IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL MISC.APPLICATION NO. 26957 of 2017
With
R/CRIMINAL MISC.APPLICATION NO. 24342 of 2017
With
R/SPECIAL CRIMINAL APPLICATION NO. 7083 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No
	Circulate this judgement in the subordinate judiciary.	

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NIMESHBHAI BHARATBHAI DESAI
Versus
STATE OF GUJARAT

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Appearance:
MR JIGAR G GADHAVI(5613) for the PETITIONER(s) No. 1
MR RAJESH K SHAH(784) for the RESPONDENT(s) No. 2
MR. MITESH AMIN, LD. PUBLIC PROSECUTOR(2) for the RESPONDENT(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**

Date : 02/04/2018

CAV JUDGMENT

1. As the issues raised in all the three captioned applications are inter-related, the parties are also the same and the prayer in two of the applications filed by the accused persons is to quash the selfsame first information report, those were heard analogously and are being disposed of by this common judgment and order.

2. The Criminal Misc. Applications Nos.26957 of 2017 and 24342 of 2017 respectively are filed by the accused persons with the following prayers;

> "(A) The Honourable Court may be pleased to quash and set aside the FIR being C.R. No.I-131/2017 lodged with Idar Police Station on 30.08.2017 for the offence under sections 376(a) (amended section 376-B), 377, 498(A) and 114 of the Indian Penal Code.
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> (B) Pending admission, hearing and final disposal of the present application, this Hon'ble Court may be pleased to stay the further proceedings arising out of the said FIR being C.R. No.I-131/2017 lodged with the Idar Police Station on 30.08.2017 for the offence under section 376(a) (amended Section 376-B), 377, 498(A) and 114 of the Indian Penal Code
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> (C) To pass such other further order as deemed fit in the facts and circumstances of the case."

3. So far as the third petition is concerned, i.e, the Special Criminal Application No.7083 of 2017, the same has been filed by the original first informant with the following prayers;

> *"(A) Your Lordships may be pleased to admit and allow this petition*
>
> *(B) Your Lordships may be pleased to issue a writ of mandamus, orders, directions in the nature of mandamus by directing the respondents to carry out the*

investigation in pursuance to complaint dated 28.8.2017 and representation dated 01.09.2017 by the independent agency like CID Crime or CBI;

(C) Your Lordships may be pleased to consider the case of the petitioner in view of the judgment of the Hon'ble Supreme Court reported in 2017(2) GLH P. 818n case of Rajesh Sharma and Ors. vs. State of U.P., Your Lordship may be pleased to direct the District Judge, S.K to scrutinize the complaint as per the interim direction of the Hon'ble Supreme Court and complaint may be sent to the appropriate authority for investigation;

(D) Pending hearing and final disposal of this petition, Your Lordships may be pleased to direct the respondents to produce the investigation report in pursuance to the complaint dated 28.8.2017 and 1.9.2017 before this Hon'ble Court.

(E) Your Lordships may be pleased to grant any other nd further relief which this Hon'ble Court may deem just, fit and proper in the interest of justice."

4. Let me first deal with the two applications, seeking quashing of the first information report.

5. It appears from the materials on record that the first informant got married with one Nimeshbhai Desai, original accused No.1 on 20th May, 2014. Soon after the marriage, matrimonial disputes cropped up between the husband and wife, which ultimately led to the filing of the first information report for the offences enumerated above. It appears that the husband of the first informant is a doctor. The first informant is also a doctor (pediatrician). The first information report is extracted hereunder;

"My name is Nikita, w/o Nimesh Bharatbhai Desai, aged about 28 years, occupation service, residing at Mahadev Vas, Kheralu, Tal. Kheralu, Dist. Mahesana. Presently

residing at B-25-26, Dhaneshwar Society, Barwav Road, Idar, Dist. Sabarkantha. Mobile No. 9428312479.

I dictate the fact of my complaint that I reside at the above address and since 20/3/2017, I am staying at Idar with my father Bharatbhai Prabhudas Desai. I work as Pediatrician in the Sanjivani Pediatric Private Hospital and I commute from Idar to Himmatnagar at the place of my service. My marriage was solemnized on 20/5/2014 with Nimesh Bharatbhai Desai at Mahadev Vas, Kheralu as per customs of our society. Since then, we were living together as husband and wife. After marriage, I stayed at Kheralu with my husband and mother-in-law and father-in-law for one month. Thereafter, as my husband was doing internship of M.D. at Vadodara, I stayed with my husband for two and a half years at 22, Vrajvihar Duplex, Near Vishwamitri Society, Near Gujarat Tact, Vishwamitri, Vadodara. I was also doing service at the Dadaji Pediatric Hospital, Baranpur, Vadodara and I was drawing monthly salary of Rs. 12,000/-. Thereafter, in August 2016, as my husband completed M.D., he got a service at Surat as a Medical Officer in Unn Corporation. We came to stay at Surat from Vadodara and we were staying at 602, Shalin Enclave, Near Raj Corner, SUDA Aawas Road, Pal, T.P. 10, L.P. Savani Circle, Adajan, Surat. I was doing service as a Medical Officer at the Neo Plus Neonatal ICU Hospital, Adajan at the salary of Rs. 16,000/- per month. I was staying with my husband and as my father-in-law is working as Veterinary Officer at Satlasana, he stays there and my mother-in-law Nayanaben stays with my Jeth (elder brother of husband) at Ahmedabad and commutes to Satlasana. I do not have any children. My husband loved me very much till about six months from my marriage and we consumed all the rights as husband and wife. Suddenly after six months of my marriage, I noticed that the behaviour of my husband had changed and he developed sexual perversion. But as we both were having good jobs and as we were husband and wife, I ignored his such behaviour of sexual perversion and as I used to support my husband in all the works as per his desire and as I did not oppose him, he had got a free hand. His actions changed as the days passed and his bad demands also increased. When I used to stay alone at my house at Adajan, Surat after my job, my husband used to force me to indulge in oral sex with him and if I would oppose, then he sometimes used to allure me with love

and sometimes, he used to threaten me. But I used to bear all these as I was his wife. Thereafter, I realized that my husband became more perverted. On holidays, when we used to go out to gardens or public places, he used to force me to have sexual relations in public and he used to often compel me to do oral sex. Thereafter, his mental pervertness increased and at times, he used to have sexual intercourse with me forcibly against my consent without considering whether it was night or day. After some time, along with the oral sex, my husband used to take off my clothes and used to tell me to have unnatural sex with him. When I denied to do it, he started moving his fingers on my vagina and started oral sex. Because of his such act, I was mentally and physically broken down. When I told my husband not to do unnatural sex with me, he threatened me saying you are my lawful wife and being your husband I have right over all the parts of your body and you do not have any child till today and you will not have any child in future also. I have made you my wife just to fulfill my sexual desires. You can go wherever you want. I will get much better girls than you. He used to tell me this and if I do not give in to his demands, he used to beat me up. Though my father-in-law and mother-in-law were aware about this, they used to provoke my husband to give me this kind of physical and mental torture. However, I used to bear all this harassment so that me and my parents are not defamed in the society and therefore, I did not inform my parents regarding this.

My husband forcefully made me to remove my clothes against my wish and committed oral sex and raped me at about half past nine in the night on 19/03/2017. He started oral sex by moving fingers over my private part i.e. vagina. Therefore, I got frightened by his such act. I informed my brother Amar residing in Idar about such indecent acts of my husband over phone and silently slept in the main room of our house. I and my husband woke up in the morning next day. After having breakfast, when my husband went for the job, I grabbed the opportunity and came to my maternal house in Idar from Adajan Surat. I informed my parents and my brother about indecent acts of my husband and physical and mental harassment being meted out to me. The persons from maternal side held talks with in-laws for compromise in this regard so that our reputation is not

tarnished in the society, but they had been telling me till date that, "You can lodge the complaint anywhere you want. Our son will remain as he is and he will not improve." Therefore, I have been compelled to lodge the complaint. It is my lawful complaint against my husband and my in-laws. My witnesses are the persons mentioned in the complaint and other persons, who may be found during the investigation.
The facts of my complaint as dictated are true and correct. "

6. It also appears from the materials on record that a Coordinate Bench of this Court granted anticipatory bail to the husband by an order dated 12th October, 2017 passed in the Criminal Misc. Application No.25606 of 2017. The applicants of the Criminal Misc. Application No.24342 of 2017 are the father-in-law and the mother-in-law respectively of the first informant.

7. On 6th November, 2017, this Court passed the following order;

"1. This Court is called upon to decide a question of utmost public importance. whether a wife can initiate prosecution against her husband for unnatural sex punishable under section 377 of the Indian Penal Code ?. If the husband forces his wife to indulge in oral sex, whether the same would constitute an offence under section 377 of the IPC?. If the husband compels his wife to indulge in oral sex, whether the same would constitute an offence of cruelty within the meaning of section 498-A of the IPC. This Court would also like to examine the question whether forcing a wife by the husband to indulge in oral sex would amount to rape punishable under section 376 of the IPC.

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

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

4. The following three kinds of marital rape, generally prevalent in the society;

** Battering rape: In this type of marital rape, women experience both physical and sexual violence in the relationship and in many ways. Some instances are those where the wife is battered during the sexual violence, or the rape may follow a physical violent episode where the husband wants to make up and coerces his wife to have sex against her will. In most cases, the victims fall under this stated category.*

** Force only rape: In this type of marital rape, husbands use only that amount of force, as it is necessary to coerce their wives. In such cases, battering may not be a characteristic and women who refuse sexual intercourse usually face such assaults.*

** Obsessive rape: In obsessive rape, assaults involve brutal torture and/or perverse sexual acts and are most commonly violent in form. This type has also been labeled as sadistic rape.*

5. Mr. Gadhvi, the learned counsel appearing for the applicant and Mr. Devnani, the learned APP appearing for the State are requested to assist the Court.

6. Let notice be issued to the respondents, returnable on 23.11.2017. Mr. Devnani, the learned APP, waives service of notice for and on behalf of the respondent No.1. The respondent No.2 be served directly through the Investigating Officer of the concerned police station.

Let the matter appear on top of th board."

8. **Submissions on behalf of the accused-applicants;**

8.1 Mr. Jigar Gadhvi, the learned counsel appearing for the accused-applicants vehemently submitted that even if the entire case of the prosecution is believed or accepted to be true, none of the ingredients to constitute the offence punishable under sections 376 and 377 of the IPC are spelt out. Mr. Gadhvi would submit that it is not in dispute that Nimeshbhai-original accused No.1 and the first informant are lawfully wedded husband and wife. In such circumstances, the wife cannot file a first information report for the offence of rape punishable under section 376 of the IPC or even for an unnatural offence punishable under section 377 of the IPC. The learned counsel would submit that in India, marital rape is not recognized and the same is not an offence. However, Mr. Gadhvi very fairly submitted that at the most a prima facie case of cruelty within the meaning of section 498A of the IPC could be said to have been made out.

8.2 Mr. Gadhvi submitted that in a dispute essentially between the husband and wife, the parents of the husband have also been dragged in the prosecution. According to the learned counsel, even otherwise, the allegations levelled by the first informant are far fetched and unpalatable. In such circumstances, referred to above, the learned counsel prays that there being merit in both the applications filed by the accused-applicants, those be allowed and the first information report be quashed so far as the offence punishable under sections 376 and 377 of the IPC is concerned.

9. **Submissions on behalf of the State.**

9.1 On the other hand, these two applications have been vehemently opposed by Mr. Amin, the learned Public Prosecutor appearing for the State. Mr. Amin submitted that no case worth the name for quashing of the first information report is made out at this stage. The plain reading of the first information report do disclose commission of very serious cognizable offence and the police should be permitted to carry out the investigation in accordance with law. According to the learned Public Prosecutor, no interference is warranted at the end of this Court at this stage. In such circumstances, the learned Public Prosecutor prays that there being no merit in the two applications filed by the accused persons, those be rejected.

10. **Submissions on behalf of the victim**

10.1 Mr. Shah, the learned counsel appearing for the first informant has also vehemently opposed the two applications filed by the accused-applicants. He would submit that more than a prima facie case is made out having regard to the serious nature of the allegations, and in such circumstances, the police should be permitted to complete the investigation in accordance with law. According to Mr. Shah, the conduct of the husband could be termed as most disgraceful and condemnable. Mr. Shah would submit that the case is one of marital rape. According to him, marital rape means “unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence or when she is unable to give consent”. He would submit that the case at hand is one of non-consensual act of violent perversion by a husband against the wife where she is abused physically and sexually.

11. In such circumstances, referred to above, Mr. Shah prays that there being no merit in the two applications filed by the accused-applicants, those be rejected.

12. Having heard the learned counsel appearing for the parties and having considered the materials on record, the following questions fall for my consideration;

(I) Whether a husband can be prosecuted for the offence of rape punishable under section 376 of the IPC at the instance of his wife?

(II) Whether a wife can initiate proceedings against her husband for unnatural sex under section 377 of the IPC?

(III) Whether there is any concept of marital rape?

(IV) Whether the acts complained by the wife in her first information report would fall within the ambit of “unnatural offence” within the meaning of section 377 of the IPC?.

(V) Whether the acts of sexual assault or sexual perversion as alleged by the wife against her husband would constitute physical and mental cruelty within the meaning of section 498A of the IPC?.

(VI) Whether a person can be held guilty of outraging the modesty of his own wife?

ANALYSIS

13. Section 375 of the IPC is extracted hereunder;

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

a. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

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

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

d. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:—

First.—Against her will.

Secondly.—Without her consent.

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

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

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

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

Seventhly.—When she is unable to communicate consent.

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

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

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

Exception I.—A medical procedure or intervention shall not onstitute rape.

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

14. The exception-II in section 375 IPC, referred to above, makes it clear that sexual intercourse or sexual acts by a man with his own wife, the wife not being under 18 years of age, is not rape.

15. Thus, if a husband has sexual intercourse or indulges in any other sexual acts with his own wife, who is under 18 years of age, then the same would constitute an offence of rape. In the case at hand, the acts complained or alleged would definitely amount to rape within the meaning of section 375 of the IPC, but it is the lawful marriage between the accused and the first informant that saves the situation for the husband. Section 375 does not recognize the concept of marital rape. If the complainant is a legally wedded wife of the accused, the

sexual intercourse with her or any sexual acts by accused would not constitute an offence of rape even if it was by force, violence or against her wishes.

16. Section 376-B makes sexual intercourse by husband upon his wife during separation an offence, which is punishable with imprisonment of not less than two years, but which may extend to seven years. The explanation in section 376-B clarifies that "sexual intercourse" which mean any of the acts mentioned in clause (a) to (d) of section 375.

17. Section 376-B is extracted hereunder;

> *"376-B.* ***Sexual intercourse by husband upon his wife during separation****-Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.*
>
> *Explanations: In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.*

18. Thus, exception to section 375 IPC enacts that "sexual intercourse by a man with his own wife, not being under 18 years of age, is not rape." That section, therefore, applies to the cases where the husband and wife are not living separately under a decree, custom or usage. Section 376-B applies to the cases where a wife is living separately from her husband under a decree of separation or otherwise. In such cases, if the husband commits sexual intercourse with his wife without her consent, he would be guilty of rape.

19. Under the English Law, husband and wife were considered as one person. In 1736. Sir Mathew Hale stated: "The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband. which she cannot retract.", History of the Pleas of the Crown: 1 Hale P C (1736) 629.

20. Similarly, in 1803, East declared: "..... a husband cannot by law be guilty by ravishing his wife, on account of the matrimonial consent which she cannot retract.", Treatise of the Pleas of the Crown: 1 East P C 446.

21. In R. v Clarence, (1888) 22 QBD 23; (1886-90) AII ER 133 CCR, the husband was suffering from a venereal disease and he communicated to his wife through sexual intercourse. He was convicted by the trial court on charges of unlawfully conflicting grievous bodily harm and of assault but the conviction was quashed by a court of thirteen Judges with four dissents. Hale's proposition was accepted as sound by majority Judges. Field and Charles, JJ., however, observed that there might be cases in which a wife might lawfully refuse sexual intercourse to her husband. In such cases, the husband might be held guilty of a crime.

22. But thereafter the modern philosophy played its part. In R. v Miller, (1954) 2 AII WR 529: (1954) 2 QB 282: (1954) 2 WLR 138,' the wife had presented a petition for divorce. But before it was heard, the husband committed sexual intercourse

with her against her will. The husband was charged with rape and with assault causing bodily harm. The court quashed the charge of rape but refused to quash that of assault.

23. Lynskey, J, stated:

> "*Although the husband has a right to marital intercourse, and the wife cannot refuse her consent, and although if he does have intercourse against her actual will, it is not rape, nevertheless he is not entitled to use force or violence for the purpose of exercising that right. If he does so, he may make himself liable to the criminal law, not for the offence of rape. but for whatever other offence the facts of the particular case warrant. If he should wound her, he might be charged with wounding or causing actual bodily harm, or he may be liable to be convicted of common assault. The result is that in the present case I am satisfied that the second count is a valid one and must be left to the jury for their decision, Ibid at p. 533 (AER): 291 (QB)" (Emphasis supplied)*

24. Reference may be made to a decision of the House of Lords in R. v R, (1991) 4 All ER 481. In that case, in October, 1989, the wife had already left her matrimonial home. Divorce proceedings were, however, not initiated. In November. 1989, the husband went to the house of the wife's parents and attempted to have sexual intercourse with her against her will. He also assaulted her. He was charged on two counts, the first being rape and the second being assault causing bodily harm to wife. He was convicted on both the counts.

25. Confirming the conviction, and commenting upon Hale's proposition, Lord Keith stated:

> "The position is that that part of Hale's proposition which asserts that a wife cannot retract the consent to sexual

> intercourse which she gives on marriage has been departed from in a series of decided cases. On grounds of principles there is no good reason why the whole proposition should not be held inapplicable in modern times, Ibid, at p. 488." [Emphasis supplied]

26. Having regard to the position of law prevailing as on date in this country, the wife cannot initiate proceedings against her lawfully wedded husband for the offence of rape punishable under section 376 of the IPC. One of the origins of the concept of a marital exemption from rape laws (a rule that a husband cannot be charged with the rape of his wife) is the idea that by marriage a woman gives irrevocable consent for her husband to have sex with her any time he demands it. The issue with regard to marital rape shall be discussed by me a little later and, more particularly, when the same has been raised by the learned counsel appearing for the victim.

27. Let me now deal with section 377 of the IPC.

28. The term 'unnatural offence' comes under Chapter XVI of the Indian Penal Code which deals with the offences affecting human body and finds its place as the last offence of the said chapter. The title of the offence uses the words 'unnatural offences'. The word 'unnatural' 'means contrary to nature; abnormal; not spontaneous. The word 'carnal' implies something relating to the physical, especially sexual needs, and activities. When construed in this way an unnatural offence means sexual activities contrary to the nature. The Indian Penal-Code 1860 defines it as 'carnal intercourse against the order of nature with any man, woman or animal.' Section 377 of the Indian Penal Code 1860 makes it an offence by declaring that "whoever has carnal Intercourse against the

order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine." The .section further makes it clear that penetration would .be sufficient to constitute the carnal intercourse necessary to the offence described in the section.

29. The definition uses the Word 'against the order of nature' without any elaboration, and· leaves It for the courts to interpret.

30. Unnatural offence indicates sexual perversion which takes shape in manifold forms going by different names such as sodomy, buggery, bestiality, tribadism, sadism, masochism. The term unnatural offence implies sexual perversity.

31. History of the legislation

The Indian Penal Code was drafted by Lord Macaulay and was introduced in 1861 during the British time. Thus, it has been largely influenced by the British laws. What was considered crime in Britain at that time was also been made a crime under the IPC to a large extent. “Acts of sodomy were penalized by hanging under the Buggery Act of 1533 which was re-enacted in 1563 by Queen Elizabeth I, after which it became the charter for the subsequent criminalisation of sodomy in the British colonies”. Thus, Section 377 of Indian Penal Code derives its origin from the Buggery Act of 1533. It is important to note here that this law has not been amended

by the Parliament ever since its enactment. This law is based on the Judeo-Christian moral and ethical standards which conceive of sex on purely functional terms, that is, for procreation and on this basis homosexuality is considered as unnatural and against the order of nature.

For the purpose of implementation of Section 377 it becomes important to determine what is natural and what is unnatural. Also, it becomes necessary to determine whether homosexuality is against the order of nature or not.

32. Natural v. unnatural

The Black's law dictionary define natural as (1) "A fundamental quality that distinguishes one thing from another; the essence of something. (2) Something pure or true as distinguished from something artificial or contrived. (3) The basic instincts or impulses of someone or something". To determine what is natural, functional basis is cited which basically means that every instrument or organ of the body has a particular function to perform, and therefore, using such an organ for a purpose inconsistent with its principal function is unnatural. As per this logic, every form of sex other than penile vaginal will be considered as unnatural. The same logic is used to denounce anything other than procreative sex as unnatural. This logic though prima facie illogical has been endorsed by the courts in various cases. In *Khanu v Emperor, AIR 1925 Sind 286* it was held that "the natural object of carnal intercourse is that there should be the possibility of conception of human beings, which in the case of coitus per os is impossible". The courts in India have interpreted the term

"carnal intercourse against the order of nature" so broadly that it now includes from oral and anal sex to penetration into the artificial orifices such as folded palms or between thighs. Such a wide application of section 377 where the language itself is not very clear has led to arbitrary application of the law and thus questions were raised regarding the constitutional validity of this section. Apart from this, section 377 clearly makes homosexuality illegal on the ground that it is against the order of nature. This has also led to various controversies in view of the recognition of right to freedom as a fundamental human right., It is considered world over that the criminalization of homosexual acts is a clear violation of right to privacy. In view of the arbitrariness of section 377 and the violation of basic fundamental rights the constitutional validity of this section was challenged in the court.

