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**ANALYSIS OF THE OPINION BY JUSTICE HARI SHANKAR IN
RIT FOUNDATION: The Case against the Marital Rape Exception**
Karthik Ravichandran

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ANALYSIS OF THE OPINION BY JUSTICE HARI SHANKAR IN RIT FOUNDATION: The Case against the Marital Rape Exception

*Karthik Ravichandran**

[Abstract: According to the annual report by The National Crime Records Bureau (herein referred as NCRB), India recorded 86 cases of rape per day on an average last year. This however, does not include cases of men forcing sexual intercourse on their wives. This is because Section 375 of the Indian Penal Code, which criminalises rape, carves out an exception for any sexual act by a husband upon his wife. This Common Law practice of exempting forcible sex within a marriage from the ambit of laws criminalising rape can be traced back to seventeenth century England where the prevalent legal position was that a man could not be guilty of raping his wife as once married, a woman was to 'submit' to her husband completely. Sexual intercourse was but an obligation under the contract of marriage and the husband had every right to force his wife into fulfilling the obligation. This theory, known as the Hale Dictum, named for Sir Mathew Hale, the English Chief Justice who articulated it into law, has now been abandoned in most Common Law Jurisdictions, including in England three decades ago. The Indian version, however, still occupies the law books. Last year, a Division Bench of the Delhi High Court heard four petitions challenging the Marital Rape Exception. It handed down a split verdict. Rajiv Shakhder J. struck down the exception while C Hari Shankar J upheld it. In this essay, I seek to critique the opinion by Hari Shankar J and make a case against the vires of the Marital Rape Exception. Each Part of the essay seeks to address and counter-arguments in the opinion in the context of particular Constitutional Standards. Before concluding, I briefly address the argument that striking down the exception would result in the judicial 'creation of an offence'. I conclude by stating that the Marital Rape Exception is a remnant of a school of thought that is completely contrary to the values and morality espoused by the Indian Constitution.]

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I

Introduction

Section 375 of the Indian Penal Code (herein referred as IPC)¹ deals with the offence of rape. The offence is defined as a man having sexual intercourse with a woman without her consent or with consent obtained illegitimately under circumstances in which she is unable to give her consent or with or without her consent if she is under eighteen years of age. The law however makes two exceptions. The first exception is made out for 'medical treatments or interventions'. The second exception is made out for instances of forced sex in which the perpetrator is the husband of the victim provided the wife is over fifteen years of age. This age limit has been read up to eighteen years by the Supreme Court in *Independent Thought v. Union of India*.²

In May 2022, a Division Bench of the Delhi High Court returned a split verdict³ in a slew of petitions challenging the second exception. The appeal is currently pending in the Supreme Court and is slated to be heard later this year. In the High Court, Rajiv Shakdher, J struck down⁴ the Marital Rape Exception (herein referred as 'MRE') as manifestly arbitrary and undermining the bodily integrity and sexual autonomy of married women and therefore violative of Articles 14⁵, 19(1)(a)⁶ and 21⁷ of the Constitution, while C Hari Shankar, J upheld it.⁸ This essay seeks to use the opinion by Hari Shankar J to refute some of the most common arguments in favour of the exception (as endorsed by the opinion). Part II refutes the opinion's application of the Classic Reasonable Classifications Test. It argues that the most commonly cited distinctions between forcible sex inside and outside of a marriage are flawed and at times unscientific. It specifically questions the use of the distinctions purportedly created by the *institution* of marriage to make out an 'intelligible differentia' between forced marital and non-marital sex. Part III refutes the opinion's application of the Arbitrariness standard to the MRE. It questions the argument that the MRE is justified because an allegation of rape has 'no place' in the marital institution considering the 'taint' or 'slur' that it generates. These are irrelevant and extraneous considerations and do not save the exception from Article 14. Part IV deals with a woman's right to refuse consent to sex with her husband under Article 19(1)(a). It argues that though the MRE does not indirectly obligate a woman to have sex with her husband against her will, it does dilute

¹ Indian Penal Code, 1860, S. 375.

