down the Exception 2 to Section 375 as violative of Article 14, 15, 19 and 21 of the Constitution of India, and consequentially;*

*B. Issue a writ of mandamus or other similar writ striking down Section 376B of the Indian Penal Code, 1860, as also Section 198B of the Code of Criminal Procedure 1973 as violative of Article 14, 15, 19 and 21 of the Constitution of India;*

3. From the prayers extracted above from each of the Petitions, apart from prayers relating to quashing of specific FIRs, the sole prayer which is tenable from a constitutional perspective is Prayer C in *Abdulla Khan v. Union of India & Ors.,* W.P. (C) No. 6217/2016 which reads as follows:

   *C. Issue an appropriate Writ/Order thereby directing the Respondent No. 3 to consider the legal issue raised in the present petition (i.e. whether qua the legally wedded citizens of our country, amendment made in Section 375 IPC vide the Criminal Law (Amendment) Act, 2013, is incorrect, improper, inconsistent with Section 377 of IPC, Anti Wives and unconstitutional, or nor?) and take appropriate steps as per law within fixed time frame.*

   The reference to Respondent No. 3 in the above prayer is erroneous and should have been to the Respondent No. 1 therein, namely the Union of India. That said, this is the sole prayer in these batch of Petitions which can be constitutionally considered by this Hon'ble Court since the prayer limits itself to a direction from this Hon'ble Court to the Union of India to consider the question of recognising "marital rape" as a species falling within the meaning of rape under Section 375. In other words, the prayer requests the Union through the medium of this Court to consider doing away with Exception 2 to Section 375. While the Intervenor is of the view that the said Exception has a sound policy basis and is constitutionally valid under Articles 14, 15, 19 and 21, since the prayer recognises that the issue is within the exclusive domain of the Legislature and merely asks this Hon'ble Court to direct the Legislature to consider the issue, it passes muster on the anvils of the doctrine of separation of powers.

4. It is humbly submitted that all other prayers (except the ones that relate to quashing of FIRs) that call upon this Hon'ble Court to strike down Exception 2 to Section 375 and/or Section 376B of the IPC are constitutionally impermissible for the following reasons:

i. Exception 2 to Section 375 (hereinafter referred to as "the Exception") is, as it says, an exception to the offence of "rape" within the meaning of Section 375 of the IPC. The direct and intended, not incidental, consequence of striking down the said Exception would be to enlarge the scope of the offence and to recognize its commission in the context of a marriage, which is entirely beyond the scope of judicial review under Article 226 or for that matter even under Article 141 of the Constitution which is available only to the Supreme Court. The instant case does not relate to a constitutional challenge to a criminalising provision such as Section 66A of the Information Technology Act, 2000 which was the case in *Shreya Singhal v. Union of India* (2015) 5 SCC 1, or Section 377 of the IPC in *Navtej Johar v. Union of India* (2018) 10 SCC 1. In stark contrast, the Exception which is under challenge, if struck down would have the exact opposite consequence of *Shreya Singhal* or *Navtej Johar*. Therefore, any comparison with the said judgements or drawing from the observations therein is completely misplaced. To selectively quote from the said judgements on the issue of dignity of an individual is to obfuscate the central question of jurisdiction and the doctrine of separation of powers.

ii. Similarly, any comparison with *Shayara Bano v. Union of India* (2017) 9 SCC 1 (the Triple Talaq judgement) is baseless since in that judgement the Hon'ble Supreme Court struck down the practise of *talaq-e-biddat* as unconstitutional under Section 2 of Muslim Personal Law (Shariat) Application Act, 1937. However, the question of criminalising the said practice was relegated to the Legislature recognising that criminalisation or creation of an offence is the sole and exclusive preserve of the Legislature. In other words, in the absence of the subsequent law of 2019 criminalising talaq-e-biddat, the *Shayara Bano* judgement did not have the consequence of creating an offence. Therefore, no reliance can be placed on this judgement to advance the prayers in the Petitions at hand which expressly require this Hon'ble Court to recognise "marital rape" as a species of rape within the meaning of Section 375 of the IPC;

iii. Since the grant of the prayers sought in the Petitions is bound to impinge on the exclusive domain of the Legislature (both central and State) under Article 246, this Hon'ble Court cannot treat the issue involved in the Petitions as a mere challenge to the

constitutionality of a provision. The issue of "marital rape"/spousal sexual violence requires the consideration of several aspects including social, cultural, and finally legal. It is undeniable that while the issue escalated for this Court's consideration is legal, the consequences are bound to be social and cultural. This is precisely why a judicial forum is neither empowered to nor institutionally equipped for undertaking policy decisions which require wide-ranging consultation with members of the public as well as subject-matter experts who are in a position to present concrete data on ground realities. It is not possible to arrive at a peremptory conclusion in matters such as these, no matter how well-intentioned, based only on anecdotal evidence. At a time when policy-making is moving towards a data-driven approach, a narrow constitutional/legal analysis by treating the issue at hand as mere *lis* would be to miss the forest for the trees;

iv. In any case, members of the public have the constitutionally-guaranteed right to put forth their perspectives to elected representatives which would translate to assessment of the current state of public morality on the subject. For the Petitioners to urge a Court of law to take over the process is to deprive both the electorate as well as the elected to formulate policy and laws, which goes against constitutional morality. Just as the Legislature cannot comment on the direction in which a particular matter must be decided even by trial Courts, much less constitutional Courts, a Court of law too cannot dictate either the course of public cogitation or legislative deliberation. In fact, in the absence of express powers under the Constitution akin to Article 143 which are vested in the Supreme Court, a High Court exercising powers under Article 226 cannot even venture to issue an advisory opinion which could amount to or result in creating unwarranted institutional tensity on the Legislature. At best, given its unelected nature, the role of a constitutional Court is limited to seeking expedition in the process of law-making by calling out the policy paralysis of the Legislature, but nothing beyond;

v. The Petitioners' invitation to this Hon'ble Court to transgress the lines drawn by the doctrine of separation of powers is deeply disturbing for it could have disastrous consequences for the public's respect for all institutions as well as the Constitution. Both constitutional morality and institutional independence would stand undermined if the Petitioners' prayers were to be granted;

vi. In support of the above submissions, the Intervenor places reliance on the following judgements which form part of the compilation filed on January 28, 2022:

a. *Social Action Forum for Manav Adhikar & ors. v. Union of India* MANU/SC/0987/2018, Paragraphs 36-37, running Pages 465-466;
b. *Indian Drugs and Pharmaceuticals Ltd. v. Workman, Indian Drugs and Pharmaceuticals Ltd.*, MANU/SC/4993/2006, Paragraph 18, running Page 723;
c. *Kalpana Mehta & Ors. v. Union of India & Ors.*, (2018) 7 SCC 1, Paragraph 43, running Page 792;
d. *Suresh Seth v. Commissioner, Indore Municipal Corporation & Ors.*, MANU/SC/2491/2005, Paragraph 5, running Page 938;
e. *Census Commissioner v. R. Krishnamurthy*, MANU/SC/0999/2014, Paragraph 21, running page 945;
f. *Anuja Kapur v. Union of India & Ors.*, Paragraph 3, running Page 1148;
g. *Madhu Kishwar & Others vs. State of Bihar & Others* (1996 (5) SCC 125), Paragraph 5 at Page 143 of the extract being today. filed along with the instant Written Submissions.

vii. Following is a rebuttal of the case law cited by Ms. Karuna Nundy on the power of Courts to create new offences, none of which bear out her position:

a. Paragraph 108 of *Devidas Ramachandra Tuljapurkar v. State of Maharashtra* (2015) 6 SCC 1- This judgement was cited as an example of Courts having the power to create offences when, in fact, this was a case of purposive interpretation of Section 292 of the IPC to assess if a *prima facie* case of obscenity was made out in the facts of that case. Critically, in Paragraph 141(d-f), the Court clearly held as follows:

*"In the context of obscenity, the provision enshrined under Section 292 IPC has its room to play.* ***We have already opined that by bringing in a historically respected personality to the arena of Section 292 IPC, neither a new offence is created nor an ingredient is interpreted."***

b. Paragraphs 16, 18, 19, 42 and 45 *Hiral P. Harsora and Ors. versus Kusum Narottamdas Harsora and Ors.* (2016) 10 SCC 65- This was

once again a case where the Supreme Court purposively interpreted the definition of 'respondent' in Section 2(q) of the Domestic Violence Act of 2005 to enlarge the scope of "adult male" as used in the definition of 'respondent' to include women and make it gender neutral. In doing so, the Apex Court expressly noted that since the tone and tenor of the DV Act was gender neutral, the words "adult male person" in the definition of "respondent" included women. Critically, unlike Exception 2 to Section 375 which provides an express marital exception, there was no express exception in the DV Act which provided immunity to women from being prosecuted for domestic violence. Clearly, this is in no way comparable to the issue at hand in the instant Petitions wherein the Court is seized of the constitutionality of an express exception to rape which is consistently observed throughout the IPC.

c. Paragraphs 14, 15, 19, 26 and 40 of *Balram Kumawat vs Union of India & Ors.* (2003) 7 SCC 628 – It is indeed surprising that this judgement has been cited in support of the Petitioners' position since the facts once again reveal a case of purposive interpretation. In the said judgement, the question before the Apex Court was whether 'mammoth ivory' imported in India would fall within the scope of 'ivory imported in India' as contained in Wild Life (Protection) Act, 1972. Noting that the word ivory was all encompassing and did not in any way exclude "mammoth ivory" or limit itself to "elephant ivory", the Supreme Court held that ivory of all kinds fell within the ambit of the word. Here are a few relevant findings:
*Para 14. Fifth line- The law in no uncertain terms says that no person shall trade in ivory. It does not say that what is prohibited is trade in elephant ivory or other types of ivory. The purport and object of the Act, as noticed in the judgment in Indian Handicrafts Emporium (supra), is that nobody can carry on business activity in imported ivory so that while doing so, trade in ivory procured by way of poaching of elephants may be facilitated. The Parliament, therefore, advisedly used the word 'ivory' instead of elephant ivory. The intention of the Parliament in this behalf, in our opinion, is absolutely clear and unambiguous. We cannot assume that the Parliament was not aware of existence of different types of ivory. If the intention of the Parliament was to confine the subject matter of ban under Act 44 of 1991 to elephant ivory, it would have said so explicitly.*

*Para 15. As noticed hereinbefore, the object of the Parliament was not only to ban trade in imported elephant ivory but ivory of every description so that poaching of elephant can be effectively restricted.*

In addition to the above findings, what is also critical to note is that, once again unlike the express Exception 2 to Section 375 which provides immunity to marital relationships from the definition of "rape", there was no express exception in favour of mammoth ivory from the definition of ivory. In other words, the said case did not involve or result in creation of a new species of offence or enlarging the scope of the offence as it existed.

vi. From the above, it is evident that the Petitioners have laboured hard to stretch the applicability of existing judgements, and yet have not been able to place a single judgement that supports their position. This leaves us with the bedrock of the Petitioners' case, namely the *Independent Thought* judgement, which too, as shall be seen, does not aid the Petitioners in any manner. If anything, it expressly goes against their contention.

**B. The Petitioners' Misplaced Reliance on *Independent Thought v. Union of India* and the Inversion Test**

5. The case of the Petitioners hinges on the misplaced reliance on the Supreme Court's judgement in *Independent Thought v. Union of India* (2017) 10 SCC 800, and the torturous and forced application of the Inversion Test to the observations made in the said judgement. The very backdrop of the said judgement was limited which is evident from its Paragraph 1:

*"1. The issue before us is **limited** but one of considerable public importance – **whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape**? Exception 2 to Section 375 of the Indian Penal Code, 1860 (the IPC) answers this in the negative, but in our opinion sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The exception carved out in the IPC creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and is definitely not in the best interest of the girl child. The artificial distinction is contrary to the philosophy and ethos of Article 15(3) of the Constitution as well as contrary to Article 21 of the Constitution and our commitments in international conventions. It is also contrary to the philosophy behind some*

*statutes, the bodily integrity of the girl child and her reproductive choice. What is equally dreadful, the artificial distinction turns a blind eye to trafficking of the girl child and surely each one of us must discourage trafficking which is such a horrible social evil."*

This is the clear and limited context in which the *Independent Thought* judgement was delivered. The Petitioners' reliance on the said judgement to make the argument that it is an authority on the power of the judiciary to create a new species of offence is completely misplaced in view of the following observations:

*"IS THE COURT CREATING A NEW OFFENCE?*
*81. One of the doubts raised was if this Court strikes down, partially or fully, Exception 2 to Section 375 IPC, is the Court creating a new offence.* ***There can be no cavil of doubt that the Courts cannot create an offence. However, there can be no manner of doubt that by partly striking down Section 375 IPC, no new offence is being created. The offence already exists in the main part of Section 375 IPC as well as in Section 3 and 5 of POCSO. What has been done is only to read down Exception 2 to Section 375 IPC to bring it in consonance with the Constitution and POCSO****."*

6. This takes us to the fact that the *Independent Thought* judgement was delivered in the specific backdrop of a clear conflict between the POCSO Act/PCMA and Exception 2 to Section 375 in so far as it related to girls in the 15-18 years age group. Pertinently, since POCSO defines a child as a person below the age of 18 years and its Section 42A has an overriding effect over all other legislations, Exception 2 to Section 375 was clearly at loggerheads with POCSO in so far as it provided immunity to men who were married to girls under the age of 18 years. The Hon'ble Supreme Court also referred to Section 198(6) of the CrPC and drew from the amendment to the age of the wife under it , to read down Exception 2 to Section 375 for a girl child between 15 - 18 years of age. This obvious lacuna and inconsistency had to be addressed by reading down the Exception to the extent it related to a girl child under the age of 18. Extracted below is the relevant portion of the judgement:

*"LAW IN CONFLICT WITH POCSO*
*79. Another aspect of the matter is that the POSCO was enacted by Parliament in the year 2012 and it came into force on 14th November, 2012. Certain amendments were made by Criminal Law Amendment Act of 2013, whereby Section 42 and Section 42A, which have been enumerated above, were added. It would be pertinent to note that these amendments in POCSO were*

*brought by the same Amendment Act by which Section 375, Section 376 and other sections of IPC relating to crimes against women were amended. The definition of rape was enlarged and the punishment under Section 375 IPC was made much more severe. Section 42 of POCSO, as mentioned above, makes it clear that where an offence is punishable, both under POCSO and also under IPC, then the offender, if found guilty of such offence, is liable to be punished under that Act, which provides for more severe punishment. This is against the traditional concept of criminal jurisprudence that if two punishments are provided, then the benefit of the lower punishment should be given to the offender. The legislature knowingly introduced Section 42 of POCSO to protect the interests of the child. As the objects and reasons of the POCSO show, this Act was enacted as a special provision for protection of children, with a view to ensure that children of tender age are not abused during their childhood and youth. These children were to be protected from exploitation and given facilities to develop in a healthy manner. When a girl is married at the age of 15 years, it is not only her human right of choice, which is violated. She is also deprived of having an education; she is deprived of leading a youthful life. Early marriage and consummation of child marriage affects the health of the girl child. All these ill effects of early marriage have been recognised by the Government of India in its own documents, referred to hereinabove.*

*80. Section 42A of POCSO has two parts. The first part of the Section provides that the Act is in addition to and not in derogation of any other law. Therefore, the provisions of POCSO are in addition to and not above any other law.* ***However, the second part of Section 42A provides that in case of any inconsistency between the provisions of POCSO and any other law, then it is the provisions of POCSO, which will have an overriding effect to the extent of inconsistency. POCSO defines a child to be a person below the age of 18 years. Penetrative sexual assault and aggravated penetrative sexual assault have been defined in Section 3 and Section 5 of POCSO. Provisions of Section 3 and 5 are by and large similar to Section 375 and Section 376 of IPC. Section 3 of the POCSO is identical to the opening portion of Section 375 of IPC whereas Section 5 of POCSO is similar to Section 376(2) of the IPC. Exception 2 to Section 375 of IPC, which makes sexual intercourse or acts of consensual sex of a man with his own "wife" not being under 15 years of age, not an offence, is not found in any provision of POCSO. Therefore, this is a major inconsistency between POCSO and IPC. As provided in Section 42A, in case of such an inconsistency, POCSO will prevail. Moreover, POCSO is a special Act, dealing with the children whereas IPC is the general criminal law. Therefore, POCSO will prevail over IPC and Exception 2 in so far as it relates to children, is inconsistent with POCSO."***

7. Further, there is no merit in the Petitioners' contention that by applying the Inversion Test to the *Independent Thought* judgement, it is possible to arrive at the conclusion that the State cannot advance the sanctity of the marital institution between adults to defend Exception 2. This is because, every observation of the Supreme Court in *Independent Thought* dismissing the marital institution argument was *in relation to a girl child under the age of 18*, and not remotely to a marriage between adults. This is evident from the following paragraphs of *Independent Thought*:

"*81. During the course of oral submissions, three further but more substantive justifications were given by learned counsel for the Union of India for making this distinction. The first justification is that by virtue of getting married, the girl child has consented to sexual intercourse with her husband either expressly or by necessary implication. The second justification is that traditionally child marriages have been performed in different parts of the country and therefore such traditions must be respected and not destroyed.* ***The third justification is that paragraph 5.9.1 of the 167th report of the Parliamentary Standing Committee of the Rajya Sabha (presented in March 2013) records that several Members felt that marital rape has the potential of destroying the institution of marriage.***

*82. In law, it is difficult to accept any one of these justifications.* ***There is no question of a girl child giving express or implied consent for sexual intercourse. The age of consent is statutorily and definitively fixed at 18 years and there is no law that provides for any specific deviation from this. Therefore unless Parliament gives any specific indication (and it has not given any such indication) that the age of consent could be deviated from for any rational reason, we cannot assume that a girl child who is otherwise incapable of giving consent for sexual intercourse has nevertheless given such consent by implication, necessary or otherwise only by virtue of being married. It would be reading too much into the mind of the girl child and assuming a state of affairs for which there is neither any specific indication nor any warrant. It must be remembered that those days are long gone when a married woman or a married girl child could be treated as subordinate to her husband or at his beck and call or as his property.*** *Constitutionally a female has equal rights as a male and no statute should be interpreted or understood to derogate from this position. If there is some theory that propounds such an unconstitutional myth, then that theory deserves to be completely demolished.*

*83. **Merely because child marriages have been performed in different parts of the country as a part of a tradition or custom does not necessarily mean that the tradition is an acceptable one nor should it be sanctified as such. Times change and what was acceptable the few decades ago may not necessarily be acceptable today**….*

*87. **We have adverted to the wealth of documentary material which goes to show that an early marriage and sexual intercourse at an early age could have detrimental effects on the girl child not only in terms of her physical and mental health but also in terms of her nutrition, her education, her employability and her general well-being. To make matters worse, the detrimental impact could pass on to the children of the girl child who may be malnourished and may be required to live in an impoverished state due to a variety of factors. An early marriage therefore could have an inter-generational adverse impact. In effect therefore the practice of early marriage or child marriage even if sanctified by tradition and custom may yet be an undesirable practice today with increasing awareness and knowledge of its detrimental effects and the detrimental effects of an early pregnancy. Should this traditional practice still continue? We do not think so and the sooner it is given up, it would be in the best interest of the girl child and for society as a whole.***

*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.***

*91****. Looked at from another perspective, the PCMA actually makes child marriages voidable and makes the parties to a child marriage (other than the girl child) punishable for an offence under the said Act.*** *For someone who supports the institution of marriage, nothing could be more destructive of the institution of marriage than the PCMA which makes a child marriage voidable and punishable on the one hand and on the other, it otherwise collaterally legitimizes the pernicious practice of child marriages. It is doubtful if the Parliamentary Standing Committee intended such a situation along with its attendant adverse and detrimental impacts and so we leave it at that.*

***92. Assuming some objective is sought to be achieved by the artificial distinction, the further question is: what is the rational nexus between decriminalizing sexual intercourse under the IPC with a married girl child and an unclear and uncertain statutory objective? There is no intelligible answer to this question particularly since sexual intercourse with a married girl child is a criminal offence of aggravated penetrative sexual assault under the POCSO Act."***

8. From the above extracted discussion, it is evident that the fulcrum/*ratio decidendi* of the *Independent Thought* judgement is that it is in relation to the treatment of a girl child to address the stark inconsistency between POCSO, PCMA (which criminalises child marriage) on the one hand, and Exception 2 to Section 375 on the other. It is also evident that the Apex Court dismissed the marital institution exception as a justification *only* in the context of a girl child under the age of 18, but not in relation to marriage between adults. In other words, the proposition of law that the Petitioners wish to advance based on *Independent Thought* does not even find support in the said judgement. What makes matters abundantly clear is the fact that Supreme Court clarified more than once in *Independent Thought* that it was not remotely commenting on the issue of marital rape. Following are the relevant paragraphs which establish that the application of the Inversion Test by the Petitioners to the issue at hand, namely non-consensual sex between adults in a marriage, citing *Independent Thought* is an exercise in futility, apart from being blatant misrepresentation of the judgement:

   *2. We make it clear that we have refrained from making any observation with regard to the marital rape of a woman who is 18 years of age and above since that issue is not before us at all. Therefore, we should not be understood to advert to that issue even collaterally.*

   *5. A husband who commits rape on his wife, as defined under Section 375 of the IPC, cannot be charged with the said offence as long as the wife is over 15 years of age. It may be made clear that this Court is not going into the issue of "marital rape" of women aged 18 years and above and the discussion is limited only to "wives" aged 15 to 18 years…*

9. Further, even where the Court discussed marital rape in general terms, it proceeded to connect it to the issue of a girl child which is evident from the following paragraphs:

   *71. **While we are not concerned with the general question of marital rape of an adult woman but only with marital rape of a girl child between 15 and 18 years of age in the context of Exception 2 to Section 375 of the IPC, it is worth noting the view expressed by the Committee on Amendments to Criminal Law chaired by Justice J.S. Verma (Retired)**. In paragraphs 72, 73 and 74 of the Report it was stated that the out-dated notion that a wife is no more than a subservient chattel of her husband has since been given up in the United Kingdom. Reference was also made to a decision of the European*

*Commission of Human Rights which endorsed the conclusion that "a rapist remains a rapist regardless of his relationship with the victim." The relevant paragraphs of the Report read as follows:*

*"72. The exemption for marital rape stems from a long-outdated notion of marriage which regarded wives as no more than the property of their husbands. According to the common law of coverture, a wife was deemed to have consented at the time of the marriage to have intercourse with her husband at his whim. Moreover, this consent could not be revoked. As far back as 1736, Sir Matthew Hale declared: 'The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract'.*

*73. This immunity has now been withdrawn in most major jurisdictions. In England and Wales, the House of Lords held in 1991 that the status of married women had changed beyond all recognition since Hale set out his proposition. Most importantly, Lord Keith, speaking for the Court, declared, 'marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband.'*

*74. Our view is supported by the judgment of the European Commission of Human Rights in C.R. v UK [C.R. v UK Publ. ECHR, Ser.A, No. 335-C] which endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim. Importantly, it acknowledged that this change in the common law was in accordance with the fundamental objectives of the Convention on Human Rights, the very essence of which is respect for human rights, dignity and freedom. This was given statutory recognition in the Criminal Justice and Public Order Act 1994." (Emphasis supplied by us)*

*72. In Eisenstadt v. Baird21 the US Supreme Court observed that a "marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."*

*73. On a combined reading of C.R. v. UK and Eisenstadt v. Baird it is quite clear that a rapist remains a rapist and marriage with the victim does not convert him into a non-rapist. Similarly, a rape is a rape whether it is described as such or is described as penetrative sexual assault or aggravated 21 405 US 438, 31 L Ed 2d 349, 92 S Ct 1092 penetrative sexual assault. A rape that actually occurs cannot legislatively be simply wished away or legislatively denied as non-existent.* ***Harmonizing the IPC, the POCSO Act, the JJ Act and the PCMA, there is an apparent conflict or incongruity between the provisions of***

***the IPC and the POCSO Act. The rape of a married girl child (a girl child between 15 and 18 years of age) is not rape under the IPC and therefore not an offence in view of Exception 2 to Section 375 thereof but it is an offence of aggravated penetrative sexual assault under Section 5(n) of the POCSO Act and punishable under Section 6 of that Act. This conflict or incongruity needs to be resolved in the best interest of the girl child and the provisions of various complementary statutes need to be harmonized and read purposively to present an articulate whole."***

10. To remove any iota of doubt as to whether any part of the judgement, *ratio decidendi* or *obiter dicta,* was meant to comment on the issue of marital rape between adults, Justice Madan Lokur categorically observed as follows:

    *106. We make it clear that we have not at all dealt with the larger issue of marital rape of adult women since that issue was not raised before us by the petitioner or the intervener.*

    Justice Deepak Gupta too observed as follows:

    *90. At the cost of repetition, it is reiterated that nothing said in this judgement shall be taken to be an observation one way or the other with regard to the issue of "marital rape".*

11. In light of the above clear findings and observations by both the Hon'ble Judges of the Supreme Court who co-authored *Independent Thought*, there is no room whatsoever for applying the Inversion Test to undermine or dislodge the reason behind Exception 2, namely protection of the marital institution between adults. This explains the Petitioners' invitation to this Hon'ble Court, as an alternative argument, to build on the *obiter dicta* in *Independent Thought* to dislodge the marital exception. However, even this is impermissible given that the Supreme Court has underscored at least thrice that its observations, including *obiter dicta, do not relate* to the larger issue of marital rape between adults in one way or another. The reason for the Supreme Court's reticence on the subject is justified given that neither was it an issue before it in the said judgement, nor could the Court have created a new species of offence even in exercise of its powers under Article 141. Therefore, the Petitioners' best case, namely the *Independent Thought* judgement, too does not come to their aid. As stated earlier, it supports the position of the Intervenor on immutable constitutional fetters on a Court in matters of criminalisation.

12. This takes us to the next limb of the Petitioners' argument, namely that their prayers do not result in the creation of a new offence or a new species of offence, but merely enlarge the scope of offenders which is permissible in law. In other words, this was an attempt on the part of the Petitioners to try and force-fit the issue at hand in the same category as the judgements cited by them which involved purposive construction of existing offences. It shall be demonstrated hereinbelow that this argument too does not hold water in view of the consistent and express treatment of the institution of marriage by the Legislature as deserving of a *sui generic* treatment.

**C. The Legislative Intent behind the *Sui Generic* Treatment of Spousal Sexual Violence and its Constitutional Validity**

13. It is humbly submitted that before proceeding to demonstrate the validity of Exception 2 to Section 375, and Section 376B of the IPC, the Petitioners' contention of Exception 2 being a colonial provision which lacks presumption of constitutionality, needs to be rebutted. While it is true that the provision is part of the Code of 1860 which is a colonial inheritance, Article 13(1) effectively acts as a bridge between pre-constitution laws and the Constitution by taking the clear position that such laws shall be void to the extent that they are inconsistent with the provisions of Part III. Clearly, such inconsistency cannot be presumed at the outset but must be demonstrated by the challenger. While the Petitioners have placed reliance on Paragraph 90 of *Navtej Johar* in support of their contention, it is humbly submitted that the Supreme Court's finding in this regard is *per incuriam* for the following reasons:

    i. First, while the Supreme Court has discussed Article 372(2) and the dissenting judgement of Ahmadi C.J in *New Delhi Municipal Council v. State of Punjab and Ors.,* (1997) 7 SCC 339 to conclude that pre-constitutional laws do not enjoy the same degree of presumption of constitutionality, the appropriate provision which ought to have been discussed is Article 13(1). In fact, there is no discussion undertaken by the Apex Court on Article 13(1) in *Navtej Johar* despite quoting *John Vallamattom v. Union of India* AIR 2003 SC 2902 which discusses the said Article;

    *ii.* Second, although the Supreme Court in *Navtej Johar* made a reference to *Chiranjitlal Chowdhuri v. Union of India and Ors.* 1950 SCR 869, the fact that *Chiranjit* attached presumption of constitutionality to a pre-constitutional enactment was not dealt with. Similarly, the decision of *State of Bombay and Anr. v. F.N.*

*Balsara* 1951 SCR 682 which too dealt with a pre-constitutional enactment, to which the presumption of constitutionality was attached unanimously by a Constitution Bench, was not considered in *Navtej Johar.* Another judgement which was not considered and which related to a pre-constitutional enactment is *Reynold Raiamani and Another vs. Union of India and Another* (1982) 2 SCC 474 which dealt with the Divorce Act of 1869.

In light of the above, a question of constitutional import has arisen which must be referred to the Supreme Court, namely whether the Supreme Court's observation regarding the presumption of constitutionality not attaching to pre-constitution laws is good law?

14. In any case, coming back to the instant case, it needs to be pointed out that Section 376B of the IPC and Sections 198B are post-constitutional laws, and therefore enjoy the presumption of constitutionality. As regards Exception 2 to Section 375, despite calls for recognition of marital rape and to do away with the said Exception, the Legislature has not only retained the said provision but has also cited the institution of marriage and the existence of other criminal remedies as reasons for retaining the said Exception. Therefore, the Exception has received legislative attention post the coming into force of the Constitution, thereby entitling it to the same degree of presumptive constitutionality as a post-constitutional enactment. Following are the documents where the Exception has been considered and retained by the Legislature:

   i. Paragraph 5.9.1 of the 167th of the Parliamentary Standing Committee on the Criminal Law (Amendment) Bill, 2012- running Pages 38-39 of the Intervenor's case compilation;
   ii. The integral link between Exception 2 and Section 376B has been captured clearly in the 19th Report of the Lok Sabha's Committee on Empowerment of Women in Paragraph 1.64 (internal page 31, running Page 212 of the compilation);
   iii. Despite the recommendation of the Justice J.S. Verma Committee Report to remove the marital rape exception in 2013, the said Exception was retained, thereby establishing the conscious Legislative intent behind the retention of the Exception. Paragraph 79 of the Report (internal Page 117, running Page 1611 of the compilation);
   iv. In Para 3.1.2.1 of the 172nd Law Commission Report (2000), the Commission specifically expresses its disagreement with the suggestion to remove the Exception citing "excessive interference

with the marital relationship" (internal Pages 22-23, running Pages 2367-2368 of the compilation).

15. In light of the above, regardless of the position of law on presumptive constitutionality of pre-constitutional laws, it is factually incorrect on the part of the Petitioners to contend that Exception 2 to Section 375 remains a "colonial" provision or that it retains the baggage of the English doctrine of coverture under which the wife is treated as the property of the husband. In fact, the Petitioners have not placed a single document on record to demonstrate that post the coming into force of the Constitution, the Legislature has retained Exception 2 citing the doctrine of coverture or for treating wives as the husbands' chattel. In the absence of any such supporting material, to use "patriarchy" as the argument against Exception 2 and to impute it to the Indian Legislature as well as the Indian society at large, is to project colonial attitudes onto the Bharatiya society without basis. In short, baseless and slavishly imported rhetoric cannot replace cogent and evidence-based legal arguments.

16. It is evident from the above material that not only do Exception 2 to Section 375 and Section 376B enjoy presumptive constitutionality, it is also evident that there is a clear legislative intent behind the retention of the former and the introduction of the latter, both of which are connected. In other words, neither provision suffers from manifest arbitrariness or unreasonableness or a discriminatory streak which must be demonstrated if they are to be struck down on the touchstones of Articles 14, 15, 19 and 21. On the constitutional validity of the said provisions and the burden which the Petitioners must discharge to demonstrate unconstitutionality, following are the Intervenor's submissions:

    i. Under the IPC, sexual offences fall under Chapter XVI of the IPC that relates to offences affecting the human body, while offences relating to marriage and cruelty by husband or relatives of the husband fall under Chapters XX and XXA respectively. Sexual offences committed by non-spouses/strangers attract Section 375, gangrape attracts Section 376D, those by persons in position of authority attract Section 376C, unnatural offences by anyone without exception attracts Section 377, sexual offences committed by a husband while remaining a husband attracts Section 498A and sexual offences committed by him after legal separation or *de facto* separation attracts Section 376B. Even within Section 376(2), a host of *dramatis personae* are identified for whom a punishment of not less than 10 years and maximum punishment of life imprisonment

is prescribed. By virtue of Section 114A of the Evidence Act, in such cases the victim's word alone is sufficient on the issue of consent if sexual intercourse within the meaning of clauses a-d of Section 375 has indeed occurred. Despite the fact that the husband may fall under certain categories in Section 376(2) or Section 376C, a specific provision has been created for husbands, namely Section 376B. Clearly, there is a pattern and legislative intent behind the said framework;

ii. Striking down of Exception 2 to Section 375 will have the effect of rendering the fourthly to Section 375 otiose since it is predicated on natural conjugal relations between spouses. That said, the husband is *not* given a free pass with respect to unnatural offences under Section 377 or even sexual cruelty under Section 498A which is broad enough to encompass non-consensual sex/spousal sexual violence. Therefore, there is no merit in the contention that the legal framework as it stands today does not recognise the need for consent in spousal sex. That said, the framework does recognise the need for a differential treatment owing to the nature of the relationship as well as the difficulty in establishing lack of consent where there is no legal separation or *de facto* separation within the meaning of Section 376B;

iii. It is submitted that a combined reading of clauses a-d of Section 375 and the Explanation to Section 376B makes it clear that all acts which fall within clauses a-d of Section 375 are deemed "sexual intercourse" and are not *per se* illegal and are outside the remit of unnatural offences within the meaning of Section 377. What makes such acts illegal is the satisfaction of any one of the seven circumstances enumerated in Section 375 or the absence of consent between a separated couple within the meaning of Section 376B. In other words, consent is not the sole deciding factor, but circumstance/context determines the nature of consent or its absence. This is not a "patriarchal" consideration but a "practical" one since it is practically impossible to establish the absence of consent given the nature of intimacy that is associated with the institution of marriage and the absence of eyewitness accounts (hopefully) to the conjugal relations of a couple. This is precisely why absence of consensual conjugal relations is easier to presume in the event of legal or *de facto* separation under Section 376B. This is also the reason why a preliminary enquiry of sorts under Section

198B of the CrPC is undertaken to assess if a couple lives apart although living under the same roof;

iv. Given the times we live in and the age of sexual liberation, it is not even possible to arrive at the conclusion of either sexual cruelty or non-consensual sex between couples since imagination is allowed a free run between consenting adults especially after the *Navtej Johar* verdict. In other words, even the presence of bruises/injuries cannot lead to adverse conclusions for they could be merely marks of passion which none has the right to judge. Such being the case, to be able to arrive at the conclusion of forced sex/non-consensual sex/spousal sexual violence is an extremely delicate task which requires the State to balance individual dignity and the real possibility of abuse of legal remedies which too harms individual dignity;

v. The argument that consent alone matters and marriage changes nothing in this regard, is legally and practically baseless. The factum of marriage translates to serious obligations on the part of the partners, from conjugal expectations and rights to financial obligations, mental health obligations and finally duty towards the progeny. Considering this, to contend that the institution of marriage cannot form the basis of Exception 2 to Section 375 is to deny the obvious. Further, it is evident from the language of Section 375 and Section 376B that 'will' and 'consent' are related but not identical, which explains the reason behind the use of "without consent" in the latter provision. In a marital relationship, since conjugal expectations are a two-way street, partners may choose to accede to each other in matters of sex out of a variety of considerations, not all of which necessarily amount to cruelty. In such circumstances, 'consent' is given as a matter of spousal intimacy, although 'will' may be absent. If every such instance were to be treated as a cut-and-dried instance of "marital rape", the only way partners in a marriage or spousal-like relationships can ever hope to have sex without the fear of accusations of rape is by drawing a detailed written agreement on the steps to be observed for courtship or mating, or by creating a detailed evidentiary record of every act of intimacy, or by inviting a third party to act as a witness, none of which is healthy for the survival of the institution of marriage. This would be the precise consequence of a blinkered approach to consent without context getting its due;

vi. It is further submitted that apart from the remedies under the IPC, the victim of spousal sexual violence can invoke the gender-specific, Protection of Women from Domestic Violence Act of 2005 whose Section 3 includes sexual abuse within the meaning of domestic violence and further declares that "sexual abuse" includes *any conduct* of a *sexual nature* that abuses, humiliates, degrades or otherwise violates the dignity of woman. Clearly, this includes non-consensual sex. The Petitioners' contention that this Act provides only for civil remedies is misplaced since 19(2) of the said Act clearly empowers the Magistrate to "*pass any other direction which he may deem reasonably necessary to protect or to provide for the safety of the aggrieved person*". In fact, as a matter of practice, in such instances directions are regularly passed for registration of FIR under Sections 498A, 376B and 377 of the IPC. Therefore, it is incorrect to claim absence of criminal remedies. As for their sufficiency/adequacy, as stated earlier, this is strictly a matter of legislative policy which the Court cannot step into. Further, the difference in punishment for spousal sexual violence and other safeguards such as time limitation is a conscious legislative call taking into account the special status of marital relationships accorded under the IPC and the DV Act;

vii. From the above submissions, it is evident that Exception 2 to Section 375 and Section 376B are based on treating spousal sexual violence as a species distinct from rape within the meaning of Section 375. Therefore, it is not possible for the Petitioners to contend that striking down of Exception 2 merely results in enlarging the scope of offenders without creating a new offence or a species thereof. Given the *sui generic* treatment of sexual offences committed in marital relations, the difference is one of 'offence' and not offender. In other words, the legislative intent behind Exception 2 to Section 375 is to not use the prism of rape in the context of spousal relationships either from a substantive perspective or from the point of view of labelling of the offence. In this regard, the Petitioners have relied on the judgment of *Queen-Empress v. Kandhaia and Others* 1884 SCC OnLine All 142 and *S. Khushboo v. Kanniammal & Another* (2010) 5 SCC 600 to argue in the context of Section 40 of the IPC that the IPC recognises only an offence which is synonymous with a prohibited 'act' and does not recognise a distinction based on the offender or the context. This reliance is entirely misplaced since the IPC contains several

provisions whereunder the same 'act' committed by different *dramatis personae* takes a different shape or results in a different outcome. For instance, the starkest distinction based on the offender is the one that is struck between adults and juveniles, which equally extends to sexual offences. The said distinction is observed both from the perspective of the victim as well as from that of the accused. The existence of the POCSO Act despite provisions relating to sexual offences in the IPC is the clearest proof that the definition of offence under Section 40 of the IPC is not blind to context, relationship, age or any other valid consideration. Simply put, the Petitioners argument that its prayers merely seek enlargement of the class of offenders is baseless in light of the legislative reticence to use 'rape' in the context of spousal relationships. Accordingly, none of the case laws cited by the Petitioners which permits a Court to enlarge the class of offenders is applicable to the instant case. This also addresses the question of fair labelling of an offence since the Legislature has consciously avoided using "rape" in the context of a spousal relationship, not to protect the spouse, but those connected with them, namely the families and the products/issues of the marriage – the progeny;

viii. Also, it is clear that Exception 2 to Section 375 and Section 376B are reasonable, constitutional and not manifestly arbitrary for the purposes of assessment under Articles 14, 15, 19 and 21. Protection of the marital institution is a legitimate State interest in our society and the mores/values of other countries/societies cannot be foisted on this society. In any case, the current state of public morality on such issues can be determined only by the Legislature and not the Court. Further, every policy disagreement cannot rise up to the high threshold of unconstitutionality and Courts cannot be used as instrumentalities to upset a policy decision merely because a certain cross-section of the society disagrees with it. After all, disagreement is to be expected in a democracy, but not all disagreements satisfy the requirements of showing unconstitutionality of the provision. Critically, it is not for the Judiciary or its members to treat such disagreements with a policy decision, as proof of unconstitutionality. The decisions of the Legislature must be preserved and defended to the extent possible, and where necessary, through purposive interpretation. In support of the above position, the Intervenors place reliance on the following judgements:

A. *Government of Andhra Pradesh & ors. v. P. Laxmi Devi*, MANU/SC/1017/2008, Paragraphs 31-74, running Pages 504-516 of the compilation;
B. *Mohd. Hanif Quareshi and Ors. v. State of Bihar*, MANU/SC/0027/1958, Paragraph 22, running Page 527;
C. *Sunil Batra v. Delhi Administration and Ors.*, MANU/SC/0184/1978, Paragraph 44, Page 2257;
D. *Joseph Shine v. Union of India,* MANU/SC/1074/2018, Paragraph 150, running page 2219;
E. *Ram Krishna Dalmia Vs. Justice S.R. Tendolkar and Ors.*, MANU/SC/0024/1958, Paragraphs 13-14, running Page 2136;
F. *State of Bihar and Ors. Vs. Bihar Distillery Ltd. and Ors.*, MANU/SC/0354/1997, Paragraph 17, running Page 636;
G. *Bombay Dyeing and Mfg. Co. Ltd. Vs. Bombay Environmental Action Group and Ors.*, MANU/SC/1197/2006, Paragraph 204, running Page 594;
H. *Beeru Vs. State NCT of Delhi,* MANU/DE/4563/2013, Paragraphs 36-37, running Page 365.

**D. International Position**

17. Since the Petitioners have sought application of "international norms and standards" on the subject in Bharat, attention of this Hon'ble Court is drawn to the Sexual Offenses Act of 2003 of the UK. Under Section 1 of the said Act, it is critical to note that the accused has the right to raise the defense that he was under the reasonable belief that sexual intercourse with the alleged victim was consensual. This indicates an in-built safeguard in the ingredients of rape. Critically, Section 23 of the Act exempts spouses and civil partners from the application of Sections 16 to 19 which deal with abuse of Position of Trust (running Page 2374 of the compilation). The Act also spells out the evidentiary standards and circumstances in which conclusive presumptions may be drawn (Pages 2395 and 2398 of the Intervenor's compilation). The standard operating procedure for prosecution of cases of rape are spelt out on Pages 2325 and 2334 of the compilation. Critically, this legislation is the product of legislative action, and not judicial intervention, apart from being gender neutral. As for the judgement cited in the *Khushboo Saifi* petition, namely *European Court of Human Rights in C.R. Versus the United Kingdom* Application Number: 00020190/92, dated November 22,1995, the said judgement was delivered in the context of a separated couple wherein the estranged husband had imposed himself on his former wife. Such a situation is squarely covered by Section 376B of the IPC.

18. Contrary to the impression sought to be given by the Petitioners, in Nepal a petition similar to the Petitions at hand was quashed. Please refer to Page 4 of Written Submissions filed by the Intervenor on March 12, 2018. Further, a number of procedural safeguards were brought in by Nepal when the law on spousal sexual violence was finally introduced by its Legislature. Such safeguards include initiation of a legal proceeding within 35 days of the alleged commission of the offence. Further, Nepal's legislation is gender neutral Please see page 48 - 52 of compilation dated January 12, 2022].

19. In the United States of America, different States have taken varying positions. For instance, in the State of Maryland, spousal defence is recognised Please see page 68 of compilation dated January 12, 2022]. Similarly, Connecticut treats spouses differently from strangers Please see page 69 of compilation dated January 12, 2022]. The State of Idaho too recognises special circumstances in which a spouse/partner may be prosecuted Please see page 70 – 72 of compilation dated January 12, 2022]. In each of these States, the Legislation was not introduced by the Judiciary. The position of law on the subject in the US States of Nevada, Rhode Island, Oklahoma, South Carolina and Virginia is also presented at the Intervenor's compilation dated January 12, 2022 at 73 – 80.

20. As for the international instruments cited by the Petitioners, none of the instruments envisage creation of offences by the Judiciary and critically, they address the issue of sexual dignity and violence in gender neutral terms, which goes against the position of the Petitioners herein.

**E. Conclusion**

21. In conclusion, it is reiterated that the Intervenor is not opposed to recognition of spousal sexual violence. Its limited position is that spousal sexual violence already stands criminalised, as discussed above, and therefore any grievances relating to the inadequacy of the same can be addressed only by the Legislature and not the Judiciary. This is because inadequacy or perceived inadequacy is a matter of legislative policy and not a ground for constitutional challenge. Further, it is the position of the Intervenor that it is possible to protect individual dignity and the marital institution without sacrificing one for the other. Finally, a gender-neutral approach to such issues would be consistent with calls for gender equity.

Date: March 2, 2022 | Drawn by: Advocate J. Sai Deepak

Place: New Delhi | Filed by: Priyanka Agarwal, Shaktiki Sharma,

Pragya Parijat Singh and Avinash Kumar Sharma

IN THE HON'BLE HIGH COURT OF DELHI
*(EXTRAORDINARY CIVIL WRIT JURISDICTION)*

**Writ Petition (Civil) No. 284 of 2015**

**IN THE MATTER OF:**

RIT Foundation …Petitioner

*Versus*

Union of India …Respondent

**INDEX**


| S. No. | Particulars | Page No. |
|---|---|---|
| 1. | 167th Standing Committee report on Criminal Amendment Bill 2021<br>***Para 3.3.35*** | **1-4** |
| 2. | State of U.P. Vs Chhoteylal<br>(AIR 2011 SC 697 \| MANU/SC/0053/2011)<br>***Para 13,15*** | **5-7** |
| 3. | Deelip Singh Vs State of Bihar<br>(AIR 2000 SC 203 \| MANU/SC/0948/2004)<br>***Para 15*** | **8-9** |
| 4. | Committee on Empowerment of Women 19th Report (**Section 376B**) | **10-11** |
| 5. | Beeru Vs State NCT of Delhi<br>(2014 (1) JCC 509 \| MANU/DE/4563/2013)<br>***Para.1 36, and 37*** | **12-13** |
| 6. | Saregama India Limited Vs Next Radio Limited & Ors.<br>(2021(6) ALD 1 \| MANU/SC/0723/2021)<br>***Para 20(12,14) & 21*** | **14-16** |
| 7. | Social Action Forum for Manav Adhikar & Ors. Vs Union of India & Ors.<br>(AIR 2018 SC 4273 \| MANU/SC/0987/2018)<br>***Para 36*** | **17-19** |
| 8. | Harakchand Ratanchand Banthia & Ors. Vs UOI & Ors.<br>(AIR1970 SC 1453 \| MANU/SC/0038/1969)<br>***Para 6*** | **20-21** |
| 9. | State of M.P. Vs Rakesh Kohli & Ors. | **22-24** |

| | | |
|---|---|---|
| | (AIR 2012 SC 2351 \| MANU/SC/0443/2012)<br>***Para 13*** | |
| 10. | Government of Andhra Pradesh & Ors. Vs P. Laxmi Devi<br>(AIR 2008 SC 1640 \| MANU/SC/1017/2008)<br>***Para 38*** | **25-28** |
| 11. | Mohd. Hanif Quareshi & Ors. Vs The State of Bihar<br>(AIR 1958 SC 731 \|MANU/SC/0027/1958)<br>***Para 22*** | **29-30** |
| 12. | Bombay Dyeing & Mfg. Co. Ltd Vs Bombay Environmental Action Group & Ors.<br>(AIR 2006 SC 1489 \| MANU/SC/1197/2006)<br>***Para 204*** | **31-32** |
| 13. | State of Bihar & Ors. Vs Bihar Distillery Ltd & Ors.<br>(AIR 1997 SC 1511 \| MANU/SC/0354/1997)<br>***Para 17*** | **33-34** |
| 14. | State of Tamil Nadu & Ors. Vs Ananthi Ammal & Ors.<br>(AIR 1995 SC 2114 \| MANU/SC/0416/1995)<br>***Para 7*** | **35-36** |
| 15. | Indian Express Newspapers (Bombay) Private Ltd Vs UOI and Ors.<br>(AIR 1986 SC 515 \| MANU/SC/0406/1984)<br>***Para 77*** | **37-38** |
| 16. | Indian Drugs & Pharmaceuticals Ltd. Vs Workman, India Drugs & Pharmaceuticals<br>(JT2006 (10) SC216 \| MANU/SC/4993/2006)<br>***Para 18*** | **39-40** |
| 17. | Dhruv Krishan Maggu & Ors. Vs UOI (277(2021)DLT 604 \| MANU/DE/0021/2021)<br>***Para 30*** | **41-42** |
| 18. | Kalpana Mehta & Ors. Vs UOI & Ors.<br>((2018) 7 SCC 1)<br>***Para 43*** | **43-44** |
| 19. | Suresh Seth Vs Commissioner, IndoreMunicipal Corporation & Ors.<br>(AIR 2006 SC 767 \| MANU/SC/2491/2005)<br>***Para 5*** | **45-46** |
| 20. | Census Commissioner vs R. Krishnamurthy | **47-48** |

| | | |
|---|---|---|
| | ((2015) 2 SCC 796 \| MANU/SC/0999/2014)<br>***Para 21*** | |
| 21. | Kartar Singh Vs State of Punjab<br>((1994) 3 SCC 569)<br>***Para 130*** | **49-50** |
| 22. | Anuja Kapur Vs Union of India & Ors. W.P.(C) No. 7256/2019 (Order dated 09.07.2019) | **51-52** |
| 23. | Shayara Bano & Ors. Vs UOI & Ors.<br>(AIR 2017 SC 4609 \| MANU/SC/1031/2017)<br>***Para 282*** | **53-55** |
| 24. | Justice J.S. Verma Committee Report<br>***Para 79*** | **56-57** |
| 25. | Ram Krishna Dalmia Vs Justice S.R. Tendolkar & Ors.<br>(AIR 1958 SC 538 \| MANU/SC/0034/1958)<br>***Para 13, and 14*** | **58-59** |
| 26. | Joseph Shine Vs UOI<br>(AIR 2018 SC 4898 \| MANU/SC/1074/2018)<br>***Para 150*** | **60-61** |
| 27. | Sunil Batra Vs Delhi Administration & Ors.<br>(AIR 1980 SC 1579 \| MANU/SC/0184/1978)<br>***Para 44*** | **62-63** |
| 28. | CPS Policy for Prosecuting Case of Rape<br>***Para 6 (5) 1, 3*** | **64-67** |
| 29. | 172$^{nd}$ Law Commission Report<br>***Para 3.1.2.1*** | **68-70** |
| 30. | Relevant Provision of UK sexual Offences Act of 2003 | **71-98** |
| 31. | State of Maryland: Rape and Spousal offence – Spousal defense | **99** |
| 32. | Law of State of Connecticut<br>***Sec. 53a-70b*** | **100** |
| 33. | State of Idaho, Title 18, Chapter 16, Section 18-6107 | **101-103** |
| 34. | State of Nevada, NRS 200.366: Sexual assault: Definition; penalties; exclusions & NRC 200.373 | **104-105** |
| 35. | Oklahoma Statues Title 21 Section 21-1111A & Section 21-1111B | **106-107** |
| 36. | Rhode Statues Title 11, Chapter 11-37, Section 11-37-2 | **108** |
| 37. | South Carolina Code of Law, Title 16, Chapter 3, | **109** |

| | | |
|---|---|---|
| | Section 16-3-615 | |
| 38. | Code of Virginia, Title 18.2, Chapter 4, Section 18.2-61 | **110-111** |
| 39. | Nepal's Muluki Ain (general code)–2006 Rape Law Amendment | **112-116** |
| 40. | Nepal's The "Domestic Violence (Offence and Punishment) Act, 2066 (2009) [As well as the Amendment of 2010] | **117-125** |
| 41. | Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015' under Section 24 | **126-128** |
| 42. | "The Anti Rape Law of 1997" of the Republic of Philippines | **129-132** |
| 43. | Madhu Kishwar & Ors. v. State of Bihar & Ors. ((1996) 5 SCC 125) | **133-171** |


**Through**

Place: New Delhi

Date : 02.03.2022

**MEN WELFARE TRUST**

Advocates for the Intervenors

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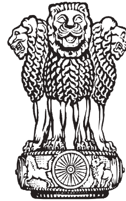
REPORT NO.
167




# PARLIAMENT OF INDIA
# RAJYA SABHA

DEPARTMENT-RELATED PARLIAMENTARY STANDING COMMITTEE
ON HOME AFFAIRS

## ONE HUNDRED AND SIXTY SEVENTH REPORT

## The Criminal Law (Amendment) Bill, 2012

(*Presented to the Rajya Sabha on* 1*st March,* 2013)
(*Laid on the Table of Lok Sabha on* 4*th March,* 2013)

Rajya Sabha Secretariat, New Delhi
March, 2013/Phalguna, 1934 (Saka)

3.2.33 The Chairman of the Committee added that use of the term intercourse in Section 376B is also wrong and the same should be read as "Rape by public servant against the woman in his custody" because when it is "intercourse", it has to be with consent. Responding to the query, the Additional Secretary, Ministry of Home Affairs clarified that the Verma Committee have also used the word "intercourse". The punishment is less than five years but it may exceed to ten years. However, the same has been enhanced in the Ordinance.