33**.** **Constitutional validity**

The constitutional validity of section 377 was challenged in the Delhi High Court in the case of *Naz Foundation v Government of Delhi & Ors., (2010) Cri.L.J., 94 (Delhi).* In this case it was argued that section 377 on account of covering consensual sexual intercourse between the two adults in private, is violative of the fundamental rights guaranteed in Articles 14, 15, 19 and 21 of the Constitution. It was also contended that Article 21 can be curtailed only in case of compelling state interest which is missing in this case. The petitioner also contended that the legislative intent behind section 377 is based on stereotypes that are outmoded and have no historical or logical backing. They also argued that the expression "sex" as used in Article 15 also includes "sexual orientation" and thus according to Article 15 there can be no

discrimination on the basis of sexual orientation. Broadly it was prayed before the high court that section 377 of IPC should be declared *ultra vires* to the constitution, insofar it criminalizes consensual sexual acts of adults.

The two wings of Union of India filed completely counter affidavit in this case. The Ministry of Home Affairs sought to justify the retention of section 377 on the grounds of public health, public disapproval, and social disgust of the act. On the other hand, The Ministry of Health & Family Welfare supported the claim of the petitioners stating that the presence of section 377 in the statute book had hampered the HIV/AIDS prevention efforts and that its deletion would help in treating the homosexuals suffering from HIV/AIDS.

The Delhi High Court rejected the contention of Ministry of Home Affairs on the ground that popular morality or public disapproval cannot be a valid ground for restricting the right under Articles 14 and 21. The court stated that if there is any type of morality that can pass the test of compelling state interest, it must be constitutional morality and not public morality. India is a land of unity in diversity and our constitution drafters recognised this idea and incorporated it in our constitution in the form of various articles which recognises, protects and celebrates diversity. Section 377 of IPC by criminalising the homosexuals only on account of their sexual orientation violates the constitutional morality. In the end, the court accepted all the contentions of the petitioners and declared the part of section 377 *ultra vires* which criminalised consensual sexual acts of adults in private.

However, the court also ruled that the provisions of section 377 would still continue to govern the non-consensual penile non-vaginal sex involving the minors.

This judgment and order of the Delhi High Court was challenged before the Supreme Court in the case of *Suresh Kumar koushal and another v Naz Foundation & others, AIR 2014 SC 563* by groups of religious bodies and individuals including the All India Muslim Personal Law Board, the Apostolic Churches Alliance and the Utkal Christian Council. They contended that section 377 was enacted by the legislature to protect the social values and morals. The Supreme Court accepted such contention and set aside the order of the High court. The Supreme Court took the view that every legislation enacted by the Parliament or State legislature carried with it a presumption of constitutionality. This principal also applies to the pre-constitutional laws. If no amendment is made to a particular law it may suggest that the legislature deems it fit and leave the law as it is. Post-independence almost 30 amendments in the IPC have been made in the IPC including the amendments in the chapter of sexual offences under which the unnatural offences fall. However, the Legislature has chosen not to amend the law or revisit it. This shows that the Parliament, which is indisputably the representative body of the people of India, has not thought it fit or proper to delete the provision. The Supreme Court ultimately declared section 377 to be constitutionally valid. However, the court left it open for the Legislature to delete or amend the law.

The Naz foundation has filed a curative petition challenging this judgement of the Supreme Court. The matter is sub judice before the Supreme Court. However, as of now, section 377 is constitutionally valid and homosexuality is treated as an unnatural offence. Since, this section is operative as of now it becomes pertinent to see the sentencing policy in cases of unnatural offence.

34. Section 377 of the Indian Penal Code is a Victorian Law which can be divided into three neat compartments- first, it penalizes sexual activities between the homosexuals, secondly, it penalizes certain specific sexual activities between the heterosexuals and lastly, it penalizes sexual activities with animals (Bestiality). In the present context, we are to analyze the second type of offences- carnal penetration between the heterosexuals. It is imperative to delve into the ingredients of this section to understand what are the criteria for constitution of the offence. The same are set out below;

> "1) Voluntarily
> 2) Carnal penetration
> 3) Against the order of nature."
>
> The term "Voluntarily" makes it abundantly apparent that irrespective of the wife's consent, indulging into any of the carnal acts as envisaged by this section would invariably be punishable as an unnatural offence.

35. In the aforesaid context, I may refer to and rely upon the decision of the Supreme Court in the case of ***Suresh Kumar Koushal vs. Naz Foundation & Ors***., *AIR 2014 SC 563*. The relevant observations of the Supreme Court are extracted hereunder;

"17.1 Interpretation of Section 377 is not in consonance with the scheme of the IPC, with established principles of interpretation and with the changing nature of society.

17.2 That Section 377 punishes whoever voluntarily has carnal intercourse against the order of nature. This would render liable to punishment- (a) Any person who has intercourse with his wife other than penile - vaginal intercourse; (b) Any person who has intercourse with a woman without using a contraceptive.

17.3 When the same act is committed by 2 consenting males, and not one, it cannot be regarded as an offence when- (i) The act is done in private; (ii) The act is not in the nature of sexual assault, causing harm to one of the two individuals indulging in it; and (iii) No force or coercion is used since there is mutual consent.

17.4 Section 377 must be read in light of constitutional provisions which include the "right to be let alone". The difference between obscene acts in private and public is statutorily recognized in Section 294 IPC.

17.5 The phraseology of Section 377 ('Carnal intercourse against the order of nature') is quaint and archaic, it should be given a meaning which reflects the era when it was enacted. (1860) 17.6 Section 377 should be interpreted in the context of its placement in the IPC as criminalizing an act in some way adversely affecting the human body and not an act which is an offence against morals as dealt with in Chapter XIV. The language of Section 377 is qua harm of adverse affection to the body which is the context in which the section appears. It would have to be associated with sexual assault. It is placed at the end of the Chapter XVI (Of Offences affecting the human body) and not in Chapter XIV (Of Offences affecting the Public Health, Safety, Convenience, Decency and Morals).

17.7 Chapter Headings and sub headings provide a guide to interpreting the scope and ambit of Section 377. The Petitioners rely on G.P. Singh, Principles of Statutory Interpretation,13th Ed. 2012, pp 167 – 170, Raichuramatham Prabhakar v. Rawatmal Dugar, (2004) 4 SCC 766 at para 14 and DPP v. Schildkamp, 1971 A.C. 1 at page 23. Headings or Titles may be taken as a condensed name assigned to indicate collectively the characteristics of the subject matter dealt with by the enactment underneath.

17.8 Section 377 is impermissibly vague, delegates policy making powers to the police and results in harassment and abuse of the rights of LGBT persons. The Petitioners rely on State of MP v. Baldeo Prasad, (1961) 1 SCR 970 at 989 which held that, 'Where a statute empowers the specified authorities to take preventive action against the citizens it is essential that it should expressly make it a part of the duty of the said authorities to satisfy themselves about the existence of what the statute regards as conditions precedent to the exercise of the said authority. If the statute is silent in respect of one of such conditions precedent, it undoubtedly constitutes a serious infirmity which would inevitably take it out of the provisions of Article 19 (5).' 17.9 Widespread abuse and harassment of LGBT persons u/s 377 has been incontrovertibly established. The appellants rely on paras 21, 22, 50, 74 and 94 of the judgment of the Division Bench of the Delhi High Court in Suresh Kumar Koushal v. Naz Foundation which records evidence of various instances of the use of Section 377 to harass members of the LGBT community. These were based on paras 33 and 35 of the Writ Petition filed by the Naz Foundation challenging the vires of Section 377. It was supported by various documents brought on record, such as Human Rights Watch Report, July 2002 titled, "Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India"; Affidavits giving instances of torture and sexual abuse; Jayalakshmi v. State, (2007) 4 MLJ 849 dealing with sexual abuse and torture of a eunuch by police; An Order of a Metropolitan Magistrate alleging an offence u/s 377 against two women even though there is an express requirement of penetration under the Explanation to Section

377. 17.10 Section 377 is ultra vires of Article 14 as there is no classification apparent on the face of it.

17.11 The appellants contend that Section 377 is too broadly phrased as it may include: (1) Carnal intercourse between husband and wife; (2) Carnal intercourse between man and woman for pleasure without the possibility of conception of a human being; (3) Use of contraceptives between man and woman; (4) Anal sex between husband and wife; (5) Consenting carnal intercourse between man and man; (6) Non consenting carnal intercourse between man and man; (7) Carnal intercourse with a child with or without consent.

17.12 The Section does not lay down any principle or policy for exercise of discretion as to which of all these cases he may investigate. It is silent on whether the offence can be committed taking within its ambit, the most private of places, the home.

17.13 Section 377 targets the LGBT community by criminalizing a closely held personal characteristic such as sexual orientation. By covering within its ambit, consensual sexual acts by persons within the privacy of their homes, it is repugnant to the right to equality.

18. Shri Shyam Divan, learned senior counsel representing respondent No.11-Voices Against 377, made the following arguments:

18.1 Section 377 is ultra vires Articles 14, 15, 19(1)(a) and 21 of the Constitution inasmuch as it violates the dignity and personhood of the LGBT community. Sexual rights and sexuality are a part of human rights and are guaranteed under Article 21. It is scientifically established that consensual same sex conduct is not "against the order of nature". LGBT persons do not seek any special rights. They merely seek their right to equality of not to be criminalized for being who they are. Our Constitution does not deny any citizen the right to fully develop relationships with other persons of the same gender by casting a shadow of criminality on such sexual relationships. Justice Vivian Bose in Krishna v. State of Madras, 1951 SCR 621 stated: 'When there is ambiguity or doubt the construction of any clause in the chapter on Fundamental Rights, it is our duty to resolve it in favour of the freedoms so solemnly stressed.' Section 377 in its interpretation and operation targets LGBT persons and deprives them of their full moral citizenship. This Court has developed great human rights jurisprudence in cases concerning under trials, scavengers and bonded labourers to interpret the notion of 'dignity'. The Delhi High Court has exercised its jurisdiction to separate out the offending portion of Section 377 IPC. Shri Divan also referred to the legislative history of Section 377 IPC and argued that this provision perpetuates violation of fundamental rights of LGBT persons. Shri Divan referred to the incidents, which took place at Lucknow (2002 and 2006), Bangalore (2004 and 2006), Delhi (2006), Chennai (2006), Goa (2007), and Aligarh (2011) to bring home the point that LGBT persons

have been targeted by the police with impunity and the judiciary at the grass route level has been extremely slow to recognize harassment suffered by the victims. He also relied upon 'Homosexuality: A Dilemma in Discourse, Corsini Concise Encyclopaedia of Psychology and Behavioural Science', articles written by Prof. Upendra Baxi and Prof. S.P. Sathe, 172nd Report of the Law Commission which contained recommendation for deleting Section 377 IPC and argued that Section 377 has been rightly declared unconstitutional because it infringes right to privacy and right to dignity. He relied upon the statement made by the Attorney General on 22.3.2012 that the Government of India does not find any legal error in the order of the High Court and accepts the same. Shri Divan further argued that Section 377 IPC targets LGBT persons as a class and is, therefore, violative of Articles 14 and 15 of the Constitution.

19. Shri Anand Grover, learned senior counsel for respondent No.1 made the following submissions:

19.1 Section 377 criminalises certain sexual acts covered by the expressions "carnal intercourse against the order of nature" between consenting adults in private. The expression has been interpreted to imply penile non vaginal sex. Though facially neutral, these acts are identified and perceived by the broader society to be indulged in by homosexual men.

19.2 By criminalising these acts which are an expression of the core sexual personality of homosexual men, Section 377 makes them out to be criminals with deleterious consequences thus impairing their human dignity.

19.3 Article 21 protects intrusion into the zone of intimate relations entered into in the privacy of the home and this right is violated by Section 377, particularly of homosexual men. The issue is therefore whether protection of the privacy is available to consenting adults who may indulge in "carnal intercourse against the order of nature".

19.4 Section 377 does not fulfil the just fair and reasonable criteria of substantive due process now read into Article 21.

19.5 Criminalisation impairs health services for gay men and thus violates their right to health under Article 21.

19.6 Section 377 is vague and seeks to introduce a classification which is not based on rational criteria and the object it seeks to advance is not a legitimate state object.

19.7 The history of unnatural offences against the order of nature and their enforcement in India during the Mogul time, British time and post independence, shows that the concept was introduced by the British and there was no law criminalising such acts in India. It is based on Judeo-Christian moral and ethical standards which conceive of sex on purely functional terms, that is, for procreation. Post independence the section remained on the statute books and is now seen as part of Indian values and morals.

19.8 Though facially neutral, an analysis of the judgments shows that heterosexual couples have been practically excluded from the ambit of the section and homosexual men are targeted by virtue of their association with the proscribed acts.

19.9 The criminalisation of Section 377 impacts homosexual men at a deep level and restricts their right to dignity, personhood and identity, privacy, equality and right to health by criminalising all forms of sexual intercourse that homosexual men can indulge in as the penetrative sexual acts they indulge in are essentially penile non vaginal. It impacts them disproportionately as a class especially because it restricts only certain forms of sexual intercourse that heterosexual persons can indulge in. The expression of homosexual orientation which is an innate and immutable characteristic of homosexual persons is criminalised by Section 377. The section ends up criminalising identity and not mere acts as it is usually homosexual or transgender persons who are associated with the sexual practices proscribed under Section 377 (relied on National Coalition for Gay and Lesbian Equality v. Minster of Justice & Ors. 1998 (12) BCLR 1517 (CC), Queen Empress v. Khairati 1884 ILR 6 ALL 204, Noshirwan v. Emperor). While the privacy of heterosexual relations, especially marriage are clothed in legitimacy, homosexual relations are subjected to societal disapproval and scrutiny. The section has been interpreted to limit its application to same sex sexual acts (Govindrajulu, in re, (1886) 1 Weir

382. Grace Jayamani v. E Peter AIR 1982 Kar 46, Lohana

Vasantlal Devchand v. State). Sexual intimacy is a core aspect of human experience and is important to mental health, psychological well being and social adjustment. By criminalising sexual acts engaged in by homosexual men, they are denied this fundamental human experience while the same is allowed to heterosexuals. The section exposed homosexual persons to disproportionate risk of prosecution and harassment. There have been documented instances of harassment and abuse, for example, Lucknow 2001 and Lucknow 2006.

19.10 Criminalisation creates a culture of silence and intolerance in society and perpetuates stigma and discrimination against homosexuals. Homosexual persons are reluctant to reveal their orientation to their family. Those who have revealed their orientation are faced with shock, denial and rejection and some are even pressurised through abuse and marriage to cure themselves. They are subjected to conversion therapies such as electro-convulsive therapy although homosexuality is no longer considered a disease or a mental disorder but an alternate variant of human sexuality and an immutable characteristic which cannot be changed. Infact the American Psychiatry Association and American Psychological Association filed an amicus brief in Lawrence v. Texas demonstrating the harm from and the groundlessness of the criminalisation of same sex sexual acts.

19.11 Fundamental rights must be interpreted in an expansive and purposive manner so as to enhance the dignity of the individual and worth of the human person. The Constitution is a living document and it should remain flexible to meet newly emerging problems and challenges. The rights under Articles 14, 19 and 21 must be read together. The right to equality under Article 14 and the right to dignity and privacy under Article 21 are interlinked and must be fulfilled for other rights to be truly effectuated. International law can be used to expand and give effect to fundamental rights guaranteed under our Constitution. This includes UDHR, ICCPR and ICESCR which have been ratified by India. In particular the ICCPR and ICESCR have been domesticated through enactment of Section 2 of the Protection of Human Rights Act 1993 (Francis Coralie Mullin v. Administrator, UT of Delhi (1981) 1 SCC 608, M. Nagaraj v. UoI (2006) 8 SCC

212, Maneka Gandhi v. UoI (1978) 1 SCC 248, Tractor Export v. Tarapore & Co., (1969) 3 SCC 562, Jolly George v. Bank of Cochin (1980) 2 SCC 360, Gramaphone Company of India Ltd. v. Birendra Bahadur Pandey (1984) 2 SCC 534, Vellore Citizens Welfare Forum v. UoI (1996) 5 SCC 647, Vishaka & Ors. v. State of Rajasthn & Ors (1997) 6 SCC 241, PUCL v. UoI & Anr (1997) 1 SCC 301, PUCL v. UoI & Anr (1997) 3 SCC 433, Apparel Export Promotion Council v. A.K. Chopra (1999) 1 SCC 759, Pratap Singh v. State of Jharkhand (2005) 3 SCC 551, PUCL v. UoI & Anr. (2005) 2 SCC 436, Entertainment Network (India) Ltd. v. Super Cassette Industries (2008) 12 SCC 10, Smt. Selvi v. State of Karnataka (2010) 7 SCC 263).

19.12 Section 377 violates the right to privacy, dignity and health guaranteed under Article 21 of all persons especially homosexual men.

19.13 Section 377 fails the criteria of substantive due process under Article 21 as it infringes upon the private sphere of individuals without justification which is not permissible. The principle has been incorporated into Indian jurisprudence in the last few years after the Maneka Gandhi case. The test of whether a law is just fair and reasonable has been applied in examining the validity of state action which infringes upon the realm of personal liberty (Mithu v. State of Punjab (1983) 2 SCC 277, Selvi v. State of Karnataka (2010) 7 SCC 263, State of Punjab v. Dalbir Singh (2012) 2 SCALE 126, Rajesh Kumar v. State through Govt of NCT of Delhi (2011) 11 SCALE 182).

19.14 The guarantee of human dignity forms a part of Article 21 and our constitutional culture. It seeks to ensure full development and evolution of persons. It includes right to carry on functions and activities which constitute the bare minimum of expression of the human self. The right is intimately related to the right to privacy. Dignity is linked to personal self realisation and autonomy. Personal intimacies and sexual relations are an important part of the expression of oneself. In light of the right to privacy, dignity and bodily integrity, there should be no restriction on a person's decision to participate or not participate in a sexual activity. By making certain sexual relations between consenting adults a crime, Section 377 by its existence demeans and

degrades people and imposes an examination on sexual intercourse. This is regardless of whether it is enforced. By denying sexual expression which is an essential experience of a human being, Section 377 violates the dignity of homosexual men in particular. Sex between two men can never be penile vaginal and hence virtually all penile penetrative acts between homosexual men are offences. As the society associates these acts with homosexual men they become suspect of committing an offence thus creating fear and vulnerability and reinforcing stigma of being a criminal (refer to Francis Coralie Mullin, Prem Shankar Shukla v. Delhi Administration (1980) 3 SCC 526, Maharashtra University of Health Science and Ors. v. Satchikitsa Prasarak Mandal and Ors. (2010) 3 SCC 786, Kharak Singh, Noise Pollution (V), In re (2005) 5 SCC 733, DK Basu v. State of WB (1997) 1 SCC 416, Gobind, Suchita Srivastava v. Chandigarh Administration (2009) 9 SCC 1, Egan v. Canada [1995] 2 SCR 513, Law v. Canada (Minister of Employment and Immigration [1999] 1 SCR 497, Lawrence v. Texas, National Coalition of Gay and Lesbian Equality & Ors.).

19.15 Right to health is an inherent part of the right to life under Article 21, it is recognised by the ICESC which has been domesticated through Section 2 of the Protection of Human Rights Act 1993. Article 12 of the ICESCR requires states to take measures to protect and fulfil the health of all persons. States are obliged to ensure the availability and accessibility of health services, information, education facilitates and goods without discrimination especially to vulnerable and marginalised sections of the population. The Govt. has committed to addressing the needs of those at the greatest risk of HIV including MSM and transgendered persons. The risk of contracting HIV through unprotected penile anal sex is higher than through penile vaginal sex. The HIV prevalence in MSM is 7.3% which is disproportionately higher than in that of the general population which is less than 0.5%. The prevalence continues to rise in many States and this is because of the stigmatisation of the MSM population due to which they are not provided with sexual health services including prevention services such as condoms. Due to pressure, some MSM also marry women thus acting as a bridge population. Criminalisation increases stigma and

discrimination and acts as a barrier to HIV prevention programmes. Section 377 thwarts health services by preventing collection of HIV data, impeding dissemination of information, forcing harassment, threats and closure upon organisations who work with MSM, preventing supply of condoms as it is seen as aiding an offence; limits access to health services, driving the community underground; prevents disclosure of symptoms; increases sexual violence and harassment against the community; and creates an absence of safe spaces leading to risky sex. There are little if any negative consequences of decriminalisation and studies have shown a reduction in STDs (sexually transmitted diseases) and increased psychological adjustment.

19.16 Section 377 is vague and arbitrary. It is incapable of clear construction such that those affected by it do not know the true intention as it does not clearly indicate the prohibition. The expression "carnal intercourse against the order of nature" has not been defined in the statute. In the absence of legislative guidance, courts are left to decide what acts constitute the same. A study of the cases shows that application has become inconsistent and highly varied. From excluding oral sex to now including oral sex, anal sex and penetration into artificial orifices such as folded palms or between thighs by terming them as imitative actors or acts of sexual perversity, the scope has been so broadened that there is no reasonable idea of what acts are prohibited. It is only clear that penile vaginal acts are not covered. This results in arbitrary application of a penal law which is violative of Article 14 (refer to AK Roy v. Uol (1982) 1 SCC 271, KA Abbas v. Uol and Anr. (1970) 2 SCC 760, Harish Chandra Gupta v. State of UP AIR 1960 All 650, Subhash Chandra and Anr. v. Delhi Subordinate Services Selection Board (2009) 15 SCC 458).