² *Independent Thought v. Union of India*, (2017) 10 SCC 800.

³ *RIT Foundation v. Union of India*, (2022) SCC OnLine Del 1404.

⁴ *RIT Foundation v. Union of India, Id.*, (per. Rajiv Shakdher J.).

⁵ Constitution of India, 1950, Article 14.

⁶ Constitution of India, 1950, Article 19(1)(a).

⁷ Constitution of India, 1950, Article 21.

⁸ *RIT Foundation v. Union of India*, *Supra* note 3, (per. Hari Shankar J.).

the value of her consent by mandating a lesser punishment for the perpetrator. Part V refutes the argument that striking down the impugned exception would result in the judicial 'creation of a new offence'. If this were to be accepted, it would become possible for the legislature to sneak in unconstitutionality into exceptions to general provisions rendering the Fundamental Rights provisions of the Constitution virtually useless.

II

Reasonable Classification

A significant portion of the defence set up in the opinion for the MRE vis a vis Article 14, dwells upon the Classic Reasonable Classifications Test. Let us for the moment, disregard the fact that in the wake of the enormous progress made in Article 14 jurisprudence, reasonable classification is no longer the minimum equality standard required of the state.⁹ The test, nevertheless, is as follows. Any state action that makes a classification is liable to be struck down if there is no 'intelligible differentia' between the classes created and the basis for such classification has no rational nexus with a legitimate object of the state¹⁰. The MRE makes a classification between perpetrators of forced sex who are the husbands of the victims and those who are not. According to the opinion, the 'intelligible differentia' in this classification lies in the unique demographics of the institution of marriage and the 'emotional, psychological, social and other complex equations that exist between a wife and a husband.'¹¹ Paragraph 116 of the opinion states:

*'Marriage...is the most pristine institution of mankind, on which the entire bedrock of society rests...Between a husband and wife, who spend their days and nights together, living in a house which, by dint of their joint effort, they make a home, there exists a bond which defies, and indeed transcends, all known and identifiable parameters...'*¹²

This description of marriage fails to take into consideration the realities that surround marriages in India. The two individuals within the marriage are seldom on the same plane of power and rights.¹³ A study by the Pew Research Centre found that 87% of Indian adults believed that 'a wife must always obey her husband'¹⁴. This includes 80%

⁹ Mohan V Katarki, *Equality- Jurisprudential Interest Resurrected*, THE LEAFLET, (May 8, 2022) available at: <https://theleaflet.in/equality-jurisprudential-interest-resurrected/> (last visited Apr. 30, 2024).

¹⁰ *State of Bengal v. Anwar Ali Sarkar*, 1952 A.I.R. 75, ¶ 85.

¹¹ *RIT Foundation v. Union of India*, *Supra* note 3 (per. Hari Shankar J) at ¶ 113.

¹² *RIT Foundation v. Union of India, Id.*, at ¶116.

¹³ S. Desai, et al., *Gender scripts and age at marriage in India*, (Aug. 2010), available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3000052/> (last visited Apr 30, 2024).

¹⁴ Jonathan Evans, *How Indians View Gender Roles in Families and Society*, Pew Research

of college educated adults.¹⁵ 45% of surveyed men agreed with the proposition that ‘men in a family should be responsible for earning money.’¹⁶ This power imbalance within marriages often manifests itself violently. According to The National Family Health Survey (herein referred as NFHS), 2019-2021 by the Union Ministry of Health and Family Welfare, 38 % of men believed that beating one’s wife was justified in case she, among other things, ignored her home or children, went out without notifying the husband, didn’t cook adequately or *rejected sex*.¹⁷ According to data collected by the National Crime Records Bureau (NCRB) from 2019, 30.9 % of all cases¹⁸ pertaining to crime against women were under Section 498A of the IPC¹⁹ which deals with ‘cruelty by husbands and his relatives’. Domestic abuse is often a means of obtaining coercive control over one’s wife²⁰ and is not merely a discrete series of events but emblematic of a dynamic of power and control.²¹ This dynamic of coercive control is as fundamental then, to the marital experience of a significant number of Indian women as (in the words of Harishankar J) ‘*care, consideration, and an understanding of one another’s likes and dislikes, hopes and aspirations*’²². The ‘sacred bond’ described in the opinion is often a leash by which every aspect of a woman’s life is supervised. The institutionalisation of these inequalities in marriage in the legal framework, has been acknowledged by the Supreme Court in striking down Section 497 of the IPC²³ which criminalised adultery.²⁴

