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# Unconstitutionality of Exception 2 of Section 375 of the Indian Penal Code

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## ABSTRACT

*The topic of marital rape, which is profoundly ingrained in the legal system, is receiving more and more attention in the legal discourse of today. This study explores the intricate and varied facets of marital rape from a sociocultural and legal standpoint. It aims to shed light on the various jurisdictions' current legal systems, cultural norms, and victim difficulties.*

*In the recent verdict of RIT Foundation v. Union of India, division bench of Justices Rajiv Shakdher and C Hari Shankar delivered a split verdict on their position about marital rape in India. The idea of marital rape is a highly controversial topic in India. India being a patriarchal set up has always recognised the will of a husband over his wife, so for marital rape to even be considered an offence shocks most people with this mindset.*

*Establishing that marital rape violates fundamental rights and that societal pressures on women lead to violations of their rights is the main goal of this study work. After reading and analysing a number of journals and case laws, it was determined that marital rape is unconstitutional and that the law shielding the perpetrators needs to be overturned.*

*Finally, this research paper urges legal reform, more knowledge, and survivor support systems in order to reevaluate legislation pertaining to marital rape. It makes the case that dealing with marital rape is essential to establishing a more equitable and compassionate society as well as upholding the values of gender equality and human rights which are not being given priority over age old discriminations.*

**Keywords:** *Constitution of India, Fundamental Rights, Marital rape, Protection by law, Unconstitutional.*

A man is said to commit "rape" under Section 375 of The Indian Penal Code when he engages in sexual intercourse with a woman under specific circumstances, except for the case outlined in the exception.

1. Against Her Will: Rape occurs when a man has sexual intercourse with a woman without her consent or against her will.

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2. Without Her Consent: Rape also occurs when sexual intercourse happens without the woman's consent.
3. Consent Obtained by Threats: Rape can occur when a man obtains the woman's consent through threats of death or harm to her or someone she cares about.
4. Deceptive Consent: Rape can occur when a man has sexual intercourse with the woman with her consent, but he knows that she consents because she believes he is her husband or another man to whom she is lawfully married.
5. Consent Under Incapacity: Rape can occur when a woman gives her consent, but she is unable to understand the nature and consequences of her consent due to unsoundness of mind, intoxication, or the administration of stupefying or unwholesome substances.
6. Minor's Consent: Rape can occur with or without the woman's consent when she is under sixteen years of age.

The text also contains an exception, stating that sexual intercourse by a man with his own wife is not considered rape if the wife is not under fifteen years of age. <sup>2</sup>

This means that even if a husband satisfies all these above conditions ( except the 4<sup>th</sup> subpoint which wouldn't apply in this case) and rapes his wife, it would not be considered rape and he would be give legal immunity from the offence of marital rape as it is not considered an offence at all. It's important to note this definition is meant to outline when a sexual act can be classified as rape and when it falls outside the scope of the crime.

In a country with a such a large population and within a society where women are victims to a patriarchal set up , it isn't astonishing to see that such an exception to rape hasn't yet been held unconstitutional. Married women are viewed as objects that are owned by their husbands by the society and not as a human being who have the right to make choices over their own bodies.

In the case *X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi and Another*<sup>3</sup>, para 74 says as follow:

*74. Married women may also form part of the class of survivors of sexual assault or rape. The ordinary meaning of the word 'rape' is sexual intercourse with a person, without their consent or against their will, regardless of whether such forced intercourse occurs in the context of matrimony. A woman may become pregnant as a result of non-consensual sexual intercourse*

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<sup>2</sup> Indian Penal Code, 1860

<sup>3</sup> *X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi and Another* 2022 SCC OnLine SC 1321

*performed upon her by her husband. We would be remiss in not recognizing that intimate partner violence is a reality and can take the form of rape. The misconception that strangers are exclusively or almost exclusively responsible for sex-and gender-based violence is a deeply regrettable one. Sex-and gender-based violence (in all its forms) within the context of the family has long formed a part of the lived experiences of scores of women.*

Though this was said only in the context of a woman getting an abortion, it can be observed that the Indian Courts are recognising the aspect of the existence of marital rape within the institution of marriage as an actual problem that needs to be addressed.