3.2.34 The Additional Secretary, Ministry of Home Affairs pointed out that the person in position of authority, may be a public servant or a superintendent or a manager of a jail, remand home or other place of custody or under any law, for the time being, in force, or a women's or children's institution or the management of a hospital or the staff of a hospital. If they take advantage of the position in which they are placed in a superior position and seduce or induce a person and have sexual intercourse, then it is punishable. The Legislative Secretary, clarifying the issue, stated that the doubt, which is being expressed, may be resolved while paying attention to the explanation given just to Section 376B, which says 'sexual intercourse shall mean any of the act mentioned in sub-clauses (a) to (d) of Section 375'.

3.2.35 Another Member, referring to Section 376 C, wanted to know about the safety of a woman working in private places like corporate sector, construction work and farming sector because it could happen there also. The Joint Secretary, Ministry of Home Affairs, replied that the provision of "Being in a position of authority or in a fiduciary relationship" under the Section, covers all this in private sector also.

3.2.36 Another Member pointed out that Section 376B includes the situation in hospitals. One member drew attention to the two-finger test by a doctor of a rape victim and felt that, as far as gynecological diagnosis is concerned, with the advent of the Transience Sonography, it is much superior to the two-finger test. The Member suggested that the provision for doing away with the two-finger test has to be included in the Bill.

3.2.37 The Joint Secretary of the Ministry of Home Affairs stated that the issue has been referred to the Ministry of Health and Family Welfare.

3.2.38 The Committee took up Section 376D, which specifically deals with sexual assault by gang. The Legislative Secretary informed that the Verma Committee used the word gang rape. Instead of 'rape', the Government is using the words 'sexual assault' in the Bill, and, therefore, it is sexual assault by gang. The punishment prescribed here is not less than 20 years, but which may extend to life and, in addition, compensation also.

3.2.39 The Legislative Secretary apprised the Committee that Section 376E deals with punishment for repeat offenders. He pointed out that the Verma Committee did not say about death sentence but Government has added it in the Bill. The Chairman sought to know the purpose of giving life imprisonment for repeat offence instead of death penalty. The Legislative Secretary replied that there are two places where death penalty has been added. One is, repeat of offences, and the other is, where the victim goes into vegetative state or it leads to the death of the victim.

3.2.40 The Legislative Secretary pointed out that Section 509 of IPC, deals with insult of modesty of a woman. Here again, basically the punishment is being increased from one year under the existing provision to a term, which may extend to three years and also with fine.

3.2.41 The Chairman of the Committee wanted to know the safeguards against misuse of this Section. The Legislative Secretary clarified that when a group of students in a college itself or while travelling in a bus or travelling in a train or walking in a park, pass certain remarks against a woman, those will be covered under Section 509. Another Member wanted to know as to when the Justice Verma Committee has recommended this Section for being repealed,

increase it to five years and ten years. Some Members suggested that it should be perpetrator or aggrieved or perpetrator or complainant instead of perpetrator or any other person. However, the Committee felt that the victim has to be a woman and the perpetrator can be anybody. By simply saying perpetrator or complainant, no justice would be done to women.

5.5.2 Some Members felt that in certain occasions there may be crowd which cheers and applaud the disrobing of a woman publicly, and in such cases, entire crowd should be held responsible. The Committee, however, felt that only those who cooperate can be held. But holding the entire crowd watching is stretching too far.

**5.6 Section 354C of IPC**

5.6.1 While discussing about Section 354C, which provides for voyeurism, some Members felt that the punishment of one year for the first offence is not sufficient; it should be increased. The Committee, however, felt that it is already one year to three years and three to seven years for second offence. The punishment cannot be increased more than one year at one go for the first offence. Some Members again raised the issue of making accused or perpetrator gender specific. The Committee, however, decided to go with the present proposition as provided in the Bill and Ordinance.

**5.7 Section 354D of IPC**

5.7.1 While discussing about Section 354D, some Members expressed doubts regarding the words 'watches' or 'spies' on a person and their implication. It was felt that though the word 'spies' on a person can be understood but the word 'watches' may have wider ramification. The Home Secretary stated that 'watches' or 'spies' is directly on the person who is being stalked; it is not the internet or any other electronic communication. He also stated that casual watching by accident would not attract this Section. Watching has to be designed and it must result in a fear of violence or serious alarm or distress in mind of such person or interferes with the mental peace of the person. **The Committee, however, felt that Home Secretary should discuss with Law Ministry and take a view in the matter.**

**5.8 Sections 370 and 370A of IPC**

5.8.1 While discussing about trafficking in Section 370 and Section 370A, some Members expressed the doubt about the use of the words 'forced labour' or 'services' in the present law. It was felt that since the law specifically belonged to criminal assault, all provisions relating to labour, forced labour, etc., should appropriately be dealt in different laws. **The Home Secretary agreed with the view of the Committee and stated that the words 'forced labour' or 'services' can be removed and that can be separately dealt under the relevant Act. However, the Committee felt that while removing these provisions, the Government should not give an impression that these provisions and the related crimes are not being taken care of. They are also equally important and they should be appropriately dealt in the concerned law.**

**5.9 Section 375 of IPC**

5.9.1 While discussing about Section 375, some Members felt that the word 'rape' should also be kept within the scope of sexual assault. The Home Secretary clarified that there is a change of terminology and the offence of 'rape' has been made wider. Some Members also suggested that somewhere there should be some room for wife to take up the issue of marital rape. It was also felt that no woman takes marriage so simple that she will just go and complain blindly. Consent in marriage cannot be consent forever. However, several Members felt that the marital rape has the

potential of destroying the institution of marriage. The Committee felt that if a woman is aggrieved by the acts of her husband, there are other means of approaching the court. In India, for ages, the family system has evolved and it is moving forward. Family is able to resolve the problems and there is also a provision under the law for cruelty against women. It was, therefore, felt that if the marital rape is brought under the law, the entire family system will be under great stress and the Committee may perhaps be doing more injustice. Some Members also suggested that the age mentioned in the exception to the Section may be raised to 18 years from 16 years. The exception provides that sexual intercourse or sexual acts by a man with his own wife, the wife not being under 16 years of age, is not sexual assault. The Home Secretary, responding to this suggestion, stated that by doing so by one stroke, the marriages in thousands in different States would be outlawed. One Member again suggested that for the words 'with or without the other person's consent, the words 'with or without the complainant's consent' may be used. The Committee, however, felt that by using complainant, a proper message will not go and existing formulation may continue.

### 5.10 **Section 376 of IPC**

5.10.1 While discussing Section 376, the Committee felt that in sub-Section (1) of Section 376, the liability of the accused to pay compensation to the victim, which shall be adequate to meet at least medical expenses incurred by the victim should also be included. The Committee, accordingly, decided to add this in sub-Section (1) of Section 376. Some Members also mentioned that the State needs to take care of the medical expenditure, treatment, etc. of the victim. Responding to this, the Home Secretary mentioned that there is a scheme for providing this. The Committee, however, felt that first the accused should be asked to pay victim's medical expenses by way of fine. In case, the accused is not in a position to pay if he is a labourer, or if he is a poor person, then the State may step in to take care of the medical expenses and the treatment of the woman, who is a victim. The Home Secretary was, accordingly, directed to do needful in the matter.

5.10.2 In Sub-Section 2 of Section 376, the Chairman brought to the notice of the Home Secretary that in item (j) of sub-Section 2 of Section 376, the word 'political' has been deleted in the Ordinance where it is there in the Bill. The Committee decided to include the word 'political'. One Member felt that there should be a clause providing for punishment when a person has a medical condition that can be transmitted through sexual intercourse and that person knowingly commits such intercourse without use of protection and that act should also be brought under aggravated crime. The Home Secretary, however, stated that this does not come under the category of 'sexual assault'; it has to be differentiated. He stated that Section 270 of the IPC provides for punishment for this though it is slightly less. The Committee felt that the punishment should be increased and sought to know whether that can be amended suitably. **The Home Secretary agreed to the suggestion of the Committee. The Committee, accordingly, recommends that punishment under Section 270 may be increased suitably.**

### 5.11 **Section 376A of IPC**

5.11.1 While discussing Section 376 A, some Members felt that the Government will have to take a decision regarding death penalty. It was stated that several countries have abolished the death penalty whereas India is continuing with it. However, the majority of the Members felt that the issue of abolishing death penalty is totally a different matter and needs to be discussed and decided separately. Since, as on date, death penalty exists in the law, the Committee cannot recommend for abolishing death penalty. The Committee also takes note of the fact that the death penalty being proposed in Section 376A is only in the extreme case where the victim has died or goes in a vegetative state and in Section 376E in the case of a repeat offender. The Committee was of the view that extreme penalty of death will be given only in case of death or the victim being in

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MANU/SC/0053/2011

**Equivalent Citation:** 2011(2)ACR1885(SC), 2011(1)ADJ738, 2011(100)AIC150, AIR2011SC697, 2011(1)ALD(Cri)691, 2011 (73) ACC 429, I(2011)CCR239(SC), 2011(1)JCC449(SC), JT2011(1)SC228, 2011(2)KCCRSN97, 2011(1)N.C.C.637, 2011(1)RCR(Civil)117, 2011(1)RCR(Criminal)443, 2011(1)SCALE454, (2011)2SCC550, (2011)2SCC(Cri)674, [2011]1SCR406

**IN THE SUPREME COURT OF INDIA**

Criminal Appeal No. 769 of 2006

Decided On: 14.01.2011

Appellants:**State of U.P**
**Vs.**
Respondent:**Chhoteylal**

**Hon'ble Judges/Coram:**
*Aftab Alam and R.M. Lodha, JJ.*

**Counsels:**
*For Appellant/Petitioner/Plaintiff: S.K. Dwivedi, AAG, S.N. Pandey, M.K. Dwivedi, Vandana Mishra, Ashutosh Sharma and Aviral Shukla, Advs. Gunnam Venkateswara Rao, Adv.*

*For Respondents/Defendant: Vishal Arun, Adv. for Abhijit Sengupta, Adv.*

**Case Category:**
CRIMINAL MATTERS - MATTERS RELATING TO SEXUAL HARASSMENT, KIDNAPPING AND ABDUCTION

**JUDGMENT**

**R.M. Lodha, J.**

**1.** The State of Uttar Pradesh is in appeal, by special leave, because the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow reversed the judgment of the trial court and acquitted the Respondent.

**2.** The prosecution case in brief is this: On September 19, 1989 the prosecutrix (name withheld by us) had gone to relieve herself in the evening. Ram Kali (A-3) followed her on the way. While she was returning and reached near the plot of one Vijai Bahadur, Chhotey Lal (A-1) and Ramdas (A-2) came from behind; A-1 caught hold of her and when she raised alarm, A-1 showed fire-arm to her and gagged her mouth. A-1 along with A-2 and A-3 brought the prosecutrix upto the road. There, A-3 parted company with A-1 and A-2. A-1 and A-2 then took the prosecutrix to Village Sahora. On the night of September 19, 1989, the prosecutrix was kept in the house of Girish and Saroj Pandit in Village Sahora. On the next day i.e., September 20, 1989, in the wee hours, A-1 and A-2 took the prosecutrix in a bus to Shahajahanpur where she was kept in a rented room for few days. During their stay in Shahajahanpur, A-1 allegedly committed forcible intercourse with the prosecutrix. Whenever prosecutrix asked for return to her house, A-1 would gag her mouth and threaten her. In the meanwhile, Rampal - brother of the prosecutrix - made a complaint to the Superintendent of Police, Hardoi on September 28, 1989 that A-1, A-2 and A-3 have kidnapped her sister (prosecutrix) on September 19, 1989. Based on this complaint, the First Information Report (FIR) was registered on September 30, 1989. The prosecutrix was recovered by the police on

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> According to the complainant Rampal, PW-2 was aged 13 years at the time of the occurrence, but during the cross-examination, the complainant has stated in para 7 of her cross examination that he was aged about 24 years and PW-2 was younger to him by 8-9 years. Thus, the age of the prosecutrix, according to the statement of the complainant appearing in para 7 of his cross examination, comes to about 15 or 16 years. PW- 2, the prosecutrix, gave her age as 13 years at the time of the occurrence. According to the supplementary report, Ext. Ka. 12 on record, prepared by Lady Dr. Shakuntala Reddy, P.W. 5, PW-2 was aged about 17 years. During the cross- examination, Lady Dr. Shakuntala Reddy, P.W. 5, has stated in para 9 of cross-examination that there could be a difference of 6 months both ways in the age of PW-2. Thus PW-2 can be said to be aged 17 = years at the time of the occurrence.

**11.** We find ourselves in agreement with the view of the trial court regarding the age of the prosecutrix. The High Court conjectured that the age of the prosecutrix could be even 19 years. This appears to have been done by adding two years to the age opined by PW-5. There is no such rule much less an absolute one that two years have to be added to the age determined by a doctor. We are supported by a 3-Judge Bench decision of this Court in *State of Karnataka* v. *Bantara Sudhakara @ Sudha and Anr.* MANU/SC/7843/2008 : (2008) 11 SCC 38 wherein this Court at page 41 of the Report stated as under:

> Additionally, merely because the doctor's evidence showed that the victims belong to the age group of 14 to 16, to conclude that the two years' age has to be added to the upper age-limit is without any foundation.

**12.** Learned Counsel for the Respondent relied upon a decision of this Court in the case of *Mussauddin Ahmed* v. *State of Assam* MANU/SC/1126/2009 : (2009) 14 SCC 541 in support of his submission that the best evidence concerning the age of prosecutrix having been withheld, the finding of the High Court that the prosecutrix could be 19 years of age cannot be said to erroneous. In the present case, the brother of the prosecutrix has been examined as PW-1 and, therefore, it cannot be said that best evidence has been with held. The decision of this Court in Mussauddin Ahmed has no application at all. In our view, the High Court fell in grave error in observing that the prosecutrix could be even 19 years of age at the time of alleged occurrence.

**13.** Be that as it may, in our view, clause Sixthly of Section 375 IPC is not attracted since the prosecutrix has been found to be above 16 years (although below 18 years). In the facts of the case what is crucial to be considered is whether clause First or clause Secondly of Section 375 IPC is attracted. The expressions 'against her will' and 'without her consent' may overlap sometimes but surely the two expressions in clause First and clause Secondly have different connotation and dimension. The expression 'against her will' would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition. On the other hand, the expression 'without her consent' would comprehend an act of reason accompanied by deliberation. The concept of 'consent' in the context of Section 375 IPC has come up for consideration before this Court on more than one occasion. Before we deal with some of these decisions, reference to Section 90 of the IPC may be relevant which reads as under:

> Section 90. Consent known to be given under fear or misconception.--A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent

was given in consequence of such fear or misconception; or

Consent of insane person.--if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.--unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

**14.** This Court in a long line of cases has given wider meaning to the word 'consent' in the context of sexual offences as explained in various judicial dictionaries. In Jowitt's Dictionary of English Law (Second Edition), Volume 1 (1977) at page 422 the word 'consent' has been explained as an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil on either side. It is further stated that consent supposes three things--a physical power, a mental power, and a free and serious use of them and if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind.

**15.** Stroud's Judicial Dictionary (Fourth Edition), Volume 1 (1971) at page 555 explains the expression 'consent', inter alia, as under:

Every 'consent' to an act, involves a submission; but it by no means follows that a mere submission involves consent," e.g. the mere submission of a girl to a carnal assault, she being in the power of a strong man, is not consent (per Coleridge J., R.V. Day, 9 C. & P. 724).

Stroud's Judicial Dictionary also refers to decision in the case of *Holman* v. *The Queen* [1970] W.A.R. 2 wherein it was stated: 'But there does not necessarily have to be complete willingness to constitute consent. A woman's consent to intercourse may be hesitant, reluctant or grudging, but if she consciously permits it there is "consent".'

**16.** In Words and Phrases, Permanent Edition, (Volume 8A) at pages 205-206, few American decisions wherein the word 'consent' has been considered and explained with regard to the law of rape have been referred. These are as follows:

In order to constitute "rape", there need not be resistance to the utmost, and a woman who is assaulted need not resist to the point of risking being beaten into insensibility, and, if she resists to the point where further resistance would be useless or until her resistance is overcome by force or violence, submission thereafter is not "consent". *People* v. *McIlvain* 55 Cal. App. 2d 322.

....

"Consent," within Penal Law, ' 2010, defining rape, requires exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent. *People* v. *Pelvino,* 214 N.Y.S. 577"

....

"Consenting" as used in the law of rape means consent of the will and submission under the influence of fear or terror cannot amount to real consent. *Hallmark* v. *State,* 22 Okl. Cr. 422"

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MANU/SC/0948/2004

**Equivalent Citation:** 2005(1)ACR487(SC), 2004(24)AIC33, AIR2005SC203, 2005(1)ALD(Cri)65, 2005(1)ALD65(SC), 2005 (51) ACC 1, 2005(1)ALT(Cri)129, 2005((1))ALT(Cri)129, 2004(3)BLJR2373, IV(2004)CCR238(SC), 2004(4)Crimes371(SC), 2005(2)MhLj147, 2005(2)MhLJ147(SC), 2005(I)OLR181, 2005(I)OLR(SC)181, 2005(1)PLJR119, 2004(4)RCR(Criminal)972, RLW2005(2)SC165, 2004(9)SCALE278, (2005)1SCC88, 2005(1)UJ179

**IN THE SUPREME COURT OF INDIA**

Criminal Appeal No. 44 of 2004

Decided On: 03.11.2004

Appellants: **Deelip Singh**
**Vs.**
Respondent: **State of Bihar**

**Hon'ble Judges/Coram:**
*P. Venkatarama Reddi and P.P. Naolekar, JJ.*

**Counsels:**
*For Appellant/Petitioner/Plaintiff: D.K. Thakur, Ravi Shankar Kumar and Debasis Misra, Advs*

*For Respondents/Defendant: H.L. Aggarwal, Sr. Adv., Kumar Rajesh Singh, Adv. for B.B. Singh, Adv.*

**Case Category:**
CRIMINAL MATTERS - MATTERS RELATING TO SEXUAL HARASSMENT, KIDNAPPING AND ABDUCTION

**JUDGMENT**

**P. Venkatarama Reddi, J.**

**1.** The appellant has been charged and convicted under Section 376 IPC for committing rape of a minor girl (figured as PW12 in this case) in the month of February, 1988. The IIIrd Additional Sessions Judge of Katihar sentenced him to rigorous imprisonment for a period of ten years. On appeal, the High Court upheld the conviction but modified the sentence to seven years, Aggrieved thereby, the present appeal is filed by the accused.

**Facts:**

**2.** The victim girl lodged a complaint to the police on 29.11.1988 i.e., long after the alleged act of rape. By the date of the report, she was pregnant by six months. Broadly, the version of the victim girl was that she and the accused were neighbours and fell in love with each other and one day, the accused forcibly raped her and later consoled her saying that he would marry her, that she succumbed to the entreaties of the accused to have sexual relations with him, on account of the promise made by him to marry her and therefore continued to have sex on several occasions. After she became pregnant, she revealed the matter to her parents. Even thereafter the intimacy continued to the knowledge of the parents and other relations who were under the impression that the accused would marry the girl but the accused avoided to marry her and his father took him out of the village to thwart the bid to marry. The efforts made by the father to establish the marital tie failed and therefore she was constrained to file the complaint

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of doubt on her version that she was subjected to sexual intercourse in spite of her resistance. Above all, the version given by her in the Court is at variance with the version set out in the FIR. As already noticed, she categorically stated in the first information report that she 'surrendered before him' in view of his repeated promises to marry. In short, her version about the first incident of rape bristles with improbabilities, improvements and exaggerations. It is a different matter that she became a consenting party under the impact of his promise to marry her. That aspect, we will examine later. But, what we would like to point out at this juncture is, it is not safe to lend credence to the version of PW12 that she was subjected to rape against her will in the first instance even before the appellant held out the promise to marry. We cannot, therefore, uphold the finding of the trial Court that the girl was raped forcibly on the first occasion and that the talk of marriage emerged only later. The finding of the trial Court in this respect is wholly unsustainable.

**Whether clause secondly (without consent) is attracted:**

**15.** The last question which calls for consideration is whether the accused is guilty of having sexual intercourse with PW12 'without her consent' (vide Clause secondly of Section 375 IPC). Though will and consent often interlace and an act done against the will of a person can be said to be an act done without consent, the Indian Penal Code categorizes these two expressions under separate heads in order to be as comprehensive as possible.

**16.** What then is the meaning and content of the expression 'without her consent'? Whether the consent given by a woman believing the man's promise to marry her is a consent which excludes the offence of rape? These are the questions which have come up for debate directly or incidentally.

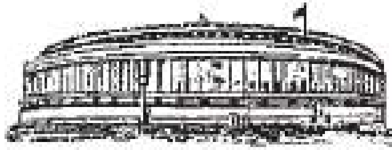
**17.** The concept and dimensions of 'consent' in the context of Section 375 IPC has been viewed from different angles. The decided cases on the issue reveal different approaches which may not necessarily be dichotomous. Of course, the ultimate conclusion depends on the facts of each case.

**18.** Indian Penal Code does not define 'consent' in positive terms, but what cannot be regarded as 'consent' under the Code is explained by Section 90. Section 90 reads as follows:

> **"90. Consent known to be given under fear or misconception--**A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows or has reason to believe, that the consent was given in consequence of such fear or misconception; ..."

**19.** Consent given firstly under fear of injury and secondly under a misconception of fact is not 'consent' at all. That is what is enjoined by the first part of Section 90. These two grounds specified in Section 90 are analogous to coercion and mistake of fact which are the familiar grounds that can vitiate a transaction under the jurisprudence of our country as well as other countries.

20. The factors set out in the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or



# PARLIAMENT OF INDIA
# LOK SABHA

**COMMITTEE ON EMPOWERMENT OF WOMEN (2012-2013)**

**(FIFTEENTH LOK SABHA)**

**NINETEENTH REPORT**

## ‘VICTIMS OF SEXUAL ABUSE AND TRAFFICKING AND THEIR REHABILITATION'

**LOK SABHA SECRETARIAT**
**NEW DELHI**

***May, 2013/Vaisakha, 1935 (Saka)***

- A new section 376B has been inserted which provides that if a man has sexual intercourse with his own wife, living separately under a decree of separation or otherwise; the punishment would be 'a minimum term of two years extendable to seven years and fine'. This provision has been kept as bailable keeping in view that there is still a hope of husband and wife would unite again.

- The punishment under section 376C, for the person who being in a position of authority or in a fiduciary relationship, or a public servant, or superintendent or manager of jail, remand home etc., abuses such position of authority and induce or seduce a woman to have sexual intercourse, not amounting to rape (as there would be consent) is a minimum term of five years, extendable to ten years and fine. This has been increased for 'a term extendable to five years and fine' and hence is a stringent punishment and should act as a deterrent.

- New section 376D on gang rape has been inserted. The punishment for gang rape is a minimum rigorous imprisonment of twenty years, extendable to life and the offenders will pay fine to the victim which shall be just and reasonable to meet the medical expenses and rehabilitation of the victim. The fine imposed will be paid to the victim which would be in addition to the compensation payable by the State Government under Victim Compensation Scheme (under section 357A of Cr. P.C.). The punishment for gang rape convicts has been made more stringent.

- The new section 376E provides for stringent punishment for repeat offenders of the offence of rape. The punishment is imprisonment for life, (which shall mean the remainder of the convict's natural life) *or with death*. This should serve as deterrence against the second time offenders.

**Setting up of Fast Track Courts**

1.65 It is extremely essential then that the perpetrators of crimes against women are brought to book without delay. For this, it is imperative that both the investigation as well as the criminal trials are fast tracked so that the faith of the people in our criminal justice system is restored. While the Ministry of Home Affairs is taking action for speedy investigation in such cases, the Minister of Law and Justice has written to the Chief Justices of High Courts and the Chief Ministers of States to impress upon the need to fast track trials in all pending rape cases in the district / subordinate courts as well as those pending in the High Courts in appeal.

1.66 On the aspect of State/UT-wise list of fast track courts functioning in the country especially for dealing with cases of violence and sexual abuse against women and children, the Committee were furnished the following information by the Ministry of Home Affairs:-

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MANU/DE/4563/2013

**Equivalent Citation:** 2014(1)JCC509

**IN THE HIGH COURT OF DELHI**

Crl. A. 1079/2010

Decided On: 11.12.2013

Appellants: **Beeru**
**Vs.**
Respondent: **State NCT of Delhi**

**Hon'ble Judges/Coram:**
*Kailash Gambhir and Indermeet Kaur, JJ.*

**Counsels:**
*For Appellant/Petitioner/Plaintiff: Avi Singh, Advocate*

*For Respondents/Defendant: Mr. Sunil Sharma, Additional Public Prosecutor for State*

**JUDGMENT**

**Kailash Gambhir, J.**

**1.** One can visibly see the growth of the country in all spheres keeping a pace with the modernization, advancement, science and technology but unfortunately the only front which is on the decline is the moral values. In the recent past, the country has witnessed too many horrifying and heart rendering incidents of rapes and many of such cases were so brutal and barbaric, that they jolted the society to ponder whether such beastly acts can be committed by a human being on the other. Amongst such horrifying incidents, sexual assaults involving minor children are the worst and amongst the worst, the cases involving sexual assault of minor children by none other than their own family members, relatives and friends. An astonishing increase has been seen in the number of cases where children are sexually assaulted by none other than their own family members, relatives and friends on whom they once relied, as their protectors to be protected from the evils of outside world. Such kind of sexual assaults at the hands of family members, relatives and friends is abhorrent as it not only harms the innocent child but it completely destroys and ruptures an innocent soul that has yet not attained enough consciousness even to understand the nature of the act committed upon her. Such cases show as to what extent a person can stoop down just to satisfy his lust for sex. In a society where the custodian of the trust betrays the same and the protector of the dignity and honor becomes the violator, it would not be wrong to say that no one can easily be trusted. Such offences pollute the sanctity of relationship which were said to be made in heaven. A momentary pleasure out of lust for sex leaves an indelible scar not only physically but also emotionally on the victim. Taking note of such an extremely odious and debased offence, the Legislature recently by way of Criminal Law Amendment Act, 2013, incorporated a new clause under Section 376(2) IPC as clause (f) to cover cases where rape is committed in a fiduciary relationship. The sole object of this provision is to visit with a more severe penalty to the persons in near relation and position of trust and authority who more often than not commit sexual assault on the members of the family or unsuspecting and trusting young persons. The case in hand is a sad reflection of the present day society where a most faithful relationship has been

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Explanation I.--Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2.--"Women's or children's institution" means an institution, whether called an orphanage or a home for neglected woman or children or a widows' home or by any other name, which is established and maintained for the reception and care of woman or children.

Explanation 3.--"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.

**36.** It would thus be seen that the offence of 'rape' if falls under any of the clauses of sub-section 2 of Section 376 of IPC, it becomes more stringent as instead of seven years, the minimum prescribed sentence is rigorous imprisonment not less than ten years. There is thus a clear demarcation of the category of cases which fall under sub-section 2 of Section 376 of IPC and those cases, which fall in the remainder. Under the unamended provision the although minimum sentence of imprisonment that can be awarded is 7 years under section 376(1) and 10 years, under Section 376(2) IPC, however even a lesser sentence can be passed, subject, to the condition that the Court has to record adequate and special reasons in the judgment. This proviso of Section 376(1) & (2) of IPC as the same existed earlier stands repealed after Criminal Law Amendment, Act of 2013. Although the rape of a victim in any form or in any manner deserves condemnation in strongest terms and deserves award of severe punishment, especially looking into the phenomenal increase in rape cases in the recent past, but so far as the awarding of sentence is concerned, the Statute itself has made a distinction.

**37.** Thus, even the legislative intent is also that only in the extreme cases of rape sentence to be imposed should be of imprisonment for life and consequently, in cases of less severity, the sentence has to be less severe. To choose whether the sentence shall be imprisonment for life or otherwise, is left on the judicial prudence of the judge. The Hon'ble Apex Court in plethora of judgments has enunciated principles which the Court shall consider while assessing as to what could be an appropriate sentence especially in cases where rape is committed upon a minor child. In State of Rajasthan v. Vinod Kumar MANU/SC/0463/2012 : AIR 2012 SC 2301, the Hon'ble Apex Court while dealing with the issue held:

The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to be severely dealt with. The socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence.

**38.** In the matter of Khem Chand vs. State of Delhi, MANU/DE/2957/2008 : ILR (2008) Supp. (5) Delhi 92, the Hon'ble Division bench of this court laid down the following parameters for assessing the quantum of punishment in cases of rape upon a child:

- Criminal and the crime are both important for the purposes of sentence.
- Manner of commission of the crime being with meticulous planning or one on

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MANU/SC/0723/2021

**Equivalent Citation:** 2021(6)ALD1, (2021)8MLJ103

**IN THE SUPREME COURT OF INDIA**

Civil Appeal Nos. 5985-5987 of 2021 (Arising out of SLP (Civil) Nos. 14972-14974 of 2021) and Civil Appeal Nos. 5988-5990 of 2021 (Arising out of SLP (Civil) Nos. 15108-15110 of 2021)

Decided On: 27.09.2021

Appellants: **Saregama India Limited**
**Vs.**
Respondent: **Next Radio Limited and Ors.**

**Hon'ble Judges/Coram:**
*Dr. D.Y. Chandrachud and B.V. Nagarathna, JJ.*

**Case Category:**
MERCANTILE LAWS, COMMERCIAL TRANSACTIONS INCLUDING BANKING - TR
MARKS/COPY RIGHTS/PATENTS/DESIGN ACT

**JUDGMENT**

**Dr. D.Y. Chandrachud, J.**

**1.** Leave granted.

**2.** These appeals arise from an interim order dated 2 August 2021 of a Division Bench of the High Court of Judicature at Madras in a batch of petitions. The writ petitions have been instituted before the High Court Under Article 226 of the Constitution to challenge the validity of Rule 29(4) of the Copyright Rules 2013[1]. The High Court has, by its interim order, directed that:

> (i) No copyrighted work may be broadcast in terms of Rule 29 without issuing a prior notice;
>
> (ii) Details pertaining to the broadcast, particularly the duration, time slots and the like, including the quantum of royalty payable may be furnished within fifteen days of the broadcast or performance;
>
> (iii) Compliance be effected with a modified regime of post facto, as opposed to prior compliance mandated by Rule 29(4) and the statutory mandate of a twenty four hour prior notice shall be substituted by a provision for compliance within fifteen days after the broadcast; and
>
> (iii) The interim order will be confined to the Petitioners before the High Court and the copyrighted works of the second and third Respondents which are sought to be exploited.

**3.** The primary submission which has been urged on behalf of the Appellants is that the interim order of the High Court has the effect of re-writing Rule 29(4) of the Rules framed in pursuance of the provisions of Section 31D and Section 78(2)(cD) of the Copyright Act 1957[2].

**4.** Mr. Mukul Rohatgi and Mr. Akhil Sibal, learned Senior Counsel, have appeared on behalf

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(i) Section 31D was introduced by Parliament by an amendment of 2012 to obviate the exercise of monopolistic rights wielded by copyright owners to the detriment of the public at large;

(ii) Section 31D creates a statutory right in favour of broadcasters to obtain licenses as a result of which the earlier regime of voluntary licensing has been replaced by the regime of statutory licenses envisaged in Section 31D;

(iii) Until December 2020, in the absence of a duly constituted IPAB, broadcasters were functioning under the ambit of voluntary licensing agreements;

(iv) Rule 29(4) defeats the object of Section 31D insofar as it incorporates minute details in the prior notice which has been prescribed;

(v) Many broadcasters operate in the context of interactive dynamic sites as a result of which the requirements which have been prescribed in Rule 29(4) are onerous and impossible to fulfill;

(vi) The broadcasters are ready and willing to pay royalties which are prescribed by the IPAB according to the statute at the end of every month and even inspection of records is furnished to copyright owners; and

(vii) Whereas Section 31D provides for only the duration and territorial coverage of the intended broadcast, the notice which has been prescribed by Rule 29(4) has gone far beyond the statutory ambit of Section 31D and is ultra vires for that reason.

**19.** While counsel appearing on behalf of the contesting parties have addressed submissions on merits, we would desist from expressing any opinion on the constitutional challenge which is pending consideration before the High Court of Judicature at Madras where, as noted earlier, the writ petitions are slated for final disposal on 4 October 2021.

**20.** At this stage, the issue is whether the interim order of the High Court can be sustained. Essentially, as the narration in the earlier part of this judgment would indicate, the High Court has substituted the provisions of Rule 29(4) with a regime of its own, which is made applicable to the broadcasters and the Petitioners before it. A Constitution Bench of this Court in In Re: Expeditious Trial of Cases Under Section 138 of NI Act 1881[4] has emphasized that the judiciary cannot transgress into the domain of policy making by re-writing a statute, however strong the temptations maybe. This Court observed:

> **20.** Conferring power on the court by reading certain words into provisions is impermissible. A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. The Judge's duty is to interpret and apply the law, not to change it to meet the Judge's idea of what justice requires. The court cannot add words to a statute or read words into it which are not there.

It is a settled principle of law that when the words of a statute are clear and unambiguous, it is not permissible for the court to read words into the statute. A Constitution Bench of this Court in Padma Sundara Rao v. State of Tamil Nadu MANU/SC/0182/2002 : (2002) 3 SCC 533 has observed:

> **12.** ...The court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in the statute is determinative factor of legislative intent. The first and primary Rule of

construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said.

.....

**14.** While interpreting a provision the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary.

**21.** The court is entrusted by the Constitution of the power of judicial review. In the discharge of its mandate, the court may evaluate the validity of a legislation or Rules made under it. A statute may be invalidated if is ultra vires constitutional guarantees or transgresses the legislative domain entrusted to the enacting legislature. Delegated legislation can, if it results in a constitutional infraction or is contrary to the ambit of the enacting statute be invalidated. However, the court in the exercise of judicial review cannot supplant the terms of the provision through judicial interpretation by re-writing statutory language. Draftsmanship is a function entrusted to the legislature. Craftsmanship on the judicial side cannot transgress into the legislative domain by re-writing the words of a statute. For then, the judicial craft enters the forbidden domain of a legislative draft. That precisely is what the Division Bench of the High Court has done by its interim order. Section 31D(2) speaks of the necessity of giving prior notice, in the manner as may be prescribed, of the intention to broadcast the work stating the duration and the territorial coverage of the broadcast, together with the payment of royalties in the manner and at the rates fixed by the Appellate Board. While the High Court has held the broadcasters down to the requirement of prior notice, it has modified the operation of Rule 29 by stipulating that the particulars which are to be furnished in the notice may be furnished within a period of fifteen days after the broadcast. The interim order converts the second proviso into a "routine procedure" instead of an exception (as the High Court has described its direction). This exercise by the High Court amounts to re-writing. Such an exercise of judicial redrafting of legislation or delegated legislation cannot be carried out. The High Court has done so at the interlocutory stage.

**22.** We are, therefore, clearly of the view that an exercise of judicial re-drafting of Rule 29(4) was unwarranted, particularly at the interlocutory stage. The difficulties which have been expressed before the High Court by the broadcasters have warranted an early listing of the matter and this Court has been assured by the copyright owners that they would file their counter affidavits immediately so as to facilitate the expeditious disposal of the proceedings. That having been assured, we are of the view that an exercise of judicial re-writing of a statutory Rule is unwarranted in the exercise of the jurisdiction Under Article 226 of the Constitution, particularly in interlocutory proceedings. The High Court was also of the view that the second proviso may be resorted to as a matter of routine, instead of as an exception and that the ex post facto reporting should be enlarged to a period of fifteen days (instead of a period of twenty four hours). Such an exercise was impermissible since it would substitute a statutory Rule made in exercise of the power of delegated legislation with a new regime and provision which the High Court considers more practicable.

**23.** We accordingly allow the appeals by setting aside the interim order of the High Court dated 2 August 2021. This is, however, subject to the clarification that this Court has not expressed any opinion on the merits of the rival submissions which would fall for determination in the exercise of the writ jurisdiction of the High Court in the pending proceedings..

**24.** Pending application(s), if any, stands disposed of.

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MANU/SC/0987/2018

**Equivalent Citation:** 2019(194)AIC129, AIR2018SC4273, 2018 (2) ALD(Crl.) 909 (SC), 2019 (106) ACC 701, 2018 (3) ALT (Crl.) 102 (A.P.), 2018(4)BLJ119, 2018(6)BomCR539, 2019(1)BomCR(Cri)1, 2018(3)Crimes503(SC), 252(2018)DLT175, III(2018)DMC525SC, 2018GLH(3)140, ILR2018(3)Kerala955, 2018(4)J.L.J.R.129, 2018(3)JKJ124[SC], 2018 (4) KHC 580, 2018(4)KLT965, 2018(4)MLJ(Crl)426, 2018(4)PLJR167, 2018(4)RCR(Criminal)226, 2018(4)RLW2713(SC), 2018(11)SCALE191, (2018)10SCC443, 2019 (2) SCJ 716, 2018 (4) WLN 5 (SC)

**IN THE SUPREME COURT OF INDIA**

Writ Petition (Civil) No. 73 of 2015, Criminal Appeal No. 1265 of 2017 and Writ Petition (Criminal) No. 156 of 2017 (Under Article 32 of the Constitution of India)

Decided On: 14.09.2018

Appellants: **Social Action Forum for Manav Adhikar and Ors.**
**Vs.**
Respondent: **Union of India (UOI), Ministry of Law and Justice and Ors.**

**Hon'ble Judges/Coram:**
*Dipak Misra, C.J.I., A.M. Khanwilkar and Dr. D.Y. Chandrachud, JJ.*

**Counsels:**
*For Appearing Parties: Indu Malhotra, V. Shekhar, Sr. Advs., Shivang Dubey, Tanvir Nayar, Prashant Singh, Deepti Gupta, Advs. (A.Cs.), P.S. Narasimha, ASG, K. Radhakrishnan, Indira Jaising, Sr. Advs., Charu Wali Khanna, Dharmender Pal Singh, Vipin Gupta, Mahesh Srivastava, P.N. Puri, Vaibhav Manu Srivastava, Pankaj Srivastava, Alok Singh, Surabhi Lata, Abhishek Singh, Sandeep S. Deshpande, Manju Jetley, Raghavendra Tripathi, Mukul Singh, Arunima Dwivedi, R.R. Rajesh, Gautam Sharma, Sunita Sharma, B.V. Balaram Das, B. Krishna Prasad, M.K. Maroria, Shadan Farasat, Aanchal Singh, Rudrakshi Deo, Pramod Dayal, Rajesh Kumar, Roopenshu Pratap Singh, Alok Sharma, Naresh Kumar, Gurmeet Singh Makker, Gaurav Agrawal, Shashank Shekhar, Umang Shankar, Namit Saxena, Sindhu T.P., R. Beniwal, Bineesh Karat, Arushi Singh, P.V. Dinesh, Kirti Singh, Pallavi Langar and Nupur Agrawal, Advs.*

**Case Category:**
LETTER PETITION AND PIL MATTER - SOCIAL JUSTICE MATTERS

## JUDGMENT

**Dipak Misra, C.J.I.**

**1.** Law, especially the criminal law, intends to control, if not altogether remove, the malady that gets into the spine of the society and gradually corrodes the marrows of the vertebrae of a large Section of the society. A situation arises and the legislature, expressing its concern and responsibility, adds a new penal provision with the intention to achieve the requisite result. When a sensitive legal provision is brought into the statute book, the victims of the crime feel adequately safe, and if the said provision pertains to matrimonial sphere, both the parties, namely, wife and husband or any one from the side of the husband is booked for the offence and both the sides play the victim card. The Accused persons, while asserting as victims, exposit grave concern and the situation of harassment is built with enormous anxiety and accentuated vigour. It is propounded in a court of law that the penal provision is abused to an unimaginable extent, for in a cruel, ruthless and totally revengeful manner, the young, old and relatives residing at distant places having no involvement with the incident, if any, are

(*i*) to secure the ends of justice, or (*ii*) to prevent abuse of the process of any court. In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the Accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim.

**35.** Though ***Rajesh Sharma*** (supra) takes note of ***Gian Singh*** (supra), yet it seems to have it applied in a different manner. The seminal issue is whether these directions could have been issued by the process of interpretation. This Court, in furtherance of a fundamental right, has issued directions in the absence of law in certain cases, namely, ***Lakshmi Kant Pandey v. Union of India*** MANU/SC/0054/1984 : (1984) 2 SCC 244, ***Vishaka and Ors. v. State of Rajasthan and Ors.*** MANU/SC/0786/1997 : (1997) 6 SCC 241 and ***Common Cause (A Registered Society) v. Union of India and Anr.*** MANU/SC/0232/2018 : (2018) 5 SCC 1 and some others. In the obtaining factual matrix, there are statutory provisions and judgments in the field and, therefore, the directions pertaining to constitution of a Committee and conferment of power on the said Committee is erroneous. However, the directions pertaining to Red Corner Notice, clubbing of cases and postulating that recovery of disputed dowry items may not by itself be a ground for denial of bail would stand on a different footing. They are protective in nature and do not sound a discordant note with the Code. When an application for bail is entertained, proper conditions have to be imposed but recovery of disputed dowry items may not by itself be a ground while rejecting an application for grant of bail Under Section 498-A Indian Penal Code. That cannot be considered at that stage. Therefore, we do not find anything erroneous in direction Nos. 19(iv) and (v). So far as direction No. 19(vi) and 19(vii) are concerned, an application has to be filed either Under Section 205 Code of Criminal Procedure or Section 317 Code of Criminal Procedure depending upon the stage at which the exemption is sought.

**36.** We have earlier stated that some of the directions issued in ***Rajesh Sharma*** (supra) have the potential to enter into the legislative field. A three-Judge Bench in ***Suresh Seth v. Commissioner, Indore Municipal Corporation and Ors.*** MANU/SC/2491/2005 : (2005) 13 SCC 287 ruled thus:

> **5.** ... In our opinion, this is a matter of policy for the elected representatives of people to decide and no direction in this regard can be issued by the Court. That apart this Court cannot issue any direction to the legislature to make any particular kind of enactment. Under our constitutional scheme Parliament and Legislative Assemblies exercise sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. In *Supreme Court Employees' Welfare Assn.* v. *Union of India* MANU/SC/0582/1989 : (1989) 4 SCC 187 (SCC para 51) it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. ....

**37.** Another three-Judge Bench in ***Census Commissioner and Ors. v. R. Krishnamurthy*** MANU/SC/0999/2014 : (2015) 2 SCC 796, after referring to ***N.D. Jayal and Anr. v. Union of India and Ors.*** MANU/SC/0649/2003 : (2004) 9 SCC 362, ***Rustom Cavasjee Cooper v. Union of India*** MANU/SC/0011/1970 : (1970) 1 SCC 248, ***Premium Granites and Anr. v. State of T.N. and Ors.*** MANU/SC/0466/1994 : (1994) 2 SCC 691, ***M.P. Oil Extraction and Anr. v. State of M.P. and Ors.*** MANU/SC/1302/1997 : (1997) 7 SCC 592, ***State of Madhya Pradesh v. Narmada Bachao Andolan and Anr.*** MANU/SC/0599/2011 : (2011) 7 SCC 639 and ***State of Punjab and Ors. v. Ram Lubhaya Bagga and Ors.*** MANU/SC/0156/1998 : (1998) 4 SCC 117, opined:

> **33.** From the aforesaid pronouncement of law, it is clear as noon day that it is not within the domain of the courts to embark upon an enquiry as to whether a particular public policy is wise and acceptable or whether a better policy could be evolved. The court can only interfere if the policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded ipse dixit offending the basic requirement of Article 14 of the Constitution. In certain matters, as often said, there can be opinions and opinions but the court is not expected to sit as an appellate authority on an opinion.

**38.** In the aforesaid analysis, while declaring the directions pertaining to Family Welfare Committee and its constitution by the District Legal Services Authority and the power conferred on the Committee is impermissible. Therefore, we think it appropriate to direct that the investigating officers be careful and be guided by the principles stated in ***Joginder Kumar*** (supra), ***D.K. Basu*** (supra), ***Lalita Kumari*** (supra) and ***Arnesh Kumar*** (supra). It will also be appropriate to direct the Director General of Police of each State to ensure that investigating officers who are in charge of investigation of cases of offences Under Section 498-A Indian Penal Code should be imparted rigorous training with regard to the principles stated by this Court relating to arrest.

**39.** In view of the aforesaid premises, the direction contained in paragraph 19(i) as a whole is not in accord with the statutory framework and the direction issued in paragraph 19(ii) shall be read in conjunction with the direction given hereinabove.

**40.** Direction No. 19(iii) is modified to the extent that if a settlement is arrived at, the parties can approach the High Court Under Section 482 of the Code of Criminal Procedure and the High Court, keeping in view the law laid down in ***Gian Singh*** (supra), shall dispose of the same.

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MANU/SC/0038/1969

**Equivalent Citation:** AIR1970SC1453, (1969)2SCC166, [1970]1SCR479

**IN THE SUPREME COURT OF INDIA**

Writ Petition Nos. 282, 407 and 408 of 1968

Decided On: 30.04.1969

Appellants: **Harakchand Ratanchand Banthia and Ors.**
**Vs.**
Respondent: **Union of India (UOI) and Ors.**

**Hon'ble Judges/Coram:**
*M. Hidayatullah, C.J., G.K. Mitter, J.C. Shah, A.N. Grover and Vaidynathier Ramaswami, JJ.*

**Counsels:**
*For Appellant/Petitioner/plaintiff C.K. Daphtary B.R.L. Iyengar R.N. Banerjee Ravinder Narain J.B. Dadachanji and O.C. Mathur, Advs. (in W.P. No. 407 of 19*

*For Respondents/Defendant M.C. Setalvad, J.M. Mukhi, A.S. Nambiar, R.N. Sachthey, Advs.*

**JUDGMENT**

**Vaidynathier Ramaswami, J.**

**1.** In these petitions which have been filed under Article 32 of the Constitution a common question is presented for determination, namely, whether the Gold (Control) Act, 1968 (Act No. 45 of 1968) is Constitutionally valid.

**2.** The Gold (Control) Act, (hereinafter called the impugned Act) was passed by Parliament and received assent of the President on September 1, 1968. The impugned Act begins with the following preamble, namely, "an Act to provide in the economic and financial interests of the community, for the control of the production, manufacture, supply, distribution, use and possession of, and business in, gold, ornaments and articles of gold and for matters connected therewith or incidental thereto." Section 2 contains a number of definitions. Section 2(b) defines an "article" to mean anything (other than ornament), in a finished form made of, manufactured from or containing, gold, and including (i) any gold coin, (ii) broken pieces of an article, but not including primary gold. Clause (d) defines a "certified goldsmith" to mean a self-employed goldsmith who holds a valid certificate, referred to in Section 30. Clause (h) defines a dealer as follows :

> "dealer" means any person who carries on, directly or otherwise, the business of making, manufacturing, preparing, repairing, polishing, buying, selling, sup plying, distributing, melting, processing or converting gold, whether for cash or for deferred payment or for commission, remuneration or other valuable consideration....
>
> ...

expedient in the public interest; List II, Entry 24 : Industries subject to the provisions of Entries 7 and 52 of List I; List II, Entry 27 Production, supply and distribution of goods subject to the provisions of Entry 33. of List III. List III, Entry 33 reads as follows :

> Trade and commerce in, and the production, supply and distribution of,-
>
> (a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;
>
> (b) foodstuffs, including edible oilseeds and oils;
>
> (c) cattle fodder, including oilcakes and other concentrates;
>
> (d) raw cotton, whether ginned or unginned, and cotton seed; and
>
> (e) raw jute.

6. Before construing these entries it is useful to notice some of the well-settled rules of interpretation laid down by the Federal Court and by this Court in the matter of construing the entries.