Moreover, this approach of emphasising upon the distinctions created by the *institution* is conceptually flawed. In keeping with the recent emphasis upon bodily integrity and autonomy in the *Puttaswamy*²⁵ line of judgements²⁶ and the shift in the understanding of privacy under the Indian Constitution from spatial privacy to autonomy-based privacy²⁷, the two most important questions that ought to be asked in looking for

Center, (March 2, 2022) available at:

<https://www.pewresearch.org/religion/2022/03/02/how-indians-view-gender-roles-in-families-and-society/> (last visited Apr 30, 2024).

¹⁵ Jonathan Evans, *Id.*

¹⁶ *Joseph Shine v. Union of India*, (2018) S.C. 1676 at ¶66 (per. Chandrachud J).

¹⁷ Ministry of Health and Family Welfare, International Institute for Population Sciences (IIPS) and ICF. 2021. *National Family Health Survey (NFHS-5), 2019-21: Volume I*

¹⁸ Ministry of Home Affairs, National Crime Records Bureau, *Crime in India 2019 Vol. I*, p.20

¹⁹ Indian Penal Code, 1860, S. 498A.

²⁰ J. Herring, et al., *The Severity of Domestic Abuse*, 30 NLSIR 37 (2018), JSTOR, available at: <https://www.jstor.org/stable/26743931> (last visited Apr 30, 2024).

²¹ M.A. Dutton, et al., *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA LAW REVIEW (1993).

²² *RIT Foundation v. Union of India*, *Supra* note 3, p. 116.

²³ Indian Penal Code, 1860, S. 497.

²⁴ *Joseph Shine v. Union of India*, *Supra* note 16.

²⁵ *Justice K. S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

²⁶ *Joseph Shine v. Union of India*, *Supra* note 16 at p. 4, (per. Chandrachud J.).

²⁷ Gautam Bhatia, *THE TRANSFORMATIVE CONSTITUTION 198-199* (2019).

distinctions between non-consensual sex in a marriage and outside of it, are the following:

- a. When a woman is subjected to forced sex by her husband, is her *individual* experience any different physically and emotionally than if she had been forced into sex by another man?
- b. Are there significant distinguishing factors in the psychology of men between when they perpetrate forced sex within a marriage and outside of it?

The first question is answered by the opinion in paragraph 130 as follows:

*'...If the wife refuses, and the husband, nonetheless, has sex with her, however one may disapprove of the act, it cannot be equated with the act of ravishing by a stranger. Nor can the impact on the wife, in such a situation, be equated with the impact of a woman who is raped by a stranger...'*²⁸

This is however, a patently unscientific claim. An abundance of scientific literature negates the notion that conjugal forcible sex is less impactful to the woman's mind than non-conjugal rape. A study in the American Journal of Psychotherapy categorically states that it is a myth that 'wife rape is less traumatic than any other rape'.²⁹ It finds that data shows the most upsetting and long-term effects result from 'rape' by a husband or a relative³⁰. Another study in the Journal of Family Violence also concludes that 'the commonly held belief that marital rape is less traumatising is not supported by their results.³¹ Intimate partner violence and forcible sex also have substantial links to varying levels of Post-Traumatic Stress Disorder (herein referred as PTSD)³². Women assaulted by spouses or dates are just as likely as those assaulted by strangers to be depressed, fearful, obsessive-compulsive, and sexually dysfunctional years after the assault and common assumptions about women assaulted by strangers having a more difficult time adjusting to the event than women raped by husbands and boyfriends are incorrect.³³

The second question is whether there is a fundamental psychological motive of a man who forces sex on his wife and a man who does the same to another woman. In a study by the American Journal of Psychiatry, it was found that in every act of a man forcing sex on a woman who resists, there are three key elements in play, namely power, anger,

²⁸ Gautam Bhatia, *Id.*, at 130.