19.17 Section 377 distinguishes between carnal intercourse which is against the order of nature and not against the order of nature. This classification is unintelligible. It is arbitrary and not scientific. Due to an absence of legislative guidance it is left to the Court to decide what constitutes against the order of nature. The test in this regard has shifted from acts without possibility of procreation to imitative acts to acts amounting to sexual perversity. These parameters cannot be discerned on an objective basis. The object of

the classification which seeks to enforce Victorian notion of sexual morality which included only procreative sex is unreasonable as condemnation of non procreative sex is no longer a legitimate state object. Furthermore advancing public morality is subjective and cannot inform intrusions in personal autonomy especially since it is majoritarian. Even assuming that the section was valid when it was enacted in 1861, the unreasonableness is pronounced with time and the justification does not hold valid today. (refer to DS Nakara v. UoI (1983) 1 SCC 305, Kartar Singh v. State of Punjab (1994) 3 SCC 569, M Nagaraj v. UoI (2006) 8 SCC 212, Anuj Garg v. Hotel Association of India (2008) 3 SCC 1, Deepak Sibal v. Punjab University (1989) 2 SCC 145, Suchita Srivastava v. Chandigarh Administration).

19.18 Section 377 is disproportionate and discriminatory in its impact on homosexuals. The law must not only be assessed on its proposed aims but also on its implications and effects. Though facially neutral, the section predominantly outlaws sexual activity between men which is by its very nature penile non vaginal. While heterosexual persons indulge in oral and anal sex, their conduct does not attract scrutiny except when the woman is underage or unwilling. In fact, Courts have even excluded married heterosexual couples from the ambit of Section 377. When homosexual conduct is made criminal, this declaration itself is an invitation to perpetrate discrimination. It also reinforces societal prejudices. (Anuj Garg v. Hotel Association of India, Peerless General Finance Investment Co. Ltd. v. Reserve Bank of India (1992) 2 SCC 343, Grace Jayamani v. EP Peter AIR 1982 Kant. 46, Lawrence v. Texas, National Coalition for Gay and Lesbian Equality, Dhirendra Nadan v. State–Criminal Case Nos.HAA0085 & 86 of 2005 (Fiji High Court).

19.19 Section 377 violates Article 15 by discriminating on the ground of sexual orientation as although facially neutral it treats homosexual men unequally compared to heterosexuals and imposes an unequal burden on them. The general purport of Article 15 is to prohibit discrimination on the grounds enumerated therein. It is contended that as Article 15(3) uses the expression "women" the word sex in Article 15(1) must partake the same character. However it is submitted that Article 15(3) must not be allowed to limit the understanding of

Article 15(1) and reduce it to a binary norm of man and woman only. This becomes clear when Article 15(2) is applied to transgendered persons who identify as a third gender. For example, Government of India has introduced an option for "others" in the sex column of the passport application form. This can be achieved only if the expression "sex" is read to be broader than the binary norm of biological sex as man or woman. The Constitution is a living document and the Court can breathe content into rights. The underlying purpose against sex discrimination is to prevent differential treatment for the reasons of non conformity with normal or natural sexual or gender roles. Sex relations are intricately tied to gender stereotypes. Accordingly discrimination on the ground of sex necessarily includes discrimination on the basis of sexual orientation. Like gender discrimination, discrimination on the basis of sexual orientation is directed against an immutable and core characteristic of human personality. Even international law recognises sexual orientation as being included in the ground "sex". The determination of impact of a legislation must be taken in a contextual manner taking into account the content, purpose, characteristics and circumstances of the law. Section 377 does not take into account the differences in individuals in terms of their sexual orientation and makes sexual practices relevant to and associated with a class of homosexual persons criminal. It criminalises acts which are normal sexual expressions for homosexual men because they can only indulge in penetrative acts which are penile non vaginal. Distinction based on a prohibited ground cannot be allowed regardless of how laudable the object is. If a law operates to discriminate against some persons only on the basis of a prohibited ground, it must be struck down. (M Nagaraj v. UoI, Anuj Garg v. Hotel Association of India, Toonen v. Australia, Egan v. Canada, Vriend v. Alberta, Punjab Province v. Daulat Singh AIR 1946 PC 66, State of Bombay v. Bombay Education Society [1955] SCR 568). Shri Grover also submitted that the Courts in other countries have struck down similar laws that criminalise same-sex sexual conduct on the ground that they violate the right to privacy, dignity and equality.

20. Shri Ashok Desai, learned senior counsel, who appeared for Shri Shyam Benegal argued that Section

377 IPC, which is a pre-Constitution statute, should be interpreted in a manner which may ensure protection of freedom and dignity of the individuals. He submitted that the Court should also take cognizance of changing values and temporal reasonableness of a statute. Shri Desai emphasized that the attitude of the society is fast changing and the acts which were treated as offence should no longer be made punitive. He referred to medical literature to show that sexuality is a human condition and argued that it should not be regarded as a depravity or a sin or a crime. Learned senior counsel submitted that in view of Section 377 IPC which stigmatized homosexuality, not only homosexuals but their families face stigma and discrimination. He referred to the recommendations made by 172nd Law Commission Report for deleting Section 377 IPC, the survey conducted by Outlook Magazine giving the statistics of the persons who indulged in different sexual practices, the support extended by the eminent persons including Swami Agnivesh, Soli J. Sorabjee (Senior Advocate), Capt. Laxmi Sehgal, Aruna Roy, Prof. Amartya Sen and Prof. Upendra Baxi for deleting Section 377 IPC and submitted that the impugned order should be upheld. Learned senior counsel further argued that Section 377 IPC, which applies to same sex relations between consenting adults violates the constitutional guarantee of equality under Articles 14 and 15 and the High Court rightly applied Yogyakarta principles for de-criminalisation of the section challenged in the writ petition filed by respondent No.1. He supported the High Court's decision to invoke the principle of severability. Shri Ram Jethmalani, Senior Advocate, who did not argue the case, but filed written submissions also supported the impugned order and argued that the High Court did not commit any error by declaring Section 377 IPC as violative of Articles 14, 15 and 21 of the Constitution.

21. The learned Attorney General, who argued the case as Amicus, invited our attention to affidavit dated 1.3.2012 filed on behalf of the Home Ministry to show that the Group of Ministers constituted for looking into the issue relating to constitutionality of Section 377 IPC recommended that there is no error in the impugned order, but the Supreme Court may take final view in the matter. The learned Attorney General submitted that the declaration granted by the High Court may not result in

deletion of Section 377 IPC from the statute book, but a proviso would have to be added to clarify that nothing contained therein shall apply to any sexual activity between the two consenting adults in private. Learned Attorney General also emphasised that the Court must take cognizance of the changing social values and reject the moral views prevalent in Britain in the 18th century.

22. Shri P.P. Malhotra, learned Additional Solicitor General, who appeared on behalf of the Ministry of Home Affairs, referred to the affidavit filed before the Delhi High Court wherein the Ministry of Home Affairs had opposed de-criminalisation of homosexuality and argued that in its 42nd Report, the Law Commission had recommended retention of Section 377 IPC because the societal disapproval thereof was very strong. Learned Additional Solicitor General submitted that the legislature, which represents the will of the people has decided not to delete and it is not for the Court to import the extra-ordinary moral values and thrust the same upon the society. He emphasized that even after 60 years of independence, Parliament has not thought it proper to delete or amend Section 377 IPC and there is no warrant for the High Court to have declared the provision as ultra vires Articles 14,15 and 21 of the Constitution.

23. Shri Mohan Jain, learned Additional Solicitor General who appeared on behalf of the Ministry of Health, submitted that because of their risky sexual behaviour, MSM and female sex workers are at a high risk of getting HIV/AIDS as compared to normal human beings. He pointed out that as in 2009, the estimated number of MSM was 12.4 lakhs.

24. We have considered the arguments/submissions of the learned counsel and perused the detailed written submissions filed by them. We have also gone through the voluminous literature placed on record and the judgments of other jurisdictions to which reference has been made in the impugned order and on which reliance has been placed by the learned counsel who have supported the order under challenge.

25. We shall first deal with the issue relating to the scope of judicial review of legislations. Since Section 377 IPC is a pre-Constitutional legislation, it has been adopted after enactment of the Constitution, it will be useful to analyse the ambit and scope of the powers of the superior Courts

to declare such a provision as unconstitutional. Articles 13, 14, 15, 19, 21, 32, 226 and 372 of the Constitution, which have bearing on the issue mentioned herein above read as under:

"13. Laws inconsistent with or in derogation of the fundamental rights.—(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this Article, unless the context otherwise requires,—

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this Article shall apply to any amendment of this Constitution made under Article 368.

14. Equality before law.— The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth-

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. (2) No citizen shall, on ground only of religion, race, caste, sex, place of birth or any

of them, be subject to any disability, liability, restriction or condition with regard to -

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained whole or partly out of State funds or dedicated to the use of general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) or article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. (5) Nothing I this article or in sub-clause (g) of clause () of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizen or for the Scheduled Castes or Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in Clause (1) of article 30.

19. Protection of certain rights regarding freedom of speech etc.- (1) All citizens shall have the right-

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and

(f) omitted

(g) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub- clause.

(4) Nothing in sub-clause of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub- clause shall affect the operation of any existing law in so far as it relates to,

or prevent the State from making any law relating to,-

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

21. Protection of life and personal liberty. — No person shall be deprived of his life or personal liberty except according to procedure established by law.

32. Remedies for enforcement of rights conferred by this Part.— (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2). (4) The right guaranteed by this Article shall not be suspended except as otherwise provided for by this Constitution.

226. Power of High Courts to issue certain writs.— (1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III

and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without—

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

(4) The power conferred on a High Court by this Article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32.

372. Continuance in force of existing laws and their adaptation.— (1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this

Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law. (3) Nothing in clause (2) shall be deemed—

(a) to empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution; or

(b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.

Explanation I.—The expression "law in force" in this Article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

Explanation II.—Any law passed or made by a Legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra-territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra-territorial effect.

Explanation III.—Nothing in this Article shall be construed as continuing any temporary law in force

beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force.

Explanation IV.—An Ordinance promulgated by the Governor of a Province under section 88 of the Government of India Act, 1935, and in force immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause (1) of Article 382, and nothing in this Article shall be construed as continuing any such Ordinance in force beyond the said period."

26. A plain reading of these Articles suggests that the High Court and this Court are empowered to declare as void any pre-Constitutional law to the extent of its inconsistency with the Constitution and any law enacted post the enactment of the Constitution to the extent that it takes away or abridges the rights conferred by Part III of the Constitution. In fact a constitutional duty has been cast upon this Court to test the laws of the land on the touchstone of the Constitution and provide appropriate remedy if and when called upon to do so. Seen in this light the power of judicial review over legislations is plenary. However, keeping in mind the importance of separation of powers and out of a sense of deference to the value of democracy that parliamentary acts embody, self restraint has been exercised by the judiciary when dealing with challenges to the constitutionality of laws. This form of restraint has manifested itself in the principle of presumption of constitutionality.

27. The principle was succinctly enunciated by a Constitutional Bench in Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors. AIR 1958 SC 538 in the following words:

"... (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." The application of the above noted principles to pre-Constitutional statutes was elucidated in the following words:

"18. It is neither in doubt nor in dispute that Clause 1 of Article 13 of the Constitution of India in no uncertain terms states that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of Part III there, shall, to the extent of such inconsistency, be void. Keeping in view the fact that the Act is a pre-constitution enactment, the question as regards its constitutionality will, therefore, have to be judged as being law in force at the commencement of the Constitution of India [See Keshavan Madhava Menon v. The State of Bombay - 1951CriLJ 680 . By reason of Clause 1 of Article 13 of the Constitution of India, in the event, it be held that the provision is unconstitutional the same having regard to the

prospective nature would be void only with effect from the commencement of the Constitution. Article 372 of the Constitution of India per force does not make a pre-constitution statutory provision to be constitutional. It merely makes a provision for the applicability and enforceability of pre-constitution laws subject of course to the provisions of the Constitution and until they are altered, repealed or amended by a competent legislature or other competent authorities." Referring to that case, the Court in Anuj Garg v. Hotel Association of India and Ors. (2008) 3 SCC 1, while dealing with the constitutionality of Section 30 of Punjab Excise Act, 1914, this Court observed:

"7. The Act is a pre-constitutional legislation. Although it is saved in terms of Article 372 of the Constitution, challenge to its validity on the touchstone of Articles 14, 15 and 19 of the Constitution of India, is permissible in law. While embarking on the questions raised, it may be pertinent to know that a statute although could have been held to be a valid piece of legislation keeping in view the societal condition of those times, but with the changes occurring therein both in the domestic as also international arena, such a law can also be declared invalid." In John Vallamattom and Anr. v. Union of India AIR 2003 SC 2902, this Court, while referring to an amendment made in UK in relation to a provision which was in pari materia with Section 118 of Indian Succession Act, observed:

"The constitutionality of a provision, it is trite, will have to be judged keeping in view the interpretative changes of the statute affected by passage of time." Referring to the changing legal scenario and having regard to the Declaration on the Right to Development adopted by the World Conference on Human Rights as also Article 18 of the United Nations Covenant on Civil and Political Rights, 1966, this Court observed:

"It is trite that having regard to Article 13(1) of the Constitution, the constitutionality of the impugned legislation is required to be considered on the basis of laws existing on 26-1-1950, but while doing so the

court is not precluded from taking into consideration the subsequent events which have taken place thereafter. It is further trite that the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation." Presumption of constitutionality:

28. Every legislation enacted by Parliament or State Legislature carries with it a presumption of constitutionality. This is founded on the premise that the legislature, being a representative body of the people and accountable to them is aware of their needs and acts in their best interest within the confines of the Constitution. There is nothing to suggest that this principle would not apply to pre-Constitutional laws which have been adopted by the Parliament and used with or without amendment. If no amendment is made to a particular law it may represent a decision that the Legislature has taken to leave the law as it is and this decision is no different from a decision to amend and change the law or enact a new law. In light of this, both pre and post Constitutional laws are manifestations of the will of the people of India through the Parliament and are presumed to be constitutional.

29. The doctrine of severability and the practice of reading down a statute both arise out of the principle of presumption of constitutionality and are specifically recognized in Article 13 which renders the law, which is pre-Constitutional to be void only to the extent of inconsistency with the Constitution. In R.M.D. Chamarbaugwalla v. The Union of India (UOI) AIR 1957 SC 628, a Constitution Bench of this Court noted several earlier judgments on the issue of severability and observed as follows:

"The doctrine of severability rests, as will presently be shown, on a presumed intention of the legislature that if a part of a statute turns out to be void, that should not affect the validity of the rest of it, and that that intention is to be ascertained from the terms of the statute. It is the true nature of the subject-matter of the legislation that is the determining factor, and while a classification made in the statute might go far to support a conclusion in favour of severability, the absence of it does not necessarily preclude it.

When a statute is in part void, it will be enforced as regards the rest, if that is severable from what is invalid. It is immaterial for the purpose of this rule whether the invalidity of the statute arises by reason of its subject-matter being outside the competence of the legislature or by reason of its provisions contravening constitutional prohibitions.

26. That being the position in law, it is now necessary to consider whether the impugned provisions are severable in their application to competitions of a gambling character, assuming of course that the definition of 'prize competition' in s. 2(d) is wide enough to include also competitions involving skill to a substantial degree. It will be useful for the determination of this question to refer to certain rules of construction laid down by the American Courts, where the question of severability has been the subject of consideration in numerous authorities. They may be summarised as follows:

1. In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. Vide Corpus Juris Secundum, Vol. 82, p. 156; Sutherland on Statutory Construction, Vol. 2, pp. 176-177.

2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable. Vide Cooley's Constitutional Limitations, Vol. 1 at pp. 360-361; Crawford on Statutory Construction, pp. 217-218.

3. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the

invalidity of a part will result in the failure of the whole. Vide Crawford on Statutory Construction, pp. 218-219.

4. Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.

5. The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections; (Vide Cooley's Constitutional Limitations, Vol. 1, pp. 361-362); it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provisions therein.

6. If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation. Vide Sutherland on Statutory Construction, Vol. 2, p. 194.

7. In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it. Vide Sutherland on Statutory Construction, Vol. 2, pp. 177-178."

30. Another significant canon of determination of constitutionality is that the Courts would be reluctant to declare a law invalid or ultra vires on account of unconstitutionality. The Courts would accept an interpretation, which would be in favour of constitutionality rather than the one which would render the law unconstitutional. Declaring the law unconstitutional is one of the last resorts taken by the Courts. The Courts would preferably put into service the principle of 'reading down' or 'reading into' the provision to make it effective, workable and ensure the attainment of the object of the Act. These are the principles which clearly emerge from the consistent view taken by this

Court in its various pronouncements including the recent judgment in Namit Sharma v. Union of India (2013)1 SCC 745.

In D.S. Nakara and Ors. v. Union of India (UOI) (1983) 1 SCC 305 a Constitution Bench of this Court elucidated upon the practice of reading down statutes as an application of the doctrine of severability while answering in affirmative the question whether differential treatment to pensioners related to the date of retirement qua the revised formula for computation of pension attracts Article 14 of the Constitution. Some of the observations made in that judgment are extracted below:

"66. If from the impugned memoranda the event of being in service and retiring subsequent to specified date is severed, all pensioners would be governed by the liberalised pension scheme. The pension will have to be recomputed in accordance with the provisions of the liberalised pension scheme as salaries were required to be recomputed in accordance with the recommendation of the Third Pay Commission but becoming operative from the specified date. It does therefore appear that the reading down of impugned memoranda by severing the objectionable portion would not render the liberalised pension scheme vague, unenforceable or unworkable.

67. In reading down the memoranda, is this Court legislating? Of course 'not' When we delete basis of classification as violative of Article 14, we merely set at naught the unconstitutional portion retaining the constitutional portion.

68. We may now deal with the last submission of the learned Attorney General on the point. Said the learned Attorney-General that principle of severability cannot be applied to augment the class and to adopt his words 'severance always cuts down the scope, never enlarges it'. We are not sure whether there is any principle which inhibits the Court from striking down an unconstitutional part of a legislative action which may have the tendency to enlarge the width and coverage of the measure. Whenever classification is held to be impermissible and the measure can be retained by removing the unconstitutional portion of classification, by striking down words of limitation, the

resultant effect may be of enlarging the class. In such a situation, the Court can strike down the words of limitation in an enactment.

That is what is called reading down the measure. We know of no principle that 'severance' limits the scope of legislation and can never enlarge it." The basis of the practice of reading down was succinctly laid down in Commissioner of Sales Tax, Madhya Pradesh, Indore and Ors. v. Radhakrishan and Ors. (1979) 2 SCC 249 in the following words:

"In considering the validity of a statute the presumption is in favour of its constitutionality and the burden is upon him who attacks it to show that there has been a clear transgression of constitutional principles. For sustaining 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 it must always be presumed that the Legislature understands and correctly appreciates the need of its own people and that discrimination, if any, is based on adequate grounds. It is well settled that courts will be justified in giving a liberal interpretation to the section in order to avoid constitutional invalidity. These principles have given rise to rule of reading down the section if it becomes necessary to uphold the validity of the sections." In Minerva Mills Ltd. and Ors. v. Union of India (UOI) and Ors. (1980) 3 SCC 625, the Court identified the limitations upon the practice of reading down:

"69. The learned Attorney General and the learned Solicitor General strongly impressed upon us that Article 31C should be read down so as to save it from the challenge of unconstitutionality. It was urged that it would be legitimate to read into that Article the intendment that only such laws would be immunised from the challenge under Articles 14 and 19 as do not damage or destroy the basic structure of the Constitution. The principle of reading down the provisions of a law for the purpose of saving it from a constitutional challenge is well-known. But we find it impossible to accept the contention of the learned

Counsel in this behalf because, to do so will involve a gross distortion of the principle of reading down, depriving that doctrine of its only or true rationale when words of width are used inadvertently. The device of reading down is not to be resorted to in order to save the susceptibilities of the law makers, nor indeed to imagine a law of one's liking to have been passed. One must at least take the Parliament at its word when, especially, it undertakes a constitutional amendment." This was further clarified in Delhi Transport Corporation v. D.T.C.

Mazdoor Congress and Ors. 1991 Supp (1) SCC 600. In his concurring opinion, Ray, J. observed:

"On a proper consideration of the cases cited hereinbefore as well as the observations of Seervai in his book 'Constitutional Law of India' and also the meaning that has been given in the Australian Federal Constitutional Law by Coin Howard, it is clear and apparent that where any term has been used in the Act which per se seems to be without jurisdiction but can be read down in order to make it constitutionally valid by separating and excluding the part which is invalid or by interpreting the word in such a fashion in order to make it constitutionally valid and within jurisdiction of the legislature which passed the said enactment by reading down the provisions of the Act. This, however, does not under any circumstances mean that where the plain and literal meaning that follows from a bare reading of the provisions of the Act, Rule or Regulation that it confers arbitrary, uncancalised, unbridled, unrestricted power to terminate the services of a permanent employee without recording any reasons for the same and without adhering to the principles of natural justice and equality before the law as envisaged in Article 14 of the Constitution, cannot be read down to save the said provision from constitutional invalidity by bringing or adding words in the said legislation such as saying that it implies that reasons for the order of termination have to be recorded. In interpreting the provisions of an Act, it is not permissible where the plain language of the provision gives a clear and unambiguous meaning can be interpreted by reading down and presuming certain expressions in order to

save it from constitutional invalidity."

31. From the above noted judgments, the following principles can be culled out:

(i) The High Court and Supreme Court of India are empowered to declare as void any law, whether enacted prior to the enactment of the Constitution or after. Such power can be exercised to the extent of inconsistency with the Constitution/contravention of Part III.