### **(A) Research methodology**

The question to be investigated is why Exception 2 of Section 375 of IPC existed and whether it violates fundamental right, and if it does, whether or not it must be struck down. The author has conducted a doctrinal study of journals available in Jstor and Manupatra and case laws from SCCOnline in order to assess the current issue. The research is qualitative in nature, using primary data from case laws and secondary data from the journals cited.

### **(B) Research problem**

It is contended that Exception 2 of Section 375 of IPC is unconstitutional as it violates Articles 14, 15 (1), and 21 in particular. Article 14 is violated when married women are not shielded from their husbands' unconsented sexual activity—but are nevertheless legally protected if it is not their husband. Article 15 (1) is violated since sex is the basis for discrimination and because it fosters negative stereotypes that infringe married women's fundamental rights. Unconsensual sex violates Article 21 because it violates a married woman's right to live in dignity because her husband's act of violence is carried out without her agreement. Nevertheless, a court has not acknowledged these violations of fundamental rights to strike down the exception that grants an offender legal immunity.

### **(C) Research objective**

The author seeks to find out why the Exception to rape exists and how the provision violates fundamental rights like Articles 14, 15(1) and 21.

### **(D) Research questions**

1. What is the historical background of the existence of Exception 2 of section 375 of the IPC and why is it harmful to women?
2. How is Exception 2 of section 375 of IPC violative of article 14, 15 (1) and 21 of the Indian Constitution?

3. What is the historical background of the existence of Exception 2 of section 375 of the IPC and why is it harmful to women?

The legal invalidation of marital rape can be attributed to a combination of historical, cultural, and patriarchal factors. The lack of legal recognition and protection had significant negative implications for victims and contributed to the widespread invalidation of the marital rape experience. It was only in the late 20th century that marital rape began to be recognized as a crime in many jurisdictions, and efforts to address this issue are ongoing and exception 2 of the Indian Penal Code still provides legal immunity to a man who happens to be the perpetrator of rape on his wife.

The legal invalidation of marital rape can be traced back to the historical and cultural context in which marriage was viewed as a contract between a man and a woman, with the man having ownership and control over his wife. This patriarchal view of marriage meant that women were seen as the property of their husbands and were expected to submit to their sexual demands. As a result, the concept of marital rape was not recognized by the law, and husbands were not held accountable for raping their wives. Another reason for legal invalidation was the belief that marriage was a sacred institution that should be protected from outside interference, including from the law. This meant that the state did not want to interfere in the private affairs of married couples, including their sexual relations. This view was reinforced by the idea that the family was the basic unit of society and that the state should not interfere in its internal affairs. Furthermore, the legal system was dominated by men who held patriarchal views of marriage and sexuality. These men were often judges, lawyers, and lawmakers who had the power to shape the legal system and its policies. As a result, they were not inclined to recognize marital rape as a crime and did not see it as a serious issue. The lack of legal recognition of marital rape had significant negative implications for victims, including limited research and services. Victims of marital rape were often blamed for their abuse and were not taken seriously by law enforcement or healthcare professionals. This lack of recognition and protection also meant that victims could not seek legal recourse against their abusers, leaving them vulnerable to ongoing abuse.<sup>4</sup>

There have been given multiple rationales as to why marital rape is not a criminal act, one of the main arguments for the exemption is based on implied consent. It suggests that when a woman gets married, she consents to her husband's sexual advances as a part of the marital

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Author(s): JENNIFER A. BENNICIE and PATRICIA A. RESICK<sup>4</sup> MARITAL RAPE: History, Research, and Practice, Source: *Trauma, Violence & Abuse*, July 2003, Vol. 4, No. 3 (July 2003), pp. 228-246 Published by: Sage Publications, Inc.

contract. However, this rationale is inconsistent with the principles of modern egalitarianism in sexual relationships and does not consider the changing dynamics within marriages.