The power to legislate is given to the appropriate legislatures by Article 246 of the Constitution. The entries in the three Lists are only legislative heads or fields of legislation; they demarcate the area over which the appropriate legislatures can operate.
It is well-established that the widest amplitude should be given to the language of the entries. But some of the entries in the different lists or in the same list may overlap or may appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring about a harmonious construction. In In re The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, [1993] F.C.R.18 Sir Maurice Gwyer proceeded to state :

> Only in the Indian Constitution Act can the particular problem arise which is now under consideration; and an endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary, modifying, the language of the one by that of the other. If indeed such a reconciliation should prove impossible, then, and only then, will the non-obstante clause operate and the federal power prevail; for the clause ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship. (p. 44)

The Federal Court in that case held that the entry "taxes on the sale of goods" was not covered by the entry "duties of excise" and in coming to that conclusion the learned Chief Justice observed :

> Here are two separate enactments, each in one aspect conferring the power to impose a tax upon goods; and it would accord with sound principles of construction to take the more general power, that which extends to the whole of India, as subject to an exception created by the particular power, that which extends to the Province only. It is not perhaps strictly accurate to speak of the

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MANU/SC/0443/2012

**Equivalent Citation:** 2012(116)AIC200, AIR2012SC2351, 2012(5)ALD80, 2012(5)ALD80(SC), 2012 (93) ALR 682, 2012 4 AWC3598All, 2012(3)CTC770, 2012(3)J.L.J.R.150, 2012(3)JLJ170, 2012-4-LW541, (2012)5MLJ408, 2012(III)MPJR(SC)1, 2012(3)MPLJ595, 2012(3)PLJR172, 2012(3)RCR(Civil)158, 2012(3)RCR(Civil)258, 2013 119 RD615, 2012(5)SCALE467, (2012)6SCC312, [2012]113SCL255(SC)

**IN THE SUPREME COURT OF INDIA**

Civil Appeal Nos. 684 and 1270 of 2004

Decided On: 11.05.2012

Appellants: **State of M.P.**
**Vs.**
Respondent: **Rakesh Kohli and Ors.**

**Hon'ble Judges/Coram:**
*R.M. Lodha and H.L. Gokhale, JJ.*

**Counsels:**
*For Appellant/Petitioner/Plaintiff: Vibha Datta Makhija and B.S. Banthia, Advs.*

**JUDGMENT**

**R.M. Lodha, J.**

**1.** The only point for consideration here is, whether or not the Division Bench of the Madhya Pradesh High Court was justified in declaring Clause (d), Article 45 of Schedule 1-A of the Indian Stamp Act, 1899 (for short, '1899 Act') which was brought in by the Indian Stamp (Madhya Pradesh Amendment) Act, 2002 (for short, 'M.P. 2002 Act') as unconstitutional being violative of Article 14 of the Constitution of India.

**2.** The above point arises in this way. Two writ petitions came to be filed before the Madhya Pradesh High Court. In both writ petitions initially it was prayed that Clauses (f) and (f-1), Article 48, Schedule 1-A brought in the 1899 Act by Section 3 of the Indian Stamp (Madhya Pradesh Amendment) Act, 1997 (for short, 'M.P. 1997 Act') be declared ultra vires. During the pendency of these petitions, the 1899 Act as applicable to Madhya Pradesh was further amended by the M.P. 2002 Act. The Respondents, referred to as writ Petitioners, amended their writ petitions and prayed that Clause (d), Article 45 of Schedule 1-A of the 1899 Act as substituted by M.P. 2002 Act be declared ultra vires. The writ Petitioners set up the case that original Article 48 of the 1899 Act, Schedule 1-A prescribed stamp duty payable at Rs. 10/- if attorney was appointed for a single transaction. By M.P. 1997 Act, Article 48 Clause (f) was substituted by Clauses (f) and (f-1). Clause (f-1) provided that where power of attorney was executed without consideration in favour of person who is not his or her spouse or children or mother or father and authorizes him to sell or transfer any immovable property, the stamp duty would be leviable as if the transaction is conveyance under Article 23. Explanation II inserted by M.P. 1997 Act provided that where under Clauses (f) and (f-1), duty had been paid on the power of attorney and a conveyance relating to that property was executed in pursuance of power of attorney between the executant of the power of attorney and the person in whose favour it was executed, the duty on conveyance should be the duty calculated on the market value of the property reduced by duty paid on the power of attorney. By M.P. 2002 Act, stamp duty relating to power of attorney has been prescribed in Article 45 of Schedule 1-A. Clause (d) thereof prescribes stamp

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|---|---|
| defined by section 2(21)) not being a proxy: | |
| (a)when authorizing one person or more to act in single transaction, including a power of attorney executed for procuring the registration of one or more documents in relation to a single transaction or for admitting execution of one or more such documents; | Fifty rupees. |
| (b) when authorizing one person to act in more than one transaction or generally; or not more than ten persons to act jointly or severally in more than one transaction or generally; | One hundred rupees. |
| (c) when given for consideration and authorizing the agent to sell any immovable property. | The same duty as a conveyance (No. 22) on the |
| (d) when given without consideration to a person other than the father, mother, wife or husband, son or daughter, brother or sister in relation to the executant and authorizing such person to sell immovable property situated in Madhya Pradesh. | Two percent on the market value of the property |
| (e) In any other case; | Fifty rupees for each person authorized |

Explanation-I.-For the purpose of this article, more persons than one when belonging to the same firm shall be deemed to be one person.

Explanation-II.-The term 'registration' includes every operation incidental to registration under the Registration Act, 1908 (16 of 1908).

**13.** In our opinion, the High Court was clearly in error in declaring Clause (d), Article 45 of Schedule 1-A of the 1899 Act which as brought in by the M.P. 2002 Act as violative of Article 14 of the Constitution of India. It is very difficult to approve the reasoning of the High Court that the provision may pass the test of classification but it would not pass the requirement of the second limb of Article 14 of the Constitution which ostracises arbitrariness, unreasonable and irrationality. The High Court failed to keep in mind the well defined limitations in consideration of the constitutional validity of a statute enacted by Parliament or a State Legislature. The statute enacted by Parliament or a State Legislature cannot be declared unconstitutional lightly. The court must be able to hold beyond any iota of doubt that the violation of the constitutional provisions was so glaring that the legislative provision under challenge cannot stand. Sans flagrant violation of the constitutional provisions, the law made by Parliament or a

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State Legislature is not declared bad.

**14.** This Court has repeatedly stated that legislative enactment can be struck down by Court only on two grounds, namely (i), that the appropriate Legislature does not have competency to make the law and (ii), that it does not take away or abridge any of the fundamental rights enumerated in Part - III of the Constitution or any other constitutional provisions.

**15.** In Mcdowell and Company2 while dealing with the challenge to an enactment based on Article 14, this Court stated in paragraph 43 (at pg. 737) of the Report as follows:

> ...A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground....
>
> ... if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the Clauses (2) to (6) of Article 19 and so on. **No enactment can be struck down by just saying that it is arbitrary or unreasonable.** Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom....

(Emphasis supplied)

Then dealing with the decision of this Court in *State of T.N. and Ors. v. Ananthi Ammal and Ors.* MANU/SC/0416/1995 : (1995) 1 SCC 519, a three-Judge Bench in Mcdowell and Company MANU/SC/0427/1996 : (1996) 3 SCC 709 observed in paragraphs 43 and 44 (at pg. 739) of the Report as under:

> ...Now, coming to the decision in Ananthi Ammal, we are of the opinion that it does not lay down a different proposition. It was an appeal from the decision of the Madras High Court striking down the Tamil Nadu Acquisition of Land for Harijan Welfare Schemes Act, 1978 as violative of Articles 14, 19 and 300-A of the Constitution. On a review of the provisions of the Act, this Court found that it provided a procedure which was substantially unfair to the owners of the land as compared to the procedure prescribed by the Land Acquisition Act, 1894, insofar as Section 11 of the Act provided for payment of compensation in installments if it exceeded rupees two thousand. After noticing the several features of the Act including the one mentioned above, this Court observed: (SCC p. 526, para 7)
>
> > 7. When a statute is impugned under Article 14 what the court has to decide is whether the statute is so arbitrary or unreasonable that it must be struck down. At best, a statute upon a similar subject which derives its authority from another source can be referred to, if its provisions have been held to be reasonable or have stood the test of

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MANU/SC/1017/2008

**Equivalent Citation:** 2008(70)AIC65, AIR2008SC1640, 2008(3)ALD56, 2008(3)ALD56(SC), 2008 (73) ALR 324, 2008(2)ALT100(SC), 2008(56)BLJR1550, 2008 (2) CCC 23 , 2008GLH(2)167, [2008(3)JCR90(SC)], JT2008(2)SC639, 2008(2)RCR(Civil)561, 2008(3)SCALE45, (2008)4SCC720

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 8270 of 2001

Decided On: 25.02.2008

Appellants: **Government of Andhra Pradesh and Ors.**
**Vs.**
Respondent: **P. Laxmi Devi**

**Hon'ble Judges/Coram:**
*H.K. Sema and Markandey Katju, JJ.*

**Counsels:**
*For Appellant/Petitioner/Plaintiff: Manoj Saxena, Rajneesh Kumar Singh, Rahul Shukla and T.V. George, Advs*

**JUDGMENT**

**Markandey Katju, J.**

**1.** This appeal by special leave has been filed against the impugned judgment of the Andhra Pradesh High Court dated 8.5.2001 in Writ Petition No. 12649 of 2000.

**2.** Heard learned Counsel for the parties and perused the record.

The writ petition was filed in the High Court praying for a declaration that Section 47A of the Indian Stamp Act as amended by A.P. Act 8 of 1998 which requires a party to deposit 50% deficit stamp duty as a condition precedent for a reference to the Collector under Section 47A is unconstitutional. By the impugned judgment the High Court has declared it unconstitutional. Hence, this appeal.

**3.** Under Section 3 of the Indian Stamp Act, 1899 certain instruments are chargeable with the duty mentioned in the Schedule to the Act. Item 23 in the Schedule to the Act mentions a 'conveyance' as one of the documents requiring payment of stamp duty. A 'conveyance' is defined in Section 2(10) of the Act and includes a sale deed. Since in the present case we are concerned with payment of stamp duty on a sale deed, we have referred to the above provisions.

**4.** Experience showed that there was large scale under valuation of the real value of the property in the sale deeds so as to defraud the Government's proper revenue. In the original Stamp Act there was no provision empowering the revenue authorities to make an enquiry about the value of the property conveyed for determining the correct stamp duty. Hence amendments were made to the Indian Stamp Act from time to time in several States including amendments by the Andhra Pradesh Legislature e.g. by the Indian Stamps (A.P. Amendment) Act 22 of 1971, Indian Stamps (A.P. Amendment) Act 17 of 1986 and ultimately by the AP Act 8 of 1998 (with effect from 1.5.1998). The scheme of Section 47A was to deal with such cases where parties clandestinely undervalued the property to evade payment of the correct stamp duty.

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under a statute. The statute may be valid and constitutional, but the action taken under it may not be valid. Hence, merely because it is possible that the order of the registering authority under the proviso to Section 47A is arbitrary and illegal, that does not mean that the proviso to Section 47A is also unconstitutional. We must always keep this in mind when adjudicating on the constitutionality of a statute.

**26.** Since we have dealt with the question about constitutionality of Section 47A of the Stamp Act, we think it necessary to clarify the scope of judicial review of statutes, since Courts often are faced with a difficulty in determining whether a statute is constitutionally valid or not. We are, therefore, going a little deep into the theory of judicial review of statutes, as that will give some guidance to the High Courts in future.

*A. **Do Courts have the power to declare an Act of the Legislature to be invalid?***

The answer to the above question is : Yes. The theoretical reasoning for this view can be derived from the theory in jurisprudence of the eminent jurist Kelsen (The Pure Theory of Law).

**27.** According to Kelsen, in every country there is a hierarchy of legal norms, headed by what he calls as the 'Grundnorm' (The Basic Norm). If a legal norm in a higher layer of this hierarchy conflicts with a legal norm in a lower layer the former will prevail (see Kelsen's 'The General Theory of Law and State').

**28.** In India the Grundnorm is the Indian Constitution, and the hierarchy is as follows:

(i) The Constitution of India;

(ii) Statutory law, which may be either law made by Parliament or by the State Legislature;

(iii) Delegated legislation, which may be in the form of Rules made under the Statute, Regulations made under the Statute, etc.;

(iv) Purely executive orders not made under any Statute.

**29.** If a law (norm) in a higher layer in the above hierarchy clashes with a law in a lower layer, the former will prevail. Hence a constitutional provision will prevail over all other laws, whether in a statute or in delegated legislation or in an executive order. The Constitution is the highest law of the land, and no law which is in conflict with it can survive. Since the law made by the legislature is in the second layer of the hierarchy, obviously it will be invalid if it is in conflict with a provision in the Constitution (except the Directive Principles which, by Article 37, have been expressly made non enforceable).

**30.** The first decision laying down the principle that the Court has power to declare a Statute unconstitutional was the well-known decision of the US Supreme Court in **Marbury** v. **Madison** 5 U.S. (1Cranch) 137 (1803). This principle has been followed thereafter in most countries, including India.

*B . **How and when should the power of the Court to declare the Statute unconstitutional be exercised?***

Since, according to the above reasoning, the power in the Courts to declare a Statute unconstitutional has to be accepted, the question which then arises is how and when should such power be exercised.

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**31.** This is a very important question because invalidating an Act of the Legislature is a grave step and should never be lightly taken. As observed by the American Jurist Alexander Bickel "judicial review is a counter majoritarian force in our system, since when the Supreme Court declares unconstitutional a legislative Act or the act of an elected executive, it thus thwarts the will of the representatives of the people; it exercises control, not on behalf of the prevailing majority, but against it." (See A. Bickel's 'The Least Dangerous Branch')

**32.** The Court is, therefore, faced with a grave problem. On the one hand, it is well settled since **Marbury** v. **Madison** (supra) that the Constitution is the fundamental law of the land and must prevail over the ordinary statute in case of conflict, on the other hand the Court must not seek an unnecessary confrontation with the legislature, particularly since the legislature consists of representatives democratically elected by the people. The Court must always remember that invalidating a statute is a grave step, and must therefore be taken in very rare and exceptional circumstances.

**33.** We have observed above that while the Court has power to declare a statute to be unconstitutional, it should exercise great judicial restraint in this connection. This requires clarification, since, sometimes Courts are perplexed as to whether they should declare a statute to be constitutional or unconstitutional.

**34.** The solution to this problem was provided in the classic essay of Prof James Bradley Thayer, Professor of Law of Harvard University entitled ***'The Origin and Scope of the American Doctrine of Constitutional Law'*** which was published in the Harvard Law Review in 1893. In this article, Professor Thayer wrote that judicial review is strictly judicial and thus quite different from the policy-making functions of the executive and legislative branches. In performing their duties, he said, judges must take care not to intrude upon the domain of the other branches of government. Full and free play must be permitted to that wide margin of considerations which address themselves only to the practical judgment of a legislative body. Thus, for Thayer, legislation could be held unconstitutional only when those who have the right to make laws have not merely made a mistake (in the sense of apparently breaching a constitutional provision) but have made a very clear one, so clear that it is not open to rational question. Above all, Thayer believed, the Constitution, as Chief Justice Marshall had observed, is not a tightly drawn legal document like a title deed to be technically construed; it is rather a matter of great outlines broadly drawn for an unknowable future. Often reasonable men may differ about its meaning and application. In short, a Constitution offers a wide range for legislative discretion and choice. The judicial veto is to be exercised only in cases that leave no room for reasonable doubt. This rule recognizes that, having regard to the great, complex ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the Constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the Constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is not clearly in violation of a constitutional provision is valid even if the Court thinks it unwise or undesirable. Thayer traced these views far back in American history, finding, for example, that as early as 1811 the Chief Justice of Pennsylvania had concluded: "For weighty reasons, it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this Court, and every other Court of reputation in the United States, that an Act of the legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt" vide **Commonwealth ex. Rel. O'Hara** v. **Smith** 4 Binn. 117 (Pg.1811).

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**35.** Thus, according to Prof. Thayer, a Court can declare a statute to be unconstitutional not merely because it is possible to hold this view, but only when that is the only possible view not open to rational question. In other words, the Court can declare a statute to be unconstitutional only when there can be no manner of doubt that it is flagrantly unconstitutional, and there is no way of avoiding such decision. The philosophy behind this view is that there is broad separation of powers under the Constitution, and the three organs of the State - the legislature, the executive and the judiciary, must respect each other and must not ordinarily encroach into each other's domain. Also the judiciary must realize that the legislature is a democratically elected body which expresses the will of the people, and in a democracy this will is not to be lightly frustrated or obstructed.

**36.** Apart from the above, Thayer also warned that exercise of the power of judicial review "is always attended with a serious evil", namely, that of depriving people of "the political experience and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors" and with the tendency "to dwarf the political capacity of the people and to deaden its sense of moral responsibility".

**37.** Justices Holmes, Brandeis and Frankfurter of the United States Supreme Court were the followers of Prof. Thayer's philosophy stated above. Justice Frankfurter referred to Prof Thayer as "the great master of constitutional law", and in a lecture at the Harvard Law School observed "if I were to name one piece of writing on American Constitutional Law, I would pick Thayer's once famous essay because it is the great guide for judges and therefore, the great guide for understanding by non-judges of what the place of the judiciary is in relation to constitutional questions". (vide H. Phillip's 'Felix Frankfurter Reminisces' 299-300, 1960).

**38.** In our opinion, there is one and only one ground for declaring an Act of the legislature (or a provision in the Act) to be invalid, and that is if it clearly violates some provision of the Constitution in so evident a manner as to leave no manner of doubt. This violation can, of course, be in different ways, e.g. if a State legislature makes a law which only the Parliament can make under List I to the Seventh Schedule, in which case it will violate Article 246(1) of the Constitution, or the law violates some specific provision of the Constitution (other than the directive principles). But before declaring the statute to be unconstitutional, the Court must be absolutely sure that there can be no manner of doubt that it violates a provision of the Constitution. If two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must always be preferred. Also, the Court must make every effort to uphold the constitutional validity of a statute, even if that requires giving a strained construction or narrowing down its scope vide **Mark Netto** v. **Government of Kerala and Ors.** MANU/SC/0044/1978 : [1979]1SCR609 . Also, it is none of the concern of the Court whether the legislation in its opinion is wise or unwise.

**39.** In a dissenting judgment in **Bartels** v. **Iowa** 262 US 404 412(1923), Justice Holmes while dealing with a state statute requiring the use of English as the medium of instruction in the public schools (which the majority of the Court held to invalid) observed "I think I appreciate the objection to the law but it appears to me to present a question upon which men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried".

The Court certainly has the power to decide about the constitutional validity of a statute. However, as observed by Justice Frankfurter in **West Virginia** v. **Barnette** 319

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MANU/SC/0027/1958

**Equivalent Citation:** AIR1958SC731, [1959]1SCR629

**IN THE SUPREME COURT OF INDIA**

Petitions Nos. 58, 83, 84, 103, 117, 126, 127, 128, 248, 144 & 145 of 1956 & 129 of 1957

Decided On: 23.04.1958

Appellants: **Mohd. Hanif Quareshi and Ors.**
**Vs.**
Respondent: **The State of Bihar**

**Hon'ble Judges/Coram:**
*Sudhi Ranjan Das, C.J., P.B. Gajendragadkar, S.K. Das, T.L. Venkatarama Aiyyar and Vivian Bose, JJ.*

**Overruled / Reversed by:**
State of Gujarat vs. Mirzapur Moti Kureshi Kassab Jamat and Ors. (MANU/SC/1352/2005)

**JUDGMENT**

**Sudhi Ranjan Das, C.J.**

**1 .** These 12 petitions under Art. 32 of our Constitution raise the question of the constitutional validity of three several legislative enactments banning the slaughter of certain animals passed by the States of Bihar, Uttar Pradesh and Madhya Pradesh respectively. The controversy concerning the slaughter of cows has been raging in this country for a number of years and in the past it generated considerable ill will amongst the two major communities resulting even in riots and civil commotion in some places. We are, however, happy to note that the rival contentions of the parties to these proceedings have been urged before us without importing into them the heat of communal passion and in a rational and objective way, as a matter involving constitutional issues should be. Some of these petitions come from Bihar, some from U.P. and the rest from Madhya Pradesh, but as they raise common questions of law, it will be convenient to deal with and dispose of them together by one common judgment.

**2.** Petitions Nos. 58 of 1956, 83 of 1956 and 84 of 1956 challenge the validity of the Bihar Preservation and Improvement of Animals Act, 1955 (Bihar II of 1956), hereinafter referred to as the Bihar Act. In Petition No. 58 of 1956 there are 5 petitioners, all of whom are Muslims belonging to the Quraishi community which is said to be numerous and an important section of Muslims of this country. The members of the community are said to be mainly engaged in the butchers' trade and its subsidiary undertakings such as the sale of hides, tannery, glue making, gut making and blood-dehydrating, while some of them are also engaged in the sale and purchase of cattle and in their distribution over the various areas in the State of Bihar as well as in the other States of the Union of India. Petitioners Nos. 1 and 2 are butchers and meat vendors who, according to the petition, only slaughter cattle and not sheep or goats and are called "Kasais" in contradistinction to the "Chicks" who slaughter only sheep and goats. After slaughtering the cattle these petitioners sell the hides to tanners or hide merchants who are also members of their community and the intestines are sold to gut

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**21.** The next complaint is against the denial of the equal protection of the law. It is thus formulated : The petitioners are Muslims by religion and butchers (Kasais) by occupation and they carry on the trade of selling beef. The impugned Acts prejudicially affect only the Muslim Kasais who kill cattle but not others who kill goats and sheep and who sell goats' meat and mutton. It is, therefore, clear that only the Muslim Kasais, who slaughter only cattle but not sheep or goats, have been singled out for hostile and discriminatory treatment. Their further grievance is that the U.P. Act makes a distinction even between butchers who kill cattle and butchers who kill buffaloes and the Madhya Pradesh Act also makes a like discrimination in that slaughter of buffaloes is permitted, although under certificate, while slaughter of cows, bulls, bullocks and calves are totally prohibited. In the premises the petitioners contend that the law which permits such discrimination must be struck down as violative of the salutary provisions of Art. 14 of the Constitution.

**22.** The meaning, scope and effect of Art. 14, which is the equal protection clause in our Constitution, has been explained by this Court in a series of decisions in cases beginning with Chiranjitlal Choudhury v. The Union of India MANU/SC/0009/1950 : [1950]1SCR869 and ending with the recent case of Ram Krishna Dalmia and others v. Sri Justice S. R. Tendolkar MANU/SC/0024/1958 : [1959]1SCR279 . It is now well established that while Art. 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation and that in order to pass the test of permissible classification two conditions must be fulfilled, namely, (i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) such differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification, it has been held, may be founded on different bases, namely, geographical, or according to objects or occupations or the like and what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. The pronouncements of this Court further establish, amongst other things, that there is always a presumption in favour of the constitutionality of an enactment and that the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. The courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest and finally that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation. We, therefore, proceed to examine the impugned Acts in the light of the principles thus enunciated by this Court.

**23.** The impugned Acts, it may be recalled, have been made by the States in discharge of the obligations imposed on them by Art. 48. In order to implement the directive principles the respective Legislatures enacted the impugned Acts in exercise of the powers conferred on them by Art. 246 read with entry 15 in List II of the Seventh Schedule. It is, therefore, quite clear that the objects sought to be achieved by the impugned Acts are the preservation, protection and improvement of livestocks. Cows, bulls, bullocks and calves of cows are no doubt the most important cattle for the agricultural economy of this country. Female buffaloes yield a large quantity of milk and are, therefore, well looked after and do not need as much protection as cows yielding a small quantity of milk require. As draught cattle male buffaloes are not half as useful as

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MANU/SC/1197/2006

**Equivalent Citation:** AIR2006SC1489, AIR2006SC1489, 2006(3)BomCR260, 2006(108(1))BOMLR738, (2006)4CompLJ4(SC), (2006)4CompLJ14(SC), JT2006(3)SC235, 2006(3)SCALE1, (2006)3SCC434, [2006]67SCL107(SC)

**IN THE SUPREME COURT OF INDIA**

Civil Appeal Nos. 1519 of 2006 [Special Leave Petition (Civil) No. 23040 of 2005], 1528 of 2006 [Arising out of SLP (C) No. 24415 of 2005], 1546 of 2006, [Arising out of SLP (C) No. 23317 of 2005], 1541 of 2006 [Arising out of SLP (C) No. 23500 of 2005], 1532 of 2006 [Arising out of SLP (C) No. 24418 of 2005], 1540 of 2006 [Arising out of SLP (C) No. 23607 of 2005] 1550 of 2006 [Arising out of SLP (C) No. 23609 of 2005], 1520 of 2006 [Arising out of SLP (C) No. 23616 of 2005], 1536 of 2006 [Arising out of SLP (C) No. 23632 of 2005], 1521 of 2006 [Arising out of SLP (C) No. 23700 of 2005], 1515 of 2006 [Arising out of SLP (C) No. 23718 of 2005], 1538 of 2006 [Arising out of SLP (C) No. 23765 of 2005], 1518 of 2006 [Arising out of SLP (C) No. 24419 of 2005], 1523 of 2006 [Arising out of SLP (C) No. 23794 of 2005], 1543 of 2006 [Arising out of SLP (C) No. 23810 of 2005], 1517 of 2006 [Arising out of SLP (C) No. 23815 of 2005], 1522 of 2006 [Arising out of SLP (C) No. 26193 of 2005], 1530 of 2006, [Arising out of SLP (C) No. 26088 of 2005], 1534 of 2006 [Arising out of SLP (C) No. 26089 of 2005], 1526 of 2006 [Arising out of SLP (C) No. 25048 of 2005] and 1516 of 2006 [Arising out of SLP (C) No. 26090 of 2005]

Decided On: 07.03.2006

Appellants: **Bombay Dyeing and Mfg. Co. Ltd.**
**Vs.**
Respondent: **Bombay Environmental Action Group and Ors.**

**Hon'ble Judges/Coram:**
*S.B. Sinha and P.P. Naolekar, JJ.*

**Counsels:**
*For Appearing Parties: Ravi M. Kadam, Adv. Gen., Soli J. Sorabjee, Ram Jethmalani, Arun Jaitley, Fali Sam Nariman, Uday Umesh Lalit, Girish Godbole, Mukul Rohatgi, Rajeev Dhawan, Abhishek Manu Singhvi, T.R. Andhyarujina, R.F. Nariman, K.K. Venugopal, V.V. Tulzapurkar, V.A. Mohta, Gonsalves, Dinesh Dwivedi, Janak Dwarkadas, J.J. Bhat, Sr. Advs., Percy Gandhi, Shahrukh Kathawala, Salesh, R.N. Banerjee, Manik Karanjawala, Ravinder Narain, Pallav Shishodia, Pravin Bahadur, Meghalee Barthakur, Nupur Singh, Rajan Narain, Shivaji M. Jadhav, Himanshu Gupta, Brij Kishor Sah, Parimal K. Shroff, Bina Gupta, Rakhi Ray, Inklee Barooah, C. Rashikant, Shailesh, Gopal Jain, P.H. Parekh, Lalit Chauhan, Suresh Goel, Shyam Mehta, Bhavesh Panjwani, Advs. for P.H. Parekh & Co., Meena Doshi, B. Sunita Rao, Amit Bhandari, Sushil Kumar Pathak, U.A. Rana, Sandeep Kharel, Srabonee Roy, Advs. for Gagrat & Co., Ravi Gandhi, Dhaval Vussonji, Pratap Venugopal, E. Venu Kumar, Harshad V. Hameed, Advs. for K.J. John & Co., Anil Menon, S. Udaya Kumar Sagar, Bina Madhavan, Ambuj Agrawal, Advs. for Lawyer's Knit & Co., Dhaval Mehta, Rekha Palli, Venkatesh Dhond, C. Rashmikant, S.K. Srivastava, Santosh Paul, Shweta Gupta, A.K. Ujjainwala S.H., Rakesh Khatana, D.N. Mishra, Jay Salva, Gautam Patel, Parag Kabadi, Lyna Perira, Sharan Jagiani, Devansh A. Mohta, Reena Bagga, Meenakshi Ogra, Minakshi Satya Mitra, M.N. Shroff, Anuradha Singh, Aparna Bhat, Ravindra Keshavrao Adsure, S.S. Shinde, V.N. Raghupathy, Anirudha P. Moyee, Mukesh Verma, Ashok B. Jain, D.T. Devale, Manish Shanker, Pankaj Kumar Singh, Ashish Mohan, Yash Pal Dhingra, N.M. Ganguli, Vinay Navare, Naresh Kumar, Chander Shekhar Ashri, Prashant Bhushan, Vishal Gupta, Rohit Kumar Singh, Sumeet*

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governing the quality of life have been included in the expression "life" contained in Article 21 by reason of creative interpretation of the said provision by this Court, is it possible to argue that Article 21 does not provide for an absolute immunity? Article 21 does not only refer to the necessity to comply with procedural requirements, but also substantive rights of a citizen. It aims at preventive measures as well as payment of compensation in cases human rights of a citizen are violated. So far as the question of compliance of the procedural due process is concerned, it was conceded before the High Court by the writ petitioners Respondents that the procedural requirements laid down in provisions of Section 37 of the MRTP Act had been complied with.

**200.** We, however, are unable to uphold the contention of Mr. Salve, as at present advised, that before making DCR 58 in the year 2001, it was obligatory on the part of the State to accept in toto the recommendations made by the Expert Committees who had undertaken certain exercises; the equities should have been adjusted and the provisions of the pollution laws including the provisions of Sub-section (2) of Section 28 of the MRTP Act should have been considered. A presumption arises as regards the constitutionality of a statute. Such a presumption would also arise in a case of subordinate legislation. As indicated hereinbefore, a subordinate legislation, however, shall be susceptible or vulnerable to challenge not only on the ground that the same offends Articles 14, 21 read with Article 48A of the Constitution of India but also that the provisions of the MRTP Act are unreasonable.

**201.** In the instant case, the State appointed two committees. They have been taken into consideration by the State, may albeit be only in part. The State might not have agreed with the entirety of the report. The State might have taken into consideration other factors which would subserve the purport and object of the regulation. But, it will be difficult for us to arrive at a finding that the environmental aspects had totally been ignored. To what extent, DCR 58 would be commensurate with the ideal ecological condition as is suggested by the experts is one thing but it is another thing to say that no consideration at all in this behalf had been made by it. The State in its affidavit categorically stated that the said reports had fallen for consideration and had been accepted by it but in the third affidavit it has merely been stated that the State intended to give more than what was suggested in the said report. It has been accepted by the parties that certain suggestions have been accepted in toto and the provisions have been amended pursuant thereto or in furtherance thereof.

**202.** The Ranjit Deshmukh Committee, not only visited some mills but also took recourse to the consultative process. Even the Charles Correa Committee visited all the public sector textile mills. While taking the said reports into consideration, the State acquainted itself with the existing ground realities as they then existed.

**203.** For the purpose of striking down a legislation on the ground of infraction of the Constitutional provisions, the court would not exercise its jurisdiction only because the recommendations of the committees had not been accepted in toto but would do so inter alia on the ground as to whether they otherwise violate the constitutional principles.

**204.** Arbitrariness on the part of the legislature so as to make the legislation violative of Article 14 of the Constitution should ordinarily be manifest arbitrariness. What would be arbitrary exercise of legislative power would depend upon the provisions of the statute vis-à-vis the purpose and object thereof. [See Sharma Transport v. Government of Andhra Pradesh MANU/SC/0759/2001 : AIR2002SC322 ,Khoday Distillery v. State of Karnataka MANU/SC/0242/1996 : AIR1996SC911 andOtis Elevator Employees' Union S.

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MANU/SC/0354/1997

**Equivalent Citation:** 1996IXAD(SC)153, AIR1997SC1511, 1997(2)BLJ640, 1997(1)BLJR551, JT1996(10)SC854, 1996(8)SCALE768, (1997)2SCC453, [1996]Supp9SCR479

**IN THE SUPREME COURT OF INDIA**

Civil Appeal Nos. 15112-15115 of 1996

Decided On: 03.12.1996

Appellants:**State of Bihar and Ors.**
**Vs.**
Respondent: **Bihar Distillery Ltd. and Ors.**

**Hon'ble Judges/Coram:**
*B.P. Jeevan Reddy and K.S. Paripoornan, JJ.*

**Counsels:**
*For Appellant/Petitioner/Plaintiff: S.B. Sanyal and B.B. Singh, Advs.*

*For Respondents/Defendant: Y.V. Giri, Jyoti Saran and Praveen Kumar, Advs.*

**ORDER**

**B.P. Jeevan Reddy, J.**

**1.** Leave granted.

**2.** The distribution and sale of country liquor in the State of Bihar is regulated by the Bihar Excise Act, 1915 and the rules made thereunder. It was a two-tier system. The wholesale dealers (contractors) were lifting the liquor from the distilleries and supplying it to the retailers. Both the wholesale dealers and retailers were selected on the basis of auction/tender process. The price at which the wholesaler supplied the country liquor from the warehouse to the retailer was fixed by the Government either statutorily or on the basis of negotiations between the wholesalers (contractors) and the Government. The price so determined was known as the cost price of country liquor which was payable by the retailer at the time of taking delivery from the concerned warehouse. The maintenance of warehouse was the responsibility of the wholesale supplier (Contractor).

**3.** In the year 1989, a batch of writ petitions, C.W.J.C. No. 4722 of 1989 and others, were filed in the Patna High Court. The High Court made interim orders in those writ petitions directing that till the contract is settled and until further orders from the Court, the supply of country liquor to the retailers shall be made directly by the State through its officers. In view of the said orders the Government was obliged to undertake the supply of country liquor from the warehouses maintained by it to the retailers. Even after the said batch of writ petitions were disposed of the practice of the Government undertaking wholesale supply of country liquor to retailers continued for some time. This happened during the period commencing on July 1, 1989, and ending with March 31, 1992. (These facts are taken from the preamble to the impugned Amendment Act being Bihar Act 9 of 1995.)

**4.** On December 15, 1989, a meeting was held between the Excise Officers of the State and the representatives of the distilleries to determine the cost price of country

cannot but be held in the circumstances that the distilleries accepted the offer contained in the Commissioner's letter dated 19th February, 1990 and were making supplies on the basis of the said letter and the orders placed pursuant to that letter and their acceptance of it.

**17.** Now coming to the reasoning in the impugned judgment, we must say with all respect that we have not been able to appreciate it. The approach of the Court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The Court should try to sustain its' validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The Court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed, any such defects of drafting should be ironed out as part of the attempt to sustain the validity/constitutionality of the enactment. After all, an Act made by the Legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionally must be plainly and clearly established before an enactment is declared as void.

The same approach holds good while ascertaining the intent and purpose of an enactment or its scope and application. Now, the result of the impugned Judgment is that the Amending Act has become an exercise in futility - a purposeless piece of Legislation. And this result has been arrived at by pointing out some drafting errors and some imperfection in the language employed. If only the High Court had looked into the minutes of the meeting dated 15th December, 1989 and the two letters of the Commissioner aforementioned, it would have become clear that the Amending Act was doing no more than repeating contents of the said letters and placing the legislative imprimatur on them. As the impugned judgment itself suggests, part of the imperfection of language is perhaps attributable to translation from Hindi to English. Indeed, it is surprising that the Court has not even referred to the long preamble to the Act which clearly sets out the context and purpose of the said enactment. It was put in at such length only with a view to aid the interpretation of its provisions. It was not done without a purpose. To call the entire exercise a mere waste is, to say the least, most unwarranted besides being uncharitable. The court must recognize the fundamental nature and importance of legislative process and accord due regard and deference to it, just as the Legislature and the Executive are expected to show due regard and deference to the Judiciary. It cannot also be forgotten that our Constitution recognizes and gives effect to the concept of equality between the three wings of the State and the concept of 'checks and balances' inherent in such scheme.

**18.** Though the above propositions are well settled, it may not be out of place to refer to a few decisions. In Charanjit Lal Chowdhary v. Union of India MANU/SC/0009/1950 : [1950]1SCR869 , Fazal Ali, J. stated."....it is the accepted doctrine of the American Courts, which I consider to be well-founded on principle, that the presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles". In Burrakur Coal Company v. Union of India MANU/SC/0106/1961 : [1962]1SCR44 Mudholkar, J., speaking for the Constitution Bench, observed : Where the validity of a law made by a competent legislature is challenged in a Court of law, that Court is bound to presume in favour of its validity. Further, while considering the validity of the law the court will not consider itself restricted to the pleadings of the State and would be free to satisfy itself whether under any provision of the Constitution the law can be sustained."

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MANU/SC/0416/1995

**Equivalent Citation:** AIR1995SC2114, 1995(1)CTC465, JT1995(1)SC247, 1995-2-LW819, 1994(4)SCALE1106, (1995)1SCC519, [1994]Supp5SCR666, 1995WritLR781

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 3322 of 1981.

Decided On: 22.11.1994

Appellants:**State of Tamil Nadu and Ors.**
**Vs.**
Respondent: **Ananthi Ammal and Ors.**

**Hon'ble Judges/Coram:**
*J.S. Verma, S.P. Bharucha and K.S. Paripoornan, JJ.*

**Counsels:**
*For Appearing Parties: K.N. Bhat, R. Sundaravaradan, S. Sivasubramaniam, A. Mariarputham and Aruna Mathur, Advs*

**ORDER**

**S.P. Bharucha, J.**

Civil Appeal No. 3312 of 1981.

**1.** This appeal by special leave is filed by the State of Tamil Nadu against the judgment and order of the High Court of Madras dated 9th September, 1981, whereby the Tamil Nadu Acquisition of Land for Harijan Welfare Schemes Act, 1978, was struck down as being ultra-vires the Constitution of India. The High Court came to the conclusion that the said Act did not enjoy the protection of Articles 31C or 31A and that it was violative of Articles 14, 19 and 300A of the Constitution.

**2.** Learned Counsel for the appellants submitted that the said Act was not violative of Articles 14 or 19 or 300A and that, in any event, it was protected by reason of Article 31A. Learned counsel for the respondents submitted that the said Act was violative of Article 14 inasmuch as it was enacted to acquire lands for a purpose which could as well be served by the provisions of the Land Acquisition Act, 1894, and that a comparison of the provisions of the said Act with those of the Land Acquisition Act showed that the provisions of the said Act were for harsher insofar as the land owner was concerned. Learned counsel for the respondents also submitted that the said Act did not enjoy the protection conferred by Article 31C notwithstanding the declaration in that behalf contained in Section 2 thereof.

**3.** The said Act contains in Section 2 the declaration aforementioned, namely, that it is enacted to give effect to the policy of the State towards securing the principles laid down in Part IV and, in particular, Article 46 of the Constitution. It is enacted to provide for acquisition of land for Harijan Welfare Schemes.

**4.** Section 3 of the said Act is the definition section. It defines Court to mean, in the City of Madras, the Madras City Civil Court and elsewhere, the Subordinate Judge's Court having jurisdiction, and if there is no such Subordinate Judge's Court, the District Court having jurisdiction. A "Harijan Welfare Scheme" is defined to mean any scheme

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were a notice to show-cause against the acquisition of the land served under Sub-section (2) of Section 4 of this Act.

(2) Nothing contained in Sub-section (1) shall apply in relation to any land unless and until after the District Collector has published a notice in the District Gazette to the effect that the said land is required for the purpose specified in Sub-section (1) of Section 4 of this Act.

**5.** It was submitted by learned Counsel for the respondents that no enquiry as required by Section 5 of the Land Acquisition Act was contemplated by the said Act. Whereas it was the Government which was required to consider objections and the need for acquisition and make a declaration thereafter that the land was required for a public purpose under the Land Acquisition Act, it was, under the said Act, left to the District Collector to be satisfied that the land was required for the purpose of a Harijan Welfare Scheme. No enquiry into the value of the land was contemplated under the said Act inasmuch as a provision equivalent to Section 11 of the Land Acquisition Act was not to be found in the said Act. Whereas the Land Acquisition Act set out the matters that were required to be considered for the purposes of award of compensation there was no such provision in the said Act. The said Act did not provide for a reference to the court in regard to a claim for enhancement of compensation in the manner of section is of the Land Acquisition Act; it provided only for an appeal to the court and, having regard to the terms of Section 9, that appeal was restricted to the amount of solatium payable under Section 7(2) of the said Act. Section 11 of the said Act provided for the payment of the compensation amount in installments in the event that the amount thereof exceeded Rs. 2,000. Section 13 of the said Act provided for a second appeal to the High Court only if the amount as determined by the prescribed authority exceeded such sum as might be prescribed. This sum, it may be mentioned, was at the relevant time Rs. 50,000, which was the amount prescribed for the purposes of all second appeals to the High Court under the rules for the purpose.

**6 .** In The State of Madhya Pradesh v. G.C. Mandawar MANU/SC/0135/1954 : (1954)IILLJ673SC , a Constitution Bench held that Article 14 does not authorise the striking down of the law of one State on the ground that, in contrast with the law of another State on the same subject, its provisions are discriminatory, nor does it contemplate the law of the center or of a State dealing with similar subjects being held to be unconstitutional by a process of comparative study of the provisions of the two. The sources of authority for the two being different, Article 14 can have no application. In Sant Lal Bharti v. State of Punjab MANU/SC/0551/1987 : [1988]2SCR107 , this was reiterated.

**7.** When a statute is impugned under Article 14 what the court has to decide is whether the statute is so arbitrary or unreasonable that it must be struck down. At best, a statute upon a similar subject which derives its authority from another source can be referred to, if its provisions have been held to be reasonable or have stood the test of time, only for the purpose of indicating what may be said to be reasonable in the context. We proceed to examine the provisions of the said Act upon this basis.

**8.** Sub-section (1) of Section 4 empowers the District Collector, if he is satisfied that it is necessary to acquire some land for the purpose of an Harijan Welfare Scheme, to acquire that land by publishing in the District Gazette a notice to the effect that he has decided to acquire it in pursuance of Section 4. Sub-section (2) of Section 4 obliges the District Collector or any officer authorised by him in this behalf to call upon the owner or any other person who, in the opinion of the District Collector or the officer so

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MANU/SC/0406/1984

**Equivalent Citation:** AIR1985SC515, AIR1986SC515, (1985)1CompLJ115(SC), (1985)1CompLJ115(SC), [1986]159ITR856(SC), (1985)1SCC641

**IN THE SUPREME COURT OF INDIA**

Writ Petns. Nos. 2656-60, 2935 to 2952, 3402, 3467, 3595, 3600-03, 3608, 3632, 3653, 3661, 3821, 3890-93, 4590-93, 4613-15, 5222, 5576, 5600-02, 5726-27, 7410, 8459-62, 8825. 8944 of 1981, 1325 of 1982, 470-72 of 1984, T.C. Nos. 23 of 1983 and 23 of 1984 and W.P. Nos. 3114-17, 3392-93, 3853 and 6446-47 of 1981

Decided On: 06.12.1984

Appellants: **Indian Express Newspapers (Bombay) Private Ltd. and Ors.**
**Vs.**
Respondent: **Union of India (UOI) and Ors.**

**Hon'ble Judges/Coram:**
*O. Chinnappa Reddy, A.P. Sen and E.S. Venkataramiah, JJ.*

**JUDGMENT**

**E.S. Venkataramiah, J.**

**1.** The majority of Petitioners in these petitions filed under Article 32 of the Constitution are certain companies, their shareholders and their employees engaged in the business of editing, printing and publishing newspapers, periodicals, magazines etc. Some of them are trust or other kinds of establishments carrying on the same kind of business. They consume in the course of their activity large quantities of newsprint and it is stated that 60% of the expenditure involved in the production of a newspaper is utilized for buying newsprint, a substantial part of which is imported from abroad. They challenge in these petitions the validity of the imposition of import duty on newsprint imported from abroad under Section 12 of the Customs Act, 1962 (Act 52 of 1962) read with Section 2 and Heading No. 48.01/21 Subheading No. (2) in the First Schedule to the Customs Tariff Act, 1975 (Act 51 of 1975) and the levy of auxiliary duty under the Finance Act, 1981 on newsprint as modified by notifications issued under Section 25 of the Customs Act, 1962 with effect from March 1, 1981.

**2.** The first set of writ petitions challenging the above levy was filed in May, 1981. At that time under the Customs Act, 1962 read with the Customs Tariff Act, 1975 customs duty of 40% ad valorem was payable on newsprint. Under the Finance Act, 1981 an auxiliary duty of 30% ad valorem was payable in addition to the customs duty. But by notifications issued under Section 25 of the Customs Act, 1962 the customs duty had been reduced to 10% ad valorem and auxiliary duty had been reduced to 5% ad valorem in the case of newsprint used for printing newspapers, books and periodicals.

**3 .** During the pendency of these petitions while the Customs Tariff Act, 1975 was amended levying 40% ad valorem plus Rs. 1,000/- per MT as customs duty on newsprint, the auxiliary duty payable on all goods subject to customs duty was increased to 50% ad valorem. But by reason of notifications issued under Section 25 of the Customs Act, 1962 duty at a flat rate of Rs. 550/- per MT and auxiliary duty of Rs. 275/- per MT are now being levied on newsprint i.e. in all Rs. 825/- per MT is now being levied.

**4.** The Petitioners inter alia contend that the imposition of the import duty has the direct

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**75.** In India arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. In India any enquiry into the vires of delegated legislation must be confined to the grounds on which plenary legislation may be questioned, to the ground that it is contrary to the statute under which it is made, to the ground that it is contrary to other statutory provisions or that it is so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution.

**76.** That subordinate legislation cannot be questioned on the ground of violation of principles of natural justice on which administrative action may be questioned has been held in Tulsipur Sugar Company Ltd. v. Notified Area Committee, Tulsipur, (MANU/SC/0336/1980 : (1980) 2 SCR 1111: AIR 1980 SC 882): Rameshchandra Kachardas Porwal v. State of Maharashtra, (MANU/SC/0033/1981 : (1981) 2 SCR 866: AIR 1981 SC 1127) and in Bates v. Lord Hailsham of St. Marylebone,(1972) 1 WLR 1373. A distinction must be made between delegation of a legislative function in the case of which the question of reasonableness cannot be enquired into and the investment by statute to exercise particular discretionary powers. In the latter case the question may be considered on all grounds on which administrative action may be questioned, such as, non-application of mind taking irrelevant matters into consideration, failure to take relevant matters into consideration, etc. etc. On the facts and circumstances of a case, a subordinate legislation may be struck down as arbitrary or contrary to statute if it fails to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution. This can only be done on the ground that it does not conform to the statutory or constitutional requirements or that it offends Article 14 or Article 19(1)(a) of the Constitution. It cannot, no doubt be done merely on the ground that it is not reasonable or that it has not taken into account relevant circumstances which the Court considers relevant.

**77.** We do not, therefore find much substance in the contention that the courts cannot at all exercise judicial control over the impugned notifications. In cases where the power vested in the Government is a power which has got to be exercised in the public interest as it happens to be here, the Court may require the Government to exercise that power in a reasonable way in accordance with the spirit of the Constitution. The fact that a notification issued under Section 25(1) of the Customs Act, 1962 is required to be laid before Parliament under Section 159 thereof does not make any substantial difference as regards the jurisdiction of the court to pronounce on its validity.

**78.** The power to grant exemption should however, be exercised in a reasonable way Lord Greene M.R. has explained in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation, (1948) 1 KB 223 what a 'reasonable way' means as follows:

> It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of

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MANU/SC/4993/2006

**Equivalent Citation:** (2007)6CompLJ219(SC), [2007(112)FLR474], JT2006(10)SC216, 2006(12)SCALE1, (2007)1SCC408, (2007)1SCC(LS)270, [2006]Supp(9)SCR73, 2007(1)SCT214(SC), 2007(2)SLJ467(SC), 2007(1)SLR388(SC)

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 4996 of 2006 (Arising out of Special Leave Petition (Civil) No. 3862 of 2006)

Decided On: 16.11.2006

Appellants: **Indian Drugs and Pharmaceuticals Ltd.**
**Vs.**
Respondent: **Workman, Indian Drugs and Pharmaceuticals Ltd.**

**Hon'ble Judges/Coram:**
*S.B. Sinha and Markandey Katju, JJ.*

**Counsels:**
*For Appellant/Petitioner/Plaintiff: L. Nageshwar Rao, Sr. Adv. and Meera Mathur, Adv*

*For Respondents/Defendant: Chandra Pal Singh, Party-in-person*

**JUDGMENT**

**Markandey Katju, J.**

**1.** Leave granted.

**2 .** This appeal has been filed against the impugned judgment and order dated 30.9.2005 passed by the Uttaranchal High Court in W.P. No. 3360 of 2001. By that Judgment the High Court has modified the award of the Labour Court, U.P., Dehradun, to the extent that the workmen, in whose favour the award had been made, were allowed to be continued in the service of the appellant employer till their superannuation, and if their services were not required they should not be terminated except in accordance with Industrial Law. The High Court further directed that the workmen in question should be paid wages like the regular employees performing the work and duties in the appellant-company.

We have heard the learned Counsel for the parties and perused the record.

**3.** The facts of the case are that the appellant is a Public Sector Undertaking which has a plant in Rishikesh where it was manufacturing pharmaceuticals. The present dispute relates to the ten concerned employees who were appointed as casual workers on daily rate basis for the reason that they were dependants of employees dying in harness. Such appointments were made by the appellant due to the persistent and prolonged agitation by the trade union since the appellant wanted to maintain industrial harmony, although there was no rule/policy for such compassionate appointment in the service of the appellant company, which was already over-staffed. As against 1049 sanctioned posts, there were already 1299 employees working in the company at the relevant time.

The aforesaid ten persons were paid wages according to the rates of daily wages, declared by the State Government from time to time, as agreed with the union. Since the appellant was already over-staffed in all its departments, the said persons were

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**17.** In ***Dr. Surinder Singh Jamwal and Anr.*** v. ***State of Jammu & Kashmir and Ors.*** MANU/SC/0710/1996 : (1996)IILLJ795SC , it was held that ad hoc appointment does not give any right for regularization as regularization is governed by the statutory rules.

In ***Ashwani Kumar and Ors. etc.*** v. ***State of Bihar and Ors.*** etc. MANU/SC/0734/1996 : (1997)IILLJ856SC , the appointment made without following the appropriate procedure under the rules/Government circulars and without advertisement or inviting application from the open market was held to be in flagrant breach of Articles 14 and 16 of the Constitution.

**18.** Creation and abolition of posts and regularization are a purely executive function vide P.U. Joshi v. Accountant General, Ahmedabad and Ors. MANU/SC/1188/2002 : [2002]SUPP5SCR573 . Hence, the court cannot create a post where none exists. Also, we cannot issue any direction to absorb the respondents or continue them in service, or pay them salaries of regular employees, as these are purely executive functions. This Court cannot arrogate to itself the powers of the executive or legislature. There is broad separation of powers under the Constitution, and the judiciary, too, must know its limits. The respondents have not been able to point out any statutory rule on the basis of which their claim of continuation in service or payment of regular salary can be granted. It is well settled that unless there exists some rule no direction can be issued by the court for continuation in service or payment of regular salary to a casual, ad hoc, or daily rate employee. Such directions are executive functions, and it is not appropriate for the court to encroach into the functions of another organ of the State. The courts must exercise judicial restraint in this connection. The tendency in some courts/tribunals to legislate or perform executive functions cannot be appreciated. Judicial activism in some extreme and exceptional situation can be justified, but resorting to it readily and frequently, as has lately been happening, is not only unconstitutional, it is also fraught with grave peril for the judiciary.