(ii) There is a presumption of constitutionality in favour of all laws, including pre-Constitutional laws as the Parliament, in its capacity as the representative of the people, is deemed to act for the benefit of the people in light of their needs and the constraints of the Constitution.

iii) The doctrine of severability seeks to ensure that only that portion of the law which is unconstitutional is so declared and the remainder is saved. This doctrine should be applied keeping in mind the scheme and purpose of the law and the intention of the Legislature and should be avoided where the two portions are inextricably mixed with one another.

iv) The court can resort to reading down a law in order to save it from being rendered unconstitutional. But while doing so, it cannot change the essence of the law and create a new law which in its opinion is more desirable.

32. Applying the afore-stated principles to the case in hand, we deem it proper to observe that while the High Court and this Court are empowered to review the constitutionality of Section 377 IPC and strike it down to the extent of its inconsistency with the Constitution, self restraint must be exercised and the analysis must be guided by the presumption of constitutionality. After the adoption of the IPC in 1950, around 30 amendments have been made to the statute, the most recent being in 2013 which specifically deals with sexual offences, a category to which Section 377 IPC belongs. The 172nd Law Commission Report specifically recommended deletion of that section and the issue has repeatedly come up for debate. However, the Legislature has chosen not to amend the law or revisit it. This shows that Parliament, which is undisputedly the representative body of the people of India has not thought it proper to delete the provision. Such a conclusion is further

strengthened by the fact that despite the decision of the Union of India to not challenge in appeal the order of the Delhi High Court, the Parliament has not made any amendment in the law. While this does not make the law immune from constitutional challenge, it must nonetheless guide our understanding of character, scope, ambit and import.

33. It is, therefore, apposite to say that unless a clear constitutional violation is proved, this Court is not empowered to strike down a law merely by virtue of its falling into disuse or the perception of the society having changed as regards the legitimacy of its purpose and its need.

34. We may now notice the relevant provisions of the IPC.

"Section 375. Rape.-A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First.-Against her will.

Secondly.-Without her consent.

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

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

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

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

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

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

376. Punishment for rape.--(1) Whoever, except in the

cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,-

(a) being a police officer commits rape-

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to

fine:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1.-Where a women's 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 and orphanage or a home for neglected women or children or a widows' home or by any other name, which is established and maintained for the reception and care of women 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.

377. Unnatural offences.--Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.-Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

35. Before proceeding further, we may also notice dictionary meanings of some words and expressions, which have bearing on this case.

Buggery – a carnal copulation against nature; a man or a woman with a brute beast, a man with a man, or man unnaturally with a woman. This term is often used interchangeably with "sodomy". (Black's Law Dictionary 6th Edn. 1990) Carnal – Pertaining to the body, its passions and its appetites animal; fleshy; sensual; impure; sexual. People v. Battilana, 52 Cal. App.2d 685, 126 P.2d 923, 928 (Black's Law Dictionary 6th edn. 1990) Carnal knowledge – Coitus; copulation; the act of a man having sexual bodily connections with a woman; sexual

intercourse. Carnal knowledge of a child is unlawful sexual intercourse with a female child under the age of consent. It is a statutory crime, usually a felony. Such offense is popularly known as "statutory rape". While penetration is an essential element, there is "carnal knowledge" if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. State v. Cross, 2000 S.E.2d 27, 29. It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient. De Armond v. State, Okl. Cr., 285 P.2d 236. (Black's Law Dictionary 6th edn. 1990) Nature – (1) A fundamental quality that distinguishes one thing from another; the essence of something. (2) Something pure or true as distinguished from something artificial or contrived. (3) The basic instincts or impulses of someone or something (Black's Law Dictionary 9th edn).

Legislative History Of Section 377 England

36. The first records of sodomy as a crime at Common Law in England were chronicled in the Fleta, 1290, and later in the Britton, 1300. Both texts prescribed that sodomites should be burnt alive. Such offences were dealt with by the ecclesiastical Courts.

The Buggery Act 1533, formally an Act for the punishment of the vice of Buggerie (25 Hen. 8 c. 6), was an Act of the Parliament of England that was passed during the reign of Henry VIII. It was the country's first civil sodomy law. The Act defined buggery as an unnatural sexual act against the will of God and man and prescribed capital punishment for commission of the offence. This Act was later defined by the Courts to include only anal penetration and bestiality. The Act remained in force until its repeal in 1828.

The Buggery Act of 1533 was re-enacted in 1563 by Queen Elizabeth I, after which it became the charter for the subsequent criminalisation of sodomy in the British Colonies. Oral-genital sexual acts were removed from the definition of buggery in 1817.

The Act was repealed by Section 1 of the Offences against the Person Act 1828 (9 Geo.4 c.31) and by Section 125 of the Criminal Law (India) Act 1828 (c.74). It was replaced by Section 15 of the Offences against the Person Act 1828, and ection 63 of the Criminal Law (India) Act 1828, which provided that buggery would

continue to be a capital offence.

With the enactment of the Offences against the Person Act 1861 buggery was no longer a capital offence in England and Wales. It was punished with imprisonment from 10 years to life.

India

37. The offence of sodomy was introduced in India on 25.7.1828 through the Act for Improving the Administration of Criminal Justice in the East Indies (9.George.IV).

Chapter LXXIV Clause LXIII "Sodomy" – "And it be enacted, that every person convicted of the abominable crime of buggery committed with either mankind or with any animal, shall suffer death as a felon".

In 1837, a Draft Penal Code was prepared which included: Clauses 361 – "Whoever intending to gratify unnatural lust, touches for that purpose any person or any animal or is by his own consent touched by any person for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to fourteen years, and must not be less than two years"; and Clause 362 - "Whoever intending to gratify unnatural lust, touches for that purpose any person without that person's free and intelligent consent, shall be punished with imprisonment of either description for a term which may extend to life and must not be less than seven years, and shall also be liable to fine." In Note M of the Introductory Report of Lord Macaulay to the Draft Code these clauses were left to his Lordship in Council without comment observing that:

> *"Clauses 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible be said. We leave without comment to the judgment of his Lordship in Council the two Clauses which we have provided for these offences. We are unwilling to insert, either in the text, or in the notes, anything which could have given rise to public discussion on this revolting subject; as we are decidedly of the opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative*

measures framed with the greatest precision." [Note M on Offences Against the Body in Penal Code of 1837 – Report of the Indian Law Commission on the Penal Code, October 14, 1837.] However, in Report of the Commissioner's Vol XXVIII it was observed that the clauses and the absence of comments had created "a most improper ambiguity". Some members noted that the existing law on the subject is dead letter and also that the said offence had been omitted in revised statutes of Massachusetts and does not appear in the French Penal Code unless the sufferer is below 10 years of age.

"451. The Law Commissioners observe that Clauses 361 and 362 relate to an odious class of offences, respecting which it is desirable that as little as possible should said. They therefore leave the provisions proposed therein without comment to the judgment of the governor- General in Council. Mr A.D. Campbell in concurrence with Mr. Blane, censures the false delicacy which has in their opinion caused a most improper ambiguity in these clauses, leaving it uncertain whether they apply to the mere indecent liberties, or extend to the actual commission of an offence of the nature indicated.

452. It appears to us clear enough, that it was meant to strike at the root of the offence by making the first act tending to it liable to the same punishment, if the Judge shall deem it proper, as the offence actually accomplished. This is a new principle, and it would have been better if the Commissioners had explained for what reason they adopted it, in respect to the offences here contemplated in particular. We conceive that there is a very weighty objection to the clauses in question, in the opening which they will afford to calumny, if for an act so slight as may come within the meaning of the word, "touches", a man may be exposed to such a revolting charge and suffer the ignominy of a public trial upon it.

453. Colonel Sleeman advises the omission of both these clauses, deeming it most expedient to leave offences against nature silently to the odium of society. It may give weight to this suggestion to remark that the existing law on the subject is almost a

dead letter, as appears from the fact that in three years only six cases came before the Nizamut Adawlut at Calcutta, although it is but true, we fear that the frequency of the abominable offence in question "remains" as Mr AD Campbell expresses it, "a horrid stain upon the land.

454. Mr. Livingstone, we observe, makes no mention of offences of this nature in his code for Louisiana, and they are omitted in the revised statutes of Massachusetts, of which the Chapter "of offences against the Lives and Persons of Individuals" is appended to the 2d Report of the English Criminal Law Commissioners. By the French Penal Code, offences of this description do not come within the scope of the law, unless they are effected or attempted by violence, except the sufferer be under the age of ten years." [Comment of the Law Commissioners on clauses 361 and 362 in Report on the Indian Penal Code,1848.]

38. *The IPC along with Section 377 as it exists today was passed by the Legislative Council and the Governor General assented to it on 6.10.1860. The understating of acts which fall within the ambit of Section 377 has changed from non-procreative (Khanu v. Emperor) to imitative of sexual intercourse (Lohana Vasantlal v. State AIR 1968 Guj 352) to sexual perversity (Fazal Rab v. State of Bihar AIR 1963, Mihir v. Orissa 1991 Cri LJ 488). This would be illustrated by the following judgments:*

R. V. Jacobs (1817), Russ. & Ry. 331, C. C. R. -The offence of Sodomy can only be committed per anum.

Govindarajula In re. (1886) 1 Weir 382-Inserting the penis in the mouth would not amount to an offence under Section 377 IPC. Khanu v. Emperor AIR 1925 Sind 286.

"*The principal point in this case is whether the accused (who is clearly guilty of having committed the sin of Gomorrah coitus per os) with a certain little child, the innocent accomplice of his abomination, has thereby committed an offence under Section 377, Indian Penal Code.*

Section 377 punishes certain persons who have carnal intercourse against the order of nature with inter alia human beings. Is the act here committed one of

carnal intercourse? If so, it is clearly against the order of nature, because the natural object of carnal intercourse is that there should be the possibility of conception of human beings which in the case of coitus per os is impossible".

"Intercourse may be defined as mutual frequent action by members of independent organisation. Commercial intercourse is thereafter referred to; emphasis is made on the reciprocity".

"By metaphor the word 'intercourse' like the word 'commerce' is applied to the relations of the sexes. Here also 'there is the temporary visitation of one organism by a member of other organisation, for certain' clearly defined and limited objects. The primary object of the visiting organization is 'to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis'." "But there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity. Looking at the question in this way it would seem that sin of Gomorrah is no less carnal intercourse than the sin of sodomy".

"it is to be remembered that the Penal Code does not, except in Section 377, render abnormal sexual vice punishable at all. In England indecent assaults are punishable very severely. It is possible that under the Penal Code, some cases might be met by prosecuting the offender for simple assault, but that is a compoundable offence and in any case the patient could in no way be punished. It is to be supposed that the Legislature intended that a Tegellinus should carry on his nefarious profession perhaps vitiating and depraving hundreds of children with perfect immunity?

I doubt not therefore, that cotius per os is punishable under Section 377, Indian Penal Code."

Khandu v. Emperor 35 Cri LJ 1096 : (AIR 1934 Lah 261)-"Carnal intercourse with a bullock through nose is an unnatural offence punishable under Section 377, Penal Code."

Lohana Vasantlal Devchand v. The State AIR 1968 Guj 252.

In this case, there were three accused. Accused 1 and 2 had already committed the offence, in question, which was carnal intercourse per anus, of the victim boy. The boy began to get a lot of pain and consequently, accused 2 could not succeed having that act. He therefore voluntarily did the act in question by putting his male organ in the mouth of the boy and there was also seminal discharge and the boy had to vomit it out. The question that arose for consideration therein was as to whether the insertion of the male organ by the second accused into the orifice of the mouth of the boy amounted to an offence under Section 377 IPC.

The act was the actual replacement of desire of coitus and would amount to an offence punishable under Section 377. There was an entry of male penis in the orifice of the mouth of the victim. There was the enveloping of a visiting member by the visited organism. There was thus reciprocity; intercourse connotes reciprocity. It could, therefore, be said that the act in question amounted to an offence punishable under Section 377. What was sought to be conveyed by the explanation was that even mere penetration would be sufficient to constitute carnal intercourse, necessary to the offence referred to in Section 377. Seminal discharge, i.e., the full act of intercourse was not the essential ingredient to constitute an offence in question.

It is true that the theory that the sexual intercourse is only meant for the purpose of conception is an out-dated theory. But, at the same time it could be said without any hesitation of contradiction that the orifice of mouth is not, according to nature, meant for sexual or carnal intercourse. Viewing from that aspect, it could be said that this act of putting a male-organ in the mouth of a victim for the purposes of satisfying sexual appetite would be an act of carnal intercourse against the order of nature.

In State of Kerala v. Kundumkara Govindan and Anr., 1969 Cri LJ 818, the Kerala High Court observed:

"18. Even if I am to hold that there was no penetration into the vagina and the sexual acts were committed only between the thighs, I do not think that the respondents can escape conviction under Section 377

of the Penal Code. The counsel of the respondents contends (in this argument the Public Prosecutor also supports him) that sexual act between the thighs is not intercourse. The argument is that for intercourse there must be encirclement of the male organ by the organ visited; and that in the case of sexual act between the thighs, there is no possibility of penetration.

19. The word 'intercourse' means 'sexual connection' (Concise Oxford Dictionary). In Khanu v. Emperor AIR 1925 Sind 286 the meaning of the word 'intercourse' has been considered:

Intercourse may be defined as mutual frequent action by members of independent organization.

Then commercial intercourse, social intercourse, etc. have been considered; and then appears:

By a metaphor the word intercourse, like the word commerce, is applied to the relations of the sexes. Here also there is the temporary visitation of one organism by a member of the other organization, for certain clearly defined and limited objects. The primary object of the visiting organization is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. But there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity.

Therefore, to decide whether there is intercourse or not, what is to be considered is whether the visiting organ is enveloped at least partially by the visited organism. In intercourse between the thighs, the visiting male organ is enveloped at least partially by the organism visited, the thighs: the thighs are kept together and tight.

20. Then about penetration. The word 'penetrate' means in the concise Oxford Dictionary 'find access into or through, pass through.' When the male organ is inserted between the thighs kept together and tight, is there no penetration? The word 'insert' means place, fit, thrust.' Therefore, if the male organ is

'inserted' or 'thrust' between the thighs, there is 'penetration' to constitute unnatural offence.

21. Unnatural offence is defined in Section 377 of the Penal Code; whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal commits unnatural offence. The act of committing intercourse between the thighs is carnal intercourse against the order of nature. Therefore committing intercourse by inserting the male organ between the thighs of another is an unnatural offence. In this connection, it may be noted that the act in Section 376 is "sexual intercourse" and the act in Section 377 is carnal intercourse against the order of nature."

22. The position in English law on this question has been brought to my notice. The old decision of Rex v. Samuel Jacobs (1817) Russ & Ry 381 CCE lays down that penetration through the mouth does not amount to the offence of sodomy under English law. The counsel therefore argues that sexual intercourse between the thighs cannot also be an offence under Section 377 of the Penal Code. In Sirkar v. Gula Mythien Pillai Chaithu Maho. mathu 1908 TLR Vol XIV Appendix 43 a Full Bench of the Travancore High Court held that having connection with a person in the mouth was an offence under Section 377 of the Penal Code. In a short judgment, the learned Judges held that it was unnecessary to refer to English Statute Law and English text books which proceeded upon an interpretation of the words sodomy, buggery and bestiality; and that the words used in the Penal Code were very aim pie and died enough to include all acts against the order of nature. My view on the question is also that the words of Section 377 are simple and wide enough to include any carnal intercourse again tithe order of nature within its ambit. Committing intercourse between the thighs of another is carnal intercourse against the order of nature." In Fazal Rab Choudhary v. State of Bihar (1982) 3 SCC 9 - While reducing the sentence of the appellant who was convicted for having committed an offence under Section 377 IPC upon a young boy who had come to his house to take a syringe, the Court observed:

"3. The offence is one under Section 377 I.P.C., which implies sexual perversity. No force appears to have been used. Neither the notions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence has influenced our thinking. However in judging the Depravity of the action for determining quantum of sentence, all aspects of the matter must be kept in view. We feel there is some scope for modification of sentence. Having examined all the relevant aspects bearing on the question of nature of offence and quantum of sentence, we reduce the substantive sentence to R.I. for 6 months. To the extent of this modification in the sentence, the appeal is allowed." In Kedar Nath S/o Bhagchand v. State of Rajasthan, 1985 (2) WLN 560, the Rajasthan High Court observed:

"19. The report (Ex. P. 24) shows that the rectal swear was positive for spermatozoa, which resembled with human-spermatozoa. The presence of the human-spermatozoa in the rectum of the deceased has been held to be a definite proof of fact that the boy has been subjected to the carnal intercourse against the course of nature. We are in agreement with the above conclusion arrived at by the learned trial Court as, in the facts and circumstances of the case, the presence of human spermatozoa in the rectum of the deceased who was a young boy, leads to only one conclusion that he was subjected to the carnal intercourse against the course of nature." In Calvin Francis v. Orissa 1992 (2) Crimes 455, the Orissa High Court outlined a case in which a man inserted his genital organ into the mouth of a 6 year old girl and observed:

"8. In order to attract culpability under Section 377, IPC, it has to be established that (i) the accused had carnal intercourse with man, woman or animal, (ii) such intercourse was against the order of nature, (iii) the act by the accused was done voluntarily; and (iv) there was penetration. Carnal intercourse against the order of nature is the gist of the offence in Section 377. By virtue of the Explanation to the Section, it is necessary to prove penetration, however little, to constitute the carnal intercourse. Under the English law, to constitute a similar offence the act must be in

that part where sodomy is usually committed. According to that law, the unnatural carnal intercourse with a human being generally consists in penetration per anus. In R. v. Jacobs : (1817) B&R 331 CCR and in Govindarajulu in re (1886) 1 Weir 382, it was held that the act in a child's mouth does not constitute the offence. But in Khanu v. Emperor : AIR 1925 sind 286 it was held that coitus per os is punishable under the Section.

9. In terms of Section 377, IPC, whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, commits the offence. Words used are quite comprehensive and an act like putting male organ into victim's mouth which was an initiative act of sexual intercourse for the purpose of his satisfying the sexual appetite, would be an act punishable under Section 377, IPC.

10. In Corpus Juris Secundum, Volume 81, op. 368-370, the following comments have been made.

"*Words used in statutory definitions of the crime of Sodomy have been frequently construed as more comprehensive and as not depending on, or limited by the common law definition of the crime, at least as not dependent on the narrower definition of sodomy afforded by some of the common law authorities and are generally interpreted to include within their provisions all acts of unnatural copulation, whether with mankind or beast. Other authorities, however, have taken a contrary view, holding that the words used in the statute are limited by the common law definition of the crime where the words of the statute themselves are not explicit as to what shall be included.*

It is competent for the legislature to declare that the doing of certain acts shall constitute the crime against nature even-though they would not have constituted that crime at common law, and the statutory crime against nature is not necessarily limited to the common law crime of sodomy, but in imposing a punishment for the common law crime it is not necessary for the legislature to specify in the statute the particular acts which shall constitute the crime.

Under statutes providing that whoever has carnal copulation with a beast, or in any opening of the body, except sexual parts, with another being, shall be guilty of sodomy, it has been held that the act of cunnilingus is not a crime, but that taking the male sex organ into the mouth is sodomy. On the other hand, under such a statute it has been held that the crime of sodomy cannot be committed unless the sexual organ of accused is involved, but there is also authority to the contrary. Under a statute defining sodomy as the carnal knowledge and connection against the order of nature by man with man, or in the same unnatural manner with woman, it has been held that the crime cannot be committed by woman with woman.

A statute providing that any person who shall commit any act or practice of sexual perversity, either with mankind or beast on conviction shall be punished, is not limited to instances involving carnal copulation, but is restricted to cases involving the sex organ of at least one of the parties. The term 'sexual perversity' does not refer to every physical contact by a male with the body of the female with intent to cause sexual satisfaction to the actor, but the condemnation of the statute is limited to unnatural conduct performed for the purpose of accomplish; abnormal sexual satisfaction for the actor. Under a statute providing that any person participating in the act or copulating the mouth of one person with the sexual organ of another is guilty of the offence a person is guilty of violating the statute when he has placed his mouth on the genital organ of another, and the offence may be committed by two persons of opposite sex.

11. Though there is no statutory definition of 'sodomy', Section 377 is comprehensive to engulf any act like the alleged act. View similar to mine was expressed in Lohana Vasantlal Devchand and Ors. v. The State : AIR 1963 Guj 252 and in Khanu's case (supra). The orifice of the mouth is not, according to nature, meant for sexual or carnal intercourse. 'Intercourse' may be defined as mutual frequent action by members of independent organisation. Commercial intercourse is therefore referred to;

emphasis is made on the reciprocity. By metaphor the word 'intercourse' like the word 'commerce' is applied to the relations of the sexes. Here also there is the temporary visitation of one organism by a member of the other organisation, for certain clearly defined and limited objects. The primary object of the visiting organisation is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. But there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity, and in this view it would seem that sin of Gomorrah is no less carnal intercourse than the sin of sodomy. These aspects have been illuminatingly highlighted in Khanu's case (supra).

12. In Stroud's Judicial Dictionary, the word 'buggery' is said to be synonymous with sodomy. In K. J. Ayer's Manual of Law Terms and Phrases (as Judicially Expounded), the meaning of the word 'sodomy' is stated to be a carnal knowledge committed against the order of Nature by a man with a man or in the same unnatural manner with a woman, or by a man or woman in any manner with a beast. This is called buggery.