Historically, wives were often considered the property of their husbands, and the rape law aimed to protect the chastity and honor of women. Within the context of a marital relationship, if the parties had been intimate, forcible sexual intercourse without the wife's consent was not seen as rape, as the husband was viewed as using his property. Section 497 of the Indian Code, 1860 defined adultery as:

*Adultery.—Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.*<sup>5</sup>

This section was held struck down in the case of *Joseph Shine v. Union of India*<sup>6</sup> where Section 497 of the Indian Penal Code and Section 198(2) of the CrPC (which was the procedural provision for enforcing section 497 of the IPC) were struck down as they were violative of Articles 14, 15 (1) and 21.

However what needs to be noted, its that Section 497 of IPC had conferred the right on a husband to hold accountable the man who has sexual relations with his wife, however the same right had not been conferred upon the wife, so if the husband has sexual relations with an unmarried woman or widow, he would not be punished. This was one of the reasons as to why this section was struck down.

This decision further strengthened the idea of women being their own individual person and not a property of their fathers or husbands which was being recognised by the Apec court.

What also needs to be noted is that this decision came out in 2019, which is means that the decision is very recent and the underlying notion that a wife is the property of her husband was being subtly reinforced, decades after the Constitution was made.

There is an existence of gender bias in traditional Hindu marriage ceremonies, which promotes the inferior status of women. marriage historically involved the transfer of a daughter from her father to her husband, emphasizing the objective of providing a suitable match for the husband, protecting family property, and ensuring the continuity of the family lineage. the practices

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<sup>5</sup> Section 497, Indian Penal Code, 1860

<sup>6</sup> *Joseph Shine v. Union of India*, (2019) 3 SCC 39

Kanyadan and Panigrahan ceremonies as significant elements of marriage, with Kanyadan symbolizing the transfer of the bride from her guardian to the groom.

The term "Kanyadan" is problematic, as it implies that the bride is treated as property without feelings or autonomy, and her father has absolute control over her. The passage also points out the irony that the Brahma form of marriage, where the girl is given by her father to a learned man, is still considered the most appropriate form of marriage among Hindus.

Kanyadan as a ceremony that diminishes the value of the girl, even at the time of the enactment of the Hindu Marriage Act.<sup>7</sup>

The Unity of Person Principle is another such principle, based on the legal fiction that a wife's identity merged into that of her husband upon marriage, made rape by a husband legally impossible since, in the eyes of the law, he cannot rape himself. However, this concept has largely been abandoned in other areas of law, and marriage is now considered a partnership with equal rights.

Another argument suggests that it is challenging to prove rape between spouses, and false complaints could be used for ulterior motives, such as obtaining favorable property settlements during divorce. However, similar difficulties in proving consent exist in cases where the couple is sexually familiar with each other, and women can file complaints for other crimes.

It is also argued that prosecuting intra-marital rape cases would hinder reconciliation and marital harmony, which goes against the policy of the law. This rationale does not align with the absence of immunity for husbands in other offenses related to the same conduct and assumes a level of harmony that may not exist in troubled marriages.

Some contend that assault and battery laws provide adequate protection to wives. However, this argument assumes the validity of the exemption, when the question should be whether the exemption should continue to exist. It is suggested that the exemption is outdated and should be abandoned, given the dangers associated with forced sexual intercourse without the wife's consent and the changing dynamics within marriages.<sup>8</sup>

These societal views of women are dangerous and perpetuate a culture where women are not seen as valuable members of the society but as objects or inferior members in society or as people with ulterior motives. This further prevents women from seeking justice as just

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<sup>7</sup>Saxena, Poonam Pradhan. "MATRIMONIAL LAWS AND GENDER JUSTICE." *Journal of the Indian Law Institute* 45, no. 3/4 (2003): 335–87.

<sup>8</sup> Author(s): M. V. Sankaran, THE MARITAL STATUS EXEMPTION IN RAPE, Source: *Journal of the Indian Law Institute*, October-December 1978, Vol. 20, No. 4 (October-December 1978), pp. 594-606 Published by: Indian Law Institute

approaching the court for justice would result in societal isolation as it is viewed against the morals of the society. And even when women do seek relief, courts would deem that since, the exception exists, they would not be getting a remedy as marital rape is not a crime under the Indian Penal Code 1860.