²⁹ Weingourt, R., WIFE RAPE: Barriers to identification and treatment, 39(2) AMERICAN JOURNAL OF PSYCHOTHERAPY 187-192 (1985).

³⁰ R. Weingourt, *Id.*

³¹ D.S. Riggs, et al., *Long-term psychological distress associated with marital rape and aggravated assault: A comparison to other crime victims*, 7 JOURNAL OF FAMILY VIOLENCE 283 (1992).

³² J.A. Bennice et al., *The relative effects of intimate partner physical and sexual violence on post-traumatic stress disorder symptomatology*, VIOLENCE VICT (2003).

³³ D.G. Kilpatrick et al., *Rape in marriage and in dating relationships: How bad is it for mental health?*, ANNALS OF THE NEW YORK ACADEMY OF SCIENCES 528, 335-344, (1988).

and plain sexual desire.³⁴ All three elements are found in varying proportions across various instances of rape. But two of these are almost always dominant in proportion, namely power and anger. Rape is almost always a use of sexuality to express issues of power and anger. Therefore, rape is a pseudosexual behaviour in the sense that it is a pattern of behaviour that is concerned more with status, power, control and dominance than sexual satisfaction and is, in this sense, a sexual deviance.³⁵ When this is compounded with the statistics discussed above that characterise the relationship of dominance and control within violent marriages, one can conclude that a marital relationship with the victim does not fundamentally change the perpetrator's psychology during the act of forced sex. It is primarily about power (institutionalised through the inherent inequalities in marriage) or anger.

There is one last issue that must be addressed in the context of the psychological motives. The opinion cites the existence of a legitimate expectation of a husband to sex owing to the nature of the marital relationship. For instance, Paragraph 135 states:

*'...the legitimate expectation of sex that the husband has, is, in my view, a factor which may legitimately be regarded as mitigating the culpability, as the perpetrator of the act of non-consensual sex, vis-à-vis a stranger who has no such legitimate expectation, much less a right...'*³⁶

The notion that the legitimate expectation of sex is the decisive distinguishing factor between forcible sex in a marriage and outside of it is questionable. There are deeper psychological motivations behind the perpetration of forced sex that are independent of the marital status between the two individuals. A United Nations Survey of 10,000 men in Asia and the Pacific, across nine countries, revealed that the most common motivation that men cited for rape was related to *sexual entitlement* - a belief that men have a right to sex with women regardless of consent.³⁷ Over 80 % of men who admitted to rape in sites in rural Bangladesh and China gave this response. A study published in the Journal of Counselling Psychology concluded that men's sense of general and sexual entitlement completely mediated the relations between masculinity and rape-related attitudes.³⁸ Entitlement is significantly correlated with theoretically-relevant variables to forced sex and is able to distinguish sexually aggressive and nonaggressive men.³⁹

³⁴ A.N. Groth, et al., *Rape: power, anger, and sexuality*, AMERICAN J. OF PSYCHIATRY, (1977).

³⁵ A.N. Groth, *Id.*

³⁶ *Id.*, at 135.

³⁷ UNDP, Asia and the Pacific, *Why Do Some Men Use Violence Against Women and How Can We Prevent It?*, (Sep. 10, 2013), available at: <https://www.undp.org/asia-pacific/publications/why-do-some-men-use-violence-against-women-and-how-can-we-prevent-it> (last visited Apr 30, 2024).