**19.** In ***Asif Hameed*** v. ***State of Jammu & Kashmir*** MANU/SC/0036/1989 : [1989]3SCR19 , this Court observed:

> Before adverting to the controversy directly involved in these appeals we may have a fresh look on the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. Legislature, Executive and Judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. The legislature and executive, the two facets of people's will, have all the powers including that of finance. The judiciary has no power over the sword or the purse, nonetheless it has power to ensure that the aforesaid two main organs of the State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self imposed discipline of judicial restraint.

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MANU/DE/0021/2021

**Equivalent Citation:** 2021IIIAD(Delhi)50, 277(2021)DLT604, (2021) 84 GST 791 (Delhi), [2021]87GSTR410(Delhi), [2021]84TAXMAN791(Delhi)

**IN THE HIGH COURT OF DELHI**

W.P. (C) 5454/2020 and W.P. (C) 10130/2020

Decided On: 08.01.2021

Appellants: **Dhruv Krishan Maggu and Ors.**
**Vs.**
Respondent: **Union of India and Ors.**

**Hon'ble Judges/Coram:**
*Manmohan and Sanjeev Narula, JJ.*

**Counsels:**
*For Appellant/Petitioner/Plaintiff: Jagmohan Bansal, Akhil Krishan Maggu and J.K. Mittal, Advocates*

*For Respondents/Defendant: S.V. Raju, Ld. ASG, Ravi Prakash, Aditya Shekhar, Shahan Ulla, Farman Ali, Guntur Pramod Kumar, Annam Venkatesh, Sairica S. Raju, Shaurya R. Rai, Zeal Shah, Akshay Gadeock, Sahaj Garg, Advocates and Chetan Sharma, ASG*

**Nature of Issue Involved:**
Validity of Provision

**JUDGMENT**

**Manmohan, J.**

CM No. 28105/2020 in WP(C) 5454/2020

CM No. 32276/2020 in WP(C) 10130/2020

**1.** While the CM No. 32276/2020 has been filed by the Petitioner in W.P.(C.) No. 10130/2020 seeking interim protection, CM No. 28105/2020 has been filed by Respondent nos. 2 and 3 in W.P.(C.) No. 5454/2020 seeking vacation of interim protection granted vide order dated 20th August, 2020.

**2.** It is pertinent to point out that when W.P.(C.) No. 5454/2020 was listed before this Court for the first time on 20th August, 2020, Mr. Chetan Sharma, learned Additional Solicitor General had fairly stated that in a similar matter the Supreme Court had directed that no coercive action be taken against the petitioner therein. On the basis of the said statement, this Court had granted interim protection to the petitioner. The relevant portion of the order dated 20th August, 2020 passed by this Court in W.P.(C.) No. 5454/2020 is reproduced hereinbelow:-

> "Present writ petition has been filed seeking a declaration that Sections 69 and 132 of the CGST Act, 2017 are arbitrary, unreasonable and being beyond the legislative competence of the Parliament are ultra vires the Constitution.
>
> xxxx xxxx xxxx xxxx
>
> Mr. Chetan Sharma, learned ASG candidly states that the Supreme Court in a

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fully empowered to conduct intelligence-based enforcement action against taxpayers assigned to State tax administration under Section 6 of the CGST Act, 2017 and the corresponding provisions of the SGST/UTGST Acts.

**28.** Lastly, it was contended by the learned ASG that these issues would not be relevant at the stage of the present interim application as the application is regarding interim protection from arrest.

COURT'S REASONING

THERE IS ALWAYS A PRESUMPTION IN FAVOUR OF CONSTITUTIONALITY OF ENACTMENT OR ANY PART THEREOF AND THE BURDEN TO SHOW THAT THERE BEEN A CLEAR TRANSGRESSION OF CONSTITUTIONAL PRINCIPLES IS UPON PERSON WHO IMPUGNS SUCH AN ENACTMENT FURTHER, LA WS ARE NOT TO DECLARED UNCONSTITUTIONAL ON THE FANCIFUL THEORY THAT POWER WOULI EXERCISED IN AN UNREALISTIC FASHION OR IN A VACUUM OR ON THE GROUND T THERE IS A REMOTE POSSIBILITY OF ABUSE OF POWER.

**29.** Having heard the learned counsel for the parties and having perused the material on record, including the counter-affidavit dated 22nd December, 2020 filed by Respondent nos. 2 and 3 in WP(C) 10130/2020, this Court is of the opinion that the principles for adjudicating the constitutionality of an enactment or any part thereof are well settled.

**30.** There is always a presumption in favour of constitutionality of an enactment or any part thereof and the burden to show that there has been a clear transgression of constitutional principles is upon the person who impugns such an enactment. Also, whenever constitutionality of a provision is challenged on the ground that it infringes a fundamental right, the direct and inevitable effect/ consequence of the legislation has to be taken into account. The Supreme Court in Namit Sharma vs. Union of India, MANU/SC/0744/2012 : (2013) 1 SCC 745 has held as under:-

> *20. Dealing with the matter of closure of slaughterhouses in Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat* [MANU/SC/1246/2008 : (2008) 5 SCC 33], *the Court while noticing its earlier judgment Govt. of A.P. v. P. Laxmi Devi* [MANU/SC/1017/2008 : (2008) 4 SCC 720],*introduced a rule for exercise of such jurisdiction by the courts stating that* ***the court should exercise judicial restraint while judging the constitutional validity of the statute or even that of a delegated legislation and it is only when there is clear violation of a constitutional provision beyond reasonable doubt that the court should declare a provision to be unconstitutional....."***
>
> (emphasis supplied)

**31.** Further, laws are not to be declared unconstitutional on the fanciful theory that power would be exercised in an unrealistic fashion or in a vacuum or on the ground that there is a remote possibility of abuse of power. In fact, it must be presumed, unless the contrary is proved, that administration and application of a particular law would be done "not with an evil eye and unequal hand". The Supreme Court in Maganlal Chhagganlal (P) Ltd. Vs. Municipal Corporation of Greater Bombay & Ors., MANU/SC/0052/1974 : (1975) 1 SCR 1 has held as under:-

> *"The statute itself in the two classes of cases before us clearly lays down the purpose behind them, that is that premises belonging to the Corporation and the*

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# THE SUPREME COURT CASES

(2018) 7 SCC

(2018) 7 Supreme Court Cases 1

(BEFORE DIPAK MISRA, C.J. AND DR A.K. SIKRI, A.M. KHANWILKAR, DR D.Y. CHANDRACHUD AND ASHOK BHUSHAN, JJ.)

KALPANA MEHTA AND OTHERS ... Petitioners;

Versus

UNION OF INDIA AND OTHERS ... Respondents.

Writ Petitions (C) No. 558 of 2012 with No. 921 of 2013†, decided on May 9, 2018

A. Parliament and State Legislatures — Parliamentary privilege — Facts and Observations contained in Parliamentary Committee Reports — Extent to which may be relied on in court, and probative value — Adjudication of factual and legal issues — Appropriate authority for, is court of law — Approach to be followed in respect of contentious facts in said reports as distinguished from report itself — Government sponsored immunisation programme — Death of young girls — Adverse observations and comments against said programme in two reports of Parliamentary Committee — Reliance upon by petitioners in present PIL — Extent to which permissible and actionable

— Said reports held, *per curiam*, admissible in evidence under S. 74, Evidence Act of which judicial notice shall be taken under S. 57(4), Evidence Act — Moreover, for their production in court, permission of Speaker not necessary as they are already in public domain — It is court and not Parliament which has to adjudicate all factual and legal issues — People also have a right to know — No exception can be taken to the petitioners obtaining 72nd and 81st Reports of Parliamentary Standing Committee, for using them as evidence in court — But Parliamentary Committee Report not substantive evidence in case of findings of misdemeanour or breach of duty by public

† [illegible]

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Page 47 Thursday, January 27, 2022
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[illegible]

"[illegible] Legal [illegible] existing legal propositions [illegible] [illegible] rights [illegible] legal [illegible]"

The aforesaid two passages [illegible] the Court [illegible] exercise of the power [illegible] present. An organic instrument requires the Court to draw [illegible] from the spirit of the Constitution. [illegible] the Constitution [illegible] the interpretative process also expects the same.

**41.** This Court has the constitutional power [illegible] to interpret the constitutional provisions as well as the statutory provisions. [illegible] of the power of judicial review [illegible] as the constitutional court has the power to declare [illegible] law [illegible] unconstitutional [illegible] lack of competence of the legislature keeping in view the field of legislation as provided in the Constitution or [illegible] provision [illegible] of the fundamental rights or any constitutional provision or if a provision is manifestly arbitrary.

**42.** When we speak about judicial review, it is also necessary to be alive to the concept of judicial restraint. The duty of judicial review which the Constitution has bestowed upon the judiciary [illegible] the concept of judicial restraint. The principle of judicial restraint requires that Judges ought to decide cases [illegible] within their defined limits of power. Judges are expected to interpret any law or any provision of the Constitution [illegible]

**43.** In [illegible] it has been ruled that the judiciary should exercise restraint and ordinarily should not encroach into the legislative domain. [illegible] reference to a three-Judge Bench decision [illegible] is quite instructive. In the said case, a prayer was made before this Court to issue directions [illegible] Municipal Corporation [illegible] submission, the Court held that it is purely a matter of policy which is for the elected representatives of the people to decide and no directions can be issued by the Court in this regard. The Court further observed that this Court cannot issue directions to the legislature to make any particular kind of enactment. In this context, the Court held that under our constitutional scheme

[illegible]

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MANU/SC/2491/2005

**Equivalent Citation:** 2005(35)AIC25, AIR2006SC767, AIR2006SC767, AIR2006SC767, 2006(1)ALT1(SC), JT2005(9)SC210, RLW2005(4)SC2921, (2005)13SCC287

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 9444 of 2003

Decided On: 06.10.2005

Appellants: **Suresh Seth**
**Vs.**
Respondent: **Commissioner, Indore Municipal Corporation and Ors.**

**Hon'ble Judges/Coram:**
*R.C. Lahoti, C.J., G.P. Mathur and P.K. Balasubramanyan, JJ.*

**Counsels:**
*For Appellant/Petitioner/Plaintiff: T.S. Doabia, Sr. Adv., A.K. Chitale, Sr. Advs., M. Mannan, Vikrant Singh, Niraj Sharma, Advs*

*For Respondents/Defendant: S.K. Dubey, Sr. Adv., S. Muralidhar, K.G. Gopalakrishnan, Amit Sharma, Chandra Mohan Anisetty, Rohit Kumar Singh Ms Vibha Datta Makhija, Advs.*

**JUDGMENT**

**G.P. Mathur, J.**

**1.** This appeal, by special leave, has been filed challenging the judgment and order dated 7.5.2003 of High Court of Madhya Pradesh by which the Civil Revision filed by Bhanu Kumar Jain was dismissed.

**2.** The election for the Office of Mayor, Municipal Corporation of Indore, was notified on 25.11.1999. The election was held on 27.12.1999 and the result was declared on 3.1.2000 wherein Shri Kailash Vijayvargiya, respondent No. 3, was elected as Mayor. One Bhanu Kumar Jain filed an election petition challenging the election of Shri Kailash Vijayvargiya as Mayor on several grounds and the principal ground taken was that he being a sitting member of the Legislative Assembly, was disqualified for holding the Office of Mayor of a corporation under the M.P. Municipal Corporation Act, 1956. The election petition was dismissed by the XII Additional District Judge, Indore, by the judgment and order dated 11.4.2002. Bhanu Kumar Jain then filed a civil revision under Section 441F of the M.P. Municipal Corporation Act, 1956 in the High Court, which was also dismissed by the judgment and order dated 7.5.2003, which is the subject-matter of challenge in the present appeal.

**3.** The term of a Mayor under the M.P. Municipal Corporation Act, 1956 is five years and it is fairly admitted by learned counsel for the appellant that the term of Shri Kailash Vijayvargiya has already come to an end. In these circumstances, no effective relief can be granted in the present appeal and the same has become infructuous by passage of time.

**4.** Learned counsel for the appellant has submitted that a direction be issued that an election petition challenging the election of a returned candidate should be decided

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expeditiously by the trial court and the revision petition preferred in the High Court should also be disposed of as expeditiously as possible. The appellant has not filed copy of the order sheet of the trial court or of the High Court, which could give some indication as to who is responsible for the delay in the final disposal of the matter. Even the judgment of the trial court has not been filed along with the special leave petition. In absence of complete material having been placed on record, it will not be proper for us to issue any direction in this regard.

**5.** Learned counsel for the appellant has also submitted that this Court should issue directions for an appropriate amendment in the M.P. Municipal Corporation Act, 1956 so that a person may be debarred from simultaneously holding two elected offices, namely that of a member of the Legislative Assembly and also of Mayor of a Municipal Corporation. In our opinion, this is a matter of policy for the elected representatives of people to decide and no direction in this regard can be issued by the court. That apart this Court cannot issue any direction to the Legislature to make any particular kind of enactment. Under our constitutional scheme Parliament and Legislative Assemblies exercise sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation.

In Supreme Court Employees Welfare Association v. Union of India, MANU/SC/0582/1989 : (1989)IILLJ506SC it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. This view has been reiterated in State of J & K v. A.R. Zakki, MANU/SC/0293/1992 : AIR1992SC1546 W. In A.K. Roy v. Union of India, MANU/SC/0051/1981 : 1982CriLJ340 , it was held that no mandamus can be issued to enforce an Act which has been passed by the legislature. Therefore, the submission made by the learned counsel for the appellant cannot be accepted.

**6.** The appeal is accordingly dismissed. No costs.

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MANU/SC/0999/2014

**Equivalent Citation:** 2015VI AD (S.C.) 397, 2015 (1) AWC 757 (SC), (SCSuppl)2015(1)CHN212, 2015-2-LW978, (2014)8MLJ241(SC), 2014(4)RCR(Civil)991, 2014(12)SCALE549, (2015)2SCC796, (2015)1SCC(LS)589, 2014 (10) SCJ 222

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 9996 of 2014 (Arising out of S.L.P. (Civil) No. 480 of 2012)

Decided On: 07.11.2014

Appellants: **Census Commissioner**
**Vs.**
Respondent: **R. Krishnamurthy**

**Hon'ble Judges/Coram:**
*Dipak Misra, Rohinton Fali Nariman and U.U. Lalit, JJ.*

**Counsels:**
*For Appellant/Petitioner/Plaintiff: R.S. Suri, Sr. Adv., Rachana Srivastava, Indra Sawhney, Sushma Suri and Shreekant N. Terdal, Advs.*

*For Respondents/Defendant: Party-in-person*

**JUDGMENT**

**Dipak Misra, J.**

1. The present appeal depicts and, in a way, sculpts the non-acceptance of conceptual limitation in every human sphere including that of adjudication. No adjudicator or a Judge can conceive the idea that the sky is the limit or for that matter there is no barrier or fetters in one's individual perception, for judicial vision should not be allowed to be imprisoned and have the potentiality to cover celestial zones. Be it ingeminated, refrain and restrain are the essential virtues in the arena of adjudication because they guard as sentinel so that virtuousness is constantly sustained. Not for nothing, centuries back *Francis Bacon* [1] had to say thus:

> Judges ought to be more learned than witty, more reverend than plausible, and more advised than confident. Above all things, integrity is their portion and proper virtue......

Let the judges also remember that Solomon's throne was supported by lions on both sides: let them be lions, but yet lions under the throne.

**2.** Almost half a century back *Frankfurter, J.*[2] sounded a note of caution:

> For the Highest exercise of judicial duty is to subordinate one's personal pulls and one's views to the law of which we are all guardians-those impersonal convictions that make a society a civilized community, and not the victims of personal rule.

**3.** In this context, it is seemly to reproduce the warning of *Benjamin N. Cardozo* in *The Nature of the Judicial process* [3] Yale University Press 1921 Edn., Pg-114 which rings of poignant and inimitable expression:

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could have issued such a mandamus commanding the Appellant to carry out a census in a particular manner. The High Court has tried to inject the concept of social justice to fructify its direction. It is evincible that the said direction has been issued without any deliberation and being oblivious of the principle that the courts on very rare occasion, in exercise of powers of judicial review, would interfere with a policy decision. Interference with the policy decision and issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue Notification regarding the manner in which the census has to be carried out and the Central Government has issued Notifications, and the competent authority has issued directions. It is not within the domain of the Court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policy making by adding something to the policy by way of issuing a writ of mandamus.

There the judicial restraint is called for remembering what we have stated in the beginning. The courts are required to understand the policy decisions framed by the Executive. If a policy decision or a Notification is arbitrary, it may invite the frown of Article 14 of the Constitution. But when the Notification was not under assail and the same is in consonance with the Act, it is really unfathomable how the High Court could issue directions as to the manner in which a census would be carried out by adding certain aspects. It is, in fact, issuance of a direction for framing a policy in a specific manner. In this context, we may refer to a three-Judge Bench decision in ***Suresh Seth v. Commr., Indore Municipal Corporation*** MANU/SC/2491/2005 : (2005) 13 SCC 287 wherein a prayer was made before this Court to issue directions for appropriate amendment in the M.P. Municipal Corporation Act, 1956 so that a person may be debarred from simultaneously holding two elected offices, namely, that of a Member of the Legislative Assembly and also of a Mayor of a Municipal Corporation. Repelling the said submission, the Court held:

> In our opinion, this is a matter of policy for the elected representatives of people to decide and no direction in this regard can be issued by the Court. That apart this Court cannot issue any direction to the legislature to make any particular kind of enactment. Under out constitutional scheme Parliament and Legislative Assemblies exercise sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. In *Supreme Court Employees' Welfare Assn. v. Union of India* MANU/SC/0582/1989 : (1989) 4 SCC 187 (SCC para 51) it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. This view has been reiterated in *State of J & K v. A.R. Zakki* MANU/SC/0293/1992 : 1992 Supp (1) SCC 548. In *A.K. Roy v. Union of India* MANU/SC/0051/1981 : (1982) 1 SCC 271 it was held that no mandamus can be issued to enforce an Act which has been passed by the legislature.

**22.** At this juncture, we may refer to certain authorities about the justification in interference with the policy framed by the Government. It needs no special emphasis to state that interference with the policy, though is permissible in law, yet the policy has

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that as it may, in view of our opinion on the main question, it is not necessary to pursue this reasoning further.

**23.** Regarding the contention that the Government of Gujarat did not choose to file an appeal against the judgment of the learned Single Judge in the case of the pharmacy college but filed an appeal only in the case of the M.P. Shah Medical College and that it is guilty of discrimination on that account, we must say, we see no substance in it. It is explained by the learned Additional Solicitor General that in the case of pharmacy college, only one seat was involved whereas it was 12 seats here and that too in a medical college. In any event, since both the colleges are different and they had filed two different writ petitions, non-filing of appeal in one case does not disable the Government from filing the appeal in the other case, merely because the judgment is a common one. It must be deemed in such a case that it is a judgment in each case separately.

**24.** For the above reasons, the civil appeals are allowed and the judgments of the Gujarat High Court, both of the learned Single Judge and the Division Bench under appeal, are set aside. No order as to costs.

**25.** No orders on interlocutory applications.

— —

**(1994) 3 Supreme Court Cases 569**

(BEFORE S. RATNAVEL PANDIAN, M.M. PUNCHHI, K. RAMASWAMY, S.C. AGRAWAL, R.M. SAHAI, JJ.)

Writ Petition No. [illegible] of 1984†

KARTAR SINGH . . . Petitioner;

Versus

STATE OF PUNJAB . . . Respondent.

Writ Petition (Crl.) No. [illegible] of 198[illegible]‡

KRIPA SHANKAR RAI . . . Appellant;

Versus

STATE OF [illegible]

† [illegible] 15[illegible] of 1984, 194 of 1990, [illegible] of 1990, [illegible] of 1986, [illegible] of 1991, [illegible] of 1987, [illegible] of 1991, [illegible] of 1991, [illegible] of 1991, [illegible] of 1987, Criminal Appeal Nos. [illegible] of 1985, [illegible] of 1986, [illegible] of 1991, [illegible], 481 of 1985, [illegible] of 1985, 552, [illegible] of 1989, [illegible] of 1985, [illegible] of 1990, [illegible] of 1985, 779 of 1986, 615 of 1991, 777 of 1985, [illegible] of 1984, [illegible] of 1991, [illegible] of 1989, [illegible] of 1991, [illegible] of 1985, [illegible] of 1992, [illegible] of 1988, [illegible] of 1987 (with [illegible] of 1987) and SLP (Crl.) No. [illegible] of 1987

‡ W.P. (Crl.) Nos. 5885 of 1980, [illegible], 572, [illegible] of 1982, [illegible] of 1991, [illegible] of 1984, [illegible] and 77 of 1982, [illegible], 55 of 1988, [illegible] of 1982, [illegible] of 1981, [illegible] of 1982, [illegible] of 1986, [illegible], 549, 550 of 1985, [illegible] of 1982, 1427 of 1981, [illegible] of 1985, [illegible] of 1981, [illegible], [illegible] of 1989, 240 of 1990, [illegible] of 1988, 501 of 1987 and [illegible] of 1987

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the offence of criminal conspiracy or attempt to commit, or abetment of, an offence specified in this Schedule shall be deemed to be a schedule offence.

**126.** Under the Act of 1985 also, the word 'abet' is not defined. Nevertheless Sections 3 and 4 of this Act which deal with punishments for the substantive offences of terrorism and disruption respectively make the abetment of both the substantive offences also as penal offences. The definition of the word 'abet' is given for the first time in the Act of 1987 (TADA).

**127.** Section 3(1) which gives the meaning of the expression 'terrorist' specifically requires the intention on the part of the offender committing a terrorist act. Similarly, Section 4(2)(i) and (ii) also requires that the person committing the disruptive act should be shown to have intended to do that act. The provisions of Sections 3 and 4 of the 1985 and 1987 Acts are identical. Thus, it is very clear that the substantive offences require intention on the part of the person committing the terrorist act or the disruptive act. The abetment of the commission of these two offences comes under Sections 3(3) and 4(1) of the Act of 1987. The word 'abets' does also appear under Section 6(2) which deals with 'enhanced penalties'.

**128.** Therefore, when the substantive provisions of the Act expressly require the intention as an essential ingredient to constitute an offence, can it be said that the ingredient of intention should be excluded on the part of the abettor who abets those substantive offences. In other words, can it be said that the abettor has abetted the substantive offence without any guilty mind (mens rea) or without actual knowledge as to what would be the consequence of his designed act.

**129.** Now turning to the definition in question, clauses (i) and (ii) need not require any exposition since both the clauses themselves are self-explanatory. As rightly pointed out, the definition of the word, 'abet' as given in Section 2(1)(a) is with wide flexibility rather than with meticulous specificity. Therefore, we have to explore its allowable meaning so that there may not be any uncertainty inevitably leading any person to much difficulty in understanding acts prohibited by law so that he may act accordingly.

**130.** It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasised that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. More so uncertain and undefined words deployed inevitably lead citizens to "steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked".

**131.** Let us examine clause (i) of Section 2(1)(a). This section is shown to be blissfully and impermissibly vague and imprecise. As rightly pointed out by the learned counsel, even an innocent person who ingenuously and

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

\+ W.P.(C) 7256/2019

ANUJA KAPUR ..... Petitioner
Through: Petitioner in person

versus

UNION OF INDIA AND ORS. ..... Respondents
Through: Mr. Ripu Daman Bhardwaj, CGSC for UOI

**CORAM:**
**HON'BLE THE CHIEF JUSTICE**
**HON'BLE MR. JUSTICE C.HARI SHANKAR**

**ORDER**

**% 09.07.2019**

1. This public interest litigation has been preferred with the following prayers:

*"A. Issue a Writ/ Order or Direction in the nature of mandamus issuing the notice to the respondents to:*

*(i) Frame the necessary guidelines*
*(ii) Frame the appropriate laws and bye-laws related to marital rape as a ground of divorce;*
*(iii) Fix the appropriate punishment/penalties for violation of the above framed guidelines and laws.*

*B) Issue a Writ/Order or Direction in the nature of mandamus issuing the notice to the respondents to ensure that there should be a clear guideline for registration of the case related to Marital Rape under framed guidelines and laws, so that accountability, responsibility and liability of the concerned authorities could be assigned and awarding penalties and punishments be awarded to safeguard the fundamental right*

*guaranteed by the Constitution of India and dignity of the woman in marriage."*

2. Having heard the petitioner and looking to the facts and circumstances of the case, it appears that the main prayers are about the drafting of the guidelines, appropriate laws and bye-laws relating to marital rape as a ground of divorce; to fix appropriate punishment or penalty for violation of guidelines and laws so framed; and for drafting of guidelines for the registration of the case relating to marital rape under the framed guidelines.

3. Drafting of the law is the function of Legislature and not of the Court. Court is more concerned in the interpretation of the law rather than the drafting of the laws. The main prayer in this writ petition is to draft the laws or bye-laws and with appropriate punishment or penalties in case of violation of guidelines. This is a function of the Legislature to be performed. We would not give any direction to draft the laws or bye-laws or to fix the appropriate punishment or penalty.

4. With the aforesaid observation, this writ petition is hereby disposed of.

**CHIEF JUSTICE**

**C.HARI SHANKAR, J**

**JULY 09, 2019/ns**

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MANU/SC/1031/2017

**Equivalent Citation:** AIR2017 SC 4609 , 2017 5 AWC4353 SC , 2017 (5 )BomCR481 , 2017 (4 ) CHN (SC ) 60 , 121(3) CWN1 , III (2017 )DMC1 SC , ILR2017 (3 )Kerala907 , (2017 )6 MLJ378 , 2017 (9 )SCALE178 , (2017 )9 SCC1 , 2017 (7 ) SCJ 477

**IN THE SUPREME COURT OF INDIA**

Writ Petition (C) Nos. 118, 288, 327, 665 of 2016, 43 of 2017 and Suo Motu Writ (C) No. 2 of 2015 (Under Article 32 of the Constitution of India)

Decided On: 22.08.2017

Appellants: **Shayara Bano and Ors.**
**Vs.**
Respondent: **Union of India (UOI) and Ors.**

**Hon'ble Judges/Coram:**
J.S. Khehar, C.J.I., Kurian Joseph, Rohinton Fali Nariman, U.U. Lalit and S. Abdul Nazeer, JJ.

**Counsels:**
For Appearing Parties: Prashanth Murthy S.G., Mukul Rohatgi, A.G., Tushar Mehta, Pinky Anand, ASGs., Amit Singh Chadha, Salman Khurshid, Anand Grover, V. Giri, Kapil Sibal, Yusuf Hatim Muchhala, Raju Ramachandran, Indira Jaising, Babu H. Marlapalle, Ram Jethmalani, Sr. Advs., Balaji Srinivasan, Arunava Mukherjee, Dilpreet Singh, Abhishek Bharti, Vaishnavi Subrahmanyam, Pratiksha Mishra, Srishti Govil, Mayank K. Sagar, Sahil Monga, Divyesh Pratap Singh, Kunwar Aditya Singh, Shivangi Singh, Suraj Prakash Singh, Jailandra Kumar Rai, Priya Hingorani, Ashwani Upadhyay, Ranbir Yadav, V.K. Biju, Abhay Pratap Singh, Hema Sahu, Gagan Deep Kaur, Rajesh Pathak, Harish Pandey, Abhishek Chakraborty, Amit Sharma, Mukesh Jain, Dwarka Sawale, Madhavi Divan, Diksha Rai, Ranjeeta Rohatgi, Abhinav Mukherjee, Aishwarya Bhati, Rajat Nair, Devashish Bharuka, Rajesh Ranjan, Raj Bahadur, M.K. Maroria, Kanika Saran, Nidhi Khanna, Gurmeet Singh Makker, Zafar Khurshid, Sanchita Ain, Antony R. Julian, Azra Rehman, Advs. for Equity Lex Associates, Arif Mohd. Khan, Chandra Rajan, Reshma Arif, Aftab Ali Khan, Mustaffa Arif, Sandeep Garausa, Afshan Pracha, Rahul Sharma, Tripti Tandon, Lorraine M., Shrinidhi Rao, Shadan Farasat, Rudrakshi Deo, Uzmi Jameel Husain, Mohd. Parvez Dabas, S.A. Syed, Mohammed Sadique T.A., Svadha Shankar, Keerthivas G., A. Krishnan, Krishna Dev J., Manav Vohra, M. Tayyab Khan, Mujeebuddin Khan, Niaz Ahmed Farooqui, Syed Shahid Hussain Rizvi, S. Mansoor Ali, N. Aziz, Ejaz

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> competent legislature. *A subordinate legislation may be questioned Under Article 14 on the ground that it is unreasonable; 'unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary'*. Drawing a comparison between the law in England and in India, the Court further observed that in England the Judges would say, 'Parliament never intended the authority to make such Rules; they are unreasonable and ultra vires'. *In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. But subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution.*

44. Also, in *Sharma Transport* v. *State of A.P.* [MANU/SC/0759/2001 : (2002) 2 SCC 188], this Court held: (SCC pp. 203-04, para 25)

> 25. ... The tests of arbitrary action applicable to executive action do not necessarily apply to delegated legislation. In order to strike down a delegated legislation as arbitrary it has to be established that there is manifest arbitrariness. In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.

(at pages 736-737)

282. It will be noticed that a Constitution Bench of this Court in **Indian Express Newspapers** v. **Union of India**, MANU/SC/0406/1984 : (1985) 1 SCC 641, stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case,

there is no rational distinction between the two types of legislation when it comes to this ground of challenge Under Article 14.
The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate

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legislation Under Article 14.
Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary.
We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well Under Article 14.

283. Applying the test of manifest arbitrariness to the case at hand, it is clear that Triple Talaq is a form of Talaq which is itself considered to be something innovative, namely, that it is not in the Sunna, being an irregular or heretical form of Talaq. We have noticed how in **Fyzee's book** (supra), the Hanafi school of Shariat law, which itself recognizes this form of Talaq, specifically states that though lawful it is sinful in that it incurs the wrath of God. Indeed, in **Shamim Ara** v. **State of U.P.**, MANU/SC/0850/2002 : (2002) 7 SCC 518, this Court after referring to a number of authorities including certain recent High Court judgments held as under:

> 13...The correct law of *talaq* as ordained by the Holy Quran is that *talaq* must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters -- one from the wife's family and the other from the husband's; if the attempts fail, *talaq* may be effected (para 13). In *Rukia Khatun* case [MANU/GH/0031/1979 : (1981) 1 Gau LR 375] the Division Bench stated that the correct law of *talaq*, as ordained by the Holy Quran, is: (*i*) that "talaq" must be for a reasonable cause; and (*ii*) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, *"talaq"* may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay views which, in their opinion, did not lay down the correct law.
>
> 14. We are in respectful agreement with the abovesaid observations made by the learned Judges of the High Courts.
>
> (at page 526)

284. Given the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot

REPORT OF THE COMMITTEE ON

# AMENDMENTS TO CRIMINAL LAW

JUSTICE J.S. VERMA (RETD)
CHAIRMAN

JUSTICE LEILA SETH (RETD)
MEMBER

GOPAL SUBRAMANIUM
MEMBER

JANUARY 23, 2013

aggravated by the prevalent beliefs that marital rape is acceptable or is less serious than other types of rape.[95] Changes in the law therefore need to be accompanied by widespread measures raising awareness of women's rights to autonomy and physical integrity, regardless of marriage or other intimate relationship. This was underlined in *Vertido v The Philippines,* a recent Communication under the Optional Protocol of the Convention on the Elimination of Discrimination Against Women (CEDAW), where the CEDAW Committee emphasised the importance of appropriate training for judges, lawyers, law enforcement officers and medical personnel in understanding crimes of rape and other sexual offences in a gender-sensitive manner.[96]

79. We, therefore, recommend that:
    i. The exception for marital rape be removed.
    ii. The law ought to specify that:
        a. A marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation;
        b. The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity;
        c. The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.

[95] See further Gemma Hancox, '*Marital Rape in South Africa: Enough is Enough*' (2012) BUWA Journal on African Women's Experiences 70 <http://www.osisa.org/buwa/south-africa/marital-rape-south-africa> accessed 12 January 2013.
[96] *Vertido v The Philippines* Communication No. 18/2008, Committee on the Elimination of Discrimination against Women July 2010.

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MANU/SC/0024/1958

**Equivalent Citation:** AIR1958SC538, 1959(1)AnWR67, 1959(61)BOMLR192, (1959)IMLJ67, [1959]1SCR279

**IN THE SUPREME COURT OF INDIA**

Civil Appeals Nos. 455 to 457 and 656 to 658 of 1957

Decided On: 28.03.1958

Appellants:**Ram Krishna Dalmia**
**Vs.**
Respondent:**Justice S.R. Tendolkar and Ors.**

**Hon'ble Judges/Coram:**
*Sudhi Ranjan Das, C.J., A.K. Sarkar, B.P. Sinha, S.K. Das and T.L. Venkatarama Aiyyar, JJ.*

**JUDGMENT**

**Sudhi Ranjan Das, C.J.**

**1 .** These six several appeals are directed against a common judgment and order pronounced on April 29, 1957, by a Division Bench of the Bombay High Court in three several Miscellaneous Applications under Art. 226 of the Constitution, namely, No. 48 of 1957 filed by Shri Ram Krishna Dalmia (the appellant in Civil Appeal No. 455 of 1957), No. 49 of 1957 by Shri Shriyans Prasad Jain and Shri Sital Prasad Jain (the appellants in Civil Appeal No. 456 of 1957) and No. 50 of 1957 by Shri Jai Dayal Dalmia and Shri Shanti Prasad Jain (the appellants in Civil Appeal No. 457 of 1957). By those Miscellaneous Applications the petitioners therein prayed for an appropriate direction or order under Art. 226 for quashing and setting aside notification No. S.R.O. 2993 dated December 11, 1956, issued by the Union of India in exercise of powers conferred on it by section 3 of the Commissions of Enquiry Act (LX of 1952) and for other reliefs. Rules were issued and the Union of India appeared and showed cause. By the aforesaid judgment and order the High Court discharged the rules and dismissed the applications and ordered that the said notification was legal and valid except as to the last part of clause (10) thereof from the words "and the action" to the words "in future cases" and directed the Commission not to proceed with the inquiry to the extent that it related to the aforesaid last part of clause (10) of the said notification. The Union of India has filed three several appeals, namely, Nos. 656, 657 and 658 of 1957, in the said three Miscellaneous Applications complaining against that part of the said judgment and order of the Bombay High Court which adjudged the last part of clause (10) to be invalid.

**2.** The Commissions of Inquiry Act, 1952 (hereinafter referred to as the Act), received the assent of the President on August 14, 1952, and was thereafter brought into force by a notification issued by the Central Government under section 1(3) of the Act. As its long title states, the Act is one "to provide for the appointment of Commissions of Inquiry and for vesting such Commissions with certain powers". Sub-section (1) of section 3, omitting the proviso not material for our present purpose, provides :

> "The appropriate Government may, if it is of opinion that it is necessary so to do, and shall, if a resolution in this behalf is passed by the House of the People or, as the case may be, the Legislative Assembly of the State, by notification in the Official Gazette, appoint a Commission of Inquiry for the purpose of making

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in question. It is now well established that while article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and, (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question.The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that article 14 condemns discrimination not only by a substantive law but also by a law of procedure.

**14.** The principle enunciated above has been consistently adopted and applied in subsequent cases. The decisions of this Court further establish -

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others,
that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

**15.** The above principles will have to be constantly borne in mind by the court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws.

**16.** A close perusal of the decisions of this Court in which the above principles have been enunciated and applied by this Court will also show that a statute which may come up for consideration on a question of its validity under Art. 14 of the Constitution, may

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MANU/SC/1074/2018

**Equivalent Citation:** 2018(3)ACR2955, AIR2018SC4898, 2018ALLMR(Cri)4065, 2018 (3) ALT (Crl.) 205 (A.P.), 2019(2)BomCR(Cri)503, IV(2018)CCR199(SC), 2019CriLJ1, 2018(4)Crimes1(SC), 252(2018)DLT388, III(2018)DMC383SC, 2018(3)HLR537, ILR2018(4)Kerala79, 2018(3)JLJ515, 2018(6)KarLJ465, 2019(2)KLT727, 2018(4)MLJ(Crl)369, 2018(4)RCR(Criminal)480, 2018(11)SCALE556, (2019)3SCC39, 2018 (8) SCJ 371

**IN THE SUPREME COURT OF INDIA**

Writ Petition (Criminal) No. 194 of 2017 (Under Article 32 of the Constitution of India)

Decided On: 27.09.2018

Appellants: **Joseph Shine**
**Vs.**
Respondent: **Union of India (UOI)**

**Hon'ble Judges/Coram:**
*Dipak Misra, C.J.I., A.M. Khanwilkar, Indu Malhotra, Rohinton Fali Nariman and Dr. D.Y. Chandrachud, JJ.*

**Counsels:**
*For Appearing Parties: Pinky Anand, ASG, Meenakshi Arora, Sr. Adv., Kaleeswaram Raj, Thulasi K. Raj, Maitreyi Hegde, Suvidutt M.S., Balendu Shekhar, Madhavi Divan, Saudamini Sharma, Snidha Mehra, Sumit Teterwal, Hemant Arya, Kriti Dua, R. Balasubramanian, Sachin Sharma, Aarti Sharma, B.V. Balaram Das, Rahul Narayan, Liz Mathew, Bhabna Das, Navneet R., Nishant Jethra, Abhishek Anand Rai, Advs. for Sushil Balwada, Adv., Sunil Fernandes, Tripti Tandon, Nupur Kumar, Anju Thomas, Priyansha Sharma, Aanchal Singh, Suraj Sanad, Priyam Lizmary Cherian, Abha Singh, Munawwar Naseem, Palak Mishra, Prabjot Hora, Dhiraj Abraham Philip, K. Parameshwar, Jayena Kuthari, Anindita Pujari, Kavita Bharadwaj and Aarti Kumar, Advs.*

**Overruled/Reversed:**
Sowmithri Vishnu vs. Union of India (UOI) and Ors. MANU/SC/0199/1985, V. Revathi vs. Union of India (UOI) and Ors. MANU/SC/0562/1988

**Case Category:**
LETTER PETITION AND PIL MATTER - WRIT PETITIONS (CRIMINAL) AND W PETITIONS FILED AS PIL PERTAINING TO CRIMINAL INVESTIGATIONS/PROSECUTION

**JUDGMENT**

**Dipak Misra, C.J.I. (For himself and A.M. Khanwilkar, J.)**

**1.** The beauty of the Indian Constitution is that it includes 'I' 'you' and 'we'. Such a magnificent, compassionate and monumental document embodies emphatic inclusiveness which has been further nurtured by judicial sensitivity when it has developed the concept of golden triangle of fundamental rights. If we have to apply the parameters of a fundamental right, it is an expression of judicial sensibility which further enhances the beauty of the Constitution as conceived of. In such a situation, the essentiality of the rights of women gets the real requisite space in the living room of individual dignity rather than the space in an annex to the main building. That is the manifestation of concerned sensitivity. Individual dignity has a sanctified realm in a civilized society. The civility of a civilization earns warmth and respect when it respects more the individuality of a woman. The said concept gets a further accent when a

penalizing adultery disregards something which is basic to human identity. Sexuality is a definitive expression of identity. Autonomy over one's sexuality has been central to human urges down through the ages. It has a constitutional foundation as intrinsic to autonomy. It is in this view of the matter that we have concluded that Section 497 is violative of the fundamental rights to equality and liberty as indeed, the right to pursue a meaningful life within the fold of Articles 14 and 21.

**148.** The hallmark of a truly transformative Constitution is that it promotes and engenders societal change. To consider a free citizen as the property of another is an anathema to the ideal of dignity. Section 497 denies the individual identity of a married woman, based on age-old societal stereotypes which characterised women as the property of their spouse. It is the duty of this Court to break these stereotypes and promote a society which regards women as equal citizens in all spheres of life-irrespective of whether these spheres may be regarded as 'public' or 'private'.

**H Towards transformative justice**

**149.** Constitutional values infuse the letter of the law with meaning. True to its transformative vision, the text of the Constitution has, time and again, been interpreted to challenge hegemonic structures of power and secure the values of dignity and equality for its citizens. One of the most significant of the battles for equal citizenship in the country has been fought by women. Feminists have overcome seemingly insurmountable barriers to ensure a more egalitarian existence for future generations. However, the quest for equality continues. While there has been a considerable degree of reform in the formal legal system, there is an aspect of women's lives where their subordination has historically been considered beyond reproach or remedy. That aspect is the family. Marriage is a significant social institution where this subordination is pronounced, with entrenched structures of patriarchy and romantic paternalism shackling women into a less than equal existence.

**150.** The law on adultery, conceived in Victorian morality, considers a married woman the possession of her husband: a passive entity, bereft of agency to determine her course of life. The provision seeks to only redress perceived harm caused to the husband. This notion is grounded in stereotypes about permissible actions in a marriage and the passivity of women. Fidelity is only expected of the female spouse. This anachronistic conception of both, a woman who has entered into marriage as well as the institution of marriage itself, is antithetical to constitutional values of equality, dignity and autonomy.

In enforcing the fundamental right to equality, this Court has evolved a test of manifest arbitrariness to be employed as a check against state action or legislation which has elements of caprice, irrationality or lacks an adequate determining principle. The principle on which Section 497 rests is the preservation of the sexual exclusivity of a married woman-for the benefit of her husband, the owner of her sexuality. Significantly, the criminal provision exempts from sanction if the sexual act was with the consent and connivance of the husband. The patriarchal underpinnings of Section 497 render the provision manifestly arbitrary.

**151.** The constitutional guarantee of equality rings hollow when eviscerated of its substantive content. To construe Section 497 in a vacuum (as did **Sowmithri Vishnu**) or in formalistic terms (as did **Revathi**) is a refusal to recognise and address the subjugation that women have suffered as a consequence of the patriarchal order. Section 497 is a denial of substantive equality in that it reinforces the notion that

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MANU/SC/0184/1978

**Equivalent Citation:** AIR1980SC1579, 1978CriLJ1741, 1980CriLJ1099, (1978)4SCC494, (1980)3SCC488, (1979)SCC(Cri)155, (1980)SCC(Cri)580, [1979]1SCR392, [1980]2SCR557

**IN THE SUPREME COURT OF INDIA**

Writ Petition No. 2202 and 568 of 1977

Decided On: 30.08.1978

Appellants: **Sunil Batra**
**Vs.**
Respondent: **Delhi Administration and Ors.**
[Alongwith Writ Ptn. No. 565 of 1977]

**Hon'ble Judges/Coram:**
*Y.V. Chandrachud, C.J., V.R. Krishna Iyer, S. Murtaza Fazal Ali, P.N. Shinghal and D.A. Desai, JJ.*

**Counsels:**
*For Appellant/Petitioner/Plaintiff: Y.S. Chitale, Randhir Jain, M. Mudgal, G.K.B. Choudhury, Advs*

*For Respondents/Defendant: Soli J. Sorabjee Addl. Sol. General, E.C. Agarwala and Girish Chandra, Advs.*

**JUDGMENT**

**V.R. Krishna Iyer, J.**

**1.** The province of prison justice, the conceptualization of freedom behind bars and the role of judicial power as constitutional sentinel in a prison setting, are of the gravest moment in a world of escalating torture by the minions of State, and in India, where this virgin area of jurisprudence is becoming painfully relevant. Therefore, explicative length has been the result; and so it is that, with all my reverence for and concurrence with my learned brethren on the jurisdictional and jurisprudential basics they have indicated, I have preferred to plough a lonely furrow.

The Core-questions.

**2.** One important interrogation lies at the root of these twin writ petitions : Does a prison setting, ipso facto, out-law the rule of law, lock out the judicial process from the jail gates and declare a long holiday for human rights of convicts in confinement, and (to change the metaphor ) if there is no total eclipse, what lucent segment is open for judicial justice? Three inter-related problems project themselves : (i) a jurisdictional dilemma between 'hands off prisons' and 'take over jail administration' (ii) a constitutional conflict between detentional security and inmate liberties and (iii) the role of processual and substantive reasonableness in stopping brutal jail' conditions. In such basic situations, pragmatic belighted by the Preamble to the Constitution and balancing the vulnerability of 'caged' human to State torment and the prospect of escape or internal disorder, should be the course for the court to navigate.

**3.** I proceed to lay bare the broad facts, critically examine the legal contentions and resolve the vital controversy which has profound impact on our value system. Freedom

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> be only of what has been, but of what may be. Under any other rule a Constitution would indeed be as easy of application as it would be. Under any other rule a Constitution would indeed be as easy of applications as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in the words might be lost in reality. And this has been recognised. The meaning and vitality of the Constitution have developed against narrow and restrictive construction.

**43.** A note in Harvard Law Review Hervard Law Review, Vol. 24 (1910-11) p. 54-55 commenting on Weems v. United States urges such a progressive construction :

> The inhibition of the infliction of 'cruel and unusual punishment' first appears in the Bill of Rights of 1680, at a time when the humanity-of Judge Jeffreys of Bloody Assizes' fame and of his fellows under the Stuarts, loomed large in the popular mind.... In the eighth Amendment to the Constitution of the United States the same prohibition is found...(Courts) have held that whatever is now considered cruel and unusal in fact is forbidden by it. Another difference of interpretation intersects these divergent views and separates the Courts which confine the words to the kind or mode of punishment from those who extend their meaning to include as well its degree or severity. In a recent case concerning such a provision in the Bill of Rights of the Philippine Islands, which has the same meaning as the Eighth Amendment, the Supreme Court of United States, committing itself to the most liberal interpretation, not only held that the clause was concerned with the degree of punishment, but *approved of the extension of its scope to keep pace with the increasing enlightenment of public opinion (Weems v. United States,* 217 US, 349). *It is, indeed, difficult to believe that a law passed in the twentieth century is aimed solely at abuses which became almost unknown two hundred years before, even though it is an exact transcript of an old Bill.* And excessive punishment may be quite as bad as punishment cruel in its very nature. The fear of judicial intermeddling voiced by one of the dissenting judges seems scarcely warranted, for the power to prevent disproportionate punishment is to be exercised only when the punishment shocks public feeling. *With thin limitation, the progressive construction of this clause laid down by this case seems desirable.*

(emphasis added)

**44.** The jurisprudence of statutory construction, especially when a vigorous break with the past and smooth reconciliation with a radical constitutional value-set are the object, uses the art of reading down and reading wide, as part of interpretational engineering. Judges are the mediators between the societal tenses. this Court in R.L. Arora v. State of Uttar Pradesh and Ors. MANU/SC/0033/1964 : [1964]6SCR784 and in a host of other cases, has lent precedential support for this proposition where that process renders a statute constitutional. The learned Additional Solicitor General has urged upon us that the Prisons Act (Sections 30 and 56) can be vehicle of enlightened values if we pour into seemingly fossilized words a freshness of sense. "It is well settled that if certain provisions of law construed in one way will be consistent with the Constitution, and if another interpretation would render them unconstitutional, the Court would lean in favour of the former construction."

**45.** To put the rule beyond doubt, interstitial legislation through interpretation is a life-process of the law and judges are party to it. In the present case we are persuaded to adopt this semantic readjustment so as to obviate a legicidal sequel. A validation-

# CPS Policy for Prosecuting Cases of Rape

*Publication*

**Updated September 2012**

1. Introduction
2. What is the definition of rape?
3. The role of the CPS
4. The Code for Crown Prosecutors
5. Is there enough evidence to prosecute?
6. Bail issues
7. Helping victims and witnesses to give evidence
8. Accepting pleas
9. Sentencing
10. Keeping victims informed
11. Community engagement
12. Complaints
13. Conclusion | Glossary
14. Annex A - list of organisations concerned with rape and sexual offences

## 1 - Introduction

1. This policy statement explains the way we, the Crown Prosecution Service (CPS), deal with cases in which an allegation of rape has been made. It gives advice on what the CPS does, how rape cases are prosecuted, and what victims can expect from the CPS. The document is particularly designed for those who support victims of rape, whether professionally or personally, although it may be of interest to victims, witnesses and the general public.
2. This is the second edition of the policy statement and reflects the changes in the law and CPS procedures that have taken place since the publication of the first edition in 2004. Rape is one of the most serious of all criminal offences. It can inflict lasting trauma on victims and their families. We want people to know that our aim is to prosecute rape cases effectively, and we want people to know what they can expect from us.

1. The definition of rape was substantially changed by the Sexual Offences Act 2003, which came into force on 1 May 2004.
2. Offences committed before 1 May 2004 are prosecuted under the Sexual Offences Act 1956. Under the 1956 Act, the statutory definition of rape is any act of non-consensual intercourse by a man with a person, and the victim can be either male or female. Intercourse can be vaginal or anal. It does not include non-consensual oral sex. The courts had defined consent as having its ordinary meaning, and lack of consent could be inferred from the surrounding circumstances, such as submission through fear. It is a defence if the defendant believed that the victim was consenting, even if this belief was unreasonable, and this is a matter of fact for the jury.
3. Offences committed on or after 1 May 2004 are prosecuted under the Sexual Offences Act 2003. The 2003 Act extends the definition of rape to include the penetration by a penis of the vagina, anus or mouth of another person. The 2003 Act also changes the law about consent and belief in consent.
4. The word "consent" in the context of the offence of rape is now defined in the Sexual Offences Act 2003. A person consents if he or she agrees by choice, and has the freedom and capacity to make that choice. The essence of this definition is the agreement by choice. The law does not require the victim to have resisted physically in order to prove a lack of consent. The question of whether the victim consented is a matter for the jury to decide, although we consider this issue very carefully throughout the life of the case. The prosecutor will take into account evidence of all the circumstances surrounding the offence.
5. We are aware that the meaning of consent can be of particular relevance in rape where there has been, or is, a pre-existing relationship between the defendant and the victim, or where domestic violence has existed prior to the rape. As the 2003 Act makes it clearer what is meant by the term "consent", it should help juries decide whether the victim was able to, and did in fact, give his or her consent at the time.
6. The Sexual Offences Act 2003 requires the defendant to show that his belief in consent was reasonable. In deciding whether the belief of the defendant was reasonable, a jury must have regard to all the circumstances, including any steps he has taken to ascertain whether the victim consented. In certain circumstances, there is a presumption that the victim did not consent to sexual activity and the defendant did not reasonably believe that the victim consented, unless he can show otherwise. Examples of circumstances where the presumption applies are where the victim was unconscious, drugged, abducted or subject to threats or fear of serious harm.
7. People who have consumed alcohol may reach such a level of drunkenness that they no longer have the capacity to give consent. The courts recognise that this stage may be reached well before they become unconscious.
8. Proving the absence of consent is usually the most difficult part of a rape prosecution, and is the most common reason for a rape case to fail. Prosecutors will look for evidence such as injury, struggle, or immediate distress to help them prove that the victim did not consent, but frequently there may be no such corroborating evidence. This does not mean that these cases can never be successfully prosecuted, but it does mean that they are more difficult. In the absence of any other evidence to help prove the victim did not consent, there is the possibility

- the seriousness of the circumstances justifies the making of an immediate charging decision; and
- there are continuing substantial grounds to object to bail.
- Where all these conditions are met, the Threshold Test may be applied and the suspect charged. A decision to charge under the Threshold Test must be kept under review and the Full Code Test must be applied to the case as soon as reasonably practicable.