### **How Is Exception 2 Of Section 375 Of IPC Violative Of Article 14, 15 (1) And 21 Of The Indian Constitution?**

Article 14 of the Indian constitution ensures "Equality before the law" in India, this doesn't necessarily mean that the same law should apply universally to all persons and under all circumstances. Equality before the law means that there should be no discrimination among equals. If the law treats all persons belonging to a certain category or class equally, it doesn't violate the fundamental right of equal protection.

Law is always based on some kind of classification or selection. Some degree of inequality is implicit in every selection. Not all forms of inequality are unconstitutional; they must be "actually and palpably unreasonable or arbitrary" to be deemed unconstitutional.

Indian Constitution includes various articles that exemplify the application of the general principle of equality. Article 15(1) prohibits discrimination by the state based on religion, caste, sex, place of birth, or any of them. Article 16(1) ensures equality of opportunity in matters relating to employment or appointment to any office under the state. Article 17 abolishes untouchability. To be constitutional, a classification in legislative enactments must satisfy two tests:

- It should be founded on intelligible differentia, which distinguishes those in the group from others not in the group.
- The differentia must have a rational relation to the object sought to be achieved by the legislation. There should be a nexus between the differentia and the legislative objective.

The Supreme Court of India in the case *Dalmia v. Justice Tendolkar*<sup>9</sup> enumerated on these 6 principles:

1. law may be constitutional even if it applies to a single individual due to special circumstances.
2. There is a presumption in favor of the constitutionality of an enactment, and the burden of proof lies on those challenging it.

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<sup>9</sup> Ram Krishna Dalmia v. S.R. Tendolkar, 1958 SCC OnLine SC 6



3. The legislature is presumed to understand the needs of the people, and its laws are based on experience and adequate grounds.
4. The legislature can recognize degrees of harm and restrict its legislation accordingly.
5. The court may consider common knowledge, common report, and historical context when evaluating the constitutionality of a law.
6. Good faith and knowledge of the existing conditions are presumed on the part of the legislature, but this presumption has limits.<sup>10</sup>

Article 15 of the Indian Constitution is as such:

*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*

In the case of *Navtej Singh Johar v. Union of India*<sup>11</sup>

Justice D.Y Chandrachud talks about discrimination as done in *air india v. nergesh meerza* and why it shouldn't be interpreted the way it was interpreted - para 431 and 438: this formalistic interpretation of article 15 would render the constitutional guarantee against discrimination meaningless as it would allow the state to claim that discrimination was based on sex and another ground and hence outside the ambit of article 15. Latent in the argument of discrimination are stereotypical notions of the differences between men and women which are used to justify discrimination. This narrow view of article 15 strips the prohibition on discrimination of its essential content. This fails to take into account the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially in socio-political and economic context.

A discriminatory act will be tested against constitutional values. A discrimination cannot survive constitutional scrutiny when it's grounded in and perpetuates stereotypes about a class constituted by the grounds prohibited in article 15 (1). If any ground of discrimination, whether direct or indirect is founded on stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by article 15 on the grounds only of sex. If certain characteristics grounded in stereotypes, are associated with entire classes of people constituted as groups by any of the grounds prohibited in article 15 (1), that cannot

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<sup>10</sup> Chowdhury, Subrata Roy. "Equality before the Law in India." *The Cambridge Law Journal* 19, no. 2 (1961): 224-25

<sup>11</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1

establish a permissible reason to discriminate. Such a discrimination will be in violation of constitutional guarantee against discrimination under Article 15 (1). That such discrimination is a result of grounds rooted in sex and other considerations, can no longer be held to be a position supported by the intersectional understanding of how discrimination operates. This infuses article 15 with true rigour to give it a complete constitutional dimension in prohibiting discrimination.<sup>12</sup>

Justice D.Y Chandrachud also talks about constitutional morality and how it should prevail over public morality and also about transformative constitutionalism which emphasises on the constitution's transformative effect on the society.