³⁸ M.S. Hill, et al., *Does entitlement mediate the link between masculinity and rape-related variables?* 48(1) JOURNAL OF COUNSELLING PSYCHOLOGY 39 (2001).

³⁹ L. A. Bouffard, *Exploring the utility of entitlement in understanding sexual aggression*, 38(5) JOURNAL OF CRIMINAL JUSTICE 870 (2010).

Therefore, even if there is indeed a 'legitimate expectation' of sex in a marriage, the fact that the husband seeks to fulfil the expectation by force reveals an *entitlement* to the fulfilment of that expectation. This entitlement is independent of the 'expectation' and is a deeper psychological motive behind forcible sex than the expectation. Therefore, employing the notion of the legitimate expectation of sex as a differentiating factor between marital and non-marital forcible sex is flawed because both share the same fundamental psychological motive, namely sexual entitlement.

To sum up, there is no difference broadly in the physical and emotional/psychological experience of a woman who is forced into sex by her husband and a woman who is forced into sex by someone else. Secondly, the marital relationship between a man and a woman creates no relevant difference to the psychology of that man when he forces sex on his wife from when he does the same to another woman. There is no intelligible differentia therefore, in the context of the *individual* experience of the victim or the perpetrator. Therefore, the MRE fails the reasonable classifications test.

IV

Arbitrariness

The opinion proceeds to test the MRE against the standard of arbitrariness evolved in *EP Royappa's case*⁴⁰ in which the Supreme Court ascribed arbitrariness to a legislature that undertook, inter alia, 'extraneous and irrelevant consideration'. More recently, 'manifest arbitrariness' was defined by the Court in *Shayara Bano's case*⁴¹ as any act by the legislature that is inter alia 'irrational' and 'capricious' and without 'adequate determining Principle'. Paragraph 146 of the opinion defends the MRE from the arbitrariness standard thus:

*'...what the legislature intends, quite clearly, is that an allegation of rape should find no place in a marriage relationship. The taint of rape, in other words, according to the legislature, should never discolour a marital relationship between man and woman...'*⁴²

What the 'taint of rape' exactly means and how it is a relevant consideration here, has not been explained concretely in the opinion. The opinion also makes references to the 'slur of rape'. The noun 'taint' is defined in the Oxford English Dictionary as follows: 'The act or result of spoiling something or giving it an unpleasant quality'⁴³ The noun 'slur' is

⁴⁰ *E. P. Royappa v. State of Tamil Nadu*, 1974 A.I.R. 555, at para 85.

⁴¹ *Shayara Bano v. Union of India*, A.I.R. 2017 S.C. 4609, at para 101.

⁴² *RIT Foundation v. Union of India*, *Supra* note 3, (per. Hari Shankar J) at ¶146.

⁴³ *OED Online*, Oxford University Press 3763 (Dec 2022).

defined as: ‘a remark that criticises someone and is likely to have a harmful effect on their reputation.’⁴⁴. Therefore, the taint of rape to a marriage can be broadly defined as:

‘The unpleasant quality that arises in a marriage because of the harmful effect to its reputation which occurs due to information about the husband forcing the wife to have sex, circulating in society.’

This invites a fundamental question. How is this ‘harmful effect’ to the ‘reputation’ of such a marriage greater in magnitude to the potential ‘harmful effect’ to the same marriage, which may arise due to information about *non-sexual* domestic violence circulating in society? The answer ostensibly is a unique stigma attached to sex. Who bears this stigma? It has been found that many survivors of marital forced sex feel guilty and distressed.⁴⁵ Social stigmatisation is often the reason victims don’t report domestic sexual violence to the police⁴⁶ and the stigma often entails being told that their experience is ‘not real rape’⁴⁷. In a study conducted in Rural North India for The Journal of Religion and Violence⁴⁸, the proposition that ‘Rape cannot take place in a marriage because the husband has sexual rights over his wife’ was agreed to by 32% of the male and 17% of the female participants. This trivialisation of marital sexual violence owes itself to traditional norms and societal expectations embedded in the roles of the submissive wife and dominant husband, which serve to condone marital sexual violence.⁴⁹ This means that the taint of rape is attributed not to the marital relationship itself but disproportionately to the ‘guilty’ wife who, by refusing sex, refuses to discharge an obligation/duty. The ‘taint of rape’ is therefore, a euphemism for the guilt and the shame often borne⁵⁰ by victims in the aftermath of rape.