## 5 - Is there enough evidence to prosecute?

1. Rape usually takes place in a private setting where the victim is the only witness. Unless the defendant pleads guilty, the victim will almost certainly have to give evidence in court. Where there is conflicting evidence, the prosecutor has a duty to assess the credibility and reliability of the victim's evidence. This will always be done in a careful and sensitive way, using all the information provided to the prosecutor. A case may not proceed, not because the prosecution does not believe the victim, but because, when considering all the available evidence in the case, there is not enough to meet the evidential stage of the Code test.
2. There are rules about disclosing to the defence relevant material obtained during the investigation, which is not part of the prosecution case. The rules are complex, but broadly speaking, there is a duty to disclose to the defence any material that might undermine the prosecution case or assist the defence.
3. The police will always look for corroboration or supporting evidence (such as medical or scientific evidence, CCTV evidence, or eyewitnesses to events prior to or after the incident) but it is not essential and a prosecution can still go ahead without it. However, the prosecution must always prove the defendant's guilt. Cases may fail because a jury cannot decide between what the victim says and what the defendant says. This is why it is essential to obtain all possible forensic and scientific evidence as soon as possible. The earlier a rape is reported, the higher the chance of this being done, and the higher the chance of building a strong prosecution case.
4. Where a victim has disclosed being raped to other persons prior to reporting it to the police, strict legal rules of evidence govern whether these disclosures can be used as evidence at court.
5. We are aware that there are myths and stereotypes surrounding the offence of rape. Examples of such myths include:
    - rape occurs between strangers in dark alleys;
    - victims provoke rape by the way they dress or act;
    - victims who drink alcohol or use drugs are asking to be raped;
    - rape is a crime of passion;
    - if they did not scream, fight or get injured, it was not rape;
    - you can tell if they 'really' have been raped by how they acts;
    - victims cry rape when they regret having sex or want revenge;
    - only gay men get raped/only gay men rape men; and
    - prostitutes cannot be raped.

    Prosecutors who deal with rape cases are taught about them as part of their specialist training. We will not allow these myths and stereotypes to influence our decisions and we will

1. In some cases, we may consider accepting a guilty plea from the defendant to a charge other than rape. This might arise, for example, if a defendant pleads guilty to some but not all of the charges, or because the victim does not wish to proceed, or because new evidence comes to light.
2. When considering whether to accept a plea, we will, in accordance with our obligations under the: 'Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise 2005 (revised 2007)', discuss the situation with the victim or the victim's family whenever possible, so that we can explain the position and obtain their views in order to help us to make the right decision. We will keep them informed and explain our decisions once they are made at court.
3. We will always take proper account of the victim's interests, and we will not accept a guilty plea which is put forward upon a misleading or untrue set of facts.

## 9 - Sentencing

1. If the defendant is convicted of rape, the judge decides the sentence. There are guidelines for judges when sentencing defendants convicted of rape. The prosecution does not have any power to ask for a particular sentence.
2. The prosecuting advocate has a duty actively to assist the judge with the law and guidelines on sentencing including any other orders that may be available to the court.
3. The guidelines state that relationship and acquaintance rapes should be treated by the courts as seriously as stranger rape. Male rapes are as serious as those between a man and a woman. All types of rape are equally serious.
4. We will make sure that the court has all the information it needs to sentence appropriately. If there is a Victim Personal Statement, we will advise the court of it so that it can help the court to understand the effect of the crime upon the victim. In this way we will ensure that the court is able to come to an informed decision regarding sentence. (For details of Victim Personal Statements, see paragraph 5.24.)
5. Before being sentenced, a defendant is entitled to make a plea in mitigation. We will challenge defence mitigation which is misleading, untrue or which unfairly attacks the victim's character.
6. If the defendant pleads guilty to an offence but disagrees with the prosecution version of events, the court has to decide on which version to sentence. In order to do this, the court may hold a 'Newton hearing', The court will only hold such a hearing if it feels that there would be a substantial difference in sentence if the defendant were to be sentenced on the prosecution's version of events. If the court considers that there would be no substantial difference to sentence, the defendant is sentenced on his version of events.
7. If, however, the court feels that it would make a substantial difference to sentence, the court can hear evidence from both parties and can make a decision based on representations from both the defence and the prosecution. At the end of the hearing, the judge must announce whether the prosecution has proved its version of events beyond reasonable doubt.
8. If the judge passes a sentence which the prosecution considers to be unduly lenient because it does not reflect the seriousness of the offence, the CPS will ask the Attorney General to review the sentence.

LAW COMMISSION OF INDIA

ONE HUNDRED AND SEVENTY SECOND

REPORT

ON

REVIEW OF RAPE LAWS

MARCH, 2000

Fourthly- Where the other person is a female, with her consent, when the man knows that he is not the husband of such other person and that her consent is given because she believes that the offender is another man to whom she is or believes herself to be lawfully married.

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

Sixthly- With or without the other person's consent, when such other person is under sixteen years of age.

Explanation: Penetration to any extent is penetration for the purposes of this section.

Exception: Sexual intercourse by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault."

3.1.2.1. Representatives of Sakshi wanted us to recommend the deletion of the Exception, with which we are unable to agree. Their reasoning runs thus: where a husband causes some physical injury to his wife, he is

punishable under the appropriate offence and the fact that he is the husband of the victim is not an extenuating circumstance recognized by law; if so, there is no reason why concession should be made in the matter of offence of rape/sexual assault where the wife happens to be above 15/16 years. We are not satisfied that this Exception should be recommended to be deleted since that may amount to excessive interference with the marital relationship.

3.2. Modification of S.376.- So far as the proposed section 376 is concerned, we are not suggesting any substantial changes except two and adapting the language of the section to accord with the change in section 375. In the light of instances coming before the courts and the instances mentioned in the Note prepared by Sakshi, we have proposed addition of a proviso to sub-section (1) (while treating the existing proviso as the second proviso) providing that where the sexual assault is committed by the father, grandfather or brother, the punishment should be severe. On the basis of suggestions made by Sakshi, we have also added the words "or any other person being in a position of trust or authority towards the other person" after the words "father, grandfather or brother". The second change suggested by us is in the matter of the age of wife referred to in proposed sub-section (1) as also of the person assaulted in clause (f) of sub-section (2). The age "fifteen" is raised to "sixteen".

**Changes to legislation:** *Sexual Offences Act 2003, Section 1 is up to date with all changes known to be in force on or before 09 October 2021. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

# Sexual Offences Act 2003

**2003 CHAPTER 42**

## PART 1

SEXUAL OFFENCES

*Rape*

### 1 Rape

(1) A person (A) commits an offence if—

(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,

(b) B does not consent to the penetration, and

(c) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

(3) Sections 75 and 76 apply to an offence under this section.

(4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

**Changes to legislation:**
Sexual Offences Act 2003, Section 1 is up to date with all changes known to be in force on or before 09 October 2021. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.
View outstanding changes

**Changes and effects yet to be applied to the whole Act associated Parts and Chapters:**
Whole provisions yet to be inserted into this Act (including any effects on those provisions):

– s. 60B(5)(i) substituted for s. 60B(5)(i)(ii) by 2015 c. 9 (N.I.) Sch. 1 para. 123(1)Sch. 9 Pt. 1
– s. 89(1A) inserted by 2016 asp 22 Sch. 2 para. 3(3)
– s. 108(9) inserted by 2011 c. 18 s. 17(2)
– Sch. 5 para. 63C inserted by 2021 c. 17 Sch. 2 para. 6

*Changes to legislation: Sexual Offences Act 2003, Section 23 is up to date with all changes known to be in force on or before 09 November 2021. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

# Sexual Offences Act 2003

**2003 CHAPTER 42**

## PART 1

SEXUAL OFFENCES

*Abuse of position of trust*

### 23 Sections 16 to 19: [F1 exception for spouses and civil partners]

[F2 (1) Conduct by a person (A) which would otherwise be an offence under any of sections 16 to 19 against another person (B) is not an offence under that section if at the time —

(a) B is 16 or over, and

(b) A and B are lawfully married [F3 or civil partners of each other].

(2) In proceedings for such an offence it is for the defendant to prove that A and B [F4 were at the time lawfully married or civil partners of each other].]

**Textual Amendments**

**F1** S. 23: words in heading substituted (5.12.2005) by Civil Partnership Act 2004 (c. 33), ss. 261(1), 263, **Sch. 27 para. 173(4)**; S.I. 2005/3175, **art. 2(1)(2)**, Sch. 1 (subject to art. 2(3)-(5))

**F2** Ss. 16-24 repealed (N.I.) (2.2.2009) by The Sexual Offences (Northern Ireland) Order 2008 (S.I. 2008/1769 (N.I. 2)), arts. 1, 78(b), **Sch. 3** (with Sch. 2 par. 1); S.R. 2008/510, **art. 2**

**F3** Words in s. 23(1)(b) inserted (5.12.2005) by Civil Partnership Act 2004 (c. 33), ss. 261(1), 263, **Sch. 27 para. 173(2)**; S.I. 2005/3175, **art. 2(1)(2)**, Sch. 1 (subject to art. 2(3)-(5))

**F4** Words in s. 23(2) substituted (5.12.2005) by Civil Partnership Act 2004 (c. 33), ss. 261(1), 263, **Sch. 27 para. 173(3)**; S.I. 2005/3175, **art. 2(1)(2)**, Sch. 1 (subject to art. 2(3)-(5))

**Changes to legislation:**
Sexual Offences Act 2003, Section 23 is up to date with all changes known to be in force on or before 09 November 2021. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.
View outstanding changes

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- s. 108(9) inserted by 2011 c. 18 s. 17(2)
- Sch. 5 para. 63C inserted by 2021 c. 17 Sch. 2 para. 6

***Changes to legislation:*** *Sexual Offences Act 2003, Cross Heading: Abuse of position of trust is up to date with all changes known to be in force on or before 04 November 2021. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

# Sexual Offences Act 2003

**2003 CHAPTER 42**

## PART 1

SEXUAL OFFENCES

*Abuse of position of trust*

### 16 Abuse of position of trust: sexual activity with a child

[F1(1) A person aged 18 or over (A) commits an offence if—
(a) he intentionally touches another person (B),
(b) the touching is sexual,
(c) A is in a position of trust in relation to B,
(d) where subsection (2) applies, A knows or could reasonably be expected to know of the circumstances by virtue of which he is in a position of trust in relation to B, and
(e) either—
(i) B is under 18 and A does not reasonably believe that B is 18 or over, or
(ii) B is under 13.

(2) This subsection applies where A—
(a) is in a position of trust in relation to B by virtue of circumstances within section 21(2), (3), (4) or (5), and
(b) is not in such a position of trust by virtue of other circumstances.

(3) Where in proceedings for an offence under this section it is proved that the other person was under 18, the defendant is to be taken not to have reasonably believed that that person was 18 or over unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.

(4) Where in proceedings for an offence under this section—

(a) it is proved that the defendant was in a position of trust in relation to the other person by virtue of circumstances within section 21(2), (3), (4) or (5), and

(b) it is not proved that he was in such a position of trust by virtue of other circumstances,

it is to be taken that the defendant knew or could reasonably have been expected to know of the circumstances by virtue of which he was in such a position of trust unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know of those circumstances.

(5) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years.]

**Textual Amendments**

**F1** Ss. 16-24 repealed (N.I.) (2.2.2009) by The Sexual Offences (Northern Ireland) Order 2008 (S.I. 2008/1769 (N.I. 2)), arts. 1, 78(b), **Sch. 3** (with Sch. 2 par. 1); S.R. 2008/510, **art. 2**

## 17 Abuse of position of trust: causing or inciting a child to engage in sexual activity

[F2(1) A person aged 18 or over (A) commits an offence if—

(a) he intentionally causes or incites another person (B) to engage in an activity,

(b) the activity is sexual,

(c) A is in a position of trust in relation to B,

(d) where subsection (2) applies, A knows or could reasonably be expected to know of the circumstances by virtue of which he is in a position of trust in relation to B, and

(e) either—

(i) B is under 18 and A does not reasonably believe that B is 18 or over, or

(ii) B is under 13.

(2) This subsection applies where A—

(a) is in a position of trust in relation to B by virtue of circumstances within section 21(2), (3), (4) or (5), and

(b) is not in such a position of trust by virtue of other circumstances.

(3) Where in proceedings for an offence under this section it is proved that the other person was under 18, the defendant is to be taken not to have reasonably believed that that person was 18 or over unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.

(4) Where in proceedings for an offence under this section—

(a) it is proved that the defendant was in a position of trust in relation to the other person by virtue of circumstances within section 21(2), (3), (4) or (5), and

(b) it is not proved that he was in such a position of trust by virtue of other circumstances,

it is to be taken that the defendant knew or could reasonably have been expected to know of the circumstances by virtue of which he was in such a position of trust unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know of those circumstances.

(5) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years.**]**

**Textual Amendments**

**F2** Ss. 16-24 repealed (N.I.) (2.2.2009) by The Sexual Offences (Northern Ireland) Order 2008 (S.I. 2008/1769 (N.I. 2)), arts. 1, 78(b), **Sch. 3** (with Sch. 2 par. 1); S.R. 2008/510, **art. 2**

## 18 Abuse of position of trust: sexual activity in the presence of a child

**[**[F3](1) A person aged 18 or over (A) commits an offence if—

(a) he intentionally engages in an activity,

(b) the activity is sexual,

(c) for the purpose of obtaining sexual gratification, he engages in it—

(i) when another person (B) is present or is in a place from which A can be observed, and

(ii) knowing or believing that B is aware, or intending that B should be aware, that he is engaging in it,

(d) A is in a position of trust in relation to B,

(e) where subsection (2) applies, A knows or could reasonably be expected to know of the circumstances by virtue of which he is in a position of trust in relation to B, and

(f) either—

(i) B is under 18 and A does not reasonably believe that B is 18 or over, or

(ii) B is under 13.

(2) This subsection applies where A—

(a) is in a position of trust in relation to B by virtue of circumstances within section 21(2), (3), (4) or (5), and

(b) is not in such a position of trust by virtue of other circumstances.

(3) Where in proceedings for an offence under this section it is proved that the other person was under 18, the defendant is to be taken not to have reasonably believed that that person was 18 or over unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.

(4) Where in proceedings for an offence under this section—

(a) it is proved that the defendant was in a position of trust in relation to the other person by virtue of circumstances within section 21(2), (3), (4) or (5), and

(b) it is not proved that he was in such a position of trust by virtue of other circumstances,

***Changes to legislation:** Sexual Offences Act 2003, Cross Heading: Abuse of position of trust is up to date with all changes known to be in force on or before 04 November 2021. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

it is to be taken that the defendant knew or could reasonably have been expected to know of the circumstances by virtue of which he was in such a position of trust unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know of those circumstances.

(5) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years.**]**

**Textual Amendments**

**F3** Ss. 16-24 repealed (N.I.) (2.2.2009) by The Sexual Offences (Northern Ireland) Order 2008 (S.I. 2008/1769 (N.I. 2)), arts. 1, 78(b), **Sch. 3** (with Sch. 2 par. 1); S.R. 2008/510, **art. 2**

## 19 Abuse of position of trust: causing a child to watch a sexual act

**[**[F4](1) A person aged 18 or over (A) commits an offence if—

(a) for the purpose of obtaining sexual gratification, he intentionally causes another person (B) to watch a third person engaging in an activity, or to look at an image of any person engaging in an activity,

(b) the activity is sexual,

(c) A is in a position of trust in relation to B,

(d) where subsection (2) applies, A knows or could reasonably be expected to know of the circumstances by virtue of which he is in a position of trust in relation to B, and

(e) either—

(i) B is under 18 and A does not reasonably believe that B is 18 or over, or

(ii) B is under 13.

(2) This subsection applies where A—

(a) is in a position of trust in relation to B by virtue of circumstances within section 21(2), (3), (4) or (5), and

(b) is not in such a position of trust by virtue of other circumstances.

(3) Where in proceedings for an offence under this section it is proved that the other person was under 18, the defendant is to be taken not to have reasonably believed that that person was 18 or over unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.

(4) Where in proceedings for an offence under this section—

(a) it is proved that the defendant was in a position of trust in relation to the other person by virtue of circumstances within section 21(2), (3), (4) or (5), and

(b) it is not proved that he was in such a position of trust by virtue of other circumstances,

it is to be taken that the defendant knew or could reasonably have been expected to know of the circumstances by virtue of which he was in such a position of trust unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know of those circumstances.

(5) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years.**]**

**Textual Amendments**

**F4** Ss. 16-24 repealed (N.I.) (2.2.2009) by The Sexual Offences (Northern Ireland) Order 2008 (S.I. 2008/1769 (N.I. 2)), arts. 1, 78(b), **Sch. 3** (with Sch. 2 par. 1); S.R. 2008/510, **art. 2**

## 20 Abuse of position of trust: acts done in Scotland

**[**[F5]Anything which, if done in England and Wales [F6]. . . , would constitute an offence under any of sections 16 to 19 also constitutes that offence if done in Scotland **[**[F7]or Northern Ireland**]**.**]**

**Textual Amendments**

**F5** Ss. 16-24 repealed (N.I.) (2.2.2009) by The Sexual Offences (Northern Ireland) Order 2008 (S.I. 2008/1769 (N.I. 2)), arts. 1, 78(b), **Sch. 3** (with Sch. 2 par. 1); S.R. 2008/510, **art. 2**

**F6** Words in s. 20 omitted (2.2.2009) by virtue of The Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (S.I. 2008/1779), arts. 2(3), **5(2)**; S.R. 2008/510, **art. 2**

**F7** Words in s. 20 inserted (2.2.2009) by virtue of The Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (S.I. 2008/1779), arts. 2(3), **5(3)**; S.R. 2008/510, **art. 2**

## 21 Positions of trust

**[**[F8](1) For the purposes of sections 16 to 19, a person (A) is in a position of trust in relation to another person (B) if—

(a) any of the following subsections applies, or

(b) any condition specified in an order made by the Secretary of State is met.

(2) This subsection applies if A looks after persons under 18 who are detained in an institution by virtue of a court order or under an enactment, and B is so detained in that institution.

(3) This subsection applies if A looks after persons under 18 who are resident in a home or other place in which—

(a) accommodation and maintenance are provided by an authority **[**[F9]in accordance with section 22C(6)**]** of the Children Act 1989 (c. 41) **[**[F10]or section 81(6) of the Social Services and Well-being (Wales) Act 2014**]**[F11]..., or

(b) accommodation is provided by a voluntary organisation under section 59(1) of **[**[F12]the Children Act 1989**]**[F13]...,

and B is resident, and is so provided with accommodation and maintenance or accommodation, in that place.

(4) This subsection applies if A looks after persons under 18 who are accommodated and cared for in one of the following institutions—

***Changes to legislation:** Sexual Offences Act 2003, Cross Heading: Abuse of position of trust is up to date with all changes known to be in force on or before 04 November 2021. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(a) a hospital,
(b) [F14in Wales,] an independent clinic,
(c) a care home, F15...
(d) a community home, voluntary home or children's home, [F16or]
(e) a home provided under section 82(5) of the Children Act 1989, F17...
F18(f) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .
[F19(g) a place in Wales at which a care home service is provided,]
[F20(h) premises in Wales at which a secure accommodation service is provided,]

and B is accommodated and cared for in that institution.

(5) This subsection applies if A looks after persons under 18 who are receiving education at an educational institution and B is receiving, and A is not receiving, education at that institution.

F21(6) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

(7) This subsection applies if A is engaged in the provision of services under, or pursuant to anything done under—
(a) sections 8 to 10 of the Employment and Training Act 1973 (c. 50), or
[F22(b) section 68, 70(1)(b) or 74 of the Education and Skills Act 2008,]

and, in that capacity, looks after B on an individual basis.

(8) This subsection applies if A regularly has unsupervised contact with B (whether face to face or by any other means)—
(a) in the exercise of functions of a local authority under section 20 or 21 of the Children Act 1989 (c. 41) [F23or section 76 or 77 of the Social Services and Well-being (Wales) Act 2014], F24...
F24(b) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

(9) This subsection applies if A, as a person who is to report to the court under section 7 of the Children Act 1989 F25... on matters relating to the welfare of B, regularly has unsupervised contact with B (whether face to face or by any other means).

(10) This subsection applies if A is a personal adviser appointed for B under—
(a) section 23B(2) of, or paragraph 19C of Schedule 2 to, the Children Act 1989, F26... [F27or]
[F28(aa) section 106(1) of the Social Services and Well-being (Wales) Act 2014 in respect of category 1 or 2 young persons within the meaning of that Act,]
F26(b) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

and, in that capacity, looks after B on an individual basis.

(11) This subsection applies if—
(a) B is subject to a care order, a supervision order or an education supervision order, and
(b) in the exercise of functions conferred by virtue of the order on an authorised person or the authority designated by the order, A looks after B on an individual basis.

(12) This subsection applies if A—
(a) is an officer of the Service [F29or Welsh family proceedings officer (within the meaning given by section 35 of the Children Act 2004)] appointed for B under section 41(1) of the Children Act 1989,

***Changes to legislation:*** *Sexual Offences Act 2003, Cross Heading: Abuse of position of trust is up to date with all changes known to be in force on or before 04 November 2021. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(b) is appointed a children's guardian of B under rule 6 or rule 18 of the Adoption Rules 1984 (S.I. 1984/265), F30...

(c) is appointed to be the guardian ad litem of B under rule 9.5 of the Family Proceedings Rules 1991 (S. I. 1991/1247) F31..., [F32or]

[F33(d) is appointed to be the children's guardian of B under rule 59 of the Family Procedure (Adoption) Rules 2005 (S.I. 2005/2795) or rule 16.3(1)(ii) or rule 16.4 of the Family Procedure Rules 2010 (S.I. 2010/2955),]

and, in that capacity, regularly has unsupervised contact with B (whether face to face or by any other means).

(13) This subsection applies if—

(a) B is subject to requirements imposed by or under an enactment on his release from detention for a criminal offence, or is subject to requirements imposed by a court order made in criminal proceedings, and

(b) A looks after B on an individual basis in pursuance of the requirements.]

**Textual Amendments**

**F8** Ss. 16-24 repealed (N.I.) (2.2.2009) by The Sexual Offences (Northern Ireland) Order 2008 (S.I. 2008/1769 (N.I. 2)), arts. 1, 78(b), **Sch. 3** (with Sch. 2 par. 1); S.R. 2008/510, **art. 2**

**F9** Words in s. 21(3)(a) substituted (E.W.) (1.4.2011 for E., 6.4.2016 for W.) by Children and Young Persons Act 2008 (c. 23), ss. 8(2), 44(4), **Sch. 1 para. 15**; S.I. 2010/2981, **art. 4(a)**; S.I. 2016/452, art. 2(b)

**F10** Words in s. 21(3)(a) inserted (6.4.2016) by The Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) Regulations 2016 (S.I. 2016/413), regs. 2(1), **202(a)**

**F11** Words in s. 21(3)(a) omitted (2.2.2009) by virtue of The Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (S.I. 2008/1779), arts. 2(3), **6(2)(a)**; S.R. 2008/510, **art. 2**

**F12** Words in s. 21(3)(b) substituted (6.4.2016) by The Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) Regulations 2016 (S.I. 2016/413), regs. 2(1), **202(b)**

**F13** Words in s. 21(3)(b) omitted (2.2.2009) by virtue of The Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (S.I. 2008/1779), arts. 2(3), **6(2)(b)**; S.R. 2008/510, **art. 2**

**F14** Words in s. 21(4)(b) inserted (1.10.2010) by The Health and Social Care Act 2008 (Consequential Amendments No.2) Order 2010 (S.I. 2010/813), **art. 13(2)**

**F15** Words in s. 21(4)(c) omitted (2.2.2009) by virtue of The Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (S.I. 2008/1779), arts. 2(3), **6(3)(a)**; S.R. 2008/510, **art. 2**

**F16** Word in s. 21(4)(d) inserted (2.2.2009) by virtue of The Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (S.I. 2008/1779), arts. 2(3), **6(3)(b)**; S.R. 2008/510, **art. 2**

**F17** Word in s. 21(4)(e) omitted (2.2.2009) by virtue of The Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (S.I. 2008/1779), arts. 2(3), **6(3)(c)**; S.R. 2008/510, **art. 2**

**F18** S. 21(4)(f) omitted (2.2.2009) by virtue of The Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (S.I. 2008/1779), arts. 2(3), **6(3)(d)**; S.R. 2008/510, **art. 2**

**F19** S. 21(4)(g) and word inserted (2.4.2018) by The Regulation and Inspection of Social Care (Wales) Act 2016 (Consequential Amendments) Regulations 2018 (S.I. 2018/195), **regs. 2(1)**, 21

**F20** S. 21(4)(h) inserted (29.4.2019) by The Regulation and Inspection of Social Care (Wales) Act 2016 (Consequential Amendments) Regulations 2019 (S.I. 2019/772), regs. 1(2), **24**

**F21** S. 21(6) omitted (2.2.2009) by virtue of The Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (S.I. 2008/1779), arts. 2(3), **6(4)**; S.R. 2008/510, **art. 2**

**F22** S. 21(7)(b) substituted (26.1.2009) by Education and Skills Act 2008 (c. 25), ss. 169(1), 173(4), **Sch. 1 para. 81**; S.I. 2008/3077, **art. 4(g)**

**F23** Words in s. 21(8)(a) inserted (6.4.2016) by The Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) Regulations 2016 (S.I. 2016/413), regs. 2(1), **202(c)**

**F24** S. 21(8)(b) and preceding word omitted (2.2.2009) by virtue of The Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (S.I. 2008/1779), arts. 2(3), **6(5)**; S.R. 2008/510, **art. 2**

**F25** Words in s. 21(9) omitted (2.2.2009) by virtue of The Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (S.I. 2008/1779), arts. 2(3), **6(6)**; S.R. 2008/510, **art. 2**

**F26** S. 21(10)(b) and preceding word omitted (2.2.2009) by virtue of The Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (S.I. 2008/1779), arts. 2(3), **6(7)**; S.R. 2008/510, **art. 2**

**F27** Word in s. 21(10)(a) inserted (6.4.2016) by The Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) Regulations 2016 (S.I. 2016/413), regs. 2(1), **202(d)**

**F28** S. 21(10)(aa) inserted (6.4.2016) by The Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) Regulations 2016 (S.I. 2016/413), regs. 2(1), **202(e)**

**F29** Words in s. 21(12)(a) inserted (E.W.) (1.4.2005) by Children Act 2004 (c. 31), ss. 40, 67, **Sch. 3 para. 18**; S.I. 2005/700, **art. 2(2)**

**F30** Word in s. 21(12)(b) omitted (6.4.2011) by virtue of The Family Procedure (Modification of Enactments) Order 2011 (S.I. 2011/1045), **art. 15(a)**

**F31** Words in s. 21(12)(c) omitted (2.2.2009) by virtue of The Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (S.I. 2008/1779), arts. 2(3), **6(8)**; S.R. 2008/510, **art. 2**

**F32** Word in s. 21(12)(c) inserted (6.4.2011) by The Family Procedure (Modification of Enactments) Order 2011 (S.I. 2011/1045), **art. 15(b)**

**F33** S. 21(12)(d) inserted (6.4.2011) by The Family Procedure (Modification of Enactments) Order 2011 (S.I. 2011/1045), **art. 15(c)**

## 22 Positions of trust: interpretation

**[**F34(1) The following provisions apply for the purposes of section 21.

(2) Subject to subsection (3), a person looks after persons under 18 if he is regularly involved in caring for, training, supervising or being in sole charge of such persons.

(3) A person (A) looks after another person (B) on an individual basis if—

(a) A is regularly involved in caring for, training or supervising B, and

(b) in the course of his involvement, A regularly has unsupervised contact with B (whether face to face or by any other means).

(4) A person receives education at an educational institution if—

(a) he is registered or otherwise enrolled as a pupil or student at the institution, or

(b) he receives education at the institution under arrangements with another educational institution at which he is so registered or otherwise enrolled.

(5) In section 21—

"authority"—

(a) in relation to England and Wales, means a local authority;

(b) F35. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

"care home" means an establishment **[**F36in England**]** which is a care home for the purposes of the Care Standards Act 2000 (c. 14);

**[**F37"care home service" has the meaning given in Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016 (anaw 2);**]**

"care order" has—

(a) in relation to England and Wales, the same meaning as in the Children Act 1989 (c. 41); F38. . .

(b) F38. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

***Changes to legislation:*** *Sexual Offences Act 2003, Cross Heading: Abuse of position of trust is up to date with all changes known to be in force on or before 04 November 2021. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

"children's home" has—

(a) in relation to England F39..., the meaning given by section 1 of the Care Standards Act 2000; F40. . .

(b) F40. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

"community home" has [F41, in relation to England] the meaning given by section 53 of the Children Act 1989;

"education supervision order" has—

(a) in relation to England and Wales, the meaning given by section 36 of the Children Act 1989; F42. . .

(b) F42. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

[F43"hospital" means—

(a) a hospital as defined by section 275 of the National Health Service Act 2006, or section 206 of the National Health Service (Wales) Act 2006; or

(b) any other establishment—

(i) in England, in which any of the services listed in subsection (6) are provided; and

(ii) in Wales, which is a hospital within the meaning given by section 2(3) of the Care Standards Act 2000;]

"independent clinic" has—

(a) F44. . . the meaning given by section 2 of the Care Standards Act 2000;

(b) F45. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

F46. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

F46. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

F46. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

[F47"secure accommodation service" has the meaning given in Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016;]

"supervision order" has—

(a) in relation to England and Wales, the meaning given by section 31(11) of the Children Act 1989 (c. 41); F48. . .

(b) F48. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

"voluntary home" has—

(a) in relation to England F49. . . , the meaning given by section 60(3) of the Children Act 1989. F50. . .

(b) F50. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

[F51(6) The services referred to in paragraph (b)(i) of the definition of "hospital" are as follows—

(a) medical treatment under anaesthesia or intravenously administered sedation;

(b) dental treatment under general anaesthesia;

(c) obstetric services and, in connection with childbirth, medical services;

(d) termination of pregnancies;

(e) cosmetic surgery, other than—

(i) ear and body piercing;

(ii) tattooing;

(iii) the subcutaneous injection of a substance or substances into the skin for cosmetic purposes; or

(iv) the removal of hair roots or small blemishes on the skin by the application of heat using an electric current.**]]**

**Textual Amendments**

**F34** Ss. 16-24 repealed (N.I.) (2.2.2009) by The Sexual Offences (Northern Ireland) Order 2008 (S.I. 2008/1769 (N.I. 2)), arts. 1, 78(b), **Sch. 3** (with Sch. 2 par. 1); S.R. 2008/510, **art. 2**

**F35** S. 22(5): paragraph (b) of the definition of "authority" omitted (2.2.2009) by virtue of The Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (S.I. 2008/1779), arts. 2(3), **7(a)**; S.R. 2008/510, **art. 2**

**F36** Words in s. 22(5) inserted (2.4.2018) by The Regulation and Inspection of Social Care (Wales) Act 2016 (Consequential Amendments) Regulations 2018 (S.I. 2018/195), **regs. 2(1)**, 22(a)

**F37** Words in s. 22(5) inserted (2.4.2018) by The Regulation and Inspection of Social Care (Wales) Act 2016 (Consequential Amendments) Regulations 2018 (S.I. 2018/195), **regs. 2(1)**, 22(b)

**F38** S. 22(5): paragraph (b) and word in paragraph (a) of the definition of "care order" omitted (2.2.2009) by virtue of The Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (S.I. 2008/1779), arts. 2(3), **7(b)**; S.R. 2008/510, **art. 2**

**F39** Words in s. 22(5) omitted (2.4.2018) by The Regulation and Inspection of Social Care (Wales) Act 2016 (Consequential Amendments) Regulations 2018 (S.I. 2018/195), **regs. 2(1)**, 22(c)

**F40** S. 22(5): paragraph (b) and word in paragraph (a) of the definition of "children's home" omitted (2.2.2009) by virtue of The Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (S.I. 2008/1779), arts. 2(3), **7(c)**; S.R. 2008/510, **art. 2**

**F41** Words in s. 22(5) inserted (2.4.2018) by The Regulation and Inspection of Social Care (Wales) Act 2016 (Consequential Amendments) Regulations 2018 (S.I. 2018/195), **regs. 2(1)**, 22(d)

**F42** S. 22(5): paragraph (b) and word in paragraph (a) of the definition of "education supervision order" omitted (2.2.2009) by virtue of The Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (S.I. 2008/1779), arts. 2(3), **7(d)**; S.R. 2008/510, **art. 2**

**F43** S. 22(5): definition of "hospital" substituted (1.10.2010) by The Health and Social Care Act 2008 (Consequential Amendments No.2) Order 2010 (S.I. 2010/813), **art. 13(3)(a)(i)**

**F44** S. 22(5): words in definition of "independent clinic" omitted (1.10.2010) by virtue of The Health and Social Care Act 2008 (Consequential Amendments No.2) Order 2010 (S.I. 2010/813), **art. 13(3)(a)(ii)**

**F45** S. 22(5): paragraph (b) of the definition of "independent clinic" omitted (2.2.2009) by virtue of The Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (S.I. 2008/1779), arts. 2(3), **7(f)**; S.R. 2008/510, **art. 2**

**F46** S. 22(5): definitions of "private hospital", "residential care home" and "residential family centre" omitted (2.2.2009) by virtue of The Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (S.I. 2008/1779), arts. 2(3), **7(g)**; S.R. 2008/510, **art. 2**

**F47** Words in s. 22(5) inserted (29.4.2019) by The Regulation and Inspection of Social Care (Wales) Act 2016 (Consequential Amendments) Regulations 2019 (S.I. 2019/772), regs. 1(2), **25**

**F48** S. 22(5): paragraph (b) and word in paragraph (a) of the definition of "supervision order" omitted (2.2.2009) by virtue of The Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (S.I. 2008/1779), arts. 2(3), **7(h)**; S.R. 2008/510, **art. 2**

**F49** Words in s. 22(5) omitted (2.4.2018) by The Regulation and Inspection of Social Care (Wales) Act 2016 (Consequential Amendments) Regulations 2018 (S.I. 2018/195), **regs. 2(1)**, 22(e)

**F50** S. 22(5): paragraph (b) and word in paragraph (a) of the definition of "voluntary home" omitted (2.2.2009) by virtue of The Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (S.I. 2008/1779), arts. 2(3), **7(i)**; S.R. 2008/510, **art. 2**

**F51** S. 22(6) added (1.10.2010) by The Health and Social Care Act 2008 (Consequential Amendments No.2) Order 2010 (S.I. 2010/81), **art. 13(3)(b)**

## 23 Sections 16 to 19: [F52 exception for spouses and civil partners]

**[**[F53](1) Conduct by a person (A) which would otherwise be an offence under any of sections 16 to 19 against another person (B) is not an offence under that section if at the time —

(a) B is 16 or over, and

(b) A and B are lawfully married **[**[F54]or civil partners of each other**]**.

(2) In proceedings for such an offence it is for the defendant to prove that A and B **[**[F55]were at the time lawfully married or civil partners of each other**]**.**]**

**Textual Amendments**

**F52** S. 23: words in heading substituted (5.12.2005) by Civil Partnership Act 2004 (c. 33), ss. 261(1), 263, **Sch. 27 para. 173(4)**; S.I. 2005/3175, **art. 2(1)(2)**, Sch. 1 (subject to art. 2(3)-(5))

**F53** Ss. 16-24 repealed (N.I.) (2.2.2009) by The Sexual Offences (Northern Ireland) Order 2008 (S.I. 2008/1769 (N.I. 2)), arts. 1, 78(b), **Sch. 3** (with Sch. 2 par. 1); S.R. 2008/510, **art. 2**

**F54** Words in s. 23(1)(b) inserted (5.12.2005) by Civil Partnership Act 2004 (c. 33), ss. 261(1), 263, **Sch. 27 para. 173(2)**; S.I. 2005/3175, **art. 2(1)(2)**, Sch. 1 (subject to art. 2(3)-(5))

**F55** Words in s. 23(2) substituted (5.12.2005) by Civil Partnership Act 2004 (c. 33), ss. 261(1), 263, **Sch. 27 para. 173(3)**; S.I. 2005/3175, **art. 2(1)(2)**, Sch. 1 (subject to art. 2(3)-(5))

## 24 Sections 16 to 19: sexual relationships which pre-date position of trust

**[**[F56](1) Conduct by a person (A) which would otherwise be an offence under any of sections 16 to 19 against another person (B) is not an offence under that section if, immediately before the position of trust arose, a sexual relationship existed between A and B.

(2) Subsection (1) does not apply if at that time sexual intercourse between A and B would have been unlawful.

(3) In proceedings for an offence under any of sections 16 to 19 it is for the defendant to prove that such a relationship existed at that time.**]**

**Textual Amendments**

**F56** Ss. 16-24 repealed (N.I.) (2.2.2009) by The Sexual Offences (Northern Ireland) Order 2008 (S.I. 2008/1769 (N.I. 2)), arts. 1, 78(b), **Sch. 3** (with Sch. 2 par. 1); S.R. 2008/510, **art. 2**

**Changes to legislation:**
Sexual Offences Act 2003, Cross Heading: Abuse of position of trust is up to date with all changes known to be in force on or before 04 November 2021. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.
View outstanding changes

**Changes and effects yet to be applied to the whole Act associated Parts and Chapters:**
Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 60B(5)(i) substituted for s. 60B(5)(i)(ii) by 2015 c. 9 (N.I.) Sch. 1 para. 123(1)Sch. 9 Pt. 1
- s. 89(1A) inserted by 2016 asp 22 Sch. 2 para. 3(3)
- s. 108(9) inserted by 2011 c. 18 s. 17(2)
- Sch. 5 para. 63C inserted by 2021 c. 17 Sch. 2 para. 6

***Changes to legislation:*** *Sexual Offences Act 2003, Cross Heading: Supplementary and general is up to date with all changes known to be in force on or before 02 October 2021. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

# Sexual Offences Act 2003

**2003 CHAPTER 42**

**PART 1**

SEXUAL OFFENCES

*Supplementary and general*

**73 Exceptions to aiding, abetting and counselling**

(1) A person is not guilty of aiding, abetting or counselling the commission against a child of an offence to which this section applies if he acts for the purpose of—
   (a) protecting the child from sexually transmitted infection,
   (b) protecting the physical safety of the child,
   (c) preventing the child from becoming pregnant, or
   (d) promoting the child's emotional well-being by the giving of advice,

and not for the purpose of obtaining sexual gratification or for the purpose of causing or encouraging the activity constituting the offence or the child's participation in it.

(2) This section applies to—
   (a) an offence under any of sections 5 to 7 (offences against children under 13);
   (b) an offence under section 9 (sexual activity with a child);
   (c) an offence under section 13 which would be an offence under section 9 if the offender were aged 18;
   (d) an offence under any of sections 16, 25, 30, 34 and 38 (sexual activity) against a person under 16.

(3) This section does not affect any other enactment or any rule of law restricting the circumstances in which a person is guilty of aiding, abetting or counselling an offence under this Part.

***Changes to legislation:** Sexual Offences Act 2003, Cross Heading: Supplementary and general is up to date with all changes known to be in force on or before 02 October 2021. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

**74 "Consent"**

For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.

**75 Evidential presumptions about consent**

(1) If in proceedings for an offence to which this section applies it is proved—

(a) that the defendant did the relevant act,

(b) that any of the circumstances specified in subsection (2) existed, and

(c) that the defendant knew that those circumstances existed,

the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.

(2) The circumstances are that—

(a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;

(b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;

(c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;

(d) the complainant was asleep or otherwise unconscious at the time of the relevant act;

(e) because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;

(f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

(3) In subsection (2)(a) and (b), the reference to the time immediately before the relevant act began is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began.

**76 Conclusive presumptions about consent**

(1) If in proceedings for an offence to which this section applies it is proved that the defendant did the relevant act and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed—

(a) that the complainant did not consent to the relevant act, and

(b) that the defendant did not believe that the complainant consented to the relevant act.

(2) The circumstances are that—

(a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;

(b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

### 77 Sections 75 and 76: relevant acts

In relation to an offence to which sections 75 and 76 apply, references in those sections to the relevant act and to the complainant are to be read as follows—

| *Offence* | *Relevant Act* |
|---|---|
| An offence under section 1 (rape). | The defendant intentionally penetrating, with his penis, the vagina, anus or mouth of another person ("the complainant"). |
| An offence under section 2 (assault by penetration). | The defendant intentionally penetrating, with a part of his body or anything else, the vagina or anus of another person ("the complainant"), where the penetration is sexual. |
| An offence under section 3 (sexual assault). | The defendant intentionally touching another person ("the complainant"), where the touching is sexual. |
| An offence under section 4 (causing a person to engage in sexual activity without consent). | The defendant intentionally causing another person ("the complainant") to engage in an activity, where the activity is sexual. |

### 78 "Sexual"

[F1For the purposes of this Part ([F2except sections 15A and 71 ]), penetration, touching or any other activity is sexual if a reasonable person would consider that—

(a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or

(b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.]

**Textual Amendments**

**F1** Ss. 78,79 repealed (N.I.) (2.2.2009) by The Sexual Offences (Northern Ireland) Order 2008 (S.I. 2008/1769 (N.I. 2)), arts. 1, 78(f), **Sch. 3**; S.R. 2008/510, **art. 2**

**F2** Words in s. 78 substituted (3.4.2017) by Serious Crime Act 2015 (c. 9), s. 88(1), **Sch. 4 para. 63**; S.I. 2017/511, reg. 2(b)(i)

### 79 Part 1: general interpretation

[F3(1) The following apply for the purposes of this Part.

(2) Penetration is a continuing act from entry to withdrawal.

***Changes to legislation:** Sexual Offences Act 2003, Cross Heading: Supplementary and general is up to date with all changes known to be in force on or before 02 October 2021. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(3) References to a part of the body include references to a part surgically constructed (in particular, through gender reassignment surgery).

(4) "Image" means a moving or still image and includes an image produced by any means and, where the context permits, a three-dimensional image.

(5) References to an image of a person include references to an image of an imaginary person.

(6) "Mental disorder" has the meaning given by section 1 of the Mental Health Act 1983 (c. 20).

(7) References to observation (however expressed) are to observation whether direct or by looking at an image.

(8) Touching includes touching—

- (a) with any part of the body,
- (b) with anything else,
- (c) through anything,

and in particular includes touching amounting to penetration.

(9) "Vagina" includes vulva.

(10) In relation to an animal, references to the vagina or anus include references to any similar part.**]**

**Textual Amendments**

**F3** Ss. 78,79 repealed (N.I.) (2.2.2009) by The Sexual Offences (Northern Ireland) Order 2008 (S.I. 2008/1769 (N.I. 2)), arts. 1, 78(f), **Sch. 3**; S.R. 2008/510, **art. 2**

**Changes to legislation:**
Sexual Offences Act 2003, Cross Heading: Supplementary and general is up to date with all changes known to be in force on or before 02 October 2021. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.
View outstanding changes

**Changes and effects yet to be applied to the whole Act associated Parts and Chapters:**
Whole provisions yet to be inserted into this Act (including any effects on those provisions):

– s. 60B(5)(i) substituted for s. 60B(5)(i)(ii) by 2015 c. 9 (N.I.) Sch. 1 para. 123(1)Sch. 9 Pt. 1
– s. 89(1A) inserted by 2016 asp 22 Sch. 2 para. 3(3)
– s. 108(9) inserted by 2011 c. 18 s. 17(2)
– Sch. 5 para. 63C inserted by 2021 c. 17 Sch. 2 para. 6

***Changes to legislation:** Sexual Offences Act 2003, Section 74 is up to date with all changes known to be in force on or before 09 October 2021. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

# Sexual Offences Act 2003

**2003 CHAPTER 42**

## PART 1

SEXUAL OFFENCES

*Supplementary and general*

**74 "Consent"**

For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.

**Changes to legislation:**
Sexual Offences Act 2003, Section 74 is up to date with all changes known to be in force on or before 09 October 2021. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.
View outstanding changes

**Changes and effects yet to be applied to the whole Act associated Parts and Chapters:**
Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 60B(5)(i) substituted for s. 60B(5)(i)(ii) by 2015 c. 9 (N.I.) Sch. 1 para. 123(1)Sch. 9 Pt. 1
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- s. 108(9) inserted by 2011 c. 18 s. 17(2)
- Sch. 5 para. 63C inserted by 2021 c. 17 Sch. 2 para. 6

***Changes to legislation:*** *Sexual Offences Act 2003, Section 75 is up to date with all changes known to be in force on or before 09 October 2021. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

# Sexual Offences Act 2003

**2003 CHAPTER 42**

## PART 1

SEXUAL OFFENCES

*Supplementary and general*

### 75 Evidential presumptions about consent

(1) If in proceedings for an offence to which this section applies it is proved—

(a) that the defendant did the relevant act,

(b) that any of the circumstances specified in subsection (2) existed, and

(c) that the defendant knew that those circumstances existed,

the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.

(2) The circumstances are that—

(a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;

(b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;

(c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;

(d) the complainant was asleep or otherwise unconscious at the time of the relevant act;

(e) because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;

***Changes to legislation:** Sexual Offences Act 2003, Section 75 is up to date with all changes known to be in force on or before 09 October 2021. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

(3) In subsection (2)(a) and (b), the reference to the time immediately before the relevant act began is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began.

**Changes to legislation:**
Sexual Offences Act 2003, Section 75 is up to date with all changes known to be in force on or before 09 October 2021. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.
View outstanding changes

**Changes and effects yet to be applied to the whole Act associated Parts and Chapters:**
Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 60B(5)(i) substituted for s. 60B(5)(i)(ii) by 2015 c. 9 (N.I.) Sch. 1 para. 123(1)Sch. 9 Pt. 1
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- s. 108(9) inserted by 2011 c. 18 s. 17(2)
- Sch. 5 para. 63C inserted by 2021 c. 17 Sch. 2 para. 6

**Changes to legislation:** *Sexual Offences Act 2003, Section 76 is up to date with all changes known to be in force on or before 05 October 2021. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

# Sexual Offences Act 2003

**2003 CHAPTER 42**

**PART 1**

SEXUAL OFFENCES

*Supplementary and general*

## 76 Conclusive presumptions about consent

(1) If in proceedings for an offence to which this section applies it is proved that the defendant did the relevant act and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed—

(a) that the complainant did not consent to the relevant act, and

(b) that the defendant did not believe that the complainant consented to the relevant act.

(2) The circumstances are that—

(a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;

(b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

**Changes to legislation:**
Sexual Offences Act 2003, Section 76 is up to date with all changes known to be in force on or before 05 October 2021. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.
View outstanding changes

**Changes and effects yet to be applied to the whole Act associated Parts and Chapters:**
Whole provisions yet to be inserted into this Act (including any effects on those provisions):

– s. 60B(5)(i) substituted for s. 60B(5)(i)(ii) by 2015 c. 9 (N.I.) Sch. 1 para. 123(1)Sch. 9 Pt. 1
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– s. 108(9) inserted by 2011 c. 18 s. 17(2)
– Sch. 5 para. 63C inserted by 2021 c. 17 Sch. 2 para. 6

**Article - Criminal Law**

[Previous][Next]

§3–318.

(a) Except as provided in subsections (b) and (c) of this section, a person may not be prosecuted under § 3-303, § 3-304, § 3-307, or § 3-308 of this subtitle for a crime against a victim who was the person's legal spouse at the time of the alleged rape or sexual offense.

(b) A person may be prosecuted under § 3-303(a), § 3-304(a)(1), or § 3-307(a)(1) of this subtitle for a crime against the person's legal spouse if:

(1) at the time of the alleged crime the person and the person's legal spouse have lived apart, without cohabitation and without interruption:

(i) under a written separation agreement executed by the person and the spouse; or

(ii) for at least 3 months immediately before the alleged rape or sexual offense; or

(2) the person in committing the crime uses force or threat of force and the act is without the consent of the spouse.

(c) A person may be prosecuted under § 3-303, § 3-304, § 3-307, or § 3-308 of this subtitle for a crime against the person's legal spouse if at the time of the alleged crime the person and the spouse live apart, without cohabitation and without interruption, under a decree of limited divorce.

[Previous][Next]

140, 145; judgment reversed, see 215 C. 538 et seq. Cited. 35 CA 173, 181. Cited. 36 CA [illegible] CA 715.

Cited. 43 CS 211, 212.

Subsec. (a):

Cited. 206 C. 40, 42, 43. Cited. 210 C. 110, 112, 115, 123, 128. Cited. Id., 315, 317. Cited. 216 C. 282, 295.

Cited. 235 C. 502, 517.

Cited. 19 CA 111, 142, 143; judgment reversed, see 215 C. 538 et seq. Cited. 25 CA 725, 726.

(Return to TOC) (Return to Chapters) (Return to Titles)

**Sec. 53a-70b. Sexual assault in spousal or cohabiting relationship: Class B felony.** (a) For the purposes of this section:

(1) "Sexual intercourse" means vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal intercourse, anal intercourse or fellatio and does not require emission of semen. Penetration may be committed by an object manipulated by the actor into the genital or anal opening of the victim's body; and

(2) "Use of force" means: (A) Use of a dangerous instrument; or (B) use of actual physical force or violence or superior physical strength against the victim.

(b) No spouse or cohabitor shall compel the other spouse or cohabitor to engage in sexual intercourse by the use of force against such other spouse or cohabitor, or by the threat of the use of force against such other spouse or cohabitor which reasonably causes such other spouse or cohabitor to fear physical injury.

(c) Any person who violates any provision of this section shall be guilty of a class B felony.

[illegible]

(Return to TOC) (Return to Chapters) (Return to Titles)

**Sec. 53a-71. Sexual assault in the second degree: Class C felony: Nine months not suspendable.** (a) A person is [illegible] such person engages in sexual intercourse with another person [illegible] years of age or older but under sixteen years of age and the actor is [illegible] such other person is mentally defective to the extent that such other person [illegible] sexual intercourse, or (3) such other person is physically helpless [illegible] person is less than eighteen years old and the actor is such person's guardian or otherwise responsible [illegible] supervision of such person's welfare, or (5) such other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over such other person; or (6) the actor is a psychotherapist and such other person is (A) a patient of the actor and the sexual intercourse occurs during the psychotherapy session, (B) a patient or former patient of the actor and such patient or former patient is emotionally dependent upon the actor, or (C) a patient or former patient of the actor and the sexual intercourse occurs by means of therapeutic deception; or (7) the actor accomplishes the sexual intercourse by means of false representation that the sexual intercourse is for a bona fide medical purpose by a health care professional; or (8) the actor is a school employee and such other person is a student enrolled in a school in which the actor works or a school under the jurisdiction of the local or regional board of education which employs the actor.