Constitutional morality refers to the adherence to the principles and values enshrined in the Constitution, such as democracy, equality, and justice. It is a moral compass that guides the actions of individuals and institutions in accordance with the Constitution's spirit and purpose. Constitutional morality is not limited to the text of the Constitution but extends to its underlying principles and values, which are essential for the functioning of a democratic society.

Transformative constitutionalism, on the other hand, is a concept that emphasizes the Constitution's transformative potential to bring about social change and promote justice. It recognizes that the Constitution is not a static document but a living one that must evolve with changing times and societal needs. Transformative constitutionalism seeks to use the Constitution as a tool for social transformation, particularly for marginalized and disadvantaged groups. It involves interpreting the Constitution in a manner that advances its transformative potential and promotes social justice.

These arguments were used to emphasise that constitution order should prevail over mainstream culture, and that discrimination should be subject to constitutional morality and not public morality.

Article 21 under Indian constitution is as such:

*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<sup>13</sup>*

In the case of *Bodhisattwa Gautam v. Subhra Chakraborty*<sup>14</sup> the court asserts that rape is not just a crime against the individual victim but is an offense against society as a whole. It highlights the broader social implications of sexual violence and how it affects the collective

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<sup>12</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

<sup>13</sup> Constitution of India

<sup>14</sup> *Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490

well-being of the community. Rape is described as having a profound psychological impact on the victim, pushing her into deep emotional crises. It states that rape is a violation of a person's most cherished fundamental rights, specifically the Right to Life contained in Article 21 of the Indian Constitution. This underscores the importance of recognizing and protecting the rights of victims. It suggests that rape is more an act of aggression aimed at degrading and humiliating women than a purely sexual offense. This perspective aligns with the idea that rape is about power and control over the victim.

In the case *Puttaswamy v. Union of India*<sup>15</sup>, in justice DY Chandrachud's opinion, it was stated that the evolution of Article 21 in India has seen significant changes since the *Cooper* decision. Two major areas of change have been observed. First, fundamental rights are no longer seen as isolated or separate, with Article 14 now animating the content of Article 21. Second, the expression 'procedure established by law' in Article 21 is no longer seen as a mere formalistic requirement, but it must ensure a fair, just, and reasonable process. The mere presence of a procedure in enacted law is not enough to guarantee its validity; it must also meet the requirements of fairness, justice, and reasonableness.

In dealing with substantive challenges to laws that violate fundamental rights, certain principles of constitutional interpretation are followed. There is a presumption of constitutionality, placing the burden of proof on the individual challenging the law. Courts are cautious when it comes to matters of social and economic policy, deferring to the legislature and executive. The separation of powers doctrine requires the Court to respect the legislature's role in lawmaking.

The test of reasonableness in evaluating the constitutionality of a law depends on various factors, including the nature of the right being infringed, the purpose of the restrictions, the urgency of addressing the issue, and prevailing conditions. Social philosophy and judges' values also play a part in determining reasonableness.

The power of judicial review allows the Court to adjudicate on the validity of a law, not limited to the fairness of the procedure but also considering substantive challenges to laws affecting the right to life and personal liberty. Article 14 against arbitrariness impacts both the procedure and the law itself. Laws under Article 21 must be consistent with fairness and reasonableness originating in Article 14. The importance of judicial review in protecting life and personal liberty cannot be understated, and ceding this right would weaken constitutional safeguards. While recognizing the presumption of constitutionality and the separation of powers, the Court retains the constitutional power to protect individuals' lives and freedoms.

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<sup>15</sup> *K.S. Puttaswamy (Privacy-9J.) v. Union of India*, (2017) 10 SCC 1

The mention of 'substantive due process' is cautioned against, as it introduces an American concept not accepted during the framing of the Indian Constitution. Reference to substantive due process is essentially about challenging the substantive provisions of a law, distinct from procedural aspects, on the grounds of constitutional violation.