As observed in Lohan Vasantlal Devchand's case (supra), sodomy will be a species and unnatural offence will be a generis. In that view of the matter, there can be no scope for any doubt that the act complained of in punishable under Sec. 377, IPC." Similar views were expressed in State v. Bachmiya Musamiya, 1999 (3) Guj LR 2456 and Orissa High Court in Mihir alias Bhikari Charan Sahu v. State 1992 Cri LJ 488. However, from these cases no uniform test can be culled out to classify acts as "carnal intercourse against the order of nature". In our opinion the acts which fall within the ambit of the section can only be determined with reference to the act itself and the circumstances in which it is executed. All the aforementioned cases refer to non consensual and markedly coercive situations and the keenness of the court in bringing justice to the victims who were either women or children cannot be discounted while analyzing the manner in which the section has been interpreted. We are apprehensive of

whether the Court would rule similarly in a case of proved consensual intercourse between adults. Hence it is difficult to prepare a list of acts which would be covered by the section. Nonetheless in light of the plain meaning and legislative history of the section, we hold that Section 377 IPC would apply irrespective of age and consent. It is relevant to mention here that the Section 377 IPC does not criminalize a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation.

39. We shall now consider the question whether the High Court was justified in entertaining challenge to Section 377 IPC despite the fact that respondent No.1 had not laid factual foundation to support its challenge. This issue deserves to be prefaced by consideration of some precedents. In Southern Petrochemical Industries v. Electricity Inspector (2007) 5 SCC 447, this Court considered challenge to the T.N. Tax Consumption or Sale of Electricity Act, 2003. While dealing with the question whether the 2003 Act was violative of the equality clause enshrined in Article 14 of the Constitution, this Court made the following observations:

"In absence of necessary pleadings and grounds taken before the High Court, we are not in a position to agree with the learned counsel appearing on behalf of the appellants that only because Section 13 of the repealed Act is inconsistent with Section 14 of the 2003 Act, the same would be arbitrary by reason of being discriminatory in nature and ultra vires Article 14 of the Constitution of India on the premise that charging section provides for levy of tax on sale and consumption of electrical energy, while the exemption provision purports to give power to exempt tax on "electricity sold for consumption" and makes no corresponding provision for exemption of tax on electrical energy self-generated and consumed." In Seema Silk and Sarees v. Directorate of Enforcement (2008) 5 SCC 580, this Court considered challenge to Sections 18(2) and (3) of the Foreign Exchange Regulation Act, 1973, referred to paragraphs 69, 70 and 74 of the Southern Petrochemical Industries v. Electricity Inspector (supra) and observed:

"In absence of such factual foundation having been pleaded, we are of the opinion that no case has been made out for declaring the said provision ultra vires the Constitution of India."

40. The writ petition filed by respondent No.1 was singularly laconic inasmuch as except giving brief detail of the work being done by it for HIV prevention targeting MSM community, it miserably failed to furnish the particulars of the incidents of discriminatory attitude exhibited by the State agencies towards sexual minorities and consequential denial of basic human rights to them. Respondent No.1 has also not furnished the particulars of the cases involving harassment and assault from public and public authorities to sexual minorities. Only in the affidavit filed before this Court on behalf of the Ministry of Health and Family Welfare, Department of AIDS Control it has been averred that estimated HIV prevalence among FSW (female sex workers) is 4.60% to 4.94%, among MSM (men who have sex with men) is 6.54% to 7.23% and IDU (injecting drug users) is 9.42% to 10.30%. The total population of MSM as in 2006 was estimated to be 25,00,000 and 10% of them are at risk of HIV. The State-wise break up of estimated size of high risk men who have sex with men has been given in paragraphs 13 and 14 of the affidavit. In paragraph 19, the State-wise details of total adult population, estimated adult HIV prevalence and estimated number of HIV infections as in 2009 has been given. These details are wholly insufficient for recording a finding that homosexuals, gays, etc., are being subjected to discriminatory treatment either by State or its agencies or the society.

41. The question whether a particular classification is unconstitutional was considered in Re: Special Courts Bill, 1978 (1979) 1 SCC 380. Speaking for majority of the Constitution Bench, Chandrachud, CJ, referred to large number of precedents relating to the scope of Article 14 and concluded several propositions including the following:

"1. The first part of Article 14, which was adopted from the Irish Constitution, is a declaration of equality of the civil rights of all persons within the territories of India. It enshrines a basic principle of republicanism. The second part, which is a corollary of the first and is

based on the last clause of the first section of the Fourteenth Amendment of the American Constitution, enjoins that equal protection shall be secured to all such persons in the enjoyment of their rights and liberties without discrimination of favourtism. It is a pledge of the protection of equal laws, that is, laws that operate alike on all persons under like circumstances.

2. The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.

3. The Constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The Courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.

4. The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian Territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.

5. By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a

number of well- defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

6. The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.

7. The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia must have a rational relation to the object sought to be achieved by the Act.

8. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense above mentioned.

9. If the legislative policy is clear and definite and as an effective method of carrying out that policy a discretion is vested by the statute upon a body of administrators or officers to make selective

application of the law to certain classes or groups of persons, the statute itself cannot be condemned as a piece of discriminatory legislation. In such cases, the power given to the executive body would import a duty on it to classify the subject-matter of legislation in accordance with the objective indicated in the statute. If the administrative body proceeds to classify persons or things on a basis which has no rational relation to the objective of the legislature, its action can be annulled as offending against the equal protection clause. On the other hand, if the statute itself does not disclose a definite policy or objective and it confers authority on another to make selection at its pleasure, the statute would be held on the face of it to be discriminatory, irrespective of the way in which it is applied.

10. Whether a law conferring discretionary powers on an administrative authority is constitutionally valid or not should not be determined on the assumption that such authority will act in an arbitrary manner in exercising the discretion committed to it. Abuse of power given by law does occur; but the validity of the law cannot be contested because of such an apprehension. Discretionary power is not necessarily a discriminatory power.

11. Classification necessarily implies the making of a distinction or discrimination between persons classified and those who are not members of that class. It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality.

12. Whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory and violative of Article 14 must be determined in each case as it arises, for no general rule applicable to all cases can safely be laid down. A practical assessment of the operation of the law in the particular circumstances is necessary.

13. A rule of procedure laid down by law comes as

much within the purview of Article 14 as any rule of substantive law and it is necessary that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination."

42. Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the later category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification. What Section 377 does is merely to define the particular offence and prescribe punishment for the same which can be awarded if in the trial conducted in accordance with the provisions of the Code of Criminal Procedure and other statutes of the same family the person is found guilty. Therefore, the High Court was not right in declaring Section 377 IPC ultra vires Articles 14 and 15 of the Constitution.

43. While reading down Section 377 IPC, the Division Bench of the High Court overlooked that a miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders and in last more than 150 years less than 200 persons have been prosecuted (as per the reported orders) for committing offence under Section 377 IPC and this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution.

44. The vagueness and arbitrariness go to the root of a provision and may render it unconstitutional, making its implementation a matter of unfettered discretion. This is especially so in case of penal statues. However while analyzing a provision the vagaries of language must be borne in mind and prior application of the law must be considered. In A.K. Roy and Ors. v. Union of India and Ors. (1982) 1 SCC 271, a Constitution Bench observed as follows:

"67. The requirement that crimes must be defined with appropriate definiteness is regarded as a fundamental concept in criminal law and must now be regarded as a pervading theme of our Constitution since the decision in Maneka Gandhi [1978] 2 SCR

621 . The underlying principle is that every person is entitled to be informed as to what the State commands or forbids and that the life and liberty of a person cannot be put in peril on an ambiguity. However, even in the domain of criminal law, the processes of which can result in the taking away of life itself, no more than a reasonable degree of certainty has to be accepted as a fact. Neither the criminal law nor the Constitution requires the application of impossible standards and therefore, what is expected is that the language of the law must contain an adequate warning of the conduct which may fall within the prescribed area, when measured by common understanding. In criminal law, the legislature frequently uses vague expressions like 'bring into hatred or contempt', 'maintenance of harmony between different religious groups' or 'likely to cause disharmony or hatred or ill-will', or 'annoyance to the public', (see Sections 124A, 153A(1)(b), 153B(1)(c), and 268 of the Penal Code). These expressions, though they are difficult to define, do not elude a just application to practical situations. The use of language carries with it the inconvenience of the imperfections of language." In K.A. Abbas v. The Union of India (UOI) and Anr. (1970) 2 SCC 780 the Court observed:

"46. These observations which are clearly obiter are apt to be too generally applied and need to be explained. While it is true that the principles evolved by the Supreme Court of the United States of America in the application of the Fourteenth Amendment were eschewed in our Constitution and instead the limits of restrictions on each fundamental right were indicated in the clauses that follow the first clause of the nineteenth Article, it cannot be said as an absolute principle that no law will be considered bad for sheer vagueness. There is ample authority for the proposition that a law affecting fundamental rights may be so considered. A very pertinent example is to be found in State of Madhya Pradesh and Anr. v. Baldeo Prasad where the Central Provinces and Berar Goondas Act 1946 was declared void for uncertainty. The condition for the application of Sections 4 and 4A was that the person sought to be proceeded against must be a goonda but the definition of goonda in the

Act indicated no tests for deciding which person fell within the definition. The provisions were therefore held to be uncertain and vague.

47. The real rule is that if a law is vague or appears to be so, the court must try to construe it, as far as may be, and language permitting, the construction sought to be placed on it, must be in accordance with the intention of the legislature. Thus if the law is open to diverse construction, that construction which accords best with the intention of the legislature and advances the purpose of legislation, is to be preferred. Where however the law admits of no such construction and the persons applying it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution as was done in the case of the Goonda Act. This is not application of the doctrine of due process. The invalidity arises from the probability of the misuse of the law to the detriment of the individual. If possible, the Court instead of striking down the law may itself draw the line of demarcation where possible but this effort should be sparingly made and only in the clearest of cases."

45. We may now deal with the issue of violation of Article 21 of the Constitution. The requirement of substantive due process has been read into the Indian Constitution through a combined reading of Articles 14, 21 and 19 and it has been held as a test which is required to be satisfied while judging the constitutionality of a provision which purports to restrict or limit the right to life and liberty, including the rights of privacy, dignity and autonomy, as envisaged under Article 21. In order to fulfill this test, the law must not only be competently legislated but it must also be just, fair and reasonable. Arising from this are the notions of legitimate state interest and the principle of proportionality. In Maneka Gandhi v. Union of India (supra), this Court laid down the due process requirement in the following words:

"13. Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at many points. They are all parts of an integrated scheme in the Constitution. Their waters

must mix to constitute that grand flow of unimpeded and impartial Justice (social, economic and political), Freedom (not only of thought, expression, belief, faith and worship, but also of association, movement, vocation or occupation as well as of acquisition and possession of reasonable property), of Equality (of status and of opportunity, which imply absence of unreasonable or unfair discrimination between individuals, groups and classes), and of Fraternity (assuring dignity of the individual and the unity of the nation), which our Constitution visualises. Isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial but would defeat the very objects of such protection....

... But the mere prescription of some kind of procedure cannot ever meet the mandate of Article 21. The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary. The question whether the procedure prescribed by a law which curtails or takes away the personal liberty guaranteed by Article 21 is reasonable or not has to be considered not in the abstract or on hypothetical considerations like the provision for a full-dressed hearing as in a Courtroom trial, but in the context, primarily, of the purpose which the Act is intended to achieve and of urgent situations which those who are charged with the duty of administering the Act may be called upon to deal with. Secondly, even the fullest compliance with the requirements of Article 21 is not the journey's end because, a law which prescribes fair and reasonable procedure for curtailing or taking away the personal liberty guaranteed by Article 21 has still to meet a possible challenge under other provisions of the Constitution like, for example, Articles 14 and 19."

46. The right to privacy has been guaranteed by Article 12 of the Universal Declaration of Human Rights (1948), Article 17 of the International Covenant of Civil and Political Rights and European Convention on Human Rights. It has been read into Article 21 through an expansive reading of the right to life and liberty. The scope of the right as also the permissible limits upon its exercise have been laid down in the cases of Kharak Singh v. State of UP & Ors. (1964) 1 SCR 332 and Gobind

v. State of MP (1975) 2 SCC 148 which have been followed in a number of other cases. In Kharak Singh v. The State of U.P. and Ors. (supra) the majority said that 'personal liberty' in Article 21 is comprehensive to include all varieties of rights which make up personal liberty of a man other than those dealt with in Article 19(1) (d). According to the Court, while Article 19(1) (d) deals with the particular types of personal freedom, Article 21 takes in and deals with the residue. The Court said:

"We have already extracted a passage from the judgment of Field J. in Munn v. Illinois (1877) 94 U.S. 113, where the learned Judge pointed out that 'life' in the 5th and 14th Amendments of the U.S. Constitution corresponding to Article 21 means not merely the right to the continuance of a person's animal existence, but a right to the possession of each of his organs-his arms and legs etc. We do not entertain any doubt that the word 'life' in Article 21 bears the same signification. Is then the word 'personal liberty' to be construed as excluding from its purview an invasion on the part of the police of the sanctity of a man's home and an intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal ? It might not be in appropriate to refer here to the words of the preamble to the Constitution that it is designed to "assure the dignity of the individual" and therefore of those cherished human value as the means of ensuring his full development and evolution. We are referring to these objectives of the framers merely to draw attention to the concepts underlying the Constitution which would point to such vital words as 'personal liberty' having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any preconceived notions or doctrinaire Constitutional theories."

47. In Gobind v. State of M.P. (supra) the Court observed:

"22. There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a

fundamental privacy right, a law infringing it must satisfy the compelling state interest test. Then the question would be whether a state interest is of such paramount importance as would justify an infringement of the right. Obviously, if the enforcement of morality were held to be a compelling as well as a permissible state interest, the characterization of ft claimed rights as a fundamental privacy right would be of far less significance. The question whether enforcement of morality is a state interest sufficient to justify the infringement of a fundamental privacy right need not be considered for the purpose of this case and therefore we refuse to enter the controversial thicket whether enforcement of morality is a function of state.

23. Individual autonomy, perhaps the central concern of any system of limited government, is protected in part under our Constitution by explicit Constitutional guarantees. "In the application of the Constitution our contemplation cannot only be of what has been but what may be." Time works changes and brings into existence new conditions. Subtler and far reaching means of invadings privacy will make it possible to be heard in the street what is whispered in the closet. Yet, too broad a definition of privacy raises serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. Of course, privacy primarily concerns the individuals. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values.

24. Any right to privacy must encompass and protect the personal intimacies of the home, the family marriage, motherhood, procreation and child rearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of that distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered

liberty.

25. Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists. "Liberty against government" a phrase coined by Professor Corwin express this idea forcefully. In this sense, many of the fundamental rights of citizens can be described as contributing to the right to privacy.

26. As Ely says: "There is nothing to prevent one from using the word 'privacy' to mean the freedom to live one's life without governmental interference. But the Court obviously does not so use the term. Nor could it, for such a right is at stake in every case" see "The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920.

27. There are two possible theories for protecting privacy of home. The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals might he engaging in such activities and that such 'harm' is not Constitutionally protective by the state. The second is that individuals need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted as themselves, an image that may reflect the values of their peers rather than the realities of their natures see 26 Standford Law Rev. 1161 at 1187.

28. The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute."

48. The issues of bodily integrity and the right to sexual choices have been dealt with by this Court in Suchita Srivastava and Anr. v. Chandigarh Administration (2009) 9 SCC 1, in context of Section 3 of the Medical Termination of Pregnancy Act, 1971, observed:

"11. A plain reading of the above-quoted provision makes it clear that Indian law allows for abortion only if the specified conditions are met. When the MTP Act was first enacted in 1971 it was largely modelled on the Abortion Act of 1967 which had been passed in the United Kingdom. The legislative intent was to provide a qualified 'right to abortion' and the termination of pregnancy has never been recognised as a normal recourse for expecting mothers. There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a 'compelling state interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices."

49. In Mr. X v. Hospital Z (1998) 8 SCC 296, this court observed:

"25. As one of the basic Human Rights, the right of

privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others.

26. Right of Privacy may, apart from contract, also arise out of a particular specific relationship which may be commercial, matrimonial, or even political. As already discussed above, Doctor-patient relationship, though basically commercial, is, professionally, a matter of confidence and, therefore. Doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the Right of Privacy which may sometimes lead to the clash of person's "right to be let alone" with another person's right to be informed.

27. Disclosure of even true private facts has the tendency to disturb a person's tranquility. It may generate many complexes in him and may even lead to psychological problems. He may, thereafter, have a disturbed life all through. In the face of these potentialities, and as already held by this Court in its various decisions referred to above, the Right of Privacy is an essential component of right to life envisaged by Article 21. The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.

28. Having regard to the fact that the appellant was found to be HIV(+), its disclosure would not be violative of either the rule of confidentiality or the appellant's Right of Privacy as Ms. Akali with whom the appellant was likely to be married was saved in time by such disclosure, or else, she too would have been infected with the dreadful disease if marriage had taken place and consummated."

50. The right to live with dignity has been recognized as a part of Article 21 and the matter has been dealt with in Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors. (1981) 1 SCC 608 wherein the Court

observed:

"8. But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights. Now obviously, any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness: it would plainly be unconstitutional and void as being violative of Articles 14 and 21."

51. Respondent No.1 attacked Section 377 IPC on the ground that the same has been used to perpetrate harassment, blackmail and torture on certain persons, especially those belonging to the LGBT community. In our opinion, this treatment is neither mandated by the section nor condoned by it and the mere fact that the section is misused by police authorities and others is not a reflection of the vires of the section. It might be a relevant factor for the Legislature to consider while judging the desirability of amending Section 377 IPC. The

law in this regard has been discussed and clarified succinctly in Sushil Kumar Sharma v. Union of India and Ors. (2005) 6 SCC 281 as follows:

"11. It is well settled that mere possibility of abuse of a provision of law does not per se invalidate a legislation. It must be presumed, unless contrary is proved, that administration and application of a particular law would be done "not with an evil eye and unequal hand" (see: A. Thangal Kunju Musaliar v. M. Venkatachalam Potti, Authorised Official and Income-Tax Officer and Anr.) : [1956]29ITR349(SC) .

12. In Budhan Choudhry and Ors. v. State of Bihar : 1955CriLJ374 a contention was raised that a provision of law may not be discriminatory but it may land itself to abuse bringing about discrimination between the persons similarly situated. This court repelled the contention holding that on the possibility of abuse of a provision by the authority, the legislation may not be held arbitrary or discriminatory and violative of Article 14 of the Constitution.

13. From the decided cases in India as well as in United States of America, the principle appears to be well settled that if a statutory provision is otherwise intra-vires, constitutional and valid, mere possibility of abuse of power in a given case would not make it objectionable, ultra-vires or unconstitutional. In such cases, "action" and not the "section" may be vulnerable. If it is so, the court by upholding the provision of law, may still set aside the action, order or decision and grant appropriate relief to the person aggrieved.

14. In Mafatlal Industries Ltd. and Ors. v. Union of India and Ors. : 1997(89)ELT247(SC) , a Bench of 9 Judges observed that mere possibility of abuse of a provision by those in charge of administering it cannot be a ground for holding a provision procedurally or substantively unreasonable. In Collector of Customs v. Nathella Sampathu Chetty : 1983ECR2198D(SC) this Court observed: "The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity." It was said in State of Rajasthan v. Union of India : [1978]1SCR1 "it must be remembered that

merely because power may sometimes be abused, it is no ground for denying the existence of power. The wisdom of man has not yet been able to conceive of a Government with power sufficient to answer all its legitimate needs and at the same time incapable of mischief." (Also see: Commissioner, H.R.E. v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Meth : [1954]1SCR1005 .

15. As observed in Maulavi Hussein Haji Abraham Umarji v. State of Gujarat MANU/SC/0567/2004 : 2004CriLJ3860 . Unique Butle Tube Industries (P) Ltd. v. U.P. Financial Corporation and Ors. : [2002]SUPP5SCR666 and Padma Sundara Rao (dead) and Ors. v. State of Tamil and Ors. [2002]255ITR147(SC) , 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 the process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary."

52. In its anxiety to protect the so-called rights of LGBT persons and to declare that Section 377 IPC violates the right to privacy, autonomy and dignity, the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature. This view was expressed as early as in 1973 in Jagmohan Singh v. State of U.P. (1973) 1 SCC 20. In that case, a Constitutional Bench considered the legality of the death sentence imposed by the Sessions Judge, Shahjahanpur, which was confirmed by the Allahabad High Court. One of the arguments raised by the counsel for the appellant was that capital punishment has been abolished in U.S. on the ground of violation of the 8th Amendment. While considering that argument, this Court observed:

"13. Reference was made by Mr Garg to several studies made by Western scholars to show the ineffectiveness of capital punishment either as a detterent or as appropriate retribution. There is large volume of evidence compiled in the West by kindly

social reformers and research workers to confound those who want to retain the capital punishment. The controversy is not yet ended and experiments are made by suspending the death sentence where possible in order to see its effect. On the other hand most of these studies suffer from one grave defect namely that they consider all murders as stereotypes, the result of sudden passion or the like, disregarding motivation in each individual case. A large number of murders is undoubtedly of the common type. But some at least are diabolical in conception and cruel in execution. In some others where the victim is a person of high standing in the country society is liable to be rocked to its very foundation. Such murders cannot be simply wished away by finding alibis in the social maladjustment of the murderer. Prevalence of such crimes speaks, in the opinion of many, for the inevitability of death penalty not only by way of deterrence but as a token of emphatic disapproval by the society.