(b) Sexual assault in the second degree is a class C felony for which nine months of the sentence imposed may not be suspended or reduced by the court.

(1969, P.A. 828, S. 72; P.A. 75-619, S. 6; P.A. 82-428, S. 3; P.A. 83-326, S. 1; P.A. 85-341, S. 2; P.A. 93-340, S. 2; P.A. 94-221, S. 18; P.A. 00-161, S. 2.)

History: P.A. 75-619 restated Subsec. (a) to conform with changes made in definitions of Sec. 53a-65, referred to sexual "assault" rather than to sexual "misconduct" and made the offense a Class C felony rather

# Idaho Statutes

TITLE 18
CRIMES AND PUNISHMENTS
CHAPTER 61
RAPE

18-6101. RAPE DEFINED. Rape is defined as the penetration, however slight, of the oral, anal or vaginal opening with a penis accomplished under any one (1) of the following circumstances:

(1) Where the victim is under the age of sixteen (16) years and the perpetrator is eighteen (18) years of age or older.

(2) Where the victim is sixteen (16) or seventeen (17) years of age and the perpetrator is three (3) years or more older than the victim.

(3) Where the victim is incapable, through any unsoundness of mind, due to any cause including, but not limited to, mental illness, mental disability or developmental disability, whether temporary or permanent, of giving legal consent.

(4) Where the victim resists but the resistance is overcome by force or violence.

(5) Where the victim is prevented from resistance by the infliction, attempted infliction, or threatened infliction of bodily harm, accompanied by apparent power of execution; or is unable to resist due to any intoxicating, narcotic, or anaesthetic substance.

(6) Where the victim is prevented from resistance due to an objectively reasonable belief that resistance would be futile or that resistance would result in force or violence beyond that necessary to accomplish the prohibited contact.

(7) Where the victim is at the time unconscious of the nature of the act. As used in this section, "unconscious of the nature of the act" means incapable of resisting because the victim meets one (1) of the following conditions:

(a) Was unconscious or asleep;

(b) Was not aware, knowing, perceiving, or cognizant that the act occurred.

(8) Where the victim submits under the belief that the person committing the act is the victim's spouse, and the belief is induced by artifice, pretense or concealment practiced by the accused, with intent to induce such belief.

(9) Where the victim submits under the belief that the person committing the act is someone other than the accused, and the belief is induced by artifice, pretense or concealment practiced by the accused, with the intent to induce such belief.

(10) Where the victim submits under the belief, instilled by the actor, that if the victim does not submit, the actor will cause physical harm to some person in the future; or cause damage to property; or engage in other conduct constituting a crime; or accuse any person of a crime or cause criminal charges to be instituted against the victim; or expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt or ridicule.

The provisions of subsections (1) and (2) of this section shall not affect the age requirements in any other provision of law, unless otherwise provided in any such law. Further, for the purposes of subsection (2) of this section, in determining whether the [illegible]rator is three (3) years or more older than the victim, the [illegible] in age shall be measured from the date of birth of the [illegible] to the date of birth of the victim.

Males and females are both capable of committing the crime of rape as defined in this section.

History:

[18-6101, added 1972, ch. 336, sec. 1, p. 961; am. 1977, ch. 208, sec. 1, p. 573; am. 1994, ch. 83, sec. 1, p. 197; am. 1994, ch. 135, sec. 1, p. 307; am. 2000, ch. 218, sec. 1, p. 606; am. 2003, ch. 280, sec. 1, p. 756; am. 2010, ch. 235, sec. 7, p. 547; am. 2010, ch. 352, sec. 1, p. 920; am. 2011, ch. 27, sec. 1, p. 67; am. 2016, ch. 296, sec. 1, p. 828.]

How current is this law?

Search the Idaho Statutes and Constitution

# Idaho Statutes

TITLE 18
CRIMES AND PUNISHMENTS
CHAPTER 61
RAPE

18-6107. RAPE OF SPOUSE. No person shall be convicted of rape for any act or acts with that person's spouse, except under the circumstances cited in subsections (4), (5), (6) and (10) of section 18-6101, Idaho Code.

History:

[18-6107, added 1977, ch. 206, sec. 4, p. 574; am. 1989, ch. 351, sec. 1, p. 879; am. 2010, ch. 152, sec. 2, p. 921; am. 2016, ch. 296, sec. 2, p. 829.]

How current is this law?

Search the Idaho Statutes and Constitution

7. Upon conviction for a violation of this section, the court shall order the defendant to pay restitution for any expenses incurred in locating or recovering the child.

8. The prosecuting attorney may recommend to the judge that the defendant be sentenced as for a misdemeanor and the judge may impose such a sentence if the judge finds that:

(a) The defendant has no prior conviction for this offense and the child has suffered no substantial harm as a result of the offense; or

(b) The interests of justice require that the defendant be punished as for a misdemeanor.

9. A person who aids or abets any other person to violate this section shall be punished as provided in subsection 1.

10. In addition to the exemption set forth in subsection 11, subsections 4 and 5 do not apply to a person who demonstrates a compelling excuse, to the satisfaction of the court, for relocating with a child in violation of NRS 125C.006 or 125C.0065.

11. This section does not apply to a person who detains, conceals, removes or relocates with a child to protect the child from the imminent danger of abuse or neglect or to protect himself or herself from imminent physical harm, and reported the detention, concealment, removal or relocation to a law enforcement agency or an agency which provides child welfare services within 24 hours after detaining, concealing, removing or relocating with the child, or as soon as the circumstances allowed. As used in this subsection:

(a) "Abuse or neglect" has the meaning ascribed to it in paragraph (a) of subsection 4 of NRS 200.508.

(b) "Agency which provides child welfare services" has the meaning ascribed to it in NRS 432B.030.

(Added to NRS by 1975, 1397; A 1981, 564; 1989, 1678; 1991, 1422; 1993, 1425; 1995, 997, 1185, 1338; 2001 Special Session, 17; 2003, 1005; 2015, 2590)

## SEXUAL ASSAULT AND SEDUCTION

**NRS 200.364 Definitions.** As used in NRS 200.364 to 200.3788, inclusive, unless the context otherwise requires:

1. "Forensic laboratory" has the meaning ascribed to it in NRS 176.09117.
2. "Forensic medical examination" has the meaning ascribed to it in NRS 217.300.
3. "Genetic marker analysis" has the meaning ascribed to it in NRS 176.09118.
4. "Offense involving a pupil or child" means any of the following offenses:

(a) Sexual conduct between certain employees of a school or volunteers at a school and a pupil pursuant to NRS 201.540.

(b) Sexual conduct between certain employees of a college or university and a student pursuant to NRS 201.550.

(c) Sexual conduct between certain employees or contractors of or volunteers for an entity which provides services to children and a person under the care, custody, control or supervision of the entity pursuant to NRS 201.555.

5. "Perpetrator" means a person who commits a sexual offense, an offense involving a pupil or child or sex trafficking.
6. "Sex trafficking" means a violation of subsection 2 of NRS 201.300.
7. "Sexual assault forensic evidence kit" means the forensic evidence obtained from a forensic medical examination.
8. "Sexual offense" means any of the following offenses:

(a) Sexual assault pursuant to NRS 200.366.

(b) Statutory sexual seduction pursuant to NRS 200.368.

9. "Sexual penetration" means cunnilingus, fellatio, or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including sexual intercourse in its ordinary meaning. The term does not include any such conduct for medical purposes.
10. "Statutory sexual seduction" means ordinary sexual intercourse, anal intercourse or sexual penetration committed by a person 18 years of age or older with a person who is 14 or 15 years of age and who is at least 4 years younger than the perpetrator.
11. "Victim" means a person who is a victim of a sexual offense, an offense involving a pupil or child or sex trafficking.
12. "Victim of sexual assault" has the meaning ascribed to it in NRS 217.280.

(Added to NRS by 1977, 1626; A 1979, 572; 1991, 801; 1995, 700; 2009, 231, 1296; 2013, 2426; 2015, 2234; 2017, 2316, 2887, 2888)

**NRS 200.366 Sexual assault: Definition; penalties; exclusions.**

1. A person is guilty of sexual assault if he or she:

(a) Subjects another person to sexual penetration, or forces another person to make a sexual penetration on himself or herself or another, or on a beast, against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his or her conduct; or

(b) Commits a sexual penetration upon a child under the age of 14 years or causes a child under the age of 14 years to make a sexual penetration on himself or herself or another, or on a beast.

2. Except as otherwise provided in subsections 3 and 4, a person who commits a sexual assault is guilty of a category A felony and shall be punished:

(a) If substantial bodily harm to the victim results from the actions of the defendant committed in connection with or as a part of the sexual assault, by imprisonment in the state prison:

(1) For life without the possibility of parole; or

(2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 15 years has been served.

(b) If no substantial bodily harm to the victim results, by imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served.

3. Except as otherwise provided in subsection 4, a person who commits a sexual assault against a child under the age of 16 years is guilty of a category A felony and shall be punished:

(a) If the crime results in substantial bodily harm to the child, by imprisonment in the state prison for life without the possibility of parole.

(b) Except as otherwise provided in paragraph (c), if the crime does not result in substantial bodily harm to the child, by imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 25 years has been served.

(c) If the crime is committed against a child under the age of 14 years and does not result in substantial bodily harm to the child, by imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 35 years has been served.

4. A person who commits a sexual assault against a child under the age of 16 years and who has been previously convicted of:

(a) A sexual assault pursuant to this section or any other sexual offense against a child; or

(b) An offense committed in another jurisdiction that, if committed in this State, would constitute a sexual assault pursuant to this section or any other sexual offense against a child,

➥ is guilty of a category A felony and shall be punished by imprisonment in the state prison for life without the possibility of parole.

5. The provisions of this section do not apply to a person who is less than 18 years of age and who commits any of the acts described in paragraph (b) of subsection 1 if the person is not more than 2 years older than the person upon whom the act was committed unless:

(a) The person committing the act uses force or threatens the use of force; or

(b) The person committing the act knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his or her conduct.

6. For the purpose of this section, "other sexual offense against a child" means any act committed by an adult upon a child constituting:

(a) Incest pursuant to NRS 201.180;

(b) Lewdness with a child pursuant to NRS 201.230;

(c) Sado-masochistic abuse pursuant to NRS 201.262; or

(d) Luring a child using a computer, system or network pursuant to NRS 201.560, if punished as a felony.

(Added to NRS by 1977, 1626; A 1991, 612; 1995, 1186; 1997, 1179, 1719; 1999, 431; 2003, 2825; 2005, 2874; 2007, 3255; 2015, 2235)

**NRS 200.368 Statutory sexual seduction: Penalties.** A person who commits statutory sexual seduction shall be punished:

1. If the person is 21 years of age or older at the time of the commission of the offense, for a category B felony by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 10 years, and may be further punished by a fine of not more than $10,000.

2. Except as otherwise provided in subsection 3, if the person is under the age of 21 years, for a gross misdemeanor.

3. If the person is under the age of 21 years and has previously been convicted of a sexual offense, as defined in NRS 179D.097, for a category D felony as provided in NRS 193.130.

(Added to NRS by 1977, 1627; A 1979, 1426; 1995, 1187; 2001, 703; 2015, 2236)

**NRS 200.373 Sexual assault of spouse by spouse.** It is no defense to a charge of sexual assault that the perpetrator was, at the time of the assault, married to the victim, if the assault was committed by force or by the threat of force.

(Added to NRS by 1967, 470; A 1975, 1141; 1977, 1628; 1987, 1165)

**NRS 200.377 Victims of certain sexual offenses: Legislative findings and declarations.** The Legislature finds and declares that:

1. This State has a compelling interest in assuring that the victim of a sexual offense, an offense involving a pupil or child or sex trafficking:

§21-1104. Additional fee by city - Abolishment.
This act shall in no way impair the right of any incorporated city or town to impose an additional license fee for maintaining any such pool or billiard hall, or pool or billiard table; or to prevent any incorporated city or town from abolishing same under existing laws.
Laws 1915, c. 21, § 4.

§21-1105. Disposition of fees and fines.
All fees collected and all fines collected for the violation of any provision of this act shall be paid into the county treasury to the credit of the court fund.
Laws 1915, c. 21, § 5; Laws 1968, c. 414, § 4, eff. Jan. 13, 1969.

§21-1111. Rape defined.
A. Rape is an act of sexual intercourse involving vaginal or anal penetration accomplished with a male or female who is not the spouse of the perpetrator and who may be of the same or the opposite sex as the perpetrator under any of the following circumstances:
1. Where the victim is under sixteen (16) years of age;
2. Where the victim is incapable through mental illness or any other unsoundness of mind, whether temporary or permanent, of giving legal consent;
3. Where force or violence is used or threatened, accompanied by apparent power of execution to the victim or to another person;
4. Where the victim is intoxicated by a narcotic or anesthetic agent, administered by or with the privity of the accused as a means of forcing the victim to submit;
5. Where the victim is at the time unconscious of the nature of the act and this fact is known to the accused;
6. Where the victim submits to sexual intercourse under the belief that the person committing the act is a spouse, and this belief is induced by artifice, pretense, or concealment practiced by the accused or by the accused in collusion with the spouse with intent to induce that belief. In all cases of collusion between the accused and the spouse to accomplish such act, both the spouse and the accused, upon conviction, shall be deemed guilty of rape;
7. Where the victim is under the legal custody or supervision of a state agency, a federal agency, a county, a municipality or a political subdivision and engages in sexual intercourse with a state, federal, county, municipal or political subdivision employee or an employee of a contractor of the state, the federal government, a county, a municipality or a political subdivision that exercises authority over the victim, or the subcontractor or employee of a subcontractor of the contractor of the state or federal government, a county, a municipality or a political subdivision that exercises authority over the victim;

8. Where the victim is at least sixteen (16) years of age and is less than twenty (20) years of age and is a student, or under the legal custody or supervision of any public or private elementary or secondary school, junior high or high school, or public vocational school, and engages in sexual intercourse with a person who is eighteen (18) years of age or older and is an employee of the same school system;

9. Where the victim is nineteen (19) years of age or younger and is in the legal custody of a state agency, federal agency or tribal court and engages in sexual intercourse with a foster parent or foster parent applicant; or

10. Where the victim is at least sixteen (16) years of age but less than eighteen (18) years of age and the perpetrator of the crime is a person responsible for the child's health, safety or welfare. "Person responsible for a child's health, safety or welfare" shall include, but not be limited to:

a. a parent,
b. a legal guardian,
c. custodian,
d. a foster parent,
e. a person eighteen (18) years of age or older with whom the child's parent cohabitates,
f. any other adult residing in the home of the child,
g. an agent or employee of a public or private residential home, institution, facility or day treatment program as defined in Section 175.20 of Title 10 of the Oklahoma Statutes, or
h. an owner, operator or employee of a child care facility, as defined by Section 402 of Title 10 of the Oklahoma Statutes.

B. Rape is an act of sexual intercourse accomplished with a male or female who is the spouse of the perpetrator if force or violence is used or threatened, accompanied by apparent power of execution to the victim or to another person.

R.L. 1910, § 2414. Amended by Laws 1981, c. 325, § 1; Laws 1983, c. 41, § 1, eff. Nov. 1, 1983; Laws 1984, c. 134, § 1, eff. Nov. 1, 1984; Laws 1990, c. 224, § 2, eff. Sept. 1, 1990; Laws 1993, c. 62, § 1, eff. Sept. 1, 1993; Laws 1995, c. 22, § 1, eff. Nov. 1, 1995; Laws 1999, c. 309, § 2, eff. Nov. 1, 1999; Laws 2001, c. 184, § 1, eff. Nov. 1, 2001; Laws 2002, c. 22, § 9, emerg. eff. March 8, 2002; Laws 2006, c. 62, § 5, emerg. eff. April 17, 2006; Laws 2015, c. 67, § 1, eff. Nov. 1, 2015; Laws 2017, c. 128, § 2, eff. July 1, 2017; Laws 2018, c. 167, § 3, eff. Nov. 1, 2018.

NOTE: Laws 2001, c. 51, § 4 repealed by Laws 2002, c. 22, § 34, emerg. eff. March 8, 2002.

§21-1111.1. Rape by instrumentation.

# TITLE 11
# Criminal Offenses

## CHAPTER 11-37
## Sexual Assault

### SECTION 11-37-2

**§ 11-37-2. First degree sexual assault.**

A person is guilty of first degree sexual assault if he or she engages in sexual penetration with another person, and if any of the following circumstances exist:

(1) The accused, not being the spouse, knows or has reason to know that the victim is mentally incapacitated, mentally disabled, or physically helpless.

(2) The accused uses force or coercion.

(3) The accused, through concealment or by the element of surprise, is able to overcome the victim.

(4) The accused engages in the medical treatment or examination of the victim for the purpose of sexual arousal, gratification, or stimulation.

History of Section.
(P.L. 1979, ch. 302, § 2; P.L. 1980, ch. 273, § 1; P.L. 1981, ch. 119, § 1; P.L. 1984, ch. 59, § 1; P.L. 1984, ch. 355, § 1; P.L. 1986, ch. 191, § 1; P.L. 1987, ch. 238, § 1.)

(3) Assault and battery in the third degree is a lesser-included offense of assault and battery in the second degree, as defined in subsection (D)(1), assault and battery in the first degree, as defined in subsection (C)(1), assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29.

HISTORY: 2010 Act No. 273, Section 6.B, eff June 2, 2010; 2011 Act No. 39, Sections 1, 2, eff June 7, 2011; 2015 Act No. 58 (S.3), Pt II, Section 3, eff June 4, 2015.

Effect of Amendment

2015 Act No. 58, Section 3, rewrote (A)(2).

**SECTION 16-3-610.** Certain offenses committed with a carried or concealed deadly weapon.

If a person is convicted of an offense pursuant to Section 16-3-29, 16-3-600, or manslaughter, and the offense is committed with a deadly weapon of the character as specified in Section 16-23-460 carried or concealed upon the person of the defendant, the judge shall, in addition to the punishment provided by law for such offense, sentence the person to imprisonment for the misdemeanor offense for not less than three months nor more than twelve months, or a fine of not less than two hundred dollars, or both.

HISTORY: 1962 Code Section 16-93; 1952 Code Section 16-93; 1942 Code Section 1258; 1932 Code Section 1258; Cr. C. '22 Section 153; Cr. C. '12 Section 160; Cr. C. '02 Section 132; 1897 (22) 427; 2010 Act No. 273, Section 6.C, eff June 2, 2010.

Editor's Note

2010 Act No. 273, Section 7.C, provides:

"Wherever in the 1976 Code of Laws reference is made to the common law offense of assault and battery of a high and aggravated nature, it means assault and battery with intent to kill, as contained in repealed Section 16-3-620, and, except for references in Section 16-1-60 and Section 17-25-45, wherever in the 1976 Code reference is made to assault and battery with intent to kill, it means attempted murder as defined in Section 16-3-29."

**SECTION 16-3-615.** Spousal sexual battery.

(A) Sexual battery, as defined in Section 16-3-651(h), when accomplished through use of aggravated force, defined as the use or the threat of use of a weapon or the use or threat of use of physical force or physical violence of a high and aggravated nature, by one spouse against the other spouse if they are living together, constitutes the felony of spousal sexual battery and, upon conviction, a person must be imprisoned not more than ten years.

(B) The offending spouse's conduct must be reported to appropriate law enforcement authorities within thirty days in order for that spouse to be prosecuted for this offense.

(C) The provisions of Section 16-3-659.1 apply to any trial brought under this section.

(D) This section is not applicable to a purported marriage entered into by a male under the age of sixteen or a female under the age of fourteen.

HISTORY: 1991 Act No. 139, Section 1; 1994 Act No. 295, Sections 1, 3; 1997 Act No. 95, Section 2.

**SECTION 16-3-625.** Resisting arrest with deadly weapon; sentencing; "deadly weapon" defined; application of section.

A person who resists the lawful efforts of a law enforcement officer to arrest him or another person with the use or threat of use of a deadly weapon against the officer, and the person is in possession or claims to be in possession of a deadly weapon, is guilty of a felony and, upon conviction, must be punished by imprisonment for not more than ten nor less than two years. No sentence imposed hereunder for a first offense shall be suspended to less than six months nor shall the persons so sentenced be eligible for parole until after service of six months. No person sentenced under this section for a second or subsequent offense shall have the sentence suspended to less than two years nor shall the person be eligible for parole until after service of two years.

As used in this section "deadly weapon" means any instrument which can be used to inflict deadly force.

This section does not affect or replace the common law crime of assault and battery with intent to kill nor does it apply if the sentencing judge, in his discretion, elects to sentence an eligible defendant under the provisions of the "Youthful Offenders Act".

HISTORY: 1980 Act No. 511, Section 1; 1995 Act No. 83, Section 11.

**SECTION 16-3-651.** Criminal sexual conduct; definitions.

For the purposes of Sections 16-3-651 to 16-3-659.1:

(a) "Actor" means a person accused of criminal sexual conduct.

(b) "Aggravated coercion" means that the actor threatens to use force or violence of a high and aggravated nature to overcome the victim or another person, if the victim reasonably believes that the actor has the present ability to carry out the threat, or threatens to retaliate in the future by the infliction of physical harm, kidnapping or extortion, under circumstances of aggravation, against the victim or any other person.

(c) "Aggravated force" means that the actor uses physical force or physical violence of a high and aggravated nature to overcome the victim or includes the threat of the use of a deadly weapon.

(d) "Intimate parts" includes the primary genital area, anus, groin, inner thighs, or buttocks of a male or female human being and the breasts of a female human being.

(e) "Mentally defective" means that a person suffers from a mental disease or defect which renders the person temporarily or permanently incapable of appraising the nature of his or her conduct.

(f) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct whether this condition is produced by illness, defect, the influence of a substance or from some other cause.

(g) "Physically helpless" means that a person is unconscious, asleep, or for any other reason physically unable to communicate unwillingness to an act.

(h) "Sexual battery" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes.

(i) "Victim" means the person alleging to have been subjected to criminal sexual conduct.

HISTORY: 1977 Act No. 157 Section 1.

**SECTION 16-3-652.** Criminal sexual conduct in the first degree.

(1) A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:

(a) The actor uses aggravated force to accomplish sexual battery.

(b) The victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement, kidnapping, trafficking in persons, robbery, extortion, burglary, housebreaking, or any other similar offense or act.

(c) The actor causes the victim, without the victim's consent, to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering, or causing to be administered, distributed, dispensed, or delivered a controlled substance, a controlled substance analogue, or any intoxicating substance.

(2) Criminal sexual conduct in the first degree is a felony punishable by imprisonment for not more than thirty years, according to the discretion of the court.

Code of Virginia
Title 18.2. Crimes and Offenses Generally
Chapter 4. Crimes Against the Person
Article 7. Criminal Sexual Assault

# § 18.2-61. Rape

A. If any person has sexual intercourse with a complaining witness, whether or not his or her spouse, or causes a complaining witness, whether or not his or her spouse, to engage in sexual intercourse with any other person and such act is accomplished (i) against the complaining witness's will, by force, threat or intimidation of or against the complaining witness or another person; or (ii) through the use of the complaining witness's mental incapacity or physical helplessness; or (iii) with a child under age 13 as the victim, he or she shall be guilty of rape.

B. A violation of this section shall be punishable, in the discretion of the court or jury, by confinement in a state correctional facility for life or for any term not less than five years; and in addition:

1. For a violation of clause (iii) of subsection A where the offender is more than three years older than the victim, if done in the commission of, or as part of the same course of conduct as, or as part of a common scheme or plan as a violation of (i) subsection A of § 18.2-47 or § 18.2-48, (ii) § 18.2-89, 18.2-90, or 18.2-91, or (iii) § 18.2-51.2, the punishment shall include a mandatory minimum term of confinement of 25 years; or

2. For a violation of clause (iii) of subsection A where it is alleged in the indictment that the offender was 18 years of age or older at the time of the offense, the punishment shall include a mandatory minimum term of confinement for life.

The mandatory minimum terms of confinement prescribed for violations of this section shall be served consecutively with any other sentence. If the term of confinement imposed for any violation of clause (iii) of subsection A, where the offender is more than three years older than the victim, is for a term less than life imprisonment, the judge shall impose, in addition to any active sentence, a suspended sentence of no less than 40 years. This suspended sentence shall be suspended for the remainder of the defendant's life, subject to revocation by the court.

There shall be a rebuttable presumption that a juvenile over the age of 10 but less than 12, does not possess the physical capacity to commit a violation of this section. In any case deemed appropriate by the court, all or part of any sentence imposed for a violation under this section against a spouse may be suspended upon the defendant's completion of counseling or therapy, if not already provided, in the manner prescribed under § 19.2-218.1 if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and will be in the best interest of the complaining witness.

C. Upon a finding of guilt under this section, when a spouse is the complaining witness in any case tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the defendant who has not previously had a proceeding against him for violation of this section dismissed pursuant to this subsection and with the consent of the complaining witness and the attorney for the Commonwealth, may defer further proceedings and place the defendant on probation pending completion of counseling or therapy, if not already provided, in

the manner prescribed under § 19.2-218.1. If the defendant fails to so complete such counseling or therapy, the court may make final disposition of the case and proceed as otherwise provided. If such counseling is completed as prescribed under § 19.2-218.1, the court may discharge the defendant and dismiss the proceedings against him if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness.

Code 1950, § 18.1-44; 1960, c. 358; 1972, c. 394; 1975, cc. 14, 15, 606; 1981, c. 397; 1982, c. 506; 1986, c. 516; 1994, cc. 339, 772, 794;1997, c. 330;1999, c. 367;2002, cc. 810, 818;2005, c. 631; 2006, cc. 853, 914;2012, cc. 575, 605;2013, cc. 761, 774.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

## Chapter-14

## On Rape

Number 1.[479] If a person enters into sexual intercourse with a woman without her consent or enters into sexual intercourse with a girl below the age of Sixteen years with or without her consent shall be deemed to be an offence of rape.

*Explanation*: For the purposes of this Number:

(a) A consent taken by using fear, coercion, undue influence, misrepresentation or use of force or kidnapping or hostage taking (abducting) shall not be considered to be consent.

(b) A consent taken when she is not in a conscious condition shall not be considered to be consent.

(c) Minor penetration of the penis into the vagina shall be considered to be a sexual intercourse for the purposes of this Number.

Number 2. A person who commits rape with a woman within kinship (prohibited degree of consanguinity) shall be liable to the punishment as referred to in the Chapter on Incest, in addition to the punishment as referred to in this Chapter. In cases where imprisonment for life has been imposed to an offender, an additional punishment for rape shall not be added.

Number 3.[480] A person who commits rape shall be liable to the imprisonment as mentioned hereunder:

Imprisonment for a term ranging from Ten years to Fifteen years if the minor girl is below the age of Ten years...............1

Imprisonment for a term ranging from Eight years to Twelve years if the minor girl is above Ten or more years of age but below Fourteen years of age...................2

[479] Amended by Some Nepal Acts to Maintain Gender Equality Amendment Act, 2063.
[480] Amended by Some Nepal Acts to Maintain Gender Equality Amendment Act, 2063.

Imprisonment for a term ranging from Six years to Ten years if the minor girl is of Fourteen years of age or above below Sixteen years of age……………….3

Imprisonment for a term ranging from Five years to Eight years if the woman is of Sixteen years of age or above but below Twenty years of age................4

Imprisonment for a term ranging from Five years to Seven years if the woman is of Twenty years of age or above . …….5

Notwithstanding anything contained in this Number, the husband who commits a rape with his wife shall be liable to imprisonment for a term ranging from Three months to Six months.

Number 3A.[481] One who commits a gang rape or commits rape with a pregnant woman or a disabled woman shall be liable to imprisonment for a term of Five years, in addition to the imprisonment mentioned in this Chapter.

Number 3B.[482] Notwithstanding anything contained in Number 3 and Number 3A, if someone commits a rape upon knowing the fact that he is living with HIV positive, such an offender shall be liable to imprisonment for a term of One year, in addition to the imprisonment referred to in Number 3 and Number 3A. of this Chapter.

Number 4. Every person who knowingly accompanies a gang and grabs a woman for rape or helps in committing the rape shall be liable to imprisonment for a term not exceeding Three years. In the case of a girl under Sixteen years of age, such a person shall be liable to the double of such punishment.

Number 5. One who has made attempt to commit rape but has not succeeded in committing it shall be liable to the punishment which is half the punishment that is imposed on the offender who commits rape.

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[481] Inserted by the Eleventh Amendment.
[482] Inserted by Some Nepal Acts to Maintain Gender Equality Amendment Act, 2063

Number 6. If a person instigates another person to commit a rape, the instigator shall be liable to the punishment which is half the punishment that is imposed on the offender if the person has committed rape, and which half the punishment that is imposed on a person who has made attempt to rape if the person has made attempt but not been able to complete the commission of rape.

Number 7. ……………………[483]

Number 8. In cases where a person with intention to attempt rape assaults, rounds up (*chhekthun*), ties up (*bandchhand*) or uses force (*jorjulum*) by any other means to a victim and it is not possible to save the chastity (*dharma*) for the victim upon rescuing herself from the offender by shouting, requesting for the help or by any other means immediately, or where the victim is in a situation that if she does not do anything with her idea (*akkal*) or power (*barkat*) she may not be able to save her chastity due to serious fear or threat so created over there before the commission of rape or even after the commission of rape where she could do nothing due to lack of her power or force immediately, if such a victim, out of anger of such act, strikes a weapon, stick (*latho*) or stone at the place of commission of rape immediately or within one hour upon pursing the offender from such place and the offender dies over there, such an act shall not be deemed to be an offence. In case the victim kills the offender after one hour, she shall be liable to a fine of up to Five Thousand Rupees or imprisonment for a term not exceeding Ten years.

Number 9. A person who commits or causes to be committed rape with a woman for the purpose of grabbing her property through inheritance shall not be eligible for inheritance to be received from the victim of such rape.

Number 9A. [484] A person who commits or causes to be committed sodomy (any kinds of unnatural sexual intercourse) with a minor, it shall be considered to be

[483] Repealed by the Eleventh Amendment.

an offence of rape and the offender shall be liable to an additional punishment of imprisonment for a term not exceeding One year as referred to in Number 3 of this Chapter, and the court shall make an order to provide appropriate compensation to such a minor from the offender, upon considering the age and grievance suffered by the minor.

Number 10.[485] If a person is held to have committed rape with a woman, the court shall make an order to provide appropriate compensation to the victim from the offender upon considering the physical or mental loss she has suffered. In the course of determining such compensation, the gravity of offence and pain suffered by the dependent minors, if any, shall also be taken into account if such victim is already dead.

Number 10A.[486] In the course of an investigation or inquiry of a case mentioned in this Chapter, a woman police employee shall record the statement of the victim woman and if a woman police employee is not available, any other police employee may record her statement in front of a woman social worker.

Number 10B.[487] In the course of hearing of a case filed pursuant to this Chapter, only the lawyer, accused, victim woman and her guardian and police or court employee so permitted by the case hearing authority may appear before the bench.

Number 10C.[488] If the court, in making judgment, convicts the accused of rape on a case filed pursuant to this Chapter, the court shall mention in its decision about the compensation to be awarded to the victim from the offender and shall also cause the same to be provided to the concerned woman. For the purpose of realizing of the compensation, the court shall attach the property, including the share on joint property, of the accused immediately after the filing of a case pursuant to this Chapter.

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[484] Inserted by the Eleventh Amendment.
[485] Amended by Some Nepal Acts to Maintain Gender Equality Amendment Act, 2063.
[486] Inserted by the Eleventh Amendment.
[487] Inserted by the Eleventh Amendment.
[488] Inserted by Some Nepal Acts to Maintain Gender Equality Amendment Act, 2063

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Number 11. If a suit on the matter of rape is not filed within Thirty Five days from the date of the cause of action, the suit shall not be entertained.

# Domestic Violence (Offence and Punishment) Act, 2066 (2009)

**Date of Authentication and Publication**
2066.1.14 (April 27, 2009)

Act No. 1 of the year 2066 (2009)

**An Act relating to control the Domestic Violence**

**Preamble**: Whereas, it is expedient to make provision to respect the right of every person to live in a secure and dignified life, to prevent and control violence occurring within the family and for matters connected therewith and incidental thereto making such violence punishable, and for providing protection to the victims of violence;

Now, therefore, be it enacted by the Constituent Assembly pursuant to Sub-article (1) of Article 81 of the Interim Constitution of Nepal, 2063 (2007).

1. **Short Title and Commencement**: (1) This Act may be called the "Domestic Violence (Crime and Punishment) Act, 2066 (2009)".

   (2) This Act shall come into force immediately.

2. **Definitions**: Unless the subject or context otherwise requires, in this Act,-

   (a) "Domestic Violence" means any form of physical, mental, sexual and economic harm perpetrated by person to a person with whom he/she has a family relationship and this word also includes any acts of reprimand or emotional harm.

   (b) "Domestic relationship" means a relationship between two or more persons who are living together in a shared household and are related by decent (consanguinity), marriage, adoption or are family

NEPAL LAW COMMISSION

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members living together as a joint family; or a dependant domestic help living in the same family.

(c) "Physical harm" means an act of committing or causing bodily harm or injury holding as a captive, inflicting physical pain or any other act connected therewith and incidental thereto except the act of breaking the limbs of body *(Angabhanga)*.

(d) "Mental harm" means any act of threatening the Victim of physical torture, showing terror, reprimanding him/her, accusing him/her of false blame, forcefully evicting him/her from the house or otherwise causing injury or harm to the Victim emotionally and this expression also includes any discrimination carried out on the basis of thought, religion or culture and customs and traditions.

(e) "Sexual harm" means sexual misbehaviour, humiliation, discouragement or harm in self respect of any person; or any other act that hampers safe sexual health.

(f) "Economic harm" means deprivation from using jointly or privately owned property or deprivation of or access to employment opportunities, economic resources or means.

(g) "Victim (Aggrieved person)" means any person who is, or has been, in a domestic relationship with the defendant and who alleges to have been subjected to an act of domestic violence by the perpetrator.

(h) "Perpetrator" means the person having family relations with the Victim and for whom the victim alleges to have been subjected to an act of domestic violence and this word also includes any person involved in the domestic violence or in the accomplice of the crime.

NEPAL LAW COMMISSION



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(i) "Police Office" means a Police Office closest to the residence of the Victim, the perpetrator or that office which is closest to the scene of crime and this word also includes the Children or Women Cell or Police Post or Police Sub-post under the District Police Office.

(j) "Court" means a court appointed by the Government of Nepal by a Notification in the Nepal Gazette.

(k) "Prescribed" or "as prescribed" means prescribed or as prescribed in the Rules made under this Act.

3. **Domestic Violence not to be committed**: (1) No one shall commit; or aid or abet; or incite for the commission of for the act of domestic violence.

(2) A person who commits an act pursuant to Sub-section (1) shall be deemed to have committed an offence under this Act.

4. **Filing of complaint**: (1) A person who has knowledge of an act of domestic violence has been committed, or is being committed, or likely to be committed, may lodge a written or oral complaint setting out the details thereof, with the Police Office, National Women Commission or Local body.

(2) In case a complaint is received pursuant to Sub-section (1), in a written form, it shall be registered immediately and if it is received in an oral form it shall be registered upon setting out details in a written form and putting the signature of the complaint.

(3) In a case the complaint is filed before the National Women Commission, necessary action shall be taken in accordance with Prevailing National Women Commission law.

(4) In a case the complaint is filed before the Police Office, the Police Office shall produce the perpetrator within 24 hours of the





NEPAL LAW COMMISSION

complaint, excluding the time of travel and make arrest if he/she refuses to appear for the statement.

(5) In a case the complaint filed in the Local Body, the Local Body shall produce the perpetrator within 24 hours of the complaint, excluding the time of travel and requesting to arrest to the Police Office if he/she refuses to appear for the statement.

(6) If the Victim has been physically wounded or mentally tortured as a result of the act of domestic violence, he/she shall be immediately sent to the nearest hospital or health post for necessary check-up and an injury report shall be drawn up. If the medical report is caused to be prepared by the Local Body, a copy of it shall be sent to the Police Station.

(7) If it is found necessary, to provide protection to Victim and his/her dependants from the preliminary investigation on the complaint pursuant to Sub-section (1) of section 4, it shall be provided with immediately with the assistance of the Police Office.

(8) The police officer or local body upon recording the statements pursuant to Sub-sections (4) or (5) of Section 8 finds reason to believe that an act of domestic violence has been committed and the Victim so desires, may, within Thirty days from the date of registration of the complaint, conduct reconciliation between the parties.

(9) The assistance a psychologist, sociologist, social activist and a family member trusted by the Victim and any other witness as per necessity and availability may be taken while conducting reconciliation pursuant to Sub-section (8). In the course of such reconciliation psychological of and social effects on the Victim, as well as his/her right to privacy shall be taken into consideration.

NEPAL LAW COMMISSION

(10) The Police Officer or Local Body Officer shall ensure the presence of the perpetrator on the due date during the investigating, prosecuting and decision making process of the complaint.

(11) If the perpetrator fails to appear pursuant to Sub-sections (4) and (5); or he/she cannot be made present; or the parties fail to settle their dispute through reconciliation, the Police Officer and Local body, with the consent of the complainant shall, within fifteen days after the expiry of Thirty days as per Sub-section (8) shall forward to the court, the complaint mentioning all details, along with evidence and other legal documents incidental thereto.

(12) It shall be the duty of the Police Office to provide assistance pursuant to Sub-sections (5) and (7).

5. **Action to be taken by the Court**: (1) Upon receiving a complaint pursuant to Sub-section (11) of Section 4, the Court shall proceed the case as per this Act, on the basis of such complaint.

(2) Notwithstanding anything contained in Section 4, the Victim may directly file his/her complaint to the Court.

6. **Interim protection order may be granted**: (1) If the Court has reason to believe, on the basis of preliminary investigation of the complaint that the Victim needs to be given immediate protection, it may, till the time the final decision on the complaint is made, pass the following orders against the perpetrator:

(a) To allow the Victim to continue to live in the shared house, to provide him/her with food, clothes, to not cause physical injury to him/her and to behave with him/ her in a civilized and dignified manner.



NEPAL LAW COMMISSION

(b) To manage for necessary treatment or to give money for the treatment of the Victim if he/ she has suffered physical or mental injury.

(c) To make necessary arrangements for the separate stay of the perpetrator in a case that it's not conducive for them to live together, and make necessary arrangements for the maintenance of the Victim.

(d) To not insult, threaten or behave in an uncivilized manner; or not to cause to do these acts.

(e) To not harass the Victim by entering his/ her place of separate residence; or in public roads; or entering his/ her place of employment; or through the communication media or in any other manner.

(f) To carry out or cause to carry out necessary and relevant actions for the protection and welfare of the Victim.

(2) If it is found necessary to provide protection pursuant to Sub-section (1) from the preliminary investigation of the complaint, the Court shall issue an appropriate order for the protection of the minor children or any other dependent of the Victim.

7. **Proceedings to be held in camera**: (1) If it is so request by the Victim, the court shall conduct in camera proceedings and hearings of the complaint relating to this Act.

(2) During in camera proceedings and hearings pursuant to sub-section (1), the claimant, defendant, their legal practitioners and those who are so permitted by the Court, shall be allowed to enter into the court room.

8. **Summary procedure to be Adopted**: The procedure mentioned in the Summary Procedure Act, 2028 (1971) shall be followed in the process and disposal of a case filed pursuant to this Act.

9. **Perpetrator to bear expenses of treatment**: (1) The total costs of treatment of the victim of the domestic violence, who has sustained physical or mental injuries so as to require medical help in the hospital, shall be borne by the perpetrator.

(2) Notwithstanding anything contained in Sub-section (1), if the Court has reason to believe that the perpetrator is unable to pay such amount due to economic reasons, the court may order to the Service Center to provide treatment expenses to the Victim.

10. **Compensation to be Provided**: The Court may, depending on the nature of the act of domestic violence and degree, the pain suffered by the Victim, and also taking into account the economic and social status of the perpetrator and Victim, order the perpetrator to pay appropriate compensation to the Victim.

11. **Service Centre**: (1) The Government of Nepal, as per necessity, may establish Service Centers for the purpose of immediate protection of the Victim, and for the separate accommodation of the Victim during the course of treatment.

(2) For the purpose of Sub-section (1), an organization may establish and operate Service Centers upon receiving approval as prescribed.

(3) Service Centers operating pursuant to Sub-section (2) may be given financial and other aid from the Fund established under Section 12.

(4) The Service Centre shall provide, as per necessity, legal aid, psycho-consultation service, psychological Service and economic aid to the Victim.





NEPAL LAW COMMISSION

(5) The provisions of management, operation and monitoring of Service Centre shall be as prescribed.

12. **Service Fund**: (1) The Government of Nepal shall establish a Service Fund for the operation of Service Centers established pursuant to Sub-section (1) of Section 11.

(2) The fund shall consist of the following amounts established pursuant to Sub-section (1):

(a) The amount received from the Government of Nepal,

(b) The amount received from any national or foreign organization, institution or individual,

(c) The amount received from any other source.

(3) The management and operation of the Service Fund shall be as prescribed.

13. **Penalty**: (1) A person who commits an act of domestic violence shall be punished with a fine of Three Thousand Rupees upto Twenty Five Thousand Rupees or Six months of imprisonment or both.

(2) A person who attempts to commit domestic violence or abets the crime or incites others to commit the crime shall be liable to half the punishment of the perpetrator.

(3) A person who has been punished once for the offence of domestic violence shall be liable to double the punishment upon every repetition of the offence.

(4) If a person holing a public post who commits the offence of domestic violence, he/she shall be liable to an additional ten percent punishment.

NEPAL LAW COMMISSION

(5) A person who disobeys the Court orders made pursuant to Section 6 shall be punished with a fine of Two Thousand Rupees upto Fifteen Thousand Rupees or Four months of imprisonment or both.

14. **Limitation**: The complaint, for an offence committed pursuant to this Act, shall be filed within Ninety days of the commission of the crime.

15. **No hindrance to file case pursuant to prevailing law**: Nothing in this Act shall prevent the investigation, trial and proceed in an offence which is punishable under this Act and prevailing law.

16. **To be as mentioned in the prevailing law**: This Act shall apply on matters mentioned herein and in other matters the prevailing laws shall apply.

17. **Power to frame Rules:** The Government of Nepal may frame necessary Rules to implement the objectives of this Act.

NEPAL LAW COMMISSION

# Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015

**2015 anaw 3**

*General*

### 24 Interpretation

(1) In this Act—

"abuse" ("*cam-drin*") means physical, sexual, psychological, emotional or financial abuse;

"domestic abuse" ("*cam-drin domestig*") means abuse where the victim of it is or has been associated with the abuser;

"financial year" ("*blwyddyn ariannol*") means a period of 12 months ending on 31 March;

"gender-based violence" ("*trais ar sail rhywedd*") means—

(a) violence, threats of violence or harassment arising directly or indirectly from values, beliefs or customs relating to gender or sexual orientation;

(b) female genital mutilation;

(c) forcing a person (whether by physical force or coercion by threats or other psychological means) to enter into a religious or civil ceremony of marriage (whether or not legally binding);

"local authority" ("*awdurdod lleol*") means the council of a county or county borough in Wales;

"Local Health Board" ("*Bwrdd Iechyd Lleol*") means a Local Health Board established under section 11 of the National Health Service (Wales) Act 2006 (c.42);

"purpose of this Act" ("*diben y Ddeddf hon*") means the purpose in section 1;

"relevant authority" ("*awdurdod perthnasol*") has the meaning given by section 14;

"sexual violence" ("*trais rhywiol*") means sexual exploitation, sexual harassment, or threats of violence of a sexual nature;

"statutory guidance" ("*canllawiau statudol*") means guidance under section 15.

(2) A person is associated with another person for the purpose of the definition of "domestic abuse" in subsection (1) if—

(a) they are or have been married to each other;

(b) they are or have been civil partners of each other;

(c) they live or have lived together in an enduring family relationship (whether they are of different sexes or the same sex);

(d) they live or have lived in the same household; and for this purpose a person is a member of another person's household if—

(i) the person normally lives with the other person as a member of his or her family, or

(ii) the person might reasonably be expected to live with that other person;

(e) they are relatives;

(f) they have agreed to marry one another (whether or not that agreement has been terminated);

(g) they have entered into a civil partnership agreement between them (whether or not that agreement has been terminated);

(h) they have or have had an intimate personal relationship with each other;

(i) in relation to a child, each of them is a parent of the child or has, or has had, parental responsibility for the child.

(3) If a child has been adopted or falls within subsection (4), two persons are also associated with each other for the purposes of the definition of "domestic abuse" in subsection (1) if—

(a) one is a natural parent of the child or a parent of such a natural parent, and

(b) the other is—

(i) the child, or

(ii) a person who has become a parent of the child by virtue of an adoption order, who has applied for an adoption order or with whom the child has at any time been placed for adoption.

(4) A child falls within this subsection if—

(a) an adoption agency, within the meaning of section 2 of the Adoption and Children Act 2002 (c.38), is authorised to place the child for adoption under section 19 of that Act (placing children with parental consent) or the child has become the subject of an order under section 21 of that Act (placement orders), or

(b) the child is freed for adoption by virtue of an order made—

(i) in England and Wales, under section 18 of the Adoption Act 1976 (c.36), or

(ii) in Northern Ireland, under Article 17(1) or 18(1) of the Adoption (Northern Ireland) Order 1987 (S.I. 1987/2203), or

(c) the child is the subject of a Scottish permanence order which includes granting authority to adopt.

(5) In this section—

"adoption order" ("*gorchymyn mabwysiadu*") means an adoption order within the meaning of section 72(1) of the Adoption Act 1976 or section 46(1) of the Adoption and Children Act 2002;

"child" ("*plentyn*") means a person under the age of 18 years;

"civil partnership agreement" ("*cytundeb partneriaeth sifil*") has the meaning given by section 73 of the Civil Partnership Act 2004 (c.33);

"female genital mutilation" ("*anffurfio organau cenhedlu benywod*") means an act that is an offence under sections 1, 2 or 3 of the Female Genital Mutilation Act 2003 (c.31);

"financial abuse" ("*cam-drin ariannol*") means—

(a) having money or other property stolen,

(b) being defrauded,

(c) being put under pressure in relation to money or other property, and

(d) having money or other property misused;

"harassment" ("*aflonyddu*") means a course of conduct by a person which he or she knows or ought to know amounts to harassment of the other; and for the purpose of this definition—

(a) a person ought to know that his or her conduct amounts to or involves harassment if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of another person, and

(b) "conduct" includes speech;

"sexual exploitation" ("*camfanteisio rhywiol*") means something that is done to or in respect of a person which—

(a) involves the commission of an offence under Part 1 of the Sexual Offences Act 2003 (c.42), as it has an effect in England and Wales, or

(b) would involve the commission of such an offence if it were done in England and Wales;

"parental responsibility" ("*cyfrifoldeb rhiant*") has the meaning given by section 3 of the Children Act 1989 (c.41);

"relative" ("*perthynas*"), in relation to a person, means that person's parent, grandparent, child, grandchild, brother, half-brother, sister, half-sister, uncle, aunt, nephew, niece (including any person who is or has been in that relationship by virtue of a marriage or civil partnership or an enduring family relationship).

### 25 Commencement

(1) The following provisions come into force on the day this Act receives Royal Assent—

section 1;
section 24;
this section;
section 26.

(2) Section 10 and sections 14 to 21 come into force two months after the day on which this Act receives Royal Assent.

(3) The remaining provisions of this Act come into force on a day appointed by the Welsh Ministers in an order made by statutory instrument.

Republic of the Philippines
Congress of the Philippines
Metro Manila

Tenth Congress

Third Regular Session

Begun and held in Metro Manila, on Monday the twenty-eighth day of July, nineteen hundred and ninety-seven.

**[REPUBLIC ACT 8353]**

AN ACT EXPANDING THE DEFINITION OF THE CRIME OF RAPE, RECLASSIFYING THE SAME AS A CRIME AGAINST PERSONS, AMENDING FOR THE PURPOSE ACT NO. 3815, AS AMENDED, OTHERWISE KNOWN AS THE REVISED PENAL CODE, AND FOR OTHER PURPOSES

SECTION 1. *Short Title.* – This Act shall be known as "*The Anti-Rape Law of 1997.*"

SEC. 2. *Rape as a Crime Against Persons.* – The crime of rape shall hereafter be classified as a Crime Against Persons under Title Eight of Act No. 3815, as amended, otherwise known as the Revised Penal Code. Accordingly, there shall be incorporated into Title Eight of the same Code a new chapter to be known as Chapter Three on Rape, to read as follows:

"Chapter Three

"Rape

"Article 266-A. *Rape; When And How Committed.* – Rape Is Committed –

"1) By a man who shall have carnal knowledge of a woman under any of the following circumstances:

"a) Through force, threat, or intimidation;

"b) When the offended party is deprived of reason or otherwise unconscious;

"c) By means of fraudulent machination or grave abuse of authority; and

"d) When the offended party is under twelve (12) years of age or is demented, even though none of the circumstances mentioned above be present.

"2) By any person who, under any of the circumstances mentioned in paragraph 1 hereof, shall commit an act of sexual assault by inserting his penis into another person's mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person.

"Article 266-B. *Penalties.* – Rape under paragraph 1 of the next preceding article shall be punished by *reclusion perpetua.*

"Whenever the rape is committed with the use of a deadly weapon or by two or more persons, the penalty shall be *reclusion perpetua* to death.

"When by reason or on the occasion of the rape, the victim has become insane, the penalty shall be *reclusion perpetua* to death.

"When the rape is attempted and a homicide is committed by reason or on the occasion thereof, the penalty shall be *reclusion perpetua* to death.

"When by reason or on the occasion of the rape, homicide is committed, the penalty shall be death.

"The death penalty shall also be imposed if the crime of rape is committed with any of the following aggravating/qualifying circumstances:

"1) When the victim is under eighteen (18) years of age and the offender is a parent, ascendant, step-parent, guardian, relative by consanguinity or affinity within the third civil degree, or the common-law spouse of the parent of the victim;

"2) When the victim is under the custody of the police or military authorities or any law enforcement or penal institution;

"3) When the rape is committed in full view of the spouse, parent, any of the children or other relatives within the third civil degree of consanguinity;

"4) When the victim is a religious engaged in legitimate religious vocation or calling and is personally known to be such by the offender before or at the time of the commission of the crime;

"5) When the victim is a child below seven (7) years old;

"6) When the offender knows that he is afflicted with Human Immuno-Deficiency Virus (HIV)/Acquired Immune Deficiency Syndrome (AIDS) or any other sexually-transmissible disease and the virus or disease is transmitted to the victim;

"7) When committed by any member of the Armed Forces of the Philippines or para-military units thereof or the Philippine National Police or any law enforcement agency or penal institution, when the offender took advantage of his position to facilitate the commission of the crime;

"8) When by reason or on the occasion of the rape, the victim has suffered permanent physical mutilation or disability;

"9) When the offender knew of the pregnancy of the offended party at the time of the commission of the crime; and

"10) When the offender knew of the mental disability, emotional disorder and/or physical handicap of the offended party at the time of the commission of the crime.