### *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<sup>16</sup>*

Considering the legal provisions and case laws mentioned, exception 2 of section 375 of IPC is unconstitutional as:

When there is an article 14 violation, it needs to be tested for two points, i) whether there is intelligible differentia and ii) whether the differentia must have a rational relation to the object sought to be achieved by the legislation. There should be a nexus between the differentia and the legislative objective. Considering these two points while keeping in mind exception 2, there is intelligible differentia which is in this case the legal provision doesn't protect married women from rape by their husband but protects women at large from rape as long as its not by their husband. However there is an absence of nexus between the object sought to be achieved and the legislation as, this legal provision dates back to 1860, this was before fundamental rights were guaranteed to it people, and women were still seen as property of their husbands, so due to that reason it would not have been rape, however after fundamental rights have been guaranteed to all, and women are no longer property of their husband, it would be considered rape as there is absence of consent between two distinct legal personalities. The whole point of the legal provision is to protect women from the act of sexual intercourse without consent, and discriminating against married women when the act has been done by their husband doesn't fulfil the purpose of the legislation.

There is also the aspect of article 15 (1) violation where the society thinks it is okay for a husband to rape his wife as the wife had consented to the sex while getting married, however this isn't a legal reason but an opinion of the public, the court has to look at constitutional morality and not public morality when an individuals fundamental rights have been violated, in this case it is an article 15 violation as the grounds are based on sex and the stereotype that women are obligated to have sexual intercourse with their husband as and when the husband pleases, and perpetuation such stereotypes are dangerous and infringes on and individuals right

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<sup>16</sup> Indian Penal Code, 1860

to consent to sexual intercourse.

This exception is also a violation of Article 21 as, when article 21 and article 14 are read together one has to establish that the provision is reasonable and fair, however rape is a violation of article 21 and the distinction created between rape and marital rape and one being protected while the other not offering any protection is not fair or reasonable as it gives the husband legal immunity from acts of rape even though it destroys the dignity of his wife, he won't be punished even though he had sexual intercourse with his wife against her will, without her consent, when she is mentally unsound or when the consent is obtained from threatening to hurt her or her loved ones. This act of violence will go unpunished just because the couple is married in the eyes of law, and thus it protects such acts of the husband. Though fundamental right is violated, this legal provision puts conjugal rights over fundamental rights.

In the case of *RIT Foundation v. the Union of India*<sup>17</sup>, there was a split verdict where JUSTICE RAJIV SHAKDHER held this exception is unconstitutional as it violated fundamental rights and struck it down while JUSTICE C. HARI SHANKAR held that it shouldn't be struck down as it created an offense and that the judiciary did not have the authority to create a new offence and also stated that the provisions for punishment and evidence were not meant to be applied to the exception, however what needs to be observed is that JUSTICE C. HARI SHANKAR opposed to striking it down because of the implications of striking it down and not because he believed that it didn't violate fundamental rights.

However taking Article 13(1) of the Constitution, it says a pre constitutional will be held void if proved that it violates fundamental rights, it doesn't mention the procedural implications of the same, in this case the court only has to look at whether fundamental rights are violated or not and not whether the punishments and other procedural provisions are meant to punish the offender or not.

## **CONCLUSION**

Exception 2 of section 375 of Indian Penal code must be struck down as it violates fundamental rights as it fails to protect women from non-consensual sexual intercourse by their husbands. Though a husband and wife are seen societally as a unit, it needs to be noted that legally they are two distinct legal personalities and it is possible for one to violate the others fundamental rights, especially in a culture where domestic violence is prevalent and still seen as something normal and acceptable, married women need to be protected by the law so that the fundamental

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<sup>17</sup> *RIT Foundation v. Union of India*, (2022) 3 HCC (Del) 572

rights that are guaranteed to them, are not violated. Women also have historically been exploited and treated as objects, and by striking down Exception 2 of Section 375 of the Indian Penal Code, it would help empower women as it would reinforce the idea that their rights would be protected by the law and that the patriarchal setup that had historically been violating their rights would be destroyed, thus giving back the rights that had previously been withheld from them.

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