Moreover, in emphasising upon the endangerment to the ‘sanctity of the marriage’, the opinion fails to take into consideration, situations in which the wife *wants* to end the marriage precisely *because* of the forced sex. Not considering this essentially means assuming that repeated instances of non-consensual sex would have no effect

⁴⁴ OED Online, *Id.*, 3493.

⁴⁵ D. Das, *Marital rape: The assassination of a woman’s dignity*, LVII THE INDIAN POLICE JOURNAL 62 (2010).

⁴⁶ S. Prasad, *Medicolegal response to violence against women in India. Violence Against Women*, NATIONAL LIBRARY OF MEDICINE (1999) available at: <https://pubmed.ncbi.nlm.nih.gov/12296027/> (last visited Apr. 30, 2024).

⁴⁷ D. Das, *Supra* note 45.

⁴⁸ Brown, C. Mackenzie, et al., *The Rape That Woke Up India: Hindu Imagination and the Rape of Jyoti Singh Pandey*, 2(2) JOURNAL OF RELIGION AND VIOLENCE 234 (2014), JSTOR, available at: <https://www.jstor.org/stable/26671430> (last visited Apr. 30, 2024).

⁴⁹ M. Bhat, et al., *Examining Marital Violence in India: Review and Recommendations for Future Research and Practice*, 15(1) TRAUMA, VIOLENCE & ABUSE 57 (2014), JSTOR, available at: <https://www.jstor.org/stable/26638333> (last visited Apr. 30, 2024).

⁵⁰ Julia Schwendinger and Herman Schwendinger, *Rape Victims and the False Sense of Guilt*, CRIME, AND SOCIAL JUSTICE 4 (1980), JSTOR, available at: <http://www.jstor.org/stable/29766083> (last visited Apr 30, 2024).

whatsoever on the wife's outlook towards the subsisting marriage. The idea that the preservation of the marriage has primacy over concerns of the physical and mental hurt being caused to the victim, is based on the notion that the wife has no say whatsoever in the direction the marriage must take and when it must end. This essentially amounts to the subordination of the wife by the husband, something which the Court has time and again decried as grossly undermining Constitutional values.⁵¹ The 'taint of rape' is, therefore, an irrelevant and extraneous consideration in delineating forced sex in marital and non-marital forced sex and does not save the MRE from the arbitrariness standard.

V

Article 19(1)(A) and the Right to Refuse Consent

To the petitioners' contention that the MRE does away with the right of a wife to consent to sex or say 'a joyful yes' to sex, the opinion has this to say in Paragraph 165:

*'...Plainly read, it is clear that there is nothing in the impugned Exception which obligates a wife to consent to having sex with her husband, wherever he so requests. All that it says is that sexual acts by a husband with his wife are not rape. It does not even obliquely refer to consent, or want of consent...'*⁵²

Paragraph 167 goes on to say:

*'...What the petitioners seek to urge, in principle, is that, because the wife, in the event of the husband's compelling her to have sex against her consent, cannot prosecute him for rape, therefore the wife would be compelled to consent to the act. The conclusion does not flow from the premise...'*⁵³

That the MRE does not obligate or compel a woman to have sex with her husband is quite clear. The issue at hand is whether in the context of rape law, the violation of the boundary of a woman's consent warrants a lesser punishment if the violator is married to that woman. One of the fundamental principles of criminal law and penology is that the punishment must be proportionate to the gravity of the crime⁵⁴. If violating the boundaries of a woman's consent warrants lesser punishment under a different law, provided the perpetrator is married to the woman, it also emerges that it is a less grave offence than violating the consent of other women through the exact same physical act. Therefore, while the MRE does not directly impinge upon the right of a woman to

⁵¹ *Joseph Shine v. Union of India*, *Supra* note 16, at 41 (per. Misra, J).