"Rape under paragraph 2 of the next preceding article shall be punished by *prision mayor*.

"Whenever the rape is committed with the use of a deadly weapon or by two or more persons, the penalty shall be *prision mayor* to *reclusion temporal*.

"When by reason or on the occasion of the rape, the victim has become insane, the penalty shall be *reclusion temporal*.

"When the rape is attempted and a homicide is committed by reason or on the occasion thereof, the penalty shall be *reclusion temporal* to *reclusion perpetua*.

"When by reason or on the occasion of the rape, homicide is committed, the penalty shall be *reclusion perpetua*.

"*Reclusion temporal* shall also be imposed if the rape is committed with any of the ten aggravating/qualifying circumstances mentioned in this article.

"Article 266-C. *Effect of Pardon*. – The subsequent valid marriage between the offender and the offended party shall extinguish the criminal action or the penalty imposed.

"In case it is the legal husband who is the offender, the subsequent forgiveness by the wife as the offended party shall extinguish the criminal action or the penalty: *Provided,* That the crime shall not be extinguished or the penalty shall not be abated if the marriage is *void ab initio*.

"Article 266-D. *Presumptions*. – Any physical overt act manifesting resistance against the act of rape in any degree from the offended party, or where the offended party is so situated as to render her/him incapable of giving valid consent, may be accepted as evidence in the prosecution of the acts punished under Article 266-A."

SEC. 3. *Separability Clause*. – If any part, section, or provision of this Act is declared invalid or unconstitutional, the other parts thereof not affected thereby shall remain valid.

SEC. 4. *Repealing Clause*. – Article 335 of Act No. 3815, as amended, and all laws, acts, presidential decrees, executive orders, administrative orders, rules and regulations inconsistent with or contrary to the provisions of this Act are deemed amended, modified or repealed accordingly.

SEC. 5. *Effectivity*. – This Act shall take effect fifteen (15) days after completion of its publication in two (2) newspapers of general circulation.

Approved,

(SGD.) JOSE DE VENECIA, JR.
Speaker of the House
of Representatives

(SGD.) ERNESTO M. MACEDA
President of the Senate

This Act, which is a consolidation of Senate Bill No. 950 and House Bill No. 6265, was finally passed by the Senate and the House of Representatives on June 5, 1997 and September 3, 1997, respectively.

(SGD.) ROBERTO P. NAZARENO
Secretary General
House of Representatives

(SGD.) LORENZO E. LEYNES, JR.
Secretary of the Senate

Approved: September 30, 1997

(SGD.) FIDEL V. RAMOS
President of the Philippines

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Page 1 ednesday, March 02, 2022
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financially dependent on Onkar Singh and Santosh Singh, it is likely that the servants may have acted at the bidding of both of them. This is, therefore, a fit case for reducing the sentence of Lallu Ram and Bandha to the sentence already undergone.

**9.** The appeals are accordingly partly allowed. The conviction and sentence of Santosh Singh is upheld. The conviction of Rajeshwari is set aside and she is acquitted of all the charges. The conviction of Onkar Singh under Section 302 read with Section 34 is set aside. However, his conviction under Section 201 and the sentence imposed, of four years' rigorous imprisonment is upheld. The sentence of Lallu Ram and Bandha is reduced to the sentence already undergone.

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**(1996) 5 Supreme Court Cases 125**

(BEFORE KULDIP SINGH, M.M. PUNCHHI AND K. RAMASWAMY, JJ.)

Writ Petition (C) No. 5723 of 1982

MADHU KISHWAR AND OTHERS .. Petitioners;

*Versus*

STATE OF BIHAR AND OTHERS .. Respondents.

*With*

Writ Petition (C) No. 219 of 1986

JULIANA LAKRA .. Petitioner;

*Versus*

STATE OF BIHAR .. Respondent.

Writ Petitions (C) No. 5723 of 1982† with No. 219 of 1986,
decided on April 17, 1996

A. **Tenancy and Land Laws — Generally — Succession — Right to intestate succession of Scheduled Tribe women governed by custom — Denial of right under Ss. 7, 8 and 76 of Chotanagpur Tenancy Act, 1908 (6 of 1908) of Bihar — Validity — Held, per majority, denial of right to succession to ST women would amount to deprivation of their right to livelihood under Art. 21 — Hence exclusive succession in the male line of heirs under the Act must remain in suspended animation till the immediate female relatives of the last male tenant continue to depend their livelihood on the land — But the custom of tribal inhabitants of exclusion of female line of succession cannot be declared to be ultra vires Arts. 14, 15 and 21 — Held, per K. Ramaswamy, J. (contra), tribal women entitled to succeed the estate of their parent/brother/husband as heirs by intestate succession and to inherit the property in equal share with male heirs with absolute rights on the basis of general principles of Hindu Succession Act and Indian Succession Act, though these Acts do not apply to them, but their right to alienation would be subject to Bihar Scheduled Areas Regulation Act, 1969 and the like legislations — In case of sale in accordance with these legislations, the female heir should first offer the land for sale to male lineal descendants — Words 'male descendants' in S. 7 of the Bihar Act have to be**

† Under Article 32 of the Constitution of India

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Page 2 Wednesday, March 02, 2022
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**read as including 'female descendants' as well by operation of S. 13(1) of General Clauses Act and accordingly, Ss. 7 and 8 have to be read down to preserve their constitutionality — Though customs of tribes have been given the status of law under Art. 13(3)(a), yet they should not be inconsistent with the fundamental rights of the ST women to elimination of gender-based discrimination — However, the custom of inheritance/succession of the Scheduled Tribes, which deny tribal women right to succession cannot be declared to be violative of Arts. 14, 15 and 21 — Hindu Succession Act, 1956, S. 2(2) — Tribals — Intestate succession — Indian Succession Act, 1925, Ss. 29 and 3**

B. **Custom — Succession — Tribal women — Neither Hindu Succession Act, nor Indian Succession Act nor Shariat law applicable to custom-governed tribals**

C. **Constitution of India — Arts. 16, 14, 15, 21, 13, 38, 39, 46, 51-A(h), (j) — Human rights — Gender-based discrimination — Tribal women have fundamental right to elimination of — State has corresponding obligation to create suitable conditions and facilities for — Custom though given status of law under Art. 13(3)(a), should not be inconsistent with the fundamental right of the tribal women — UNO declaration dated 4-12-1986 on "The Right to Development", Arts. 1, 6(1), 8 — Vienna Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), Arts. 2(e), (f), 3, 14 and 15 — Protection of Human Rights Act, 1993 (10 of 1994), Ss. 2(d) & 12I**

D. **Judicial Activism — Scope — Judicial legislation, over and above the available legislation, should be avoided — Court can only advise and point out the lacuna in the legislation and should exercise self-restraint**

E. **Jurisprudence — Law — Nature, object and role of**

*Held*:

***Per Kuldip Singh and Punchhi, JJ.***

Life is a precious gift of nature to a being. Right to life as a fundamental right stands enshrined in the Constitution. The right to livelihood is born of it. Agriculture is not a singular vocation. It is, more often than not, a joint venture, mainly of the tiller's family members. Some of them have to work hard and the others harder still. Everybody, young or old, male or female, has chores allotted to perform; a share in the burden of toil. Traditionally and historically, the agricultural family is identified by the male head and this is what Sections 7 and 8 recognise. But on his death, his dependent family females, such as his mother, widow, daughter, daughter-in-law, granddaughter, and others joint with him have, under Sections 7 and 8, to make way to male relatives within and outside the family of the deceased entitled thereunder, disconnecting them from the land and their means of livelihood. Their right to livelihood in that instance gets affected, a right constitutionally recognised, a right which the female enjoyed in common with the last male holder of the tenancy. It is in protection of that right to livelihood, that the immediate female relatives of the last male tenant have the constitutional remedy to stay on holding the land so long as they remain dependent on it for earning their livelihood, for otherwise it would render them destitute. It is on the exhaustion of, or abandonment of land by, such female descendants can the males in the line of descent take over the holding exclusively. In other words, the exclusive right of male succession conceived of in Sections 7 and 8 has to remain in suspended animation so long as the right of livelihood of the female descendants of the last male holder remain valid and in vogue. The intervening right of female dependants/descendants under Sections 7 and 8 of the Act is carved out to this extent. It is in this way only that the constitutional

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Page 3 Wednesday, March 02, 2022
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right to livelihood of a female can interject in the provisions, to be read as a burden to the statutory right of male succession, entitling her to the status of an intervening limited dependants/descendants under Sections 7 and 8. In this manner alone, and up to this extent can female dependants/descendants be given some succour so that they do not become vagrant and destitutes. To this extent, it must be so held.
(Paras 12 and 13)

*Jitmohan Singh Munda* v. *Ramratan Singh*, 1958 BLJR 373, *limited*

*Olga Tellis* v. *Bombay Municipal Corpn.*, (1985) 3 SCC 545 : AIR 1986 SC 180, *relied on*

*Baksey* v. *Board of Regents*, (1954) 347 MD 442; *Munn* v. *Illinois*, (1877) 94 US 113; *Kharak Singh* v. *State of U.P.*, (1964) 1 SCR 332 : AIR 1963 SC 1295, *cited*

However, it is not desirable to declare the customs of tribal inhabitants as offending Articles 14, 15 and 21 of the Constitution and each case must be examined when full facts are placed before the court. Rules of succession are indeed susceptible of providing differential treatment, not necessarily equal. Non-uniformities would not in all events violate Article 14. We refrain from striking down the provisions as such on the touchstone of Article 14 as this would bring about a chaos in the existing state of law. (Paras 5, 6 and 13)

The provisions of the Chotanagpur Tenancy Act show that these have been enacted to identify classes of tenants. These provisions have no connection with the ownership of land. All these tenants as classified, do not own the tenanted lands, but hold land under others. Their tenancy rights are identified and regulated through these provisions. The personal laws of the tenants nowhere figure in the set-up.
(Para 9)

Though the provisions of Hindu Succession Act, Indian Succession Act and Muslim Shariat Act treat female heirs on a par with the male heirs, but none of these Acts is applicable to the custom-governed tribals. The view of applying the general principles of these Acts to them cannot be accepted. If this be the route of return on the court's entering the thicket, it is far better that the court kept out of it. It is not far to imagine that there would follow a beeline for similar claims in diverse situations, not stopping at tribal definitions, and a deafening uproar to bring other systems of law in line with the Hindu Succession Act and the Indian Succession Act as models.
(Para 6)

The words "male descendants" wherever occurring in Section 7 of the Chotanagpur Act cannot be deemed to include "female descendants" as well by applying Section 13(2) of the General Clauses Act. Though general rule of legislative practice is that unless there is anything repugnant in the subject or context, words importing the masculine gender used in statutes are to be taken to include the females but in matters of succession the general rule of plurality would have to be applied with circumspection. Neither the Hindu Succession Act, nor the Indian Succession Act, nor even the Shariat law is applicable to the custom-governed tribals. And custom, as is well recognized, varies from people to people and region to region. (Para 4)

Judge-made amendments to provisions, over and above the available legislation, should normally be avoided. In the face of the divisions and visible barricades put up by the sensitive tribal people valuing their own customs, traditions and usages, judicially enforcing on them the principles of personal laws applicable to others, on an elitist approach or on equality principle, by judicial activism, is a difficult and mind-boggling effort. An activist court is not fully equipped to cope with the details and intricacies of the legislative subject and can at best advise and focus attention on the State polity on the problem and shake it from its slumber, goading it to awaken, march and reach the goal. For in whatever measure be the concern of the court, it

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Page 4 Wednesday, March 02, 2022
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compulsively needs to apply, somewhere and at sometime, brakes to its self-motion, described in judicial parlance as self-restraint. (Paras 6 and 5)

[Direction is issued to the State of Bihar to comprehensively examine the question on the premise of our constitutional ethos and the need voiced to amend the law. It is also directed to examine the question of recommending to the Central Government whether the latter would consider it just and necessary to withdraw the exemptions given under the Hindu Succession Act and the Indian Succession Act at this point of time insofar as the applicability of these provisions to the Scheduled Tribes in the State of Bihar is concerned.] (Para 14)

***Per K. Ramaswamy, J. (dissenting)***

The provisions of the Hindu Succession Act, 1956 and the Indian Succession Act, 1925 though in terms, would not apply to the Scheduled Tribes, the general principles contained therein being consistent with justice, equity, fairness, justness and good conscience would apply to them. Accordingly the Scheduled Tribe women would succeed to the estate of their parent, brother, husband, as heirs by intestate succession and inherit the property with equal share with the male heir with absolute rights as per the general principles of the Hindu Succession Act, 1956, as amended and interpreted by the Supreme Court and equally of the Indian Succession Act to tribal Christians. However, the right of alienation will be subject to the relevant provisions like the present Act, the Bihar Scheduled Areas Regulation, 1969, Santhals (Amendment) Act, 1958, Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949 as amended from time to time etc. They would be applicable to them and subject to the conditions mentioned therein. In case the tribal woman intends to alienate the land, subject to obtaining appropriate permission from the competent authority under the appropriate Act, she should first offer the land for sale to the brother or in his absence to any male lineal descendant of the family and the sale will be in terms of mutually agreed consideration and other terms etc. In case of any disagreement on consideration, the consideration shall be determined on an application filed by either party before the competent civil court of original jurisdiction over the area in which the land is situated and the decision of the civil court after adduction of evidence and consideration thereof, shall be final and binding on the parties. In case the brother or lineal descendant is not willing to purchase either by mutual agreement or as per the price settled by the civil court, the female tribal woman shall be entitled to alienate the land to the non-tribal but subject to the provisions of the appropriate Act. (Para 56)

*Thota Sesharathamma* v. *Thota Manikyamma*, (1991) 4 SCC 312 : JT (1991) 3 SC 506; *Basavant Gouda* v. *Channabasawwa*, AIR 1971 Mys 151 : (1970) 2 Mys LJ 540; *Amar Singh* v. *Baldev Singh*, AIR 1960 Punj 666 (FB) : 62 Punj LR 655 : ILR (1960) 2 Punj 665 (FB); *Laxmi Debi* v. *S.K. Panda*, AIR 1957 Ori 1 : 22 Cut LT 466; *Gopi Chand* v. *Bhagwani Devi*, AIR 1964 Punj 272 : ILR (1964) 1 Punj 772; *Phulmani Dibya* v. *State of Orissa*, AIR 1974 Ori 135; *Tokha* v. *Samman*, AIR 1972 P&H 406 : 74 Punj LR 570; *Bajaya* v. *Gopikabai*, (1978) 2 SCC 542; *Sooraj* v. *S D O.*, (1995) 2 SCC 45, *referred to*

By operation of Section 13(1) of General Clauses Act, males include females, of course, subject to statutory scheme which by now is subject to the Constitution. In Sections 7 and 8 of the Act if the words "male descendants" are read to include female descendants, the daughter, married or unmarried and the widow are entitled to succeed to the estate of the father, husband or son. Scheduled Tribes are as much citizens as others and are entitled to equality. Sections 7 and 8 are accordingly read down and so on that premise are valid. (Para 48)

*Jitmohan Singh Munda* v. *Ramratan Singh*, 1958 BLJR 373; *Jani Bai* v. *State of Rajasthan*, AIR 1989 Raj 115 : (1989) 1 Raj LR 139, *referred to*

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Page 5 Wednesday, March 02, 2022
SCC Online Web Edition: http://www.scconline.com
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Law is a living organism and its utility depends on its vitality and ability to serve as a sustaining pillar of society. Contours of law in an evolving society must constantly keep changing as civilization and culture advances. The customs and mores must undergo change with the march of time. Justice to the individual is one of the highest interests of the democratic State. Judiciary cannot protect the interests of the common man unless it redefines the protections of the Constitution and the common law. If law is to adapt itself to the needs of the changing society, it must be flexible and adaptable. Law is the manifestation of principles of justice, equity and good conscience. Rule of law should establish a uniform pattern for harmonious existence in a society where every individual would exercise his rights to his best advantage to achieve excellence, subject to protective discrimination. The best advantage of one person could be the worst disadvantage to another. Law steps in to iron out such creases and ensures equality of protection to individuals as well as group liberties. Man's status is a creature of substantive as well as procedural law to which legal incidents would attach. Justice, equality and fraternity are trinity for social and economic equality. Therefore, law is the foundation on which the potential of the society stands. (Paras 37 and 38)

*Sheikriyammada Nalla Koya v. Administrator, Union Territory of Laccadives, Minicoy and Amindivi Islands*, AIR 1967 Ker 259 : 1967 Ker LT 395 : 1967 Ker LJ 482, *relied on*

Sections 7 and 8 of the Act exclude women tribals from inheritance to the khunt-katti raiyati rights solely on the basis of sex and confine succession and inheritance among male descendants only. (Para 47)

Articles 13, 14, 15 and 16 of the Constitution of India and other related articles prohibit discrimination on the ground of sex. Social and economic democracy is the cornerstone for success of political democracy. The Scheduled Castes, Scheduled Tribes and women, from time immemorial, suffered discrimination and social inequalities and made them accept their ascribed social status. Among women, the tribal women are the lowest of the low. It is mandatory, therefore, to render them socio-economic justice so as to ensure their dignity of person, so that they be brought into the mainstream of the national life. The public policy and constitutional philosophy envisaged under Articles 38, 39, 46 and 15(1) and (3) and 14 is to accord social and economic democracy to women as assured in the Preamble of the Constitution. They constitute the core foundation for economic empowerment and social justice to women for stability of political democracy. In other words, they frown upon gender discrimination and aim at elimination of obstacles to enjoy social, economic, political and cultural rights on equal footing. (Paras 28 and 37)

Legislative and executive actions must be conformable to, and effectuation of the fundamental rights guaranteed in Part III and the directive principles enshrined in Part IV and the Preamble of the Constitution which constitute the conscience of the Constitution. Covenants of the United Nations add impetus and urgency to eliminate gender-based obstacles and discrimination. Legislative action should be devised suitably to constitute economic empowerment of women in socio-economic restructure for establishing egalitarian social order. Law is an instrument of social change as well as the defender of social change. (Para 27)

Though the directive principles and fundamental rights provide the matrix for development of human personality and elimination of discrimination, these conventions add urgency and teeth for immediate implementation. It is, therefore, imperative for the State to eliminate obstacles, prohibit all gender-based discriminations as mandated by Articles 14 and 15 of the Constitution of India. By operation of Article 2(*f*) and other related Articles of CEDAW, the State should by appropriate measures including legislation, modify law and abolish gender-based

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Page 6 Wednesday, March 02, 2022
SCC Online Web Edition: http://www.scconline.com
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discrimination in the existing laws, regulations, customs and practices which constitute discrimination against women. Article 15(3) of the Constitution positively protects such Acts or actions. Article 21 of the Constitution reinforces "right to life". Equality, dignity of person and right to development are inherent rights in every human being. Life in its expanded horizon includes all that gives meaning to a person's life including culture, heritage and tradition with dignity of person. The fulfilment of that heritage in full measure would encompass the right to life. For its meaningfulness and purpose every woman is entitled to elimination of obstacles and discrimination based on gender for human development. Women are entitled to enjoy economic, social, cultural and political rights without discrimination and on footing of equality. Equally, in order to effectuate fundamental duty to develop scientific temper, humanism and the spirit of enquiry and to strive towards excellence in all spheres of individual and collective activities as enjoined in Article 51-A(*h*) and (*j*) of the Constitution of India, not only facilities and opportunities are to be provided for, but also all forms of gender-based discrimination should be eliminated. It is a mandate to the State to do these acts. Property is one of the important endowments or natural assets to accord opportunity, source to develop personality, to be independent, right to equal status and dignity of person. Therefore, the State should create conditions and facilities conducive for women to realise the right to economic development including social and cultural rights. (Paras 25 and 26)

Article 2(*e*) of CEDAW enjoins this Court to breathe life into the dry bones of the Constitution, international conventions and the Protection of Human Rights Act, to prevent gender-based discrimination and to effectuate right to life including empowerment of economic, social and cultural rights. Article 5(*a*) of CEDAW on which the Government of India expressed reservation does not stand in its way and in fact Article 2(*f*) denudes its effect and enjoins to implement Article 2(*f*) read with its obligation undertaken under Articles 3, 14 and 15 of the Convention vis-à-vis Articles 1, 3, 6 and 8 of the Declaration of Right to Development. The principles embodied in CEDAW and the concomitant Right to Development became integral parts of the Indian Constitution and the Human Rights Act and became enforceable. Section 12 of Protection of Human Rights Act charges the Commission with duty for proper implementation as well as prevention of violation of the human rights and fundamental freedoms. Human rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedom have been reiterated by the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are interdependent and have mutual reinforcement. The human rights for women, including girl child are, therefore, inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth, culturally, socially and economically. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights. (Paras 27, 25, 24 and 23)

*Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*, (1872) 14 Moo IA 570; *Abdul Hussein Khan* v. *Bibi Sona Dero*, (1917-18) 45 IA 10 : AIR 1917 PC 181; *Sant Ram* v. *Labh Singh*, (1964) 7 SCR 756 : AIR 1965 SC 314; *Bhau Ram* v. *B. Baijnath Singh*, 1962 Supp (3) SCR 724 : AIR 1962 SC 1476; *Gazula. Dasaratha Rama Rao* v. *State of A.P.*, (1961) 2 SCR 931 : AIR 1961 SC 564; *Atam Prakash* v. *State of Haryana*, (1986) 2 SCC 249; *V. Tulasamma* v. *Sesha Reddy*, (1977) 3 SCC 99 : AIR 1977 SC 1944; *Chiranjit Lal Chowdhuri* v. *Union of India*, 1950 SCR 869 : AIR 1951 SC 41; *State of W.B.* v. *Anwar Ali Sarkar*, 1952 SCR 284 : AIR 1952 SC 75; *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248 : (1978) 2 SCR 621; *State of Bihar* v. *Kameshwar Singh*, 1952

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Page 7 Wednesday, March 02, 2022
SCC Online Web Edition: http://www.scconline.com
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SCR 889 : AIR 1952 SC 252; *Kasturi Lal Lakshmi Reddy* v. *State of J&K*, (1980) 4 SCC 1; *Chandra Bhavan Boarding and Lodging* v. *State of Mysore*, (1969) 3 SCC 84 : (1970) 2 SCR 600; *Narendra Prasadji* v. *State of Gujarat*, (1975) 1 SCC 11 : (1975) 2 SCR 317; *C.B. Muthamma* v. *Union of India*, (1979) 4 SCC 260 : 1979 SCC (L&S) 366 : (1980) 1 SCR 668; *Air India* v. *Nergesh Meerza*, (1981) 4 SCC 335 : 1981 SCC (L&S) 599 : (1982) 1 SCR 438; *Harbans Singh* v. *Guran Ditta Singh*, (1991) 2 SCC 523 : (1991) 1 SCR 614, *considered*

However, the customs among the Scheduled Tribes, vary from tribe to tribe and region to region, based upon the established practice prevailing in the respective regions and among particular tribes. Therefore, it would be difficult to decide, without acceptable material among each tribe, whether customary succession is valid, certain, ancient and consistent and whether it has acquired the status of law. However, customs are prevalent and are being followed among the tribes in matters of succession and inheritance apart from other customs like marriage, divorce etc. Customs became part of the tribal laws as a guide to their attitude and practice in their social life and not a final definition of law. They are accepted as a set of principles and are being applied when succession is open. They have accordingly nearly acquired the status of law. Except in Meghalaya, throughout the country patrilineal succession is being followed according to the unwritten code of customs. Like in Hindu law, they prefer son to the daughter and in his absence daughter succeeds to the estate as a limited owner. Widows also get only limited estate. More than 80 per cent of the population is still below poverty line and they did not come on a par with civilized sections of the non-tribals. Under these circumstances, it is not desirable to grant general declaration that the custom of inheritance offends Articles 14, 15 and 21 of the Constitution. Each case must be examined and decided as and when full facts are placed before the court. (Para 46)

*Doman Sahu* v. *Buka*, AIR 1931 Pat 198; *Ganesh Mahto* v. *Shib Charan Mahata*, AIR 1931 Pat 305 : ILR 11 Pat 139, *relied on*

Eugine Smith: "*Indian Constitution*"; Haimendorf: "*Tribes in India, the Struggle for Survival*"; Prof. P. Ramaiah of Kakatiya University: "*In Issues in Tribal Development*", Andhra Pradesh, p. 9; Dr L.P. Vidyarthi: "*Tribal Development Act and Its Administration*", published by Concept Publishing Co., (1986 Edn.); Archer: "*Tribal Law and Justice — The Santhal View of Woman*"; Sarad Chandra Roy: "*The Mundras and their Courts*", 14th Edn., pp. 244 to 451 (1915) and "*The Origins of Chotanagpur*", pp. 369 to 370 (1915 Edn.); S.K. Ghosh: "*Law Enforcement in Tribal Areas*" Director, Law Institute, Calcutta, published by Ashish Publishing House, p. 89; Dr Bhupinder Singh and Dr Neeti Mahanti of Jigyansu Tribal Research Centre report on: "*Codification of Customary Laws and Inheritance Laws in the Tribal Societies of Orissa*", sponsored by the Ministry of Welfare, Government of India and submitted on 19-5-1993; Dr B.L. Maharde: "*History and Culture of Girjans*", a bureaucrat of Rajasthan Civil Services, in the State of Rajasthan, *referred to*

R-M/A/16138/C

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Page 8 Wednesday, March 02, 2022
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***Chronological list of cases cited*** — ***on page(s)***

1. (1995) 2 SCC 45, *Sooraj* v. *S.D.O.* 161*e*
2. (1991) 4 SCC 312 : JT (1991) 3 SC 506, *Thota Sesharathamma* v. *Thota Manikyamma* 151*e*
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4. AIR 1989 Raj 115 : (1989) 1 Raj LR 139, *Jani Bai* v. *State of Rajasthan* 159*g*
5. (1986) 2 SCC 249, *Atam Prakash* v. *State of Haryana* 149*f*
6. (1985) 3 SCC 545 : AIR 1986 SC 180, *Olga Tellis* v. *Bombay Municipal Corpn.* 139*c*
7. (1981) 4 SCC 335 : 1981 SCC (L&S) 599 : (1982) 1 SCR 438, *Air India* v. *Nergesh Meerza* 152*b-c*
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19. (1964) 7 SCR 756 : AIR 1965 SC 314, *Sant Ram* v. *Labh Singh* 149*d*
20. (1964) 1 SCR 332 : AIR 1963 SC 1295, *Kharak Singh* v. *State of U.P.* 140*a-b*
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25. 1958 BLJR 373, *Jitmohan Singh Munda* v. *Ramratan Singh* 138*f*, 139*b*, 159*e-f*
26. AIR 1957 Ori 1 : 22 Cut LT 466, *Laxmi Debi* v. *S.K. Panda* 160*d*
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Page 9 Wednesday, March 02, 2022
SCC Online Web Edition: http://www.scconline.com
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33. (1917-18) 45 IA 10 : AIR 1917 PC 181, *Abdul Hussein Khan* v. *Bibi Sona Dero* 144*e*

34. (1877) 94 US 113, *Munn* v. *Illinois* 140*a*

35. (1872) 14 Moo IA 570, *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* 144*c-d*

The Judgments of the Court were delivered by

PUNCHHI, J. (*for Kuldip Singh, J. and himself*) — In these two petitions under Article 32 of the Constitution, challenge is made to certain provisions of the Chotanagpur Tenancy Act, 1908, (hereafter referred to as 'the Act') which go to provide in favour of the male, succession to property in the male line, on the premise that the provisions are discriminatory and unfair against women and therefore, ultra vires the equality clause in the Constitution. A two-member Bench hearing these matters at one point of time on soliciting was conveyed the information that the State of Bihar had set up a Committee to consider the feasibility of appropriate amendments to the legislation and to examine the matter in detail. It was later brought to its notice that the Committee ultimately had come to the opinion that the people of the area, who were really concerned with the question of succession, were not interested in having the law changed, and that if the law be changed or so interpreted, letting estates go into the hands of female heirs, there would be great agitation and unrest in the area among the Scheduled Tribe people who have custom-based living. The two-member Bench then ordered as follows:

> "Scheduled Tribe people are as much citizens as others and they are entitled to the benefit of guarantees of the Constitution. It may be that the law can provide reasonable regulation in the matter of succession to property with a view to maintaining cohesiveness in regard to Scheduled Tribes and their properties. But exclusion from inheritance would not be appropriate. Since this aspect of the matter has not been examined by the State of Bihar and the feasibility of permitting inheritance and simultaneously regulating such inheritance for the purpose of ensuring that the property does not go out of the family by way of transfer or otherwise we are of the view that in the peculiar facts of the case the State of Bihar should re-examine the matter. In these circumstances, instead of disposing of the two writ petitions by a final order, we adjourn the hearing thereof for three months and direct the State of Bihar to immediately take into consideration our order and undertake the exercise indicated and report to the Court by way of an affidavit and along with that a copy of the report may be furnished by the Committee to be set up by the State of Bihar."

**2.** In pursuance thereof, the State of Bihar has furnished an affidavit to the effect that a meeting of the Bihar Tribal Consultative Council was held on 31-7-1992, presided over by the Chief Minister and attended to by MPs and MLAs of the tribal areas, besides various other Ministers and officers of the State, who on deliberations have expressed the view that they were not in favour of effecting any change in the provisions of the Act, as the land of the tribals may be alienated, which will not be in the interest of the tribal

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Page 10 Wednesday, March 02, 2022
SCC Online Web Edition: http://www.scconline.com
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community at present. The matter was not closed, however, because the Council recommended that the proposal may widely be publicised in the tribal community and their various sub-castes may be prompted to give their opinion if they would like any change in the existing law. It is in this backdrop that these petitions were placed before this three-member Bench for disposal.

**3.** We have read with great admiration the opinion of our learned brother K. Ramaswamy, J. prepared after deep and tremendous research made on the conditions of the tribal societies in India, leave alone the State of Bihar, and in drawing a vivid picture of the distortions which appear in the regulation of succession to property in tribal societies, when tested on the touchstone of the codified Hindu law now existing in the form of the Hindu Succession Act, 1956 etc.

**4.** It is worthwhile to account some legislation on the subject. The Hindu Succession Act governs and prescribes rules of succession applicable to a large majority of Indians being Hindus, Sikhs, Buddhists, Jains etc. whereunder since 1956, if not earlier, the female heir is put on a par with a male heir. Next in the line of numbers is the Shariat law, applicable to Muslims, whereunder the female heir has an unequal share in the inheritance, by and large half of what a male gets. Then comes the Indian Succession Act which applies to Christians and by and large to people not covered under the aforesaid two laws, conferring in a certain manner heirship on females as also males. Certain chapters thereof are not made applicable to certain communities. Sub-section (2) of Section 2 of the Hindu Succession Act significantly provides that nothing contained in the Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution, unless otherwise directed by the Central Government by means of a notification in the Official Gazette. Section 3(2) further provides that in the Act, unless the context otherwise requires, *words importing the masculine gender shall not be taken to include females*. (emphasis supplied) General rule of legislative practice is that unless there is anything repugnant in the subject or context, words importing the masculine gender used in statutes are to be taken to include females. Attention be drawn to Section 13 of the General Clauses Act. But in matters of succession the general rule of plurality would have to be applied with circumspection. The afore provision thus appears to have been inserted *ex abundanti cautela*. Even under Section 3 of the Indian Succession Act the State Government is empowered to exempt any race, sect or tribe from the operation of the Act and the tribes of Mundas, Oraons, Santhals etc. in the State of Bihar, who are included in our concern, have been so exempted. Thus neither the Hindu Succession Act, nor the Indian Succession Act, nor even the Shariat law is applicable to the custom-governed tribals. And custom, as is well recognized, varies from people to people and region to region.

**5.** In the face of these divisions and visible barricades put up by the sensitive tribal people valuing their own customs, traditions and usages,

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Page 11 Wednesday, March 02, 2022
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judicially enforcing on them the principles of personal laws applicable to others, on an elitist approach or on equality principle, by judicial activism, is a difficult and mind-boggling effort. Brother K. Ramaswamy, J. seems to have taken the view that Indian legislatures (and Governments too) would not prompt themselves to activate in this direction because of political reasons and in this situation, an activist court, apolitical as it avowedly is, could get into action and legislate broadly on the lines as suggested by the petitioners in their written submissions. However laudable, desirable and attractive the result may seem, it has happily been viewed by our learned brother that an activist court is not fully equipped to cope with the details and intricacies of the legislative subject and can at best advise and focus attention on the State polity on the problem and shake it from its slumber, goading it to awaken, march and reach the goal. For in whatever measure be the concern of the court, it compulsively needs to apply, somewhere and at sometime, brakes to its self-motion, described in judicial parlance as self-restraint. We agree therefore with brother K. Ramaswamy, J. as summed up by him in the paragraph ending on p. 36 (para 46) of his judgment that under the circumstances it is not desirable to declare the customs of tribal inhabitants as offending Articles 14, 15 and 21 of the Constitution and each case must be examined when full facts are placed before the court.

**6.** With regard to the statutory provisions of the Act, he has proposed to the reading down of Sections 7 and 8 in order to preserve their constitutionality. This approach is available from p. 36 (paras 47, 48) onwards of his judgment. The words "male descendant" wherever occurring, would include "female descendants". It is also proposed that even though the provisions of the Hindu Succession Act, 1956 and the Indian Succession Act, 1925 in terms would not apply to the Scheduled Tribes, their general principles composing of justice, equity and fair play would apply to them. On this basis it has been proposed to take the view that the Scheduled Tribe women would succeed to the estate of paternal parent, brother or husband as heirs by intestate succession and inherit the property in equal shares with the male heir with absolute rights as per the principles of the Hindu Succession Act as also the Indian Succession Act. However much we may like the law to be so we regret our inability to subscribe to the means in achieving such objective. If this be the route of return on the court's entering the thicket, it is far better that the court kept out of it. It is not far to imagine that there would follow a beeline for similar claims in diverse situations, not stopping at tribal definitions, and a deafening uproar to bring other systems of law in line with the Hindu Succession Act and the Indian Succession Act as models. Rules of succession are indeed susceptible of providing differential treatment, not necessarily equal. Non-uniformities would not in all events violate Article 14. Judge-made amendments to provisions, over and above the available legislation, should normally be avoided. We are thus constrained to take this view, even though it may appear to be conservative for adopting a cautious approach, and the one proposed by our learned brother is, regretfully not acceptable to us.

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Page 12 Wednesday, March 02, 2022
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**7.** The Chotanagpur Tenancy Act was enacted in 1908. Its Preamble suggests that it was a law to amend and consolidate certain enactments relating to the law of landlord and tenant and the settlement of rent in Chotanagpur. It extends to North Chotanagpur and South Chotanagpur Divisions, except areas which have been constituted as municipalities under the Bihar and Orissa Municipality Act, 1922 (7 of 1922). Chapter II, thereof providing classes of tenants containing Sections 4 to 8 is reproduced hereafter:

CHAPTER II

"4. *Classes of Tenants.*—There shall be, for the purposes of this Act, the following classes of tenants, namely:

(1) tenure-holder, including under-tenure-holders,

(2) raiyats, namely:

(*a*) occupancy raiyats, that is to say, raiyats having a right of occupancy in the land held by them,

(*b*) non-occupancy raiyats, that is to say, raiyats not having such a right of occupancy, and

(*c*) raiyats having khunt-katti rights.

(3) under-raiyats, that is to say, tenants holding, whether immediately or immediately, under raiyats, and

(4)Mundari khunt-kattidars.

5. *Meaning of 'Tenure-holder'*.—Tenure-holder means primarily a person who has acquired from the proprietor, or from another tenure-holder, a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it, and includes—

(*a*) the successors-in-interest of persons who have acquired such a right, and

(*b*) the holders of tenures entered in any register prepared and confirmed under the Chotanagpur Tenures Act, 1869,

but does not include a Mundari khunt-kattidar.

"6. *Meaning of Raiyat.*—(1) 'Raiyat' means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family, or by hired servants, or with the aid of partners; and includes the successors-in-interest of persons who have acquired such a right, but does not include a Mundari khunt-kattidar.

*Explanation.*—Where a tenant of land has the right to bring it under cultivation, he shall be deemed to have acquired a right to hold it for the purpose of cultivation, notwithstanding that he uses it for the purpose of gathering the produce of it or of grazing cattle on it.

(2) A person shall not be deemed to be a raiyat unless he holds land either immediately under a proprietor or immediately under a tenure-holder or immediately under a Mundari khunt-kattidar.

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Page 13 Wednesday, March 02, 2022
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(3) In determining whether a tenant is a tenure-holder or a raiyat, the court shall have regard to—

a (*a*) local custom, and

(*b*) the purpose for which the right of tenancy was originally acquired.

7. (1) *Meaning of 'raiyat having khunt-katti rights'*.—'Raiyat having khunt-katti rights' means a raiyat in occupation of, or having any subsisting title to, land reclaimed from jungle by the original founders of b the village or their descendants in the male line, when such raiyat is a member of the family which founded the village or a descendant in the male line of any member of such family:

Provided that no raiyat shall be deemed to have khunt-katti rights in any land unless he and all his predecessors-in-title have held such land c or obtained a title thereto by virtue of inheritance from the original founders of the village.

(2) Nothing in this Act shall prejudicially affect the rights of any person who has lawfully acquired a title to a khunt-kattidari tenancy before the commencement of this Act.

8. *Meaning of Mundari khunt-kattidar.*—'Mundari khunt-kattidar' d means a Mundari who has acquired a right to hold jungle land for the purpose of bringing suitable portions thereof under cultivation by himself or by male members of his family, and includes—

(*a*) the heirs male in the line of any such Mundari, when they are in possession of such land or have any subsisting title thereto; and

(*b*) as regards any portions of such land which have remained e continuously in the possession of any such Mundari and his descendants in the male line, such descendants."

**8.** At this place, Section 76 along with its illustrations would also need reproduction:

"76. *Saving of custom.*— Nothing in this Act shall affect any f custom, usage or customary right not inconsistent with, or not expressly or by necessary implication modified or abolished by, its provisions.

*Illustrations*

I. A custom or usage whereby a raiyat obtains a right of occupancy as soon as he is admitted to occupation of the tenancy, whether he is a settled raiyat of the village or not, is inconsistent with, and is not g expressly or by necessary implication modified or abolished by, the provisions of this Act. This custom or usage, accordingly, wherever it exists, will not be affected by this Act.

II. A custom or usage by which an under-raiyat can obtain rights similar to those of an occupancy raiyat is, similarly, not inconsistent with, and is not expressly or by necessary implication modified or h abolished by, the provisions of this Act, and will not be affected by this Act.

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Page 14 Wednesday, March 02, 2022
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III. A custom or usage whereby a raiyat is entitled to make improvements on his tenancy and to receive compensation therefor on ejectment is not inconsistent with, and is not expressly or by necessary implication modified or abolished by the provisions of this Act. That custom or usage accordingly, where it exists, will not be affected by this Act.

IV. A custom or usage whereby korkar is held,—

(*a*) during preparation for cultivation, rent-free, or

(*b*) after preparation, at a rate of rent less than the rate payable for ordinary raiyati land in the same village, tenure or estate,

is not inconsistent with, and is not expressly or by necessary implication modified or abolished by, the provisions of this Act. That custom or usage accordingly, wherever it exists, will not be affected by this Act."

**9.** A bare outline of these provisions goes to show that these have been enacted to identify classes of tenants. These provisions have no connection with the ownership of land. Section 3(*xxvi*) defines 'tenant' to mean a person who holds land under another and is, or but for a special contract would be, liable to pay rent for that land to that other person. Sub-section (1) of Section 4 is plainly tied up with Section 5. Sub-sections (2)(*a*) and (*b*) of Section 4 are tied up with Section 6 and sequelly with Section 76. Local customs, as the illustrations under Section 76 show, are for the purpose of streamlining the tenancy rights and landlord-tenant relationship. Sub-section (2)(*c*) of Section 4 in the same pattern is tied up with Section 7. Lastly sub-section (4) of Section 4 is tied up with Section 8 relating to "Mundari khunt-kattidar". All these tenants as classified, do not own the tenanted lands, but hold land under others. Their tenancy rights are identified and regulated through these provisions. The personal laws of the tenants nowhere figure in the set-up.

**10.** The solitary decided case available under Section 8 of the Act and where personal law of the Mundari was allowed to intrude is *Jitmohan Singh Munda* v. *Ramratan Singh*[1]. There the learned Judges of the High Court comprising the Bench seem to have differed on the applicability of Section 8 but not on its scope. The case there established was that the Mundari khunt-kattidar deceased was of Hindu religion and on that basis it was held that his widow could retain possession of the tenancy rights of her deceased husband during her lifetime. The right of the male collateral to take possession was deferred by the intervening widow's life estate. This case could, in a sense, be taken as stare decisis, when none else is in the field, in order to take the cue that personal law of a female descendant of a *Mundari khunt-kattidar* could steal the show and Section 8 would have to be read accordingly. But this case is decided on a misreading of Section 8. The earlier part of it providing the meaning of Mundari khunt-kattidar has been overlooked. It has been assumed, on the basis of the latter part that the expression has an inclusive definition and thus would not exclude the Mundari's widow

1 1958 BLJR 373

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Page 15 Wednesday, March 02, 2022
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governed by Hindu law. The High Court at p. 375 of its report observed as follows:

> "The contention based on Section 8 also terminologically cannot be accepted. In the first place, in defining khunt-kattidar interest as quoted above, the word used is 'includes' whereafter occur clauses (*a*) and (*b*) containing reference to the male line of a Mundari. The word 'includes' cannot be taken to be exhaustive."

**11.** *Jitmohan Singh case*[1] cannot thus be a guiding precedent. It is at best a decision on its own facts. There is no scope thus in reading down the provisions of Section 8 and even that of Section 7 so as to include female descendants alongside the male descendants in the context of Sections 7 and 8. It is only in the larger perspective of the Constitution can the answer to the problem be found.

**12.** Life is a precious gift of nature to a being. Right to life as a fundamental right stands enshrined in the Constitution. The right to livelihood is born of it. In *Olga Tellis* v. *Bombay Municipal Corpn.*[2] this Court defined it in this manner in para 32 of the report: (SCC p. 572)

> "... The sweep of the right to life conferred by Article 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life. Indeed, that explains the massive migration of the rural population to big cities. They migrate because they have no means of livelihood in the villages. The motive force which propels their desertion of their hearths and homes in the village is the struggle for survival, that is, the struggle for life. So unimpeachable is the evidence of the nexus between life and the means of livelihood. They have to eat to live: Only a handful can afford the luxury of living to eat. That they can do, namely, eat, only if they have the means of livelihood. That is the context in which it was said by Douglas, J. in *Baksey*[3], that the right to

2 (1985) 3 SCC 545 : AIR 1986 SC 180

3 *Baksey* v *Board of Regents*, (1954) 347 MD 442

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Page 16 Wednesday, March 02, 2022
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work is the most precious liberty that man possesses. It is the most precious liberty because, it sustains and enables a man to live and the right to life is a precious freedom. 'Life', as observed by Field, J. in *Munn* v. *Illinois*[4], means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. This observation was quoted with approval by this Court in *Kharak Singh* v. *State of U.P.*[5]

And then in para 33: (SCC pp. 572-73)

"Article 39(*a*) of the Constitution, which is a Directive Principle of State Policy, provides that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood. Article 41, which is another Directive Principle, provides, inter alia, that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work in cases of unemployment and of undeserved want. Article 37 provides that the Directive Principles, though not enforceable by any court, are nevertheless fundamental in the governance of the country. The principles contained in Articles 39(*a*) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21."

**13.** Agriculture is not a singular vocation. It is, more often than not, a joint venture, mainly of the tiller's family members. Some of them have to work hard and the others harder still. Everybody, young or old, male or female, has chores allotted to perform; a share in the burden of toil. Traditionally and historically, the agricultural family is identified by the male head and this is what Sections 7 and 8 recognise. But on his death, his dependent family females, such as his mother, widow, daughter, daughter-in-law, granddaughter, and others joint with him have, under Sections 7 and 8, to make way to male relatives within and outside the family of the deceased entitled thereunder, disconnecting them from the land and their means of livelihood. Their right to livelihood in that instance gets affected, a right constitutionally recognised, a right which the female enjoyed in common with the last male holder of the tenancy. It is in protection of that right to livelihood, that the immediate female relatives of the last male tenant have the constitutional remedy to stay on holding the land so long as they remain

4 (1877) 94 US 113

5 (1964) 1 SCR 332 : AIR 1963 SC 1295

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Page 17 Wednesday, March 02, 2022
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dependent on it for earning their livelihood, for otherwise it would render them destitute. It is on the exhaustion of, or abandonment of land by, such female descendants can the males in the line of descent take over the holding exclusively. In other words, the exclusive right of male succession conceived of in Sections 7 and 8 has to remain in suspended animation so long as the right of livelihood of the female descendant's of the last male holder remains valid and in vogue. It is in this way only that the constitutional right to livelihood of a female can interject in the provisions, to be read as a burden to the statutory right of male succession, entitling her to the status of an intervening limited dependants/descendants under Sections 7 and 8. In this manner alone, and up to this extent can female dependants/descendants be given some succour so that they do not become vagrant and destitutes. To this extent, it must be so held. We would rather, on the other hand, refrain from striking down the provisions as such on the touchstone of Article 14 as this would bring about a chaos in the existing state of law. The intervening right of female dependants/descendants under Sections 7 and 8 of the Act is carved out to this extent, by suspending the exclusive right of the male succession till the female dependants/descendants choose other means of livelihood manifested by abandonment or release of the holding kept for the purpose.

**14.** For the afore-going reasons, disposal of these writ petitions is ordered with the above relief to the female dependants/descendants. At the same time direction is issued to the State of Bihar to comprehensively examine the question on the premise of our constitutional ethos and the need voiced to amend the law. It is also directed to examine the question of recommending to the Central Government whether the latter would consider it just and necessary to withdraw the exemptions given under the Hindu Succession Act and the Indian Succession Act at this point of time insofar as the applicability of these provisions to the Scheduled Tribes in the State of Bihar is concerned. These writ petitions would on these directions stand disposed of making absolute the interim directions in favour of the writ petitioners for their protection. No costs.

K. RAMASWAMY, J.— These two writ petitions raise common question of law: whether female tribal is entitled to parity with male tribal in intestate succession? The first petitioner is an editor of a magazine *Manushi* espousing causes to ameliorate the social and economic backwardness of Indian women and to secure them equal rights. Petitioners 2 Smt Sonamuni and 3 Smt Muki Dui respectively are the widow and married daughter of Muki Banguma, Ho Tribe of Longo village, Sonua Block, Singhbhum District in Bihar State. The petitioner in Writ Petition No. 219 of 1986, Juliana Lakra is an Oraon Christian tribal woman from Chotanagpur area. They seek declaration that Sections 7, 8 and 76 of the Chotanagpur Tenancy Act, 1908 (6 of 1908), (for short, 'the Act') are ultra vires Articles 14, 15 and 21 of the Constitution of India. They contend that the customary law operating in the Bihar State and other parts of the country excluding tribal women from inheritance of land or property belonging to father, husband,

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Page 18 Wednesday, March 02, 2022
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mother and conferment of right to inheritance to the male heirs or lineal descendants being founded solely on sex is discriminatory. The tribal women toil, share with men equally the daily sweat, troubles and tribulations in agricultural operations and family management. Their discrimination based on the customary law of inheritance is unconstitutional, unjust, unfair and illegal. Even usufructuary rights conferred on a widow or an unmarried daughter become illusory due to diverse pressures brought to bear brunt at the behest of lineal descendants or their extermination. Even married or unmarried daughters are excluded from inheritance, when they were subjected to adultery by non-tribals; they are denuded of the right to enjoy the property of her father or deceased husband for life. The widow on remarriage is denied inherited property of her former husband. They have elaborated by narrating several incidents in which the women either were forced to give up their life interest or became target of violent attacks or murdered. Petitioners 2 and 3 in the first writ petition sought police protection for their lives and interim directions were given.

**16.** When this Court has taken up the matter for hearing, in the light of the stand of the respondents taken at that time to suitably amend the Act, by order dated 16-12-1986, the case was adjourned with the hope that the State Government would suitably amend Sections 7 and 8 of the Act. By further order dated 6-8-1991, this Court after being apprised of the State Government constituting a Committee to examine the desirability to amend the Act giving equal rights of inheritance to women, further adjourned the hearing awaiting the report of the Committee. The State-level Tribal Advisory Board consisting of the Chief Minister, Cabinet Ministers, legislators and parliamentarians representing the tribal areas, met on 23-7-1988 and decided as under:

> "The tribal society is dominated by males. This, however, does not mean that the female members are neglected. A female member in a tribal family has right of usufruct in the property owned by her father till she is unmarried and the same is the property of her husband after the marriage. However, she does not have any right to transfer her share to anybody by any means whatsoever. A widow will have right to usufruct of the husband's property till such time she is issueless and, in the event of her death the property will revert back to the legal heirs of her late husband. In case of a widow having offspring the children succeed the property of the father and the mother will be a caretaker of the property till the children attain majority. The Sub-Committee also felt that every tribal does have some land and in case the right of inheritance in the ancestral property is granted to the female descendants, this will enlarge the threat of alienation of the tribal land in the hands of non-tribals. The female members being given right of transfer of their rights in the origin of malpractices like dowry and the like prevalent in the other non-tribal societies."

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Page 19 Wednesday, March 02, 2022
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**17.** When the matter was taken up for final disposal and the resolution of the Board was brought to the notice of this Court, by order dated 11-10-1991*, this Court further expressed thus: (SCC p. 105, para 5)

"Scheduled Tribe people are as much citizens as others and they are entitled to the benefit of guarantees of the Constitution. It may be that the law can provide reasonable regulation in the matter of succession to property with a view to maintaining cohesiveness in regard to Scheduled Tribes and their properties. But exclusion from inheritance would not be appropriate. Since this aspect of the matter has not been examined by the State of Bihar and the feasibility of permitting inheritance and simultaneously regulating such inheritance for the purpose of ensuring that the property does not go out of the family by way of transfer or otherwise we are of the view that in the peculiar facts of the case the State of Bihar should re-examine the matter."