14. We have grave doubts about the expediency of transplanting Western experience in our country. Social conditions are different and so also the general intellectual level. In the context of our Criminal Law which punishes murder, one cannot ignore the fact that life imprisonment works out in most cases to a dozen years of imprisonment and it may be seriously questioned whether that sole alternative will be an adequate substitute for the death penalty. We have not been referred to any large-scale studies of crime statistics compiled in this country with the object of estimating the need of protection of the society against murders. The only authoritative study is that of the Law Commission of India published in 1967. It is its Thirty-fifth Report. After collecting as much available material as possible and assessing the views expressed in the West both by abolitionists and the retentionists the Law Commission has come to its conclusion at paras 262 to 264. These paragraphs are summarized by the Commission as follows at p. 354 of the Report:

"The issue of abolition or retention has to be decided on a balancing of the various arguments for and against retention. No single argument for abolition or

retention can decide the issue. In arriving at any conclusion on the subject, the need for protecting society in general and individual human beings must be borne in mind. It is difficult to rule out the validity of, or the strength behind, many of the arguments for abolition. Nor does the Commission treat lightly the argument based on the irrevocability of the sentence of death, the need for a modern approach, the severity of capital punishment, and the strong feeling shown by certain sections of public opinion in stressing deeper questions of human values. Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment. Arguments which would be valid in respect of one area of the world may not hold good in respect of another area, in this context. Similarly, even if abolition in some parts of India may not make a material difference, it may be fraught with serious consequences in other parts.

On a consideration of all the issues involved, the Commission is of the opinion, that capital punishment should be retained in the present state of the country." The Court also referred to an earlier judgment in State of Madras v.

V.G. Row 1952 SCR 597. In that case, Patanjali Sastri, CJ. observed:

"It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and to abstract standard, or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception

of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable". The responsibility of Judges in that respect is the greater, since the question as to whether capital sentence for murder is appropriate in modern times has raised serious controversy the world over, sometimes, with emotional overtones. It is, therefore, essential that we approach this constitutional question with objectivity and proper measure of self-restraint."

53. The afore-stated judgment was relied upon in Surendra Pal v. Saraswati Arora (1974) 2 SCC 600. Learned counsel who appeared for the appellant in that case relied upon a passage from Halsbury's Laws of England on the issue of presumption of undue influence in the case of parties engaged to be married. While refusing to rely upon the proposition laid down in Halsbury's laws of England, this Court observed:

"The family law in England has undergone a drastic change, recognised new social relationship between man and woman. In our country, however, even today a marriage is an arranged affair. We do not say that there are no exceptions to this practice or that there is no tendency, however imperceptible, for young persons to choose their own spouses, but even in such cases the consent of their parents is one of the desiderata which is sought for. Whether it is obtained in any given set of circumstances is another matter. In such arranged marriages in this country the question of two persons being engaged for any appreciable time to enable each other to meet and be in a position to exercise undue influence on one another very rarely arises. Even in the case of the marriage in the instant case, an advertisement was resorted to by Bhim Sain. The person who purports to reply is

Saraswati's mother and the person who replied to her was Bhim Sain's Personal Assistant. But the social considerations prevailing in this country and ethos even in such cases persist in determining the respective attitudes. That apart, as we said earlier, the negotiations for marriage held in Saraswati's sister's house have all the appearance of a business transaction. In these circumstances that portion of the statement of the law in Halsbury which refers to the presumption of the exercise of undue influence in the case of a man to a woman to whom he is engaged to be married would hardly be applicable to conditions in this country. We have had occasion to point out the danger of such statements of law enunciated and propounded for meeting the conditions existing in the countries in which they are applicable from being blindly followed in this country without a critical examination of those principles and their applicability to the conditions, social norms and attitudes existing in this country. Often statements of law applicable to foreign countries as stated in compilations and learned treatises are cited without making a critical examination of those principles in the background of the conditions that existed or exist in those countries. If we are not wakeful and circumspect, there is every likelihood of their being simply applied to cases requiring our adjudication without consideration of the background and various other conditions to which we have referred. On several occasions merely because courts in foreign countries have taken a different view than that taken by our courts or in adjudicating on any particular matter we were asked to reconsider those decisions or to consider them for the first time and to adopt them as the law of this country.

No doubt an objective and rational deduction of a principle, if it emerges from a decision of foreign country, rendered on pari materia legislative provisions and which can be applicable to the conditions prevailing in this country will assist the Court in arriving at a proper conclusion. While we should seek light from whatever source we can get, we should however guard against being blinded by it."

36. Thus, the above referred decision of the Supreme Court

makes it very clear that section 377 IPC does not criminalize a particular class of people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates the sexual conduct regardless of the gender identity orientation. What has been held by the Supreme Court is that consent is not the determining criterion in the case of unnatural offences and rather any offence which is against the order of nature and can be described as carnal penetration would constitute an offence under section 377 of the IPC thereby making it obvious that a wife can initiate proceedings against the husband under section 377 for unnatural sex. Thus, when the husband is alleged to have forced his wife for oral sex and actually indulges into the same, the same would constitute an offence under section 377 IPC. To put it in other words, having regard to the decision of the Supreme Court, referred to above, section 377 IPC would be applicable in case of heterosexual couples, wherein the husband has compelled the wife into carnal penetration of the orifice of the mouth. In fact, even those instances wherein the wife has consented to such an act will also squarely fall under this provision, as consent is not the key factor to determine the constitution of the offence.

37. However, the important aspect which I need to look into is whether the allegations levelled by the wife in her first information report constitute an offence under section 377 of the IPC.

38. The sexual perversion takes shape in manifold forms going by the different names such as, "SODOMY : Non coital carnal copulation with a member of the same or opposite sex,

e.g., per anus or per os (mouth).

BUGGERY : Intercourse per anux by a man with a man or woman; or intercourse per anux or per vaginam by a man or a woman with an animal.

BESTIALITY: Sexual intercourse by a human being with a lower animal.

TRIBADISM: Friction of the external genital organs by one woman on another by mutual bodily contact for the gratification of the sexual desire.

SADISM : A form of sexual perversion in which the infliction of pain and torture act as sexual stimulants.

MASOCHISM: Opposite of sadism and sexual gratification is sought from the desire to be beaten, tormented or humiliated by one's sexual partner.

FETICHISM: Experiencing sexual excitement leading to orgasm from some part of the body of a woman or some article belonging to her.

EXHIBITIONISM: Exposure of genital organs in Public." (see Brother John Antony vs. The State, 1992 Cri.L.J. 1352)

39. The question that arises for consideration is as to whether Section 377, I.P.C. describing 'UNNATURAL OFFENCES' would take, in its fold and sweep and amplitude all the sexual perverse acts as catelogued above. This has to be examined with reference to the language of Section 377, IPC, which runs as under :-

> *"377. UNNATURAL OFFENCES : Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*
>
> *Explanation : Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section." (see Brother John Antony vs. The State, 1992 Cri.L.J. 1352)*

40. Certain guidelines had been given by various High Courts of Judicature and Supreme Court as regards the interpretative approach to be adopted in construing the penal provisions of the statutes and some of them may be referred to here.

> "*(1) AIR 1941 Lahore 301 : (1941 (42) Cri LJ 765) (High Court Bar Association v. Emperor). It was observed at page 303 (of AIR) : (at p. 767 of Cri LJ) thus :*
>
> "*It is a well-established canon of interpretation of statutes that a penal provision of law must be strictly construed and that no act should be penalised unless it clearly falls within the ambit of the penal provision.*"
>
> *(2) AIR 1943 All 379 : (1944 (45) Cri LJ 491) (FB) (Madho Saran Singh v. Emperor). It was observed at page 388 (of AIR) : (at p. 500 of Cri LJ) thus :*
>
> "*All penal enactments, as a rule, are interpreted in an atmosphere free from all bias and, if necessary, where there is an ambiguity, in favour of the subject.*"
>
> *(3) (M. V. Joshi v. M. U. Shimpi). It was observed at page 1498 (of AIR) : (at p. 700 of Cri LJ) thus :*
>
> "*When it is said that all penal statutes are to be construed strictly, it only means that the Court must see that the thing charged is an offence within the plain meaning of the words used and must not strain the words. To put it in other words, the rule of strict construction required that the language of a statute should be so construed that no case shall be held to fall within it which does not come within the reasonable interpretation of the statute. It has also been held that in construing a penal statute it is a cardinal principle that in case of doubt, the construction favourable to the subject should be preferred. But these rules do not in any way affect the fundamental principles of interpretation, namely, that the primary test is the language employed in the Act and when the words are clear and plain the Court is bound to accept the expressed intention of the legislature.*"
>
> *(4) The passage occurring at pages 170 and 171 of the book 'principles of Statutory Interpretation' by G. P.*

Singh, Third Edition regarding the construction of an 'explanation' appended to the provisions of a statute may usefully be referred to here :

"An explanation is at times appended to a section to explain the meaning of words contained in the section. It becomes a part and parcel of the enactment. The meaning to be given to an 'Explanation' must depend upon its terms, and 'no theory of its purpose can be entertained unless it is to be inferred from the language used." But if the language of the Explanation shows a purpose and a construction consistent with that purpose can be reasonably placed upon it, that construction will be preferred as against any other construction which does not fit in with the description or the avowed purpose. In the Bengal Immunity Co.'s Bengal Immunity Co., Ltd. v. State of Bihar, .

"An Explanation may be added to include something within or to exclude something from the ambit of the main enactment or the connotation of some word occurring in it. Even a negative Explanation which excludes certain types of a category from the ambit of the enactment may have the effect of showing that the category leaving aside the excepted types is included within it. An Explanation, normally, should be so read as to harmonise with and clear up any ambiguity in the main section and should not be so construed as to widen the ambit of the section. It is also possible that an Explanation may have been added ex abundanti cautela to allay groundless apprehensions." (see Brother John Antony vs. The State, 1992 Cri.L.J. 1352)

41. Section 377, IPC de hors the Explanation appended to it consists of the following ingredients :-

"*(1) A person accused of this offence had carnal intercourse with man, woman or animal;*

(2) Such intercourse was against the order of nature; and (3) Such act by the person accused of the offence was done voluntarily." (see Brother John Antony vs. The State, 1992 Cri.L.J. 1352)

42. The word 'voluntarily' is defined under section 39 of the

Indian Penal Code, which runs as under :-

> "*39. VOLUNTARILY - A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.*" *(see Brother John Antony vs. The State, 1992 Cri.L.J. 1352)*

43. The meaning of the two words in the phraseology 'carnal intercourse' may be understood by reference to certain Dictionaries.

44. Butterworths Medical Dictionary, Section Edition furnishes the meaning of the words, intercourse' 'coitus' and 'carnal knowledge' at pages 896, 386 and 302 respectively thus :

> *"INTERCOURSE: Coitus, Carnal Intercourse, Sexual Intercourse, Coitus (L. Intercoursus interposition).*
>
> *COITUS: Sexual union Coitus, Incompletus Coitus, Interruptus Coitus in which the male organ is withdrawn from the vagina before ejaculation takes place.*
>
> *: Coitus Reservatus, Sexual intercourse in which the male withholds his orgasm until the female climax or as a means of contraception, or sometimes as a morbid condition associated with inability to ejaculate. Coitus A x LA Vache Coitus from behind with the female partner in the knee-chest position (L. Coire to come together).*
>
> *CARNAL KNOWLEDGE : Sexual connection or partial sexual connection with some degree of penetration. (L. cargo flesh,knowledge)." (see Brother John Antony vs. The State, 1992 Cri.L.J. 1352)*

45. In understanding the phraseology, 'carnal intercourse', the Explanation appended to the section assumes significant importance. According to the Explanation, penetration is sufficient to constitute the carnal intercourse necessary to the offence described in the section. For the offence to be committed under the section, apart from the other three ingredients referred to earlier, the ingredient of penetration,

however minimal it may be is necessary. (see Brother John Antony vs. The State, 1992 Cri.L.J. 1352)

46. The Shorter Oxford English Dictionary, Volume IX, Third Edition at page 1464, the meaning for the words 'penetrate' and 'penetration' are given thus :

47. Now, very few decisions available throwing light on the words and phrases used in the section may be referred to, for understanding the import, content and the meaning of the section.

> “PENETRATE: .v. 1530 (f. L. penetrate, penetrare to place within, enter within etc., related to penitus interior, etc., see ATE). I. trans, to make or find its (or one's) way into or right through (something) usu. Implying force or effort to gain access within, to pierce, b. to permeate, also with personal subj; to cause to be permeated; to imbue (with something) 1680. 2. intr. To make its (or one's) way into or through something, or to some point or place implying remoteness or difficulty of access); to gain entrance or access 1530. 3 fig. (trans.) to pierce the ear, heart, or feelings of; : to touch' 1591 b. intr. To touch the the heart SHAKS. 4. trans. To gain intellectual access into the inner content or meaning of, to see into or through or through; to find out, discover, discern 1560. b. intr. To see into or through 1589. 1. A could which it was almost impossible to p. 1860. b. The reader .. should have penetrated himself .. with the stemosphere of the times 1887. 2. Born where Heav'n's influence scarce can p. POFE, 3. A Man penetrated with. Grief 1720 b. Cymb. II iii. 14. 4. Clive penetrated and disappointed his designs 818. Hence penetrating ppl. a .. ly adv. -ness.
>
> PENETRATION: 1623. (at. late L. Penetrationem :: f. penetrate PENETRATE) 1. The action, or an act, of penetrating; also mutual permeation as of two fluids. b. Nat. Phil. The occupation of the same space by two bodies at the same time; formerly p. of dimensions,

1661. 2. Power of penetrating, as a measurable quantity or quality. a. Gunnery. The depth to which a bullet etc., will penetrate any material against which it is fired. 1807. b. Optics. The power of an optical instrument to enable an observer to see into space, or into an object, 1799. 3. fig. Insight acuteness discernment, 1605. 1. His Magnetic beam .. to each inward part with gentle p ..... Shoots invisible vertue even to the deep MILT. 2. a. The more p. shells have the better 1901. 3. You can pretend to be a Man of P. STEELE." (see Brother John Antony vs. The State, 1992 Cri.L.J. 1352)

1969 Cri LJ 818 (State of Kerala v. K. Govindan) :

In this case, the question that came up for consideration was as to whether the act of committing intercourse between the things is carnal intercourse against the order of nature. A learned Judge of Kerala High Court, who decided the case, held that committing intercourse by inserting the male organ between the thighs of another is an unnatural offence under section 377 of the Indian Penal Code. While so holding, the learned Judge had the occasion to explain the meaning of the words 'intercourse' and also the word 'penetrate' in a graphic fashion. Such portion of the discussion is traceable from paragraphs 19 and 20 of the judgment at page 823, which is as under :-

"*(19) The word 'intercourse' means 'sexual connection' (Concise Oxford Dictionary). In Kannu v. Emperor, AIR 1925 Sind 286 : (1925 (26) Cri LJ 945), the meaning of the word 'intercourse' has been considered :*

"*Intercourse may be defined as mutual frequent action by members of independent organisation.*"

The commercial intercourse, social intercourse etc., have been considered and then appears :

"*By a metapher the word intercourse, like the word commerce, is applied to the relations of the sexes. Here also, there is the temporary visitation of the organism by*

a member of the other organisation, for certain clearly defined and limited objects. The primary object of the visiting organisation is to obtain euphoria by means of a detent of the neroves consequent on the sexual crisis But there is no intercourse unless the visiting member if enveloped at least partially by the visited organism, for intercourse connotes reciprocity."

Therefore, to decide whether there is intercourse or not, what is to be considered is whether the visiting organ is enveloped at least partially by the visited organism. In intercourse between the thighs, the visiting male organ is enveloped at least partially by the organism visited, the thighs, the thighs are kept together and tight.

"*(20) Then about penetration. The word 'penetrate' means in the Concise Oxford Dictionary, 'find access into or through, pass through.' When the male organ is inserted between the thighs kept together and tight, is there no penetration. The word 'insert' means place, fit, thrust'. Therefore, if the male organ is 'inserted' or thrust' between the thighs, there is 'penetration' to constitute unnatural offence.*" *(see Brother John Antony vs. The State, 1992 Cri.L.J. 1352)*

AIR 1925 Sind 286 : (1925 (26) Cri LJ 945) (Khanu v. Emperor) : The question which was posed for consideration in this case was whether the accused (who is clearly guilty of having committed the sin of Gomorrah coitus per os) with a certain little child, the innocent accomplice of his abomination, had thereby committed an offence under Section 377, IPC. It was observed :

> "*Is the act here committed one of carnal intercourse ? If so, it is clearly against the order of nature, because the natural object or carnal intercourse is that there should be the possibility of conception of human beings, which in the case of coitus per os is impossible ..... By a metapher the word intercourse, like the word commerce, is applied to the relations of the sexes. Here also there is that temporary visitation of one organism by a member of the other organisation, for certain clearly defined*

> *and limited objects. The primary object of the visiting organisation is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. But there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity. Looking at the question in this way, it would seem that the sin of Gomorrah is no less carnal intercourse than the sin of Sodom." (see Brother John Antony vs. The State, 1992 Cri.L.J. 1352)*

AIR 1934 Lahore 261 : (1934 (35) Cri LJ 1096) (Khandu v. Emperor) : Sexual intercourse per nose with a bullock is an unnatural offence within the meaning of Section 377, IPC. (see Brother John Antony vs. The State, 1992 Cri.L.J. 1352)

(Lohana Vasantlal Devchand v. The State, AIR 1968 Guj. 252). In this case, there were three accused. Accused 1 and 2 had already committed the offence, in question, which was carnal intercourse per anus, of the victim boy. The boy began to get a lot of pain and consequently, accused 2 could not succeed having that act. He therefore voluntarily did the act in question by putting his male organ in the mouth of the boy and there was also seminal discharge and the boy had to vomit it out. The question that arose for consideration therein was as to whether the insertion of the male organ by the second accused into the orifice of the mouth of the boy amounted to an offence under section 377, IPC. It was held :

> *"The act was the actual replacement of desire of coitus and would amount to an offence punishable under section 377. There was an entry of male penis in the orifice of the mouth of the victim. There was the enveloping of a visiting member by the visited organism. There was thus reciprocity; intercourse connotes*

reciprocity. In could, therefore, be said that the act in question amounted to an offence punishable under section 377."

What was sought to be conveyed by the explanation was that even mere penetration would be sufficient to constitute carnal intercourse, necessary to the offence referred to in Section 377. Seminal discharge, i.e., the full act of intercourse was not the essential ingredient to constitute an offence in question. (see Brother John Antony vs. The State, 1992 Cri.L.J. 1352)

It may be true that the theory that the sexual intercourse is only meant for the purpose of conception is an out-dated theory. But at the same time it could be said without any hesitation that the orifice of mouth is not, according to nature, meant for sexual or carnal intercourse. Viewing from that aspect, it could be said that this act of putting a male-organ in the mouth of a victim for the purposes of satisfying sexual appetite would be an act of carnal intercourse against the order of nature." (see Brother John Antony vs. The State, 1992 Cri.L.J. 1352)(see Brother John Antony vs. The State, 1992 Cri.L.J. 1352)

48. The foregoing discussions would point out that if a person accused of this offence, voluntarily had carnal intercourse with any man, woman or animal with a little bit of penetration against the order of nature such an act would fall within the clutches of the section in committing the unnatural offence liable to be punished thereunder. In this view of the matter, except the sexual perversions of sodomy, buggery and bestiallity, all other sexual perversions, as catelogued above, would not fall within the sweep of this section. (see Brother John Antony vs. The State, 1992 Cri.L.J. 1352)

49. I may also refer to and rely upon a full bench decision of the High Court of Karnataka in the case of ***Grace Jayamani***

vs. E. P. Peter, reported in *1982 ILR (Kar) 196*. The relevant observations are extracted hereunder;

> *"9. A doubt however arises whether the term 'sodomy', should necessarily mean that a man should have carnal copulation with a man on1y or whether it amounts to sodomy even if a man indulges in unnatural sex acts with a woman.*
>
> *10. The early legislators, in keeping with the delicacy of the early writers on the English Common Law were reluctant to set out in detail the elements of sodomy because of its loathsome nature. They simply provided for the punishment of any person who committed "Sodomy or the crime against nature". Definition of the term is not included in the present Act obviously for the same reason as the Act was drafted and enacted as early as in the year 1869. That being so we have to necessarily look into the Dictionary meaning of the term 'Sodomy'.*
>
> *11. The Shorter Oxford English Dictionary gives the meaning of the term 'Sodomy' thus:*
>
> *"An unnatural form of sexual intercourse. esp. that of one male with another."*
>
> *Webster's Third New International Dictionary gives the meaning of the - term 'Sodomy' thus:*
>
> *"Carnal copulation with a member of the same sex or with an animal: non coital carnal copulation with a member the opposite sex: specif: the penetration of the male organ into the mouth or anus of another"*
>
> *Thus, it enlarges the meaning of the term 'Sodomy' to include noncoital carnal copulation with a person of the other sex also. Halsbury's Laws of England, III Edition, Volume 10, under criminal law gives the meaning of Sodomy thus in Para 1281:*
>
> *"1281. Sodomy. The offence of Sodomy can only be committed per anum (R. V. Jacobs (1817), Russ. & Ry. 331, C. C. R.) It may, be committed by a man upon a woman (R. v. Wiseman (1718) Fortes. Rep. 91: 1 Russel on Crime (10th Edn.) 846.) even . upon his own wife (R. V. Jellyman (1838). 8 C. & P. 604: Statham v. Statham, (1929) P. 131, C. A.;)."*
>
> *Further in Jowitt's Dictionary of English Law. the term 'Sodomy, is described thus:*

"Sodomy: unnatural sexual intercourse by a man whether with a manor a woman, so-called from Sodom (Gen. Xiii. 13). In the criminal law it is known as buggery."