⁵² *RIT Foundation v. Union of India*, *Supra* note 3, at 165.

⁵³ *RIT Foundation v. Union of India*, *Id.*, at 167.

⁵⁴ Victor Tadros, 'Proportionate Punishment', *The Ends of Harm: The Moral Foundations of Criminal Law*, OXFORD LEGAL PHILOSOPHY (Oxford, 2011; Online Edn., Oxford Academic, 19 Jan. 2012).

consent to sex by creating an obligation to consent to every demand for sex, it implicitly dilutes the value of a woman's consent on the sole basis of her marital relationship with the perpetrator. The question of consent is also discussed in the context of the 'legitimate expectation of sex' and conjugal obligations. Paragraph 169 states:

*'...learned Counsel conveniently disregards all other distinguishing circumstances, including the circumstances in which the request was made, the relationship between the parties, the legitimate conjugal expectations of the man, as the husband of the woman and the reciprocal obligations of the wife...'*⁵⁵

This argument is untenable because the existence of the above-mentioned expectations and obligations with regard to sex within marriage does not mean that one of the parties in that marriage is entitled to *enforce* that expectation without the consent of the other party. As Shakhder, J points out in his opinion, the conjugal expectation of sex does not translate to an unfettered right to have sex with one's wife without consent.⁵⁶

VI

Creation of an Offence

The opinion then deals with the argument that the MRE is not liable to be struck down as redefining non-consensual sex within a marriage as rape would amount to the judicial creation of a new offence. To the argument by the petitioners that striking down the MRE would only enlarge the class of offenders and would not create a distinct offence, the opinion has the following to say in Paragraph 203.

*'...Offences may legitimately be made perpetrator-specific or victim-specific. In the present case, Section 375, read as a whole, makes the act of 'rape' perpetrator-specific, by excepting, from its scope, sexual acts by a husband with his wife...The specification of the identity of the man, and his relationship vis-à-vis the woman, which presently finds place in the impugned Exception might, therefore, just as well have been part of the main provision.'*⁵⁷

This argument encircles itself. What Hari Shankar J proposes is that since by making an exception for husbands, the entire provision read along with the exception is rendered perpetrator specific. the striking down of the exception would strip the provision of this perpetrator specific nature and effectively create an offence. However, the *exception* is precisely what is in contention here. *Its* effect on the nature of the main provision cannot be taken into consideration for its own evaluation. If the provision had a third exception which stated that no act by a man over the age of 50 would be rape, the exception could not have been defended by arguing that it made the main provision 'age specific'. The

⁵⁵ *RIT Foundation v. Union of India*, *Supra* note 3, at 169 (per. Hari Shankar J).

⁵⁶ *RIT Foundation v. Union of India*, *Id.*, at 146 (per. Shakhder J).

⁵⁷ Tadros, *Supra* Note 54.

age-specificity of the provision is precisely what would be in contention. Moreover, this seems to be an over-broad construction of the idea of creating an offence and a narrowing down of the scope of judicial review. If the offence of rape were to be rigidly interpreted to render the class of offenders and victims unalterable, there would also be no justification for reading down the age specification in the MRE from 15 to 18 as was done in *Independent Thought v. Union of India*⁵⁸. The enlargement of the victim class done by *reading down* a provision (as was done in *Independent Thought*) is in no way different to the enlargement of the victim class by *striking down* a provision. But most troublingly, in order to drive home its point of ‘offence creation’, paragraph 187 of the opinion states the following:

*‘...even if it were to be assumed that the impugned Exception does infract any right guaranteed to wives by Part III of the Constitution, the Court would, nonetheless, not be in a position to strike down the impugned Exception, as doing so would result in creation of an offence...’*⁵⁹