**18.** The State Government reiterated its earlier stand, as stated in an affidavit filed in this behalf. Sections 6, 7, 8 and 76 of the Act are as follows:

"6. *Meaning of raiyat.*—(1) 'Raiyat' means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family, or by hired servants, or with the aid of partners; and includes the successors-in-interest of persons who have acquired such a right, but does not include a *Mundari khunt-kattidar*.

*Explanation.*—Where a tenant of land has the right to bring it under cultivation, he shall be deemed to have acquired a right to hold it for the purpose of cultivation, notwithstanding that he uses it for the purpose of gathering the produce of it or of grazing cattle on it.

(2) A person shall not be deemed to be a *raiyat* unless he holds land either immediately under a proprietor or immediately under a tenure-holder or immediately under a *Mundari khunt-kattidar*.

(3) In determining whether a tenant is a tenure-holder or a *raiyat*, the court shall have regard to—

(*a*) local customs, and

(*b*) the purpose for which the right of tenancy was originally acquired.

7. (1) *Meaning of 'raiyat having khunt-katti rights'.*—'Raiyat having *khunt-katti rights*' means a *raiyat* in occupation of, or having any subsisting title to, land reclaimed from jungle by the original founders of the village or their descendants in the male line, when such *raiyat* is a member of the family which founded the village or a descendant in the male line of any member of such family:

Provided that no *raiyat* shall be deemed to have *khunt-katti* rights in any land unless he and all his predecessors-in-title have held such land

* *Madhu Kishwar* v. *State of Bihar,* (1992) 1 SCC 102

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Page 20 Wednesday, March 02, 2022
SCC Online Web Edition: http://www.scconline.com
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or obtained a title thereto by virtue of inheritance from the original founders of the village.

(2) Nothing in this Act shall prejudicially affect the rights of any person who has lawfully acquired a title to a *khunt-kattidari* tenancy before the commencement of this Act.

8. *Meaning of Mundari khunt-kattidar.—'Mundari khunt-kattidar'* means a *Mundari* who has acquired a right to hold jungle land for the purpose of bringing suitable portions thereof under cultivation by himself or by male members of his family, and includes—

(*a*) the heirs male in the line of any such *Mundari*, when they are in possession of such land or have any subsisting title thereto; and

(*b*) as regards any portions of such land which have remained continuously in the possession of any such *Mundari* and his descendants in the male line, such descendants.

76. *Saving of custom.*—Nothing in this Act shall affect any custom, usage or customary right not inconsistent with, or not expressly or by necessary implication modified or abolished by, its provisions."

**19.** In *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*[6] the Judicial Committee had held that custom is the essence of special usage modifying the ordinary law of succession that it should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone the legal title to recognition depends. In *Abdul Hussein Khan* v. *Bibi Sona Dero*[7] when it was pleaded that by customs of the family, the sister of an intestate Mohammedan was excluded from inheritance in favour of a male paternal collateral, by operation of Section 26 of the Bombay Regulation IV of 1827, (a usage was in question in the suit), the Board held that the custom was not established to exclude the sister of the deceased from inheritance.

**20.** By operation of Article 13(3)(*a*) of the Constitution law includes custom or usage having the force of law. Article 13(1) declares that the pre-constitutional laws, so far as they are inconsistent with the fundamental rights shall, to the extent of such inconsistency, be void. The object, thereby, is to secure paramountcy to the Constitution and give primacy to fundamental rights. Article 14 ensures equality of law and prohibits invidious discrimination. Arbitrariness or arbitrary exclusion are sworn enemies to equality. Article 15(1) prohibits gender discrimination. Article 15(3) lifts that rigour and permits the State to positively discriminate in favour of women to make special provision, to ameliorate their social, economic and political justice and accords them parity. Article 38 enjoins the State to promote the welfare of the people (obviously men and women

6 (1872) 14 Moo IA 570
7 (1917-18) 45 IA 10 : AIR 1917 PC 181

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Page 21 Wednesday, March 02, 2022
SCC Online Web Edition: http://www.scconline.com
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alike) by securing social order in which justice — social, economic and political — shall inform of all the institutions of national life. Article 39(*a*) and (*b*) enjoin that the State policy should be to secure that men and women equally have the right to an adequate means of livelihood and the ownership and control of the material resources of the community are so distributed as best to subserve the common good. Article 38(2) enjoins the State to minimise the inequalities in income and to endeavour to eliminate inequalities in status, facilities and opportunities not only among individuals but also amongst groups of people. Article 46 accords special protection and enjoins the State to promote with special care the economic and educational interests of the Scheduled Castes and Scheduled Tribes and other weaker sections and to protect them from social injustice and all forms of exploitation. The Preamble to the Constitution charters out the ship of the State to secure social, economic and political justice and equality of opportunity and of status and dignity of person to everyone.

**21.** The General Assembly of the United Nations adopted a Declaration on 4-12-1986 on "The Right to Development" in which India played a crusading role for its adoption and ratified the same. Its preamble cognizes that all human rights and fundamental freedoms are indivisible and interdependent. All Nation States are concerned at the existence of serious obstacles to development and complete fulfilment of human beings, denial of civil, political, economic, social and cultural rights. In order to promote development, equal attention should be given to the implementation, promotion and protection of civil, political, economic, social and political rights.

**22.** Article 1(1) assures right to development — an inalienable human right, by virtue of which every person and all people are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realised. Article 6(1) obligates the State to observe all human rights and fundamental freedoms for all without any discrimination as to *race, sex, language* or *religion*. Sub-article (2) enjoins that ... equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and political rights. Sub-article (3) thereof enjoins that "State should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights as well as economic, social and cultural rights". Article 8 casts duty on the State to undertake, ... all necessary measures for the realisation of right to development and ensure, inter alia, equality of opportunity for all in their access to basic resources ... and fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicate all social injustice.

**23.** Human rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedom have been reiterated by the Universal Declaration of Human Rights. Democracy, development

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Page 22 Wednesday, March 02, 2022
SCC Online Web Edition: http://www.scconline.com
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and respect for human rights and fundamental freedoms are interdependent and have mutual reinforcement. The human rights for women, including girl child are, therefore, inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth, culturally, socially and economically. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights. Vienna Convention on the Elimination of all forms of Discrimination Against Women (for short 'CEDAW') was ratified by the UNO on 18-12-1979. The Government of India who was an active participant to CEDAW ratified it on 19-6-1993 and acceded to CEDAW on 8-8-1993 with reservation on Articles 5(*e*), 16(1), 16(2) and 29 thereof. The Preamble of CEDAW reiterates that discrimination against women violates the principles of equality of rights and respect for human dignity; is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country; hampers the growth of the personality from society and family and makes it more difficult for the full development of potentialities of women in the service of their countries and of humanity. Poverty of women is a handicap. Establishment of new international economic order based on equality and justice will contribute significantly towards the promotion of equality between men and women etc. Article 1 defines discrimination against women to mean

> "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose on impairing or nullifying the recognized enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

Article 2(*b*) enjoins the State parties while condemning discrimination against women in all its forms, to pursue, by appropriate means, without delay, elimination of discrimination against women by adopting "appropriate legislative and other measures including sanctions where appropriate, prohibiting all discriminations against women" to take all appropriate measures including legislation, to modify or abolish existing laws, regulations, *customs and practices which constitute discrimination against women. Clause (C) enjoins to ensure legal protection of the rights of women on equal basis with men through constituted national tribunals and other public institutions against any act of discrimination to provide effective protection to women.* Article 3 enjoins State parties that it shall take, in all fields, in particular, in the political, social, economic and cultural fields, all appropriate measures including legislation to ensure full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men. Article 13 states that

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Page 23 Wednesday, March 02, 2022
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> "the State parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women".

Article 14 lays emphasis to eliminate discrimination on the problems faced by rural women so as to enable them to play "in the economic survival of their families including their work in the non-monetized sectors of the economy and shall take ... all appropriate measures ...". Participation in and benefit from rural development in particular, shall ensure to such women the right to participate in the development programme to organise self-groups and cooperatives to obtain equal access to economic opportunities through employment or self-employment etc. *Article 15(2) enjoins "to accord to women equality with men before the law, in particular, to administer property ..."*.

**24.** Parliament has enacted the Protection of Human Rights Act, 1993. Section 2(*d*) defines human rights to mean "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India". Thereby the principles embodied in CEDAW and the concomitant Right to Development became integral parts of the Indian Constitution and the Human Rights Act and became enforceable. Section 12 of Protection of Human Rights Act charges the Commission with duty for proper implementation as well as prevention of violation of the human rights and fundamental freedoms.

**25.** Article 5(*a*) of CEDAW on which the Government of India expressed reservation does not stand in its way and in fact Article 2(*f*) denudes its effect and enjoins to implement Article 2(*f*) read with its obligation undertaken under Articles 3, 14 and 15 of the Convention vis-à-vis Articles 1, 3, 6 and 8 of the Declaration of Right to Development. Though the directive principles and fundamental rights provide the matrix for development of human personality and elimination of discrimination, these conventions add urgency and teeth for immediate implementation. It is, therefore, imperative for the State to eliminate obstacles, prohibit all gender-based discriminations as mandated by Articles 14 and 15 of the Constitution of India. By operation of Article 2(*f*) and other related articles of CEDAW, the State should by appropriate measures including legislation, modify law and abolish gender-based discrimination in the existing laws, regulations, customs and practices which constitute discrimination against women.

**26.** Article 15(3) of the Constitution of India positively protects such Acts or actions. Article 21 of the Constitution of India reinforces "right to life". Equality, dignity of person and right to development are inherent rights in every human being. Life in its expanded horizon includes all that gives meaning to a person's life including culture, heritage and tradition with dignity of person. The fulfilment of that heritage in full measure would encompass the right to life. For its meaningfulness and purpose every

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Page 24 Wednesday, March 02, 2022
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woman is entitled to elimination of obstacles and discrimination based on gender for human development. Women are entitled to enjoy economic, social, cultural and political rights without discrimination and on footing of equality. Equally, in order to effectuate fundamental duty to develop scientific temper, humanism and the spirit of enquiry and to strive towards excellence in all spheres of individual and collective activities as enjoined in Article 51-A(*h*) and (*j*) of the Constitution of India, not only facilities and opportunities are to be provided for, but also all forms of gender-based discrimination should be eliminated. It is a mandate to the State to do these acts. Property is one of the important endowments or natural assets to accord opportunity, source to develop personality, to be independent, right to equal status and dignity of person. Therefore, the State should create conditions and facilities conducive for women to realise the right to economic development including social and cultural rights.

**27.** Bharat Ratna Dr B.R. Ambedkar stated on the floor of the Constituent Assembly that in future both the legislature and the executive should not pay mere lip-service to the directive principles but they should be made the bastion of all executive and legislative action. Legislative and executive actions must be conformable to, and effectuation of the fundamental rights guaranteed in Part III and the directive principles enshrined in Part IV and the Preamble of the Constitution which constitute the conscience of the Constitution. Covenants of the United Nations add impetus and urgency to eliminate gender-based obstacles and discrimination. Legislative action should be devised suitably to constitute economic empowerment of women in socio-economic restructure for establishing egalitarian social order. Law is an instrument of social change as well as the defender of social change. Article 2(*e*) of CEDAW enjoins this Court to breathe life into the dry bones of the Constitution, international conventions and the Protection of Human Rights Act, to prevent gender-based discrimination and to effectuate right to life including empowerment of economic, social and cultural rights.

**28.** As per the U.N. Report 1980

> "women constitute half the world population, perform nearly two-thirds of work hours, receive one-tenth of the world's income and own less than one-hundredth per cent of world's property".

Half of the Indian population too are women. Women have always been discriminated against and have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination. Articles 13, 14, 15 and 16 of the Constitution of India and other related articles prohibit discrimination on the ground of sex. Social and economic democracy is the cornerstone for success of political democracy. The Scheduled Castes, Scheduled Tribes and women, from time immemorial, suffered discrimination and social inequalities and made them accept their ascribed social status. Among women, the tribal women are the

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Page 25 Wednesday, March 02, 2022
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lowest of the low. It is mandatory, therefore, to render them socio-economic justice so as to ensure their dignity of person, so that they be brought into the mainstream of the national life. We are conscious that in Article 25 which defines Hindus, Scheduled Tribes were not brought within its fold to protect their customs and identity. We keep it at the back of our mind.

**29.** Agricultural land is the foundation of a sense of security and freedom from fear. Assured possession is a lasting road for development, intellectual, cultural and moral and also for peace and harmony. Agriculture is the only source of livelihood for the tribes, apart from collection and sale of minor forest produce. Land is their most important natural asset and imperishable endowment from which the tribals derive their sustenance, social status, a permanent place of abode and work. The Scheduled Tribes predominantly live in Andhra Pradesh, Maharashtra, Bihar, Gujarat, Orissa, Madhya Pradesh, Rajasthan and North Eastern States, though they spread to other States sparsely.

**30.** The empirical study by anthropologists and sociologists reveals that the customary laws of the tribes are not uniform throughout Bharat. Even in respect of intestate succession, they are not uniform. Though the customs of the tribes have been elevated to the status of law, obviously recognised by the founding fathers in Article 13(3)(*a*) of the Constitution, yet it is essential that the customs inconsistent with or repugnant to constitutional scheme must always yield place to fundamental rights. In *Sant Ram* v. *Labh Singh*[8] this Court held that the custom as such is effected by Part III dealing with fundamental rights. In *Bhau Ram* v. *B. Baijnath Singh*[9] it was held that law of pre-emption based on vicinage is void. In *Gazula Dasaratha Rama Rao* v. *State of A.P.*[10] this Court held that discrimination based on the ground of descent only offends Article 16(2).

**31.** In India agricultural land forms the bulk of the property. In most of the tenancy laws, women have been denied the right to succession to agricultural lands. The discernible reason in support thereof appears to be to maintain unity of the family and to prevent fragmentation of agricultural holdings or diversion of tenancy right. In *Atam Prakash* v. *State of Haryana*[11] testing the validity of Section 15 of the Punjab Pre-emption Act, 1930, for the aforesaid reasons, this Court held that the right of pre-emption based on consanguinity is a relic of the feudal past. It is totally inconsistent with the constitutional scheme. It is inconsistent with modern ideas. The reasons which justified its recognition, quarter of a century ago, namely, the preservation of the integrity of rural society, the unity of family life and the agnatic theory of succession, are today irrelevant. Classification on the basis of unity and integrity of either the village community or the family or on the basis of the agnatic theory of succession, cannot be upheld. Due to march of

8 (1964) 7 SCR 756 : AIR 1965 SC 314
9 1962 Supp (3) SCR 724 : AIR 1962 SC 1476
10 (1961) 2 SCR 931 : AIR 1961 SC 564
11 (1986) 2 SCC 249

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Page 26 Wednesday, March 02, 2022
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history, the tribal loyalties have disappeared and family ties have been weakened or broken and the traditional rural family-oriented society is permissible. Accordingly Section 15(1), clauses (1) to (3), violate fundamental rights and were declared ultra vires.

**32.** When a male member has the right to seek partition and at his behest, fragmentation of family holding is effected, why not the right to inheritance/succession be given to a female? On agnatic theory, she gets a shadow, but not substance. Right to equality and social justice is an illusion. The denial is absolutely inconsistent with public policy, unfair, unjust and unconscionable. The reason of fragmentation of holding or division of tenancy right would hardly be a ground to discriminate against a woman from her right to inherit the property of the parent or husband. In *V. Tulasamma* v. *Sesha Reddy*[12] (AIR at p. 1961) this Court, cognizant to equality in intestate succession by a Hindu woman, held that after the advent of independence old human values assumed new complex; women need emancipation; a new social order needs to be set up giving women equality and place of honour, abolition of discrimination based on equal right to succession is the prime need of the hour and temper of the times. In *Chiranjit Lal Chowdhuri* v. *Union of India*[13] this Court held that the guarantee against the denial of equal protection of the law does not mean that identically the same rule of law should be made applicable to all persons within the territory of India in spite of difference in circumstances or conditions. It means that there should be no discrimination between one person and another. It is with regard to the subject-matter of the legislation. In *State of W.B.* v. *Anwar Ali Sarkar*[14] it was held that the prohibition under Article 14 is to secure all persons against arbitrary laws as well as arbitrary application of laws. It applies to procedural and substantive law. *Maneka Gandhi* v. *Union of India*[15] reiterates its creed on grounds of justice, equity and fairness lest law becomes void, oppressive, unjust and unfair.

**33.** Eugine Smith in his *Indian Constitution* has stated that secularisation of law is essential to the emergence of a modern Indian State, foundation of which stands on the twin principles of democracy and secularism. He further stated that "the existence of different personal laws contradicts the principles of non-discrimination by the State". Non-discrimination is based on the philosophy of the individual, not the group, as the focal point and the basic unit of the nation. The civilization, culture, custom, usage, religion and law are founded upon the community life for man's well-being. The man will obey the command of the community by consent. The law formulates the principles to maintain the order in the society to avoid friction. Democracy brings about bloodless revolution in the social order through rule of law. Therefore, when women are discriminated only on the ground of sex in the

12 (1977) 3 SCC 99 : AIR 1977 SC 1944
13 1950 SCR 869 : AIR 1951 SC 41
14 1952 SCR 284 : AIR 1952 SC 75
15 (1978) 1 SCC 248 : (1978) 2 SCR 621

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Page 27 Wednesday, March 02, 2022
SCC Online Web Edition: http://www.scconline.com
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matter of intestate succession to the estate of the parent or husband, the basic question is whether it is founded on intelligible differentia and bears reasonable or rational relation or whether the discrimination is just and fair. Our answer is no and emphatically no.

**34.** In *State of Bihar* v. *Kameshwar Singh*[16] this Court had held that in judging the reasonableness in imposing restrictions Court would take into consideration the public purpose in Article 39. In *Kasturi Lal Lakshmi Reddy* v. *State of J&K*[17] this Court held that if law is made to further socio-economic justice it is prima facie reasonable and in public interest. In other words, if it is in negation, it is unconstitutional. In *Chandra Bhavan Boarding and Lodging* v. *State of Mysore*[18] it was held that: (SCC p. 93, para 13)

> "The mandate of the Constitution is to build a welfare society in which justice social, economical and political shall inform all institutions of our national life. The hopes and aspirations aroused by the Constitution will be belied if the minimum needs of the lowest of our citizens are not met."

In *Narendra Prasadji* v. *State of Gujarat*[19] it was held that no right in an organised society can be absolute. Enjoyment of one's rights must be consistent with the enjoyment of the rights of others. In a free play of social forces, it is not possible to bring about a voluntary harmony; the State has to step in to set right the imbalance and the directive principles, though not enforceable; mandate of Article 38, to restructure social and economic democracy, enjoins to eliminate obstacles and prohibit discrimination in intestate succession based on sex.

**35.** In *Thota Sesharathamma* v. *Thota Manikyamma*[20] construing Section 14 of the Hindu Succession Act, 1956 and its revolutionary effect on the right to ownership of the land by Hindu woman, this Court held that the validity of Section 14(1) drawn from the pre-existing limited estate held by a Hindu woman must be tested on the anvil of socio-economic justice, equality of status and by overseeing whether it would subserve the constitutional animation. Article 15(3) relieves the State from the bondage of Articles 14 and 15(1) and charges it to make special provision to accord socio-economic equality to woman.

**36.** The Hindu Succession Act revolutionised the status of a Hindu female and used Section 14(1) as a tool to undo past injustice to elevate her to equal status with dignity of person on a par with man and removed all fetters of Hindu woman's limited estate which blossomed into full ownership. By legislative fiat the discrimination in intestate succession meted out to woman was done away with. The Court should, therefore,

16 1952 SCR 889 : AIR 1952 SC 252
17 (1980) 4 SCC 1
18 (1969) 3 SCC 84 : (1970) 2 SCR 600
19 (1975) 1 SCC 11 : (1975) 2 SCR 317
20 (1991) 4 SCC 312 : JT (1991) 3 SC 506

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Page 28 Wednesday, March 02, 2022
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endeavour to find out whether the disposition clauses in the instrument will elongate the animation of Section 14 and would permeate the aforestated constitutional conscience to relieve the Hindu female from the Shastric bondage of limited estate. Articles 14, 15 and 16 frown upon discrimination on any ground and enjoin the State to make special provisions in favour of the woman to remedy past injustice and to advance their socio-economic and political status. Economic necessity is not a sanctuary to abuse a woman's person. Section 14, therefore, gives to every Hindu woman full ownership of the property irrespective of the time when the acquisition was made, namely, whether it was before or after the Act had come into force, provided, she was in possession of the property. Discrimination on the ground of sex in matters of public employment was buried fathoms deep and is now a relic of the past by decisions of this Court. In *C.B. Muthamma* v. *Union of India*[21], *Air India* v. *Nergesh Meerza*[22] and a host of other decisions are in that path. True that clauses (*h*) and (*j*) of para 3 of Schedule 6 of the Constitution give power to District or Regional Councils in North Eastern States to alter law relating to inheritance and customs; they too are bound by the law declared under Article 141 of the Constitution to be consistent with Articles 15(3), 14 and Preamble of the Constitution.

**37.** The public policy and constitutional philosophy envisaged under Articles 38, 39, 46 and 15(1) and (3) and 14 is to accord social and economic democracy to women as assured in the Preamble of the Constitution. They constitute the core foundation for economic empowerment and social justice to women for stability of political democracy. In other words, they frown upon gender discrimination and aim at elimination of obstacles to enjoy social, economic, political and cultural rights on equal footing. Law is a living organism and its utility depends on its vitality and ability to serve as sustaining pillar of society. Contours of law in an evolving society must constantly keep changing as civilization and culture advances. The customs and mores must undergo change with the march of time. Justice to the individual is one of the highest interests of the democratic State. Judiciary cannot protect the interests of the common man unless it would redefine the protections of the Constitution and the common law. If law is to adapt itself to the needs of the changing society, it must be flexible and adaptable.

**38.** Law is the manifestation of principles of justice, equity and good conscience. Rule of law should establish a uniform pattern for harmonious existence in a society where every individual would exercise his rights to his best advantage to achieve excellence, subject to protective discrimination. The best advantage of one person could be the worst disadvantage to another. Law steps in to iron out such creases and ensures equality of protection to individuals as well as group liberties. Man's status is a creature of substantive as well as procedural law to which legal incidents would attach. Justice, equality and fraternity are trinity for social and economic

21 (1979) 4 SCC 260 : 1979 SCC (L&S) 366 : (1980) 1 SCR 668
22 (1981) 4 SCC 335 : 1981 SCC (L&S) 599 : (1982) 1 SCR 438

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Page 29 Wednesday, March 02, 2022
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equality. Therefore, law is the foundation on which the potential of the society stands. In *Sheikriyammada Nalla Koya* v. *Administrator, Union Territory of Laccadives, Minicoy and Amindivi Islands*[23] K.K. Mathew, J., as he then was, held that customs which are immoral and are opposed to public policy, can neither be recognised nor be enforced. Its angulation and perspectives were stated by the learned Judge thus:

> "It is admitted that the custom must not be unreasonable or opposed to public policy. But the question is unreasonable to whom? Is a custom, which appears unreasonable to the Judge be adjudged so or should he be guided by the prevailing public opinion of the community in the place where the custom prevails? It has been said that the Judge should not consult his own standards or predilections but those of the dominant opinion at the given moment, and that in arriving at the decision, the Judge should consider the social consequences of the custom especially in the light of the factual evidence available as to its probable consequences. A Judge may not set himself in opposition to a custom which is fully accepted by the community.
>
> But I think, that the Judge should not follow merely the mass opinion when it is clearly in error, but on the contrary he should direct it, not by laying down his own personal and isolated conceptions but by resting upon the opinion of the healthy elements of the population, those guardians of an ancient tradition, which has proved itself, and which serves to inspire not only those of a conservative spirit but also those who desire in a loyal and disinterested spirit to make radical alterations to the organisations of existing society. Thus, the Judge is not bound to heed even to the clearly held opinion of the greater majority of the community if he is satisfied that that opinion is abhorrent to right-thinking people. In other words, the Judge would consult not his personal inclinations but the sense and needs and the mores of the community in a spirit of impartiality."

**39.** As in other parts of the country, in Bihar, most of the tribes like Munda, Oraon and Ho practised shifting cultivation along with the settled cultivation as it has not been popular with the tribes to combine various modern productive technology. But, by passage of time, when the land has become scarce, they too have settled down to ploughing cultivation on fixed tenures. Due to diverse reasons which it is not necessary for the purpose of this case to elaborate, major part of the land slipped out from their holdings.

**40.** Notable researchers, who spent their valuable time living among the tribes, are W.G. Archer, Deputy Commissioner, Santhal Parganas during 1939-40, Prof. Christopher Von Furer-Haimendorf, a German sociologist appointed by the Nizam of Hyderabad in 1940 who spent his life with the tribals in Nizam State in Andhra Pradesh as well as in Arunachal Pradesh. Portraying lifestyle and customs operating among the tribals, Haimendorf

23 AIR 1967 Ker 259 : 1967 Ker LT 395 : 1967 Ker LJ 482

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Page 30 Wednesday, March 02, 2022
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says in his *Tribes in India, the Struggle for Survival* that Chenchoo women, tribals in Andhra Pradesh, enjoy equal status with men. They can own property, but they cannot inherit any substantial property. They abide by the decision of their husbands. They are equal companions with men doing as much, if not more, of the work in maintaining the common household. She and her husband, are joint possessors of the family property insofar as it is acquired by daily labour. In South India, in particular Andhra Pradesh, after the grant of ryotwari pattas to the tillers of the soil including the tribes, they acquire permanent right to fixed land holdings and there does not exist any discrimination in the matter of intestate succession between man and woman. *In Issues in Tribal Development* by Prof. P. Ramaiah of Kakatiya University, Andhra Pradesh, at p. 9 it is stated that "hereditary rights rule the property distribution arrangements. If a man dies, his wife and sons get equal share of the property. Widow gets her husband's share from the property." At p. 14 he has further stated, "land is a part of his spiritual as well as economic heritage".

**41.** Dr L.P. Vidyarthi in his *Tribal Development Act and Its Administration*, published by Concept Publishing Co., (1986 Edn.) has stated at p. 310 that the element of certainty and definiteness of customs in the tribal society is lacking because of divergent customs on the same issue adopted by different sections of the tribes. The element of antiquity is also of little aid in that behalf. In tribal society, custom is generally a product of dominating mind, nurtured in the belief of supernatural forces and taboos than a source of spontaneous growth. It is mostly based upon the totem and taboos evolved in a particular family having the force of the family law. The custom in the tribal society is much influenced by the instinct of possessive authority and not on the basis of sociological origin but it has been carried, generation after generation, as being the family law. No scientific explanations are available, but if the custom is examined in detail it is found deep-rooted in the element of totem and taboos. That is the reason that majority of the customs prevailing in the tribal society could not attain the status of law and there is no legal validity except in the cases of inheritance and some family laws like adoption and marriage. If the working and life of the tribal societies is minutely observed, it will be found that from morning till night, with the birth of a baby till death, agricultural operations are the sole occupation for livelihood; all are tagged, linked and based upon certain conduct and behaviour reflecting, nearly custom and it may be said that the entire tribal society is based upon the rigid rules of custom and any society still untouched by the influence of urbanisation exists in the phenomenon of religion mixed with magic custom.

**42.** Archer in his *Tribal Law and Justice — The Santhal View of Woman* has stated in 1939-40 that the unmarried daughter has ordinarily no right at all in land. She cannot ask for partition and if her brothers separate, some land may be kept by her father or brother for financing her marriage and maintaining her, but that is to fulfil their duties towards her and does not

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Page 31 Wednesday, March 02, 2022
SCC Online Web Edition: http://www.scconline.com
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confer upon her any rights. At the partition, she is given no share. She has a right to maintenance. If her father or brothers or father's agnates are against discharging their duties, she can claim enough land for keeping her till marriage. She can acquire the land of her own which is her absolute property. If her father dies leaving no other heirs or agnates, she will get his land until she is married. If she is married, her sisters will share equally with her. If she has no sisters, the property goes to the village community. With regard to married daughters, he stated, that two to three bighas of land would be given as 'Stridhan' at the time of marriage. In respect of that property, right of the father, brother or agnates are extinguished. The property given is her absolute property. Her children inherit her property. In their absence, it passes on to the father, brother, mother or her male agnates. With regard to the right of married woman, at p. 156, he has stated that at partition the wife and children get one share and the husband gets one share. He has given instances of one Safal Hansdeak of Tharia. With regard to the right of the widow, she is like a Hindu widow having right to maintenance. If her husband died while he was joint holder with his brothers she will continue to live in the family and the situation will not differ materially from what it was in her husband's lifetime. Her right to maintenance will continue and if her husband's family neglects her without cause, she can demand sufficient land to keep herself. If there is a complete family partition the widow and her children will get the share which would have gone to her husband had he been alive. She gets life estate like Hindu widow's estate. *The Mundras and their Courts* by Sarad Chandra Roy, 14th Edn. at pp. 244 to 451 (1915) and *The Origins of Chotanagpur* by Sarad Chandra Roy at pp. 369 to 370 (1915 Edn.) dealt with inheritance on the same lines. So they need no reiteration.

**43.** In *Doman Sahu* v. *Buka*[24] though Mundas and Mundari women in Ranchi District are akin to other tribals, since they regard themselves as Hindus, it was held that Hindu law of succession would apply to them. In *Ganesh Mahto* v. *Shib Charan Mahata*[25] Kurmi Mahtons of Chotanagpur adopted Hindu religion. The Division Bench held that it must be presumed that ordinarily they are governed by Hindu law in matters of inheritance and succession except insofar as parties prove any custom obtaining among them which is at variance with it. It was held that Mitakshara Hindu law of succession was applicable to them. They did not prove any special custom alleged by them. In *Law Enforcement in Tribal Areas* by S.K. Ghosh, Director, Law Institute, Calcutta, published by Ashish Publishing House at p. 89 it is stated that though the Hindu Succession Act 1956, Hindu Marriage Act 1954, Hindu Adoptions and Maintenance Act, 1956 did not apply,

> "because of their contacts with other advanced societies some changes have taken place among tribes in the observance of marriage, divorce,

24 AIR 1931 Pat 198
25 AIR 1931 Pat 305 : ILR 11 Pat 139

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Page 32 Wednesday, March 02, 2022
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> etc. In the event of any litigation, the tribal courts are unable to reach a definite conclusion as these customary codes as they are unwritten code. Therefore, it was recommended that a proper study of customary codes of the tribals should be made and the same may be codified properly. ... Some State Governments have already taken action to codify the personal laws of important tribal groups. These laws can be gradually dispensed with or repealed when the tribals are fully assimilated with the main body of our national community."

At pp. 90-91 he explained the customs, among the Bhils living in Madhya Pradesh and Rajasthan who constitute the largest tribal group in the country, of a marriage by elopement or capture or by arrangement. They are very truthful people and they do not hesitate to speak against the culprits, though they may happen to be kith and kin.

**44.** The Garos, the Khasis and the Jaintias are the main inhabitants of Meghalaya State. They observe monogamy. The daughter (Nokma Dongipa Mechik) descendant from the ancestor is chosen for marriage for common ancestors. The husband goes and lives with the wife which in Hindu law is known as Illatom son-in-law. The custom is that the seniormost household of the area maintains a line of inheritance from the mother to the chosen daughter and the husband of the inheritress mother, popularly known as Nokma is accepted as the constitutional head of the A'Khing. The lands are held in common ownership of the Machong, the usufruct rights are granted to all the residents of the A'Khing. Mikirs, a populous tribe in Meghalaya is patrilineal. The sons inherit property and it is divided among them. In the absence of male heirs, the nearest agnate inherits that land. The daughters have been excluded. In the absence of sons and brothers, the widow retains the property provided she marries one of her husband's clan. The Gonds in Andhra Pradesh, Madhya Pradesh, Bihar and Orissa observe monogamy. At p. 139, he has stated that the custom is heritable and transferable and right of inheritance is patrilineal. The male heirs would succeed and the females are completely excluded. The sons take equal shares, but among the Apa Tanis and the Nactes, the system of primogeniture prevails, i.e. the eldest son only inherits the father's landed property which has been softened among Apa Tanis. In Manipur, the custom among Thandon Kukis is that the property is of the Chief of the village. The practice is of shifting cultivation and the Chief distributes the plots among the groups. The system of inheritance among the Naga group is that at the death of the last owner, the succession is patrilineal and the rules of primogeniture prevails among them. The practice is that during his lifetime the father gives some land to the younger brother as well.

**45.** In a report on *Codification of Customary Laws and Inheritance Laws in the Tribal Societies of Orissa* by Dr Bhupinder Singh and Dr Neeti Mahanti of Jigyansu Tribal Research Centre, sponsored by the Ministry of Welfare, Government of India and submitted on 19-5-1993, it is stated at p. 1 in the last paragraph of his preface that to reduce tribal customary laws into

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Page 33 Wednesday, March 02, 2022
SCC Online Web Edition: http://www.scconline.com
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formal, technical, strait-jacket frame is likely to rob it of its vitality and strength. It will expose the innocent, gullible tribals to the machinations of touts, middlemen etc. The customs which differ, in whatever magnitude, from one community to another would help exploitation of the tribals by application of the traditional law. Its relevance, freshness and vitality to a considerable extent, would get weakened. Whims and fancies in dispensation of justice would be avoided. They concluded that "we must proceed deliberately and wisely". In Chapter III at p. 8 it is stated thus:

> "Customary law refers to rules that are transmitted from generation to generation through social inheritance. In a close-knit simple tribal society, the people themselves want to live according to customs backed by social sanctions; to save them from objection and social ridicule of the society."

At p. 9, it is stated that "the major areas of interest for a tribal community is inheritance of land, forest rights and social customs like marriage, divorce, desertion, child support, death, birth etc." Santhals, one of the largest tribes of India spread over West Bengal, Orissa, Bihar and parts of Assam and Tripura. It is observed at p. 30 on the Chapter "Succession to Property" that the succession is in favour of the son, in his absence to the daughter, in their absence to the relative. Even among Santhals, it is not strictly patrilineal. If they have no son, succession is open to the daughter and if they have neither son nor daughter then to the relative of the family. Some people among them preferred succession among son and daughter equally. On husband's demise, the widow gets a share in the property, as life estate. In their conclusion at p. 37, they have stated that the Santhals and Saora tribals practise patrilineal as a mode of succession. At pp. 38-43, after detailed discussion it is stated that though there is considerable "ongoing acculturation process", the tribes have not completely discarded the customs. At p. 45, it was mentioned that though Santhal society is predominantly patrilineal, they do not strictly adhere to it. The inheritance in favour of the daughter has been softened but Saora society is conservative and less exposed to the winds of change. They preferred sons to daughters only if there is no son in the family and other relatives of the family. However, the widow inherits the estate of her husband. The working group of the 7th Five-Year Plan on tribal development recommended codification of customary laws prevalent among the tribals in its report at pp. 323-24 of the Planning Commission documents. Dr B.L. Maharde, a bureaucrat of Rajasthan Civil Services, in his *History and Culture of Girjans* in the State of Rajasthan, narrated the practices of tribals at p. 84 stating that the property after the death of the father is equally divided among the sons by the village elders of the Panchayat and in case of dispute, by the private Panchayat. The youngest son, since he lives with his father, is entitled to have an extra share. The grandson of his predeceased son is entitled to an equal share. Daughters are not entitled to inherit their fathers' property, but they can share the animal wealth. The son-in-law is entitled to equal share. The widow has right to property which she loses on

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Page 34 Wednesday, March 02, 2022
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her remarriage. We do not get any material as regards succession among the tribals in Madhya Pradesh, Maharashtra and Gujarat and in view of the general trend we assume that in those States also patrilineal succession would be in vogue.

**46.** It would thus be seen that the customs among the Scheduled Tribes, vary from tribe to tribe and region to region, based upon the established practice prevailing in the respective regions and among particular tribes. Therefore, it would be difficult to decide, without acceptable material among each tribe, whether customary succession is valid, certain, ancient and consistent and whether it has acquired the status of law. However, as noticed above, customs are prevalent and are being followed among the tribes in matters of succession and inheritance apart from other customs like marriage, divorce etc. Customs became part of the tribal laws as a guide to their attitude and practice in their social life and not a final definition of law. They are accepted as a set of principles and are being applied when succession is open. They have accordingly nearly acquired the status of law. Except in Meghalaya, throughout the country patrilineal succession is being followed according to the unwritten code of customs. Like in Hindu law, they prefer son to the daughter and in his absence daughter succeeds to the estate as a limited owner. Widows also get only limited estate. More than 80 per cent of the population is still below poverty line and they did not come on a par with civilized sections of the non-tribals. Under these circumstances, it is not desirable to grant general declaration that the custom of inheritance offends Articles 14, 15 and 21 of the Constitution. Each case must be examined and decided as and when full facts are placed before the court.

**47.** Section 2(2) of the Hindu Succession Act, similar to Hindu Marriage Act, Hindu Adoptions and Maintenance Act, excludes applicability of customs to the Scheduled Tribes as defined by clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette directs otherwise. Explanation II to Article 25 does not include them as Hindus. The Chotanagpur Tenancy Act and the Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949, the Bihar Scheduled Areas Regulation, 1969 intend to protect the lands of the tribals and their restoration to them. Sections 7 and 8 of the Act regulate the right of khunt-katti raiyats. By operation of customary inheritance, the son and lineal descendants inherit the lands held by the tribes for the purpose of cultivation by himself or male members of his family. Section 76 read with Section 6 gives effect to custom, usage or customary right provided thereunder not inconsistent with or not necessarily modified or abolished by the provisions of the Act. The law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. As stated earlier, it must keep pace with the march of time with the heartbeats of the society and with the needs and aspirations of the people. As seen, even among the tribals

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Page 35 Wednesday, March 02, 2022
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in Bihar, the customs have now undergone advancement. They prefer both son and daughter alike though not uniformly. Succession is patrilineal; Santhals practically adapted the Mitakshara Hindu law of succession. The Hindu Succession Act modified the pre-existing law and intestate succession gives right of succession to a Hindu female. Section 14(1) has enlarged limited estate known to Shastric law into absolute right of property held by a Hindu female. In the *Law of Intestate and Testamentary Succession*, (1991 Edn.) at p. 21, Prof. Diwan has stated that Section 2(2) does not mean that Scheduled Tribes which were, prior to the codified Hindu law, governed by Hindu law will not, now, be governed by the Hindu law. If before codification, any Scheduled Tribe was governed by Hindu law, it will continue to be governed by it. However, it would be uncodified Hindu law that would apply to them. It is settled law that the procedural or substantive law which offend the fundamental rights are void. Sections 7 and 8 of the Act exclude women tribals from inheritance to the khunt-katti raiyati rights solely on the basis of sex and confine succession and inheritance among male descendants only. In *Maneka Gandhi* v. *Union of India*[15] this Court held that reasonableness is an essential element of equality; non-arbitrariness pervades Article 14. The court must consider the direct and inevitable effect of the action in adjudging whether the State action offends the fundamental right of the individual. This Court sustained the validity of Passport Act, 1967 by reading down the statutory provisions. Justice, equity and good conscience are integral part of equality under Article 14 of the Constitution which is the genus and Article 15 is its specie. In *Harbans Singh* v. *Guran Ditta Singh*[26] this Court held that though the Transfer of Property Act, 1882 did not per se apply to the State of Punjab at the relevant time, the general principles contained therein being consistent with justice, equity and good conscience would apply.

**48.** Under the General Clauses Act, 1897 male includes female. In *Jitmohan Singh Munda* v. *Ramratan Singh*[1] interpreting Mundari khunt-kattidari widow's right to remain in possession of Mundari khunt-kattidari tenancy, after the death of her husband, the Bihar High Court held that the widow would have life estate in tenancy rights as they have adopted Hindu law of succession. There is no reference whatsoever to the exclusion of the widow of the particular Mundari. Therefore, in respect of khunt-kattidari tenancy, the widow would be entitled to possession and Section 8 is not inconsistent with that position. In *Jani Bai* v. *State of Rajasthan*[27] interpreting Rajasthan Colonisation Act, 1954 (27 of 1954), the Division Bench held that male descendants would include female descendants and the adult son and the daughter should be treated alike both being equally eligible for allotment under the Rules under that Act. By operation of Section 13(1) of the General Clauses Act, males include females, of course, subject to

26 (1991) 2 SCC 523 : (1991) 1 SCR 614
27 AIR 1989 Raj 115 : (1989) 1 Raj LR 139

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Page 36 Wednesday, March 02, 2022
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statutory scheme which by now is subject to the Constitution. In Sections 7 and 8 of the Act if the words "male descendants" are read to include female descendants, the daughter, married or unmarried and the widow are entitled to succeed to the estate of the father, husband or son. Scheduled Tribes are as much citizens as others and are entitled to equality. Sections 7 and 8 are accordingly read down and so on that premise are valid.

**49.** The question then is: whether the interpretation is consistent with sub-section (2) of Section 4 of the Hindu Succession Act, 1956? Entry 7 of List III of the Seventh Schedule to the Government of India Act, 1935 provided "Wills, intestacy and succession save as regards agricultural land." Entry 5 of the Concurrent List in the Seventh Schedule of the Constitution omitted the words "save as regards agricultural lands" and provided merely "intestacy and succession; joint family and partition". In *Basavant Gouda* v. *Smt Channabasawwa*[28] a Division Bench of the Mysore High Court in paragraph 11 had held that Entry 5 of the Concurrent List of the Seventh Schedule would apply to succession of agricultural lands under the Hindu Succession Act. It followed the judgment of *Amar Singh* v. *Baldev Singh*[29] in its support. The same view was taken by a Division Bench of the Orissa High Court, in a judgment rendered by B. Jagannadha Das, J., as he then was, in *Laxmi Debi* v. *S.K. Panda*[30].

**50.** In *Gopi Chand* v. *Bhagwani Devi*[31] a Division Bench of the Punjab High Court had held that sub-section (2) of Section 4 of the Hindu Succession Act does not apply to the Delhi Land Reforms Act, 1954 (8 of 1954) conferring permanent tenancy rights of Bhumidhar or asami, laid down in Section 50 of that Act. If it is otherwise, it would be inconsistent with Section 4(1) of the Hindu Succession Act and would be void. In *Phulmani Dibya* v. *State of Orissa*[32] a Full Bench has held that exclusion of woman from succession to any Brahmottar grant discriminates against woman under Article 15 on ground of sex and that, therefore, became void offending Article 15(1). In *Tokha* v. *Samman*[33] a Single Judge of that Court held that the occupancy rights held by a limited owner (widow) before the Hindu Succession Act had come into force, enlarged as absolute property under the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act, 1953 (8 of 1953) and thereby she became an absolute owner and was entitled to gift over that land as an absolute owner which was upheld.

**51.** In Mayne's *Hindu Law and Usage* (13th Edn.), revised by Justice A. Kuppuswami, commenting on sub-section (2) of Section 4 of the Hindu Succession Act, in paragraph 17 at p. 960, it is observed that the legislature

28 AIR 1971 Mys 151 : (1970) 2 Mys LJ 540
29 AIR 1960 Punj 666 (FB) : 62 Punj LR 655 : ILR (1960) 2 Punj 665 (FB)
30 AIR 1957 Ori 1 : 22 Cut LT 466
31 AIR 1964 Punj 272 : ILR (1964) 1 Punj 772
32 AIR 1974 Ori 135
33 AIR 1972 P&H 406 : 74 Punj LR 570

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Page 37 Wednesday, March 02, 2022
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can always provide that the devolution of tenancy rights shall be dependent upon personal law, i.e., the Hindu Succession Act. The legislature can also lay down that in certain circumstances there would be one kind of succession and in different circumstances the holding shall devolve on different persons. Devolution in the case of a Bhumidhari under the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (1 of 1951), is not affected by Section 14 of the Hindu Succession Act as tenures created by the Uttar Pradesh Act did not create proprietary interest but only tenancy right. In *Bajaya* v. *Gopikabai*[34] a Bench of three Judges of this Court held that Bhumiswami and Bhumidhari rights are two classes of tenure-holders of lands paying land revenue to the State and are governed by the provisions of the Hindu Succession Act. The tenancy rights having been separately dealt with by the Madhya Pradesh Land Revenue Code, the devolution of the rights of an ordinary tenancy and an occupancy tenant are in accordance with the personal law of the deceased tenant.

**52.** Sub-section (2) of Section 4 of the Hindu Succession Act, to remove any doubts, has declared that the Act shall not be deemed to affect the provisions of any law in force providing for (*i*) prevention of fragmentation of agricultural holdings; (*ii*) for the fixation of ceiling; and (*iii*) for the devolution of tenancy rights in respect of such holdings. It is the policy of the legislature that with a view to distribute the surplus land ceiling on agricultural land has been prescribed so that the surplus land would be distributed to the landless persons etc. Therefore, the operation of such law was excluded from the purview of the Hindu Succession Act. This Court in *Sooraj* v. *S.D.O.*[35] has upheld the ceiling law and held that married daughters are not entitled to intestate succession of the father nor a separate holding since the definition of 'family' did not include married daughter. The devolution of the tenancy rights are governed by Entry 18 to List II of the Seventh Schedule. Therefore, the Hindu Succession Act to that extent stands excluded. As regards the prevention of fragmentation of agricultural land, it is already held that if at the instance of sons the agricultural lands are divisible and each son is entitled to hold and enjoy his share separately, daughters also would be entitled to a separate share at a partition and enjoyment therein. The fragmentation in that behalf, therefore, should not stand an impediment to the daughter's claiming an intestate succession and to claim a share in the agricultural lands. The Hindu Succession Act regulates succession of agricultural land and the word 'property' in Sections 6 to 8, 14 and 15 and other sections in that Act would include agricultural land. Thus considered, the operation of sub-section (1) of Section 4 will have an overriding effect for Hindu female claiming parity with Hindu male for succession to the agricultural lands held by the father, mother, etc. and sub-section (2) does not stand an impediment for such a right of devolution.

34 (1978) 2 SCC 542
35 (1995) 2 SCC 45

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Page 38 Wednesday, March 02, 2022
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**53.** The reason assigned by the State-level Committee is that permitting succession to the female would fragment the holding and in the case of inter-caste marriage or marriage outside the tribe, the non-tribals or outsiders would enter into their community to take away their lands. There is no prohibition for a son to claim partition and to take his share of the property at the partition. If fragmentation at his instance is permissible under law, why the daughter/widow is denied inheritance and succession on a par with the son? In Kerala State, the Hindu Succession Act, 1956 was modified in relation to its application to the State of Kerala, by amendment of Devasthanam Properties (Admission of Temporary Management and Control and Hindu Succession) (Amendment) Act, 1958 and of the (Kullaiamma Thumporan Korilakam Society Partition) Act, 1961. Kerala Hindu Joint Family Abolition Act, 1975 brought about change bringing female into the fold for succession per capita. Equally, in the Hindu Succession (A.P. Amendment) Act 13 of 1986, the Andhra Pradesh Legislature took the lead and amended Section 6 of the parent Hindu Succession Act and Section 29-A conferred on the unmarried daughter the status of coparcener by birth and has given her right to claim partition and equal share along with the sons. In the event of sale by the daughter of the property obtained at the partition Section 29-C gives right to male heirs to purchase the property on payment of the consideration. In the event of disagreement on the consideration, the court having the jurisdiction is given power to determine such consideration. In the event of non-payment by male heirs, the right has been given to the female heir to sell the property to outsiders. The Karnataka and Maharashtra Legislatures have followed suit and suitably amended the Hindu Succession Act, 1956.

**54.** Throughout the country, the respective State laws prohibit sale of all lands in tribal areas to non-tribals, restoration thereof to the tribals in case of violation of law and permission of the competent authority for alienation is a must and mandatory and non-compliance renders the sale void. The Acts referred to hereinbefore prevailing in Bihar State expressly prohibit the sale of the lands by the tribals to the non-tribals and also direct restoration or recompensation by equivalent lands to the tribals. Therefore, if the female heirs intend to alienate their lands to non-tribals, the Acts would operate as a check on their action. In the event of any need for alienation by a tribal female, it would be only subject to the operation of these laws and the first offer should be given to the brothers or agnates. In the event of their refusal or unwillingness, sale would be made to other tribals. In the event of a disagreement on consideration, the civil court of original jurisdiction should determine the same which would be binding in the partition. In the event of their unwillingness to purchase the same, subject to the permission of the competent officer, a female tribal may sell the land to tribals or non-tribals. Therefore, the apprehension expressed by the State-level Committee is unfounded.

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Page 39 Wednesday, March 02, 2022
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**55.** The Christians in India are governed by the Indian Succession Act, 1925. It is stated that by operation of Section 1 notification issued under the Government of India Act of 1935, the operation thereof stood excluded to the tribal Christians residing in the State of Bihar. There is no such prohibition in other States. Even otherwise, though the principles of the Indian Succession Act are strictly inapplicable, the general principles therein being consistent with justice, equity and good conscience should equally be applicable to the tribal Christians of Bihar State.

**56.** I would hold that the provisions of the Hindu Succession Act, 1956 and the Indian Succession Act, 1925 though in terms, would not apply to the Scheduled Tribes, the general principles contained therein being consistent with justice, equity, fairness, justness and good conscience would apply to them. Accordingly I hold that the Scheduled Tribe women would succeed to the estate of their parent, brother, husband, as heirs by intestate succession and inherit the property with equal share with the male heir with absolute rights as per the general principles of the Hindu Succession Act, 1956, as amended and interpreted by this Court and equally of the Indian Succession Act to tribal Christians. However, the right of alienation will be subject to the relevant provisions like the Act, the Bihar Scheduled Areas Regulation, 1969, Santhals (Amendment) Act, 1958, Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949 as amended from time to time etc. They would be applicable to them and subject to the conditions mentioned therein. In case the tribal woman intends to alienate the land, subject to obtaining appropriate permission from the competent authority under the appropriate Act, she should first offer the land for sale to the brother or in his absence to any male lineal descendant of the family and the sale will be in terms of mutually agreed consideration and other terms etc. In case of any disagreement on consideration, the consideration shall be determined on an application filed by either party before the competent civil court of original jurisdiction over the area in which the land is situated and the decision of the civil court after adduction of evidence and consideration thereof, shall be final and binding on the parties. In case the brother or lineal descendant is not willing to purchase either by mutual agreement or as per the price settled by the civil court, the female tribal woman shall be entitled to alienate the land to the non-tribal but subject to the provisions of the appropriate Act.

**57.** The writ petitions are accordingly allowed and rule nisi is made absolute. The interim direction given for the protection of Petitioners 2 and 3 in the first writ petition would continue until they voluntarily seek its withdrawal or modification in writing made to the District Superintendent of Police and an order in that behalf is passed and communicated to them.

**58.** In the circumstances, parties are directed to bear their own costs.

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