In American Jurisprudence, II Edition, Volume 70. Sodomy is dealt with by Emmanuel S. Tipon; giving a general introduction to the term, the learned author writes:

"In most of the states, statutes have been enacted making sodomy a criminal offence, although considerable variation exists as to the wording of such statutes, and such variation accounts to a large extent for the differences in the decisions of the courts in the various jurisdictions as regards sodomy cases, the making of unnatural sexual relations a crime is embedded in the history of the common law and finds its sanction in the broader basis of the settled mores of our western civilisation and although there is a considerable body of opinion that as between willing adults, the question should be left to moral sanctions alone and eliminated from the criminal law, it has been held that such matter presents a legislative question and not one for the courts. At least one jurisdiction has amended its statute so as to require force or threat of force in order for an offence to be committed under its statute penalizing the crime of deviate sexual assault.

"Sodomy appears originally as part of the Hebriac law, taking its name from the practices reputedly indulged in by the inhabitants of the cities of Sodom and Gomorrah, but unfortunately, the Biblical text is not explicit about the various types of conduct for which these cities were visited with fire and brimstone, although other portions of the Old Testament prohibit sexual congress between man and man in general terms ("Though shall not lie with mankind, as with womankind: it is abomination." Levitious; 18:22)".

Thus it is evident that the term 'Sodomy', as it is understood currently in the Court for Divorce and Matrimonial cases in England, to which this Court shall conform as nearly as may be under the provision made in S. 7 of the Act, is noncoital, carnal copulation with a member of the same or opposite sex, e. g., per anus or per os. Thu§ a man may indulge in Sodomy even with his own wife.Taylor's Principles and Practice of Medical Jurisprudence, XII Edition, Volume II. also states thus in this behalf:

> "*Sodomv: It is a felony by the Sexual Offences Act. 1956 (Sect. 12) for a person to commit buggery with another person, which means the action of a male person attempting to obtain sexual gratification by means of the anus of a human being (sodomy) or with an animal (bestiality), whether per vaginam or per anum.*"
>
> *Whether a husband can commit sodomy with his own wife was the subject matter of a decision in the case of B. v. B., 1882 Punjab Record 68. The question was referred to a Full Bench of the Punjab Chief Court as far back as 1882 and it was held therein that a husband could be guilty of sodomy on his wife if she was not a consenting party, and that this would afford the wife a valid ground to petition for dissolution of marriage. That lends support to the view we have taken. Thus we have to find out on the facts in the present case whether the husband indulged in carnal copulation with the petitioner per anum and per os, as alleged and has thus committed sodomy. "*

50. In the backdrop and setting of the discussions, as above, I am of the view that so far as the case at hand is concerned, the various acts attributed to the accused-husband would not fall within the ambit of section 377 IPC.

51. Thus, in the aforesaid view of the matter, I have reached to the conclusion that no case is made out against the accused-husband so far as the offence punishable under sections 376 and 377 of the IPC is concerned.

52. Let me now answer the fifth question falling for my consideration as referred to in para-12 as regards section 498-A of the IPC. Section 498-A falls within the Chapter- XX-A of the IPC. This Chapter XX-A came to be introduced in the IPC in the year 1983. It reflects the anxiety of the Parliament extend protection to the weaker spouse. Life for a woman in the family

of the husband, at times, is so miserable and intolerable that the drudgery is sometime put to an end by suicide. The object of Chapter XX-A is to prevent the torture to a woman by her husband or by the relatives of her husband. The ingredients to constitute the offence under section 498A of the IPC are extracted hereunder;

> *"(1) The woman must be married;*
>
> *(2) She must be subjected to cruelty or harassment, and*
>
> *(3) Such cruelty or harassment must have been shown either by husband of the woman or by the relative of her husband."*

53. Explanation (a) in section 498A gives the meaning of cruelty. The meaning of cruelty for the purpose of this section has to be gathered from the language as found in section 498A and as per that section 'cruelty' means "any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, etc. or harassment to coerce her or any other person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

54. A new dimension has been given to the concept of cruelty. Explanation to section 498A provides that any willful conduct which is of such a nature as is likely to drive a woman to commit suicide would constitute cruelty. Such willful conduct which is likely to take grave injury or danger to life, limb or health whether mental or physical of the woman would also amount to cruelty. Harassment of the woman where such

harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security would also constitute cruelty.

55. The perverted sexual practices which the wife has alleged and which she herself did not approve would definitely amount to mental as well as physical cruelty. If between the two spouses one spouse wants healthy and normal sexual relations and the other is desirous of having perverted sexual relations, such as cunnilingus and fellatio as alleged by the wife in the present case, then the normal sexual relation between the spouses which forms the basis of a happy marital life, would be floundered on the bed-rocks of sexual aversion on the part of the spouse who is normal and not deviant, and the insistence of the other spouse who is psychologically so disturbed as not to enjoy the normal sexual relations, would tantamount to mental as well as physical cruelty. Some innocuous sado-masochistic practices may at times form an integral part of the marital relations but if they degenerate into practices which may cause physical harm or psychological trauma to one of the partners, or if they tend to verge on the pathological (sic) they would undoubtedly amount to physical and mental cruelty.

56. Thus, without any hesitation, it can be said that whatever has been alleged by the wife in her first information report, do constitute physical as well as mental cruelty of the highest form and the husband could be said, prima facie, to have committed an offence punishable under section 498A of the IPC.

57. Let me now deal with the sixth question falling for my consideration as regards the husband being guilty of outraging the modesty of his wife.

58. If a person assaults or uses criminal force against any woman intending to outrage, or knowing it to be likely that he will thereby outrage, her modesty, he commits an offence under section 354 of IPC. Its essential ingredients are the use of criminal force or assault against a woman for the purpose of outraging her modesty. A person is said to use force against another if he causes motion or cessation of motion to that other by his own bodily power or by inducing any animal to change his motion (S.349, Indian Penal Code 1860 (I.P.C.). Force becomes criminal when it is used with criminal intention and without that other's consent (id. s.350). Whoever makes any gesture or preparation to give an apprehension to the other that he is about to use criminal force is said to commit an assault (id, s.351). It follows that if this is committed or criminal force is used with the intent or knowledge specified in the section, the offender is guilty of outraging the modesty of a woman under section 354. (see Article by Surendra Chaher, Lecturer in Law, M.D. University, Rohtak titled Outraging the Modesty of a Woman: Inter-spousal Perspective)

59. The offence created by section 354 is as much in the interest of the woman concerned as in that of public morality and indecent behaviour (see, Mudholkar J. in State of Punjab v. Major Sngh, AIR 1967 S.C. 63 at 66). Now, if it is not only against the individual but also against the public morality and

society, what will be the purview of this section in case a person uses criminal force or commits an assault against his own wife or beloved?

60. In Mi Hla So v. Nga Than (1912) 13 Cri. L.J. 53 (Burma), the accused Nga Than was in love with Mi Hla So. He pulled her hair and hand in the presence of several persons. The force used in the presence of several persons was held to be calculated to outrage the woman's modesty under section 354. It was observed that "the assault suggested to Burmese onlookers that the man and woman are on conjugal terms." What follows is that had the woman been on "conjugal terms" the act of the accused in pulling her hair and hand would not have been an outrage of her modesty. Another aspect of this case is that a husband may not be held guilty of outraging the modesty of his wife in case his act is an expression of affection and happiness and not of cruelty or infidelity.

61. What shocked the public morality of the Burmese in 1912 may not be true today. At present, the expression of affection towards one's wife or beloved in public like hugging or holding of hands may not be treated as an outrage to a woman's modesty. But a cruel expression of affection such as pulling of hair in public, even if the victim is one's wife or beloved may still shock the public morality. Such act of the husband may amount to an 'indecent act' because in the present set up with the emphasis on individuals' equality, personal rights, liberties and a flair for women liberation, it would be rather impossible to think that a woman will not resent such behaviour.

62. Further, under section 354 reference is made to "any

woman" suggesting that a person may be held guilty of outraging the modesty of any woman including the one who is his wife. Some specific instances are, however, to be examined before arriving at the conclusion that a husband may be held guilty of outraging the modesty of his wife. These are:

(I) If the husband expresses his affection towards his wife in public in an unkind manner such conduct will (a) amount to an indecent behaviour; (b) be against 'public morality'; and (c) amount to an outrage under section 354.

(ii) In case the husband and wife are alone, it may be essential that some liberty be permitted to the spouses with regard to certain acts which are a necessary part of the conjugal relationship. Certain overtures or acts of affection and love in private by the husband, which may not be acceptable to the wife in public, will have to be conceded as not amounting to outrage under the provision.

(iii) Highly personal acts of love and affection by the husband which may or may not be liked by the wife, if done in public, may go against public morality and fall under section 354 as all its essential ingredients are present in such a situation.

(iv) Such personal acts done by the husband as are not acceptable to the wife even in *private* and also not approved by society, should also fall under the scope of section 354. Today no woman or society would approve of perverted sexual acts as being a legitimate part of the spousal relation.

63. As stated above, If between the two spouses one spouse wants healthy and normal sexual relations and the other is desirous of having perverted sexual relations such as *cunnilingus* and *fellatio* as alleged by the wife in the present case then normal sexual relations between the spouses which form basis of a happy marital life would be floundered. On the bedrocks of sexual aversion on the part of the spouse who is normal and not deviant

64. It is conceivable that in case the husband assaults or uses criminal force against her wife the act will amount to an outrage under section 354, irrespective of the fact whether it was done with or without her consent or in the absence of a third party. The question of husband's knowledge, intention or her developed sense under the modern set up would become irrelevant and a deliberate outrageous conduct of the husband is indefensible. It would thus seem to follow that a husband may be held guilty of an offence even under section 354 if the victim is a woman who is his wife.

65. In construing section 354, it is irrelevant to consider the age, physical condition or subjective attitude of the wife against whom the assault has been committed or criminal force is used. The word woman under the IPC denotes a female human being of any age (S. 10, IPC). The earlier interpretation in Soka v. Emperor (AIR 1933 Cal. 142) that the protection of the provision is available to women who are old enough to feel the sense of modesty and whose sense of modesty is sufficiently developed, is no longer acceptable. In earlier cases where assault was committed or criminal force used against girls of tender age, conviction of the accused rested mainly on

behaviour of the victim. In *Girdhar Gopal* v. *State (1953) 54 Cri.L.J. 1964 (M.B.)* the accused confined the victim, a girl of six years in a room and asked her to remove her clothes. She refused to do so and shouted for help. The act of the applicant in confining the girl, making her lie on a bed and then sitting on her and becoming naked was held as amounting to use of criminal force with the intention or knowledge that the girl's modesty would be outraged. The court was apparently of the opinion that since the girl shouted for help, she had had her sense of modesty developed. In another case, *Emperor* v. *Tatia Mahadev (1912) 13 Cr. L.J. 858 (Bom.)* the accused took a girl, six years old, to his room and made her to lie down and he lay on her. The girl screamed and ran away. The magistrate took the view that the girl being only six years old was too young to have any sense of modesty developed. The High Court negatived the view in the following words:

> *"It seems to us that there are many answers to this view of the learned Magistrate's. One sufficient answer may be found in the proved facts of this particular case that the girl screamed and ran away when the accused began his assault upon her. (Ibid)"*

Since the outrage was felt by the victim, and she screamed and ran away, the court had seemingly no difficulty in convicting the accused under section 354 of IPC.

66. The question whether any reaction of the victim as also her age are decisive or not for determining the guilt under section 354 were resolved by the Supreme Court in *State of Punjab* v. *Major Singh (supra).* In this case the accused caused injury to the vagina of a seven and half months old child by fingering. The court held that the provision does not require

that the outrage must be felt by the victim. If such an interpretation is given to the provision as would require that to punish a person, the victim must be having a developed sense of modesty, "it would leave out of the purview of the section assaults not only on the girls of tender age but on even grown up woman when such a woman is sleeping and did not wake up or is under anaesthesia or stupor or is an idiot."[1] It was held that the legislature did not intend that the outrage to be an offence must be felt by the victim. Bachawat J. observed:

> *"A female of tender age stands on a somewhat different footing. Her body is immature and her sexual powers are dormant. In this case the victim is a baby seven and half months old. She has not yet developed a sense of shame and has not awareness of sex. Nevertheless, from, her very birth she possesses the modesty which is the attribute of her sex. (Id. At 68)"*

67. It would seem to follow that modesty is considered to be an attribute of every female since her birth and an outrage against a wife will be punishable irrespective of the fact that she is of a tender age or developed enough understanding so as to appreciate the nature of the act, or to realise that it is offensive to her senses. There is no reason for confining the protection afforded by section 354 only to the wives who have attained enough understanding to comprehend that the act complained of was intended to corrupt their morals or offensive to propriety of womanly behaviour. The result is that under section 354 age of the wife or her reaction is not a decisive factor in determining the question whether her modesty was outraged or not. This approach would suggest thus that women have modesty irrespective of their age and

1

understanding of it. Modesty is an inherent characteristic of womanhood independent of any individual's personality.

68. The next question is, which acts of the husband would amount to an outrage. To answer this it is necessary that one should look at the concept of a woman's modesty in a general sense. IPC does not define the term modesty. In *Major Singh (supra)* the Supreme Court appears to have confined 'modesty' to sex as it observed:

> *"When any act done to or in the presence of a woman is clearly suggestive of sex according to the common notions of mankind that act must fall within the mischief of this section."*

69. Bachawat J. also pointed out:

> *"I think that the essence of a woman's modesty is her sex. The modesty of an adult female is writ large on her body. Young or old, intelligent or imbecile, awake or sleeping, the woman possesses modesty capable of being outraged."*

70. It follows that anything done by the husband which is suggestive of sex amounts to an outrage. Kissing violently in public, raising her skirt before one's own or the wife's relatives (principle derived from State of Rajasthan vs. Vijairam, (1968) Cr. L.J. 270, or taking off her clothes and stripping her naked may all amount to an outrage under section 354. Embracing the wife in public, holding her breasts (see Baldev vs. The State, (1984) Cri. L.J., N.O.C. 122 (Orissa), sitting on her, or trying to open the string of her clothes before others. (See Rameshwar vs. State of Haryana (1984) Cri. L.J., 786)

71. Further the term 'modesty' connotes more than this. Its

dictionary meaning is the quality of being modest, decency, etc. The word decent means that which is not obscene, reasonably good, fair, confirming to approved social standards, kind, respectable (Webster's New World Dictionary, 196, (1975). If the dictionary meaning of the word is adhered to, the acts which are indecent, unfair, unkind, unreasonable and do not conform to approved social standards would be naturally deemed outrageous to the modesty of a woman. Such acts may assume a variety of forms. It all depends upon the custom and habits of the people. For instance, uplifting the veil of a woman's pardah in presence of her father-in-law, she being a village lady, would be justly regarded as an indecent act outrageous to her modesty. Pulling of hair or hand, pushing, obstructing the way, waylaying, may all come within the mischief of the provision. Similarly, hurting her by putting a strong arm-hold around her neck or waist will be covered by the scope and ambit of section 354. Catching hold of a woman by her arm and dragging her may also amount to an outrage irrespective of the fact that the act is done in the presence of others or not (principle derived from Fakir vs. Emperor, (1928) Cri. L.J. 749 (Lahore). Throwing her on the ground is outrageous (See, Nuna vs. Emperor, (1912) Cri. L.J. 469 (Punj.) as the act is unkind and indecent.

72. It follows that if a person takes indecent liberties with his wife in public he will be as much punishable as if he had outraged the modesty of another woman. But in case the wife is below 18 years of age, then irrespective of the fact that the husband and wife are alone or in public, any assault or use of force against her may amount to an outrage (In case the wife

is below 18 years of age her express or implied consent is not material. See, Exception to S.375, IPC). If they are alone, the husband may be held guilty of outraging the modesty of his wife if he does unkind, cruel or perverted sexual acts to her. In substance, the question whether a person can be held guilty of outraging the modesty of his wife must be answered in the affirmative, and section 354 should be equally applicable to a person who commits an assault or uses criminal force against his own wife. (see Article by Surendra Chaher, Lecturer in Law, M.D. University, Rohtak titled Outraging the Modesty of a Woman: Inter-spousal Perspective)

MARITAL RAPE:

73. As the learned counsel appearing for the victim has vociferously submitted a lot with regard to marital rape, I would like to say something in this regard. Marital rape is not an offence in our country as the belief is that it could become a potent tool or weapon in the hands of an unscrupulous wife to harass her husband and become a phenomenon which may destabilize the institution of marriage. Marital rape is a widespread problem for a woman that has existed for centuries throughout the world. This problem has received relatively little attention from the criminal justice system and the society as a whole. Marital rape is illegal in 50 American states, 3 Australian states, New Zealand, Canada, Israel, France, Sweeden, Denmark, Norway, Soviet Union, Poland and Czechoslovakia.

74. Marital rape is one of the acts of sexual intercourse with

one's spouse without consent. It is a form of intercourse with one's spouse without consent. It is a form of domestic violence and sexual abuse. The controversy over the issue of marital rape stems from the failure of the Indian Penal Code to criminalize it. Marital rape is also known as spousal rape or inmate partner rape. According to Morton Hunt, an American Psychologist and Science Writer of U.S.A, "the typical marital rapist is a man who still believes that husbands are supposed to "rule" their wives. This extends, he feels, to sexual matters: when he wants her, she should be glad, or at least willing, if she is not , he has the right to force her. But in forcing her, he gains far more than a few minutes of sexual pleasure. He humbles her and reasserts, in the most emotionally powerful way possible, that he is the ruler and she is the subject."

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

76. U.S.A

Rape is defined as any nonconsensual sexual intercourse between non-spouses and it has always been illegal. However, until 1975, every state had a "marital exemption" that allowed a husband to rape his wife without fear of legal consequences.

By 1993, largely in response to the women's rights and equality movement, every state and the District of Columbia had passed laws against marital rape. Since 1993, all 50 states and DC have enacted laws against marital rape. The only marital exemption that still exists in some states is for statutory rape. All states now recognize rape within the marriage as a crime, and most charge the crime in the same way that rape between the strangers, would be charged. The legal history of marital rape laws in the United States is a long and complex one, that spans over several decades. Traditional rape laws in the US defined rape as forced sexual intercourse by a male with a "female not his wife", making it clear that the statutes did not apply to the married couples. The 1962 Model Penal Code stated that "*A male who has sexual intercourse with a female not his wife is guilty of rape if: (...)*".

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

marital rape in Tennessee to be treated like any other type of rape, South Carolina remains the only US state with a law requiring excessive force/violence (the force or violence used or threatened must be of a "high and aggravated nature").

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

77. U.K.

The marital rape exemption was abolished in England and Wales in 1991 by the Appellate Committee of the House of Lords, in the case of R v. R. The exemption had never been a rule of statute, having first been promulgated in 1736 in Matthew Hale's History of the Pleas of the Crown, where Hale stated: "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract." Corresponding amendment to the statutory law was made through Section 147 of the Criminal Justice and Public Order Act, 1994. This judgment was also affirmed by the European Court of Human Rights in the decision of SW v. UK. Although the issue of marital rape was highlighted by feminists in the 19th century, and was also deplored by thinkers such as John Stuart Mill and Bertrand Russell (see above section 'Feminist critique in the

19th century'), it was not until the 1970s that this issue was raised at a political level. The late 1970s also saw the enactment of Sexual Offences (Amendment) Act of 1976, which provided the first statutory definition of rape (prior to this rape was an offense at common law). The Criminal Law Revision Committee in their 1984 Report on Sexual Offences rejected the idea that the offense of rape should be extended to marital relations; writing the following:

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

The Committee also expressed more general views on domestic violence arguing that "Violence occurs in some marriages but the wives do not always wish the marital tie to be severed" and reiterated the point that domestic incidents without physical injury would generally be outside the scope of the law: "Some of us consider that the criminal law should be kept out of the marital relationships between the cohabiting partners especially the marriage bed—except where injury arises, when there are other offences which can be charged."

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

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

There are at least four recorded instances of a husband successfully relying on the exemption in England and Wales. The first was *R v Miller*, where it was held that the wife had not legally revoked her consent despite having presented a divorce petition. *R v Kowalski* was followed by *R v Sharples*, and the fourth occurred in 1991 in the case of *R v J*, a judgment made after the first instance decision of the Crown Court in *R v R* but before the decision of the House of Lords

that was to abolish the exemption. In *Miller*, *Kowalski* and *R v J* the husbands were instead convicted of assault. The *R v Kowalski* case involved, among other acts, an instance of non-consensual oral sex. For this, the husband was convicted of indecent assault, as the court ruled that his wife's "implied consent" by virtue of marriage extended only to vaginal intercourse, not to other acts such as fellatio. [At that time the offense of 'rape' dealt only with vaginal intercourse]

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

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

a true rule of English law. R's appeal was accordingly dismissed, and he was convicted of the rape of his wife.

Aftermath

By 1991, when the exemption was removed, the Law Commission in its *Working Paper* of 1990 was already supporting the abolition of the exemption, a view reiterated in their *Final Report* that was published in 1992; and international moves in this direction were by now common. Therefore, the result of the *R v R* case was welcomed. But, while the removal of the exemption itself was not controversial, the way through which this was done was; since the change was not made through usual statutory modification. The cases of *SW v UK* and *CR v UK* arose in response to *R v R*; in which the applicants (convicted of rape and attempted rape of the wives) appealed to the European Court of Human Rights arguing that their convictions were a retrospective application of the law in breach of Article 7 of the European Convention on Human Rights. They claimed that at the time of the rape there was a common law exemption in force, therefore their convictions were *post facto*. Their case was not successful, with their arguments being rejected by the European Court of Human Rights, which ruled that the criminalization of marital rape had become a reasonably foreseeable development of the criminal law in the light of the evolution of social norms; and that the Article 7 does not prohibit the gradual judicial evolution of the interpretation of an offense, provided the result is consistent with the essence of the offense and that it could be reasonably foreseen.