A judicial opinion flirting with the idea that a provision might not be liable to be struck down even if it violated a fundamental right is unprecedented (with the exception of Emergency Era Jurisprudence⁶⁰) and dangerous to say the least. But let us consider once more, our imaginary third exception that stipulates an age limit for guilt. Would the Court hesitate in striking down such an exception because it would ‘create an offence’, even at the expense of women’s fundamental rights? Article 13(1)⁶¹ of the Constitution states that any law enacted before the adoption of the Constitution inasmuch as it is inconsistent with Part III of the Constitution is invalid. The location within the law, of the clause that is unconstitutional, is irrelevant to the reading of Article 13(1). Bypassing fundamental rights cannot be made as easy as simply hiding rights violating provisions in exceptions to main clauses. If the legislature is allowed to sneak in unconstitutionality into its actions by invoking such technicalities, there is simply no point to Article 13 or having a bill of rights in the first place.

VII

Conclusion

The MRE fails all the equality standards of Article 14. There is no ‘intelligible differentia’ between acts of non-consensual sex within and outside of a marriage because there is essentially no difference in the *individual* experience of a woman, physical or emotional, during and in the aftermath of forcible sex within a marriage from forcible sex outside

⁵⁸ *Independent Thought v. Union of India*, *Supra* note 2.

⁵⁹ *RIT Foundation v. Union of India*, *Supra* note 3, at ¶187.

⁶⁰ *ADM Jabalpur v. Shivkant Shukla*, AIR 1976 SC 1207.

⁶¹ Constitution of India, 1950, Article 13(1).

of a marriage. Additionally, there is no difference in the fundamental psychological motivations of a man, when he engages in forcible sex with his wife from when he does the same with another woman. The MRE, therefore, fails the reasonable classifications test. Legitimate expectation of sex, the 'taint' of rape and the preservation of the marriage are considerations that are irrelevant to the validity of the MRE. The 'taint' of rape is essentially a euphemism for the feeling of guilt and shame experienced by a woman in the aftermath of rape and it cannot be used to defend the MRE from the Arbitrariness Standard. The MRE, while not directly obligating the wife to consent to sex on every occasion, does dilute the value of her consent by compelling her to prosecute her husband under a different law that prescribes a lesser punishment, thereby implicitly deeming the gravity of forcible sex by the husband less than that of being raped by another man. Therefore, it violates the right of a woman under Article 19(1)(a) to refuse consent for sex.

Additionally, as Shaktidher J points out in his opinion⁶², the existence of a conjugal right to sex does not mean that the husband is entitled to *enforce* those rights by disregarding the wife's non-consent. The argument that striking down the MRE would 'create an offence' cannot be accepted as it would only enlarge the class of victims, something that has already been done by increasing the age threshold in the MRE from 15 to 18⁶³. Finally, the argument that the MRE would not be liable to be struck down even if it violated the fundamental rights of married women is untenable as it is virtually an argument for a free ticket to the legislature to hide unconstitutionality in exceptions to general provisions.

The marital rape exception is a vestige from a time that did not recognise the values and morality envisaged by the Constitution. It is the direct product of a school of legal thought that was most clearly articulated by the Hale Dictum⁶⁴ which held that married women were obligated to completely submit to their husbands in furtherance of the marital 'contract'. These notions were eradicated from the Indian legal framework when the Constitution was adopted in 1950. As stated above, the institution of marriage in India is alarmingly unequal. Striking down the Marital Rape Exception will be a stepping stone in the Constitutional goal of equality and dignity for all.

⁶² *RIT Foundation v. Union of India*, *Supra* note 3, at 146 (per. Shaktidher J.).

⁶³ *Independent Thought v. Union of India*, *Supra* note 2.

⁶⁴ Amanda Taub, *The 17th Century Judge at the Heart of Today's Women's Rights Rulings*, THE NEW YORK TIMES (2022) available at: <https://www.nytimes.com/2022/05/19/world/asia/abortion-lord-matthew-hale.html> (last visited Apr 30, 2024).