A new definition of the offense of 'rape' was created in

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

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

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

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

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

79. Germany criminalized marital rape in 1997. Before 1997, the definition of rape was" Whoever compels a woman to have extramarital intercourse with him, or with a third person, by force or the threat of present danger to life or limb, shall be punished by not less than two years' imprisonment".Then in 1997 there were changes made to the definition and marital rape was outlawed in Germany. Germany outlawed spousal rape in 1997, which is later than other developed countries. Female ministers and women's rights activists lobbied for this law for over 25 years. Before 1997, the definition of rape was: "*Whoever compels a woman to have extramarital intercourse with him, or with a third person, by force or the threat of present danger to life or limb, shall be punished by not less than two years' imprisonment*". In 1997 there were changes to the rape law, broadening the definition, making it gender-neutral, and removing the marital exemption. Before, marital rape could only be prosecuted as "Causing bodily harm" (Section 223 of the German Criminal Code), "Insult" (Section 185 of the German Criminal Code) and "Using threats or force to cause a person to do, suffer or omit an act" (Nötigung, Section 240 of the German Criminal Code) which carried lower sentences and were rarely prosecuted.

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

exemption.

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

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

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

84. In Italy the law on rape, *violenza carnale* ('carnal violence', as it was termed) did not contain a statutory exemption, but was, as elsewhere, understood as inapplicable in the context of marriage. Although Italy has a reputation of a male dominated traditional society, it was quite early to accept that the rape law covers forced sex in marriage too: in 1976 in *Sentenza n. 12857 del 1976*, the Supreme Court ruled that "the spouse who compels the other spouse to carnal knowledge by violence or threats commits the crime of carnal violence" ("*commette il delitto di violenza carnale il coniuge che costringa con violenza o minaccia l'altro coniuge a congiunzione carnale*").

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

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

87. Liechtenstein made marital rape illegal in 2001.

88. In Colombia, marital rape was criminalized in 1996, in Chile in 1999.

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

90. Papua New Guinea criminalized merital rape in 2003. Nambia outlawed marital rape in 2000.

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

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

fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime, which is called rape."[154] Discussions of criminalization of marital rape were already taking place in the late 1970s in Queensland,[154] but it was not until 1989 that it was criminalized.

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

93. According to the UN Population Fund, more than two-third of the married women in India, aged between 15 and 49, are severely beaten, or forced to provide sex. In 2011, the International Men and Gender Equality Survey revealed that one in five had forced their wives or partner to have sex. The

United Nations published a report stipulating that 69% of the Indian women believe that occasional violence is resorted to when a meal hasn't been prepared in time or when sex has been refused. Further statistical research reveals that 9 to 15% of the married women are subjected to rape by their husbands, a staggering and sobering statistic.

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

95. A woman in this country can protect her right to life and liberty, but not her body, within her marriage. If the husband lays an assault on her wife, then that would constitute an offence under the IPC. If the very same husband lays an assault and forces his wife to have sexual intercourse, he would be liable for assault but not for an offence of rape only because there is a valid marriage between the two.

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

1. 'Rape' should be replaced by the term 'sexual assault'.

2. 'Sexual intercourse as contained in section 375 of IPC should include all forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.

3. In the light of Sakshi v. Union of India and Others [2004 (5) SCC 518], ‘sexual assault on any part of the body should be construed as rape.

4. Rape laws should be made gender neutral as custodial rape of young boys has been neglected by law.

5. A new offence, namely section 376E with the title ‘unlawful sexual conduct’ should be created.

6. Section 509 of the IPC was also sought to be amended, providing higher punishment where the offence set out in the said section is committed with sexual intent.

7. Marital rape: explanation (2) of section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence. On the same reasoning, section 376 A was to be deleted.

8. Under the Indian Evidence Act, when alleged that a victim consented to the sexual act and it is denied, the court shall presume it to be so.

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

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

99. Types of Marital Rape:- Marital rape may be broadly classified into following two categories;

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

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

(a) Battering Rape:-this form of rape involves the use of aggression and force against the wife. The women are either

battered during the sexual act itself or face a violent aggression after the coerced sexual intercourse. The beating may also occur before the sexual assault so as to compel her into sexual intercourse.

(b) Force Only Rape:- in this form of rape, the husband does not necessarily batter the wife, but uses as much force as is necessary to enter into sexual intercourse with the unwilling wife.

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

100. The Justice Verma Committee notes: ***"Changes in the law therefore need to be accompanied by widespread measures raising awareness of women's rights to autonomy and physical integrity, regardless of marriage or other intimate relationship***." Clearly, rather than the Justice Verma Committee's desire to raise awareness among women on their right to autonomy and physical integrity, the government is more keen on "moral and social awareness" which is a euphemism for appearing to patriarchal notions of honour that tell men to respect women and do the right thing.

101. Justice Verma Committee was constituted by the Central Government on 23rd December, 2012 after the rape of a 23

year old student. The committee comprised of Justice J.S Verma, (Former Chief Justice of India), Justice Leila Seth (Former Judge High Court of Delhi) and Mr. Gopal Subramanium (Solicitor General of India). The committee was asked to look into the possible amendments in the criminal laws related to sexual violence against women. The committee was conscious of the recommendations in respect of the India made by the U.N. Committee on the Elimination of Discrimination against women. (CEDAW Committee) in February, 2007. The CEDAW Committee recommended that the country should " widen the definition of rape in its Penal Code to reflect the realities of sexual abuse experienced by women and to remove the exception of marital rape from the definition of rape..." The Verma Committee report points out a 2010 study suggesting that 18.8% of the women are raped by their partners on one or more occasion. The rate of reporting and conviction also remains low; aggravated by the prevalent beliefs that the marital rape is acceptable or is less serious than the other types of rape. The recommendation of Justice Verma Committee regarding deleting exception of marital rape was not included in the Criminal Law Amendment Bill, 2013 passed by the Lok Sabha on 19th March, 2013 and by the Rajya Sabha on 21st March, 2013. The bill received Presidential assent on 2nd April, 2013 and deemed to come into force from 3rd February, 2013. The word rape has been replaced with sexual assault in section 375 IPC.

102. Rashida Manjoo, the UN Special Repporteur on violence against women said that the Justice Verma Committee's recommendation and subsequent legislation was a "golden

moment for India" but the recommendations on marital rape age of consent for sex, etc. were not adopted in the legislation. The government is hesitant to criminalize the marital rape because it would require them to change the laws based on the religious practices, including the Hindu Marriage Act, 1955 which says a wife is duty bound to have sex with her husband. The parliamentary panel examining the Criminal Law (Amendment) Bill 2012, said that " In India", for ages, the family system has evolved... Family is able to resolve the (marital) problems and there is also a provision under the law for cruelty against women. It was, therefore, felt that if marital rape is brought under the law, the entire family system will be under great stress and the committee may perhaps be doing more injustice.

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

104. The above are the questions which were posed by a Division Bench of the Kerala High Court for its consideration in

the case of ***Sandeep Mohan Varghese vs. Anjana***, MAT. Appeal. Nos. 99 & 152 of 2009, decided on 15th September, 2010.

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

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

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

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

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

[89] *We have also adverted to the issue of reproductive choices that are severely curtailed as far as a married girl child is concerned. There is every possibility that being subjected to sexual intercourse, the girl child might become pregnant and would have to deliver a baby even though her body is not quite ready for procreation. The documentary material shown to us indicates that there are greater chances of a girl child dying during childbirth and there are greater chances of neonatal deaths. The results adverted to in the material also suggest that children born out of early marriages are more likely to be malnourished. In the face of this material, would it be wise to continue with a practice, traditional though it might be, that puts the life of a girl child in danger and also puts the life of the baby of a girl child born from an early marriage at stake? Apart from constitutional and statutory provisions, constitutional morality forbids us from giving an interpretation to Exception 2 to Section 375 of the IPC that sanctifies a tradition or custom that is no longer sustainable.*

[90] The view that marital rape of a girl child has the potential of destroying the institution of marriage cannot be accepted. Marriage is not institutional but personal nothing can destroy the 'institution' of marriage except a statute that makes marriage illegal and punishable. A divorce may destroy a marriage but does it have the potential of destroying the 'institution' of marriage? A judicial separation may dent a marital relationship but does it have the potential of destroying the 'institution' of marriage or even the marriage? Can it be said that no divorce should be permitted or that judicial separation should be prohibited? The answer is quite obvious. "

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

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

111. Further, the delicate and reverent nature of sexual intimacy between a husband and wife excludes cruelty and coercion. Sexual intimacy brings spouses wholeness and oneness. It is a gift and a participation in the mystery of creation. It is a deep sense of spiritual communion. It is a function which enlivens the hope of procreation and ensures the continuation of family relations. It is an expressive interest in each other's feelings at a time it is needed by the other and it can go a long way in deepening marital relationship. When it is egoistically utilized to despoil marital union in order to advance a felonious urge for coitus by force, violence or intimidation, the same should be made punishable to protect its lofty purpose, vindicate justice.

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

113. Moreover, to treat the marital rape cases differently from

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

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

115. Rape is a crime that evokes global condemnation because it is an abhorrence to a woman's value and dignity as a human being. It respects no time, place, age, physical condition or social status. It can happen anywhere and it can happen to anyone.

116. Husbands need to be reminded that marriage is not a license to forcibly rape their wives. A husband does not own his wife's body by reason of marriage. By marrying, she does not divest herself of the human right to an exclusive autonomy over her own body and thus, she can lawfully opt to give or withhold her consent to marital coitus. A husband aggrieved by his wife's unremitting refusal to engage in sexual intercourse cannot resort to felonious force or coercion to make her yield.

He can seek succor before the Family Courts that can determine whether her refusal constitutes psychological incapacity justifying an annulment of the marriage.

117. Sexual intimacy is an integral part of marriage because it is the spiritual and biological communion that achieves the marital purpose of procreation. It entails mutual love and self–giving and as such it contemplates only mutual sexual cooperation and not sexual coercion or imposition.

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

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

120. In 2005, the Protection of Women from Domestic

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

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

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

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

based mainly on the basis of the man and is another form of oppression on women.

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

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

126. A decision of the House of Lords in the case of Regina (Respondent) and R. (Appellant), (1992) 1 AC 599 is worth taking note of. The question of law and general public

importance involved in this decision was “is a husband criminally liable for raping his wife?”. Some of the observations are extracted hereunder;

> *“The appeal arises out of the appellant's conviction at Leicester Crown Court on 30 July 1990, upon his pleas of guilty, of attempted rape and of assault occasioning actual bodily harm. The alleged victim in respect of each offence was the appellant's wife. The circumstances of the case were these. The appellant married his wife in August 1984 and they had one son born in 1985. On 11 November 1987 the couple separated for about two weeks but resumed cohabitation at the end of that period. On 21 October 1989 the wife left the matrimonial home with the son and went to live with her parents. She had previously consulted solicitors about matrimonial problems, and she left at the matrimonial home a letter for the appellant informing him that she intended to petition for divorce. On 23 October 1989 the appellant spoke to his wife on the telephone indicating that it was his intention also to see about a divorce. No divorce proceedings had, however, been instituted before the events which gave rise to the charges against the appellant. About 9 p.m. on 12 November 1989 the appellant forced his way into the house of his wife's parents, who were out at the time, and attempted to have sexual intercourse with her against her will. In the course of doing so he assaulted her by squeezing her neck with both hands. The appellant was arrested and interviewed by police officers.Headmitted responsibility for what had happened.On 3 May 1990 a decree nisi of divorce was made absolute.The appellant was charged on an indictment containing two counts, the first being rape and the second being assault occasioning actual bodily harm. When he appeared before Owen J. at Leicester Crown Court on 30 July 1990 it was submitted to the judge on his behalf that a husband could not in law be guilty as a principal of the offence of raping his own wife. Owen J. rejected that proposition as being capable of exonerating the appellant in the circumstances of the case. His ground for doing so was that, assuming an implicit general consent to sexual intercourse by a wife on marriage to her husband, that consent was capable of being withdrawn by agreement of the parties or by the wife unilaterally removing herself from cohabitation and clearly indicating that consent to sexual intercourse had been terminated. On the facts appearing from the depositions either the first or the second of these sets of circumstances prevailed. Following the judge's ruling the appellant pleaded guilty to attempted rape and to the assault charged. He was sentenced to three years' imprisonment on the former count and to eighteen months imprisonment on the latter.*
>
> The appellant appealed to the Court of Appeal (Criminal Division) on the ground that Owen J.:
>
> "made a wrong decision in law in ruling that a man may

rape his wife when the consent to intercourse which his wife gives in entering the contract of marriage has been revoked neither by order of a court nor by agreement between the parties."

On 14 March 1990 that Court (Lord Lane C.J., Sir Stephen BrownP., Watkins, Neill and Russell L.JJ.) delivered a reserved judgment dismissing the appeal but certifying the question of general public importance set out above and granting leave to appeal to your Lordships' House, which the appellant now does.

Sir Matthew Hale, in his History of the Pleas of the Crown (1736) vol. 1, ch. 58, p. 629, wrote:

"But the husband cannot be guilty of a rape committed byhimself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract."

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

"*... a husband cannot by law be guilty of ravishing his wife, on account of the matrimonial consent which she cannot retract.*

"In the first edition (1822) of Archbold, A Summary of the Law Relative to Pleading and Evidence in Criminal Cases, at p. 259 it was stated, after a reference to Hale, "A husband also cannot be guilty of a rape upon his wife."

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

feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable.

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

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

It seems likely that this pronouncement consciously followed Hale:

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

"We say no more on this matter which was not the subject of debate before us, because we are satisfied that the Solicitor Genral was well founded in his *contention that whether or not the reason for the husband’s immunity given by Hume was a good one in the 18th and early 19th senturies, it has since disappeared altogether. Whatever Hume meant to encompass in the concept of a wife's 'surrender of her person' to her husband 'in that sort' the concept is to be understood against the background of the status of women and the position of a married woman at the time when he wrote. Then, no doubt, a married woman could be said to have subjected herself to her husband's dominion in all things. She was required to obey him in all things. Leaving out of account the absence of rights of property, a wife's freedoms were virtually non-existent, and she had in particular no right whatever to interfere in her husband's control over the lives and upbringing of any children of the marriage.*

By the second half of the 20th century, however, the status of women, and the status of a married woman, in our law have changed quite dramatically. A husband and wife are now for ail practical purposes equal partners in marriage and both husband and wife are tutors and curators of their

children. A wife is not obliged to obey her husband in all things nor to suffer excessive sexual demands on the part of her husband. She may rely on such demands as evidence of unreasonable behaviour for the purposes of divorce. A live system of law will always have regard to changing circumstances to test the justification for any exception to the application of a general rule. Nowadays it cannot seriously be maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances. It cannot be affirmed nowadays, whatever the position may have been in earlier centuries, that it is an incident of modern marriage that a wife consents to intercourse in all circumstances, including sexual intercourse obtained only by force. There is no doubt that a wife does not consent to assault upon her person and there is no plausible justification for saying today that she nevertheless is to be taken to consent to intercourse by assault. The modern cases of H.M. Advocate v. Duffy and H.M. Advocate v. Paxton show that any supposed implied consent to intercourse is not irrevocable, that separation may demonstrate that such consent has been withdrawn, and that in these circumstances a relevant charge of rape may lie against a husband. This development of the law since Hume's time immediately prompts the question: is revocation of a wife's implied consent to intercourse, which is revocable, only capable of being established by the act of separation? In our opinion the answer to that question must be no. Revocation of a consent which is revocable must depend on the circumstances. Where there is no separation this may be harder to prove but the critical question in any case must simply be whether or not consent has been withheld. The fiction of implied consent has no useful purpose to serve today in the law of rape in Scotland. The reason given by Hume for the husband's immunity from prosecution upon a charge of rape of his wife, if it ever was a good reason, no longer applies today. There is now,accordingly, no justification for the supposed immunity of a husband. Logically the only question is whether or not as matter of fact the wife consented to the acts complained of, and we affirm the decision of the trial judge that charge 2(b) is a relevant charge against the appellant to go to trial.

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

127. The Supreme Court, in the case of ***Suchita Srivastava & Anr. vs. Chandigarh Administration***, *2009 (9) SCC 1*, in para-22, had recognized a woman's right to make her reproductive choices as a dimension of " personal liberty" as understood under Article 21 of the Constitution of India. The

observations of the Supreme Court go a long way if one tries to understand the problem of marital rape. The observations are extracted hereunder;

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

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

> *"Though nobility and self-denial coupled with tolerance mark the greatest features of Indian womanhood in the past and the cry for equality and equal status being at a very low ebb, but with the passage of time and change of social structure the same is however no longer dormant but presently quite loud. This cry is not restrictive to any particular country but world over with variation in degree*

only. Article 2 of the Universal Declaration of Human Rights [as adopted and proclaimed by the General Assembly in its resolution No.217A(III)] provided that everybody is entitled to all rights and freedom without distinction of any kind whatsoever such as race, sex or religion and the ratification of the convention for elimination of all forms of discrimination against women (for short CEDAW) by the United Nations Organisation in 1979 and subsequent acceptance and ratification by India in June 1993 also amply demonstrate the same. We the people of this country gave ourselves a written Constitution, the basic structure of which permeates equality of status and thus negates gender bias and it is on this score, the validity of Section 6 of the Hindu Minority and Guardianship Act of 1956 has been challenged in the matters under consideration, on the ground that dignity of women is a right inherent under the Constitution which as a matter of fact stands negatived by Section 6 of the Act of 1956."

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

130. My final conclusion is summarized as under;

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

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

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

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

130.5 As discussed above, a prima facie case to proceed

against the accused-husband for outraging the modesty of his wife could also be said to have been made out. Although section 354 is not one of the offences in the FIR, yet I am of the view that the investigation in this direction is necessary.

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

130.7 Way back in the 1800s, almost around 125 years back, there was a situation that brought forth to the law makers. A girl aged 11 years was brutally raped by her 35 year old husband. The then colonial government proposed to amend the age of consent for a girl from 10 to 12 years, yet, this idea was criticized at large but only after much acrimony and argument, the same was amended in 1891. In the words of Dr. B.R. Ambedkar, *“realizing depth of the degradation to which the so-called leaders of the peoples had fallen.... could*

any sane man, could any man, with a sense of shame, oppose so simple a measure? But it was opposed...” Dr. B.R. Ambedkar referred to the idea of necessity in the law that has been needed since then. I wonder how Dr. B.R. Ambedkar would have seen the present day scenario when no one is willing to even discuss to reform the criminalization of marital rape. A law that does not give married and unmarried women equal protection creates conditions that lead to the marital rape. It allows the men and women to believe that wife rape is acceptable. Making wife rape illegal or an offence will remove the destructive attitudes that promote the marital rape. Such an action raises a moral boundary that informs the society that a punishment results if the boundary is transgressed. The Husbands may then begin to recognize that marital rape is wrong. Recognition coupled with the criminal punishment should deter the husbands from raping their wives. Women should not have to tolerate rape and violence in the marriage. The total statutory abolition of the marital rape exemption is the first necessary step in teaching societies that dehumanized treatment of women will not be tolerated and that the marital rape is not a husband's privilege, but rather a violent act and an injustice that must be criminalized.

131. In the result, the Criminal Misc. Application No.26957 of 2017 is allowed in part. The first information report is quashed so far as the offence punishable under sections 376 and 377 of the IPC is concerned. The investigation shall proceed further in accordance with law so far as the other offences are concerned. The Investigating Officer shall file an appropriate report before the court concerned to add section 354 of the IPC in the first information report.

Criminal Misc. Application No.24342 of 2017

132. This application under section 482 of the Cr.P.C., 1973 has been filed by the father-in-law and mother-in-law-original accused Nos.2 and 3 respectively of the first informant with the prayer to quash the first information report in question.

133. Having regard to the nature of the allegations and considering the fact that essentially the dispute is between the husband and wife, I see no good reason why the two applicants herein, being the father-in-law and the mother-in-law of the first informant, should be prosecuted for the alleged offences. As usual, in a dispute between the husband and wife, the parents of the husband have also been dragged into the prosecution. In such circumstances, I have no hesitation in arriving at the conclusion that the first information report so far as the two applicants herein are concerned, deserves to be quashed.

134. In the result, the Criminal Misc. Application No.24342 of 2017 is allowed. The first information report being C.R. No.I-131 of 2017 lodged at the Idar Police Station is hereby quashed so far as the two applicants herein are concerned.

Special Criminal Application No.7083 of 2017

135. This writ application has been filed by the original first informant with a prayer that the investigation of the first information report be transferred to an independent agency like the State C.I.D Crime or CBI. The ground on which the

transfer is prayed for is that the first information report has not been registered in accordance with what was actually narrated by the victim.

136. Having heard the learned counsel appearing for the parties and having considered the materials on record, I am of the view that at this stage, there is no reason to transfer the investigation to an agency like the State C.I.D. Crime or C.B.I. Let the investigation be carried out by the Investigating Officer, who is in charge, as on date, in accordance with law. However, having regard to the nature of the allegations and the plight of the victim, I direct the District Superintendent of Police, Himmatnagar to monitor the investigation and see to it that the same is carried out in the right direction. What is important for the Superintendent of Police to look into is the grievance of the victim that the first information report was not reduced into writing according to what was actually stated by the first informant at the relevant point of time. Let this aspect shall be looked into thoroughly by the Superintendent of Police.

137. With the above, this writ application is disposed of.

138. The Registry is directed to forward one copy of this judgment to the Ministry of Legal Affairs, Union of India, New Delhi as well as one copy to the Law Commission of India. The Registry shall also forward one copy to the Legal Department of the State Government at Gandhinagar.

(J.B.PARDIWALA, J)

Vahid