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WOMEN AND THE LAW

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I INTRODUCTION

ON JANUARY 14, 2022, the Additional District and Sessions Court, Kottayam Division, acquitted Bishop Franco Mulakkal of Jalandhar on charges of wrongful confinement, rape, unnatural sex and criminal intimidation of a nun who had accused him of repeated sexual assault.[1] The court found that the complainant could not 'be categorised as a sterling witness', she was not 'wholly reliable witness'[2] as her testimony was full of inconsistencies and contradictions. The judgment – 289 pages long – is woven by court's incessant attempts at discrediting the complainant's version and establishing that she was a liar. Instead of inquiring into the accusations against the accused Bishop, the court turned most of its interpretive and investigative energies into establishing how guilty the nun herself was. The verdict could be summed up in the following lines:[3]

> This is a case in which the grain and chaff are inextricably mixed up. It is impossible to separate the grain from the chaff. There are exaggerations and embellishments in the version of the victim. She has also made every attempt to hide certain facts. It is also evident that the victim wasswayed under the influence of others who had other vested interest in the matter. The in-fight and rivalry and group fights of the nuns, and the desire for power, position andcontrol over the congregation is evident from the demand placed by PW1 and her supporting nuns who were ready to settle the matter if their demands for a separate region under the diocese of Bihar is accepted by the church.

According to the court, it was a grave inconsistency that the complainant nun had not disclosed the complete extent of sexual abuse suffered by her either

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1 *State of Kerala* v. *Bishop Franco Mulakkal*, Sessions Case No. 457/2019, In the Court of Session Kottayam Division (date of judgment: Jan. 14, 2022).

2 *Id.*, para 389.

3 *Id.*, para 394.

in the first information report or when she had confided in the other sisters. In paragraph 388, where the judge, in detail, elucidated how the complainant gave different versions at different points of time, he observed: 'Her revelation to PWs 3 and 4 during December 2016 was that Bishop is *forcing her* to share bed with him. She did notdisclose to them that she was subjected tosexual violence on 13 occasions' (emphasis supplied). Throughout the case, the judge stuck to a fallacious distinction he had carved out between 'forced to share bed' and sexual violence, remitting the former category to the realm of legality. We get no insight into court's understanding of consent, or even 'force'. All that one learns from the judgment is that the complainant has a dubious history, and that she concocted a story of lies, backed by many power-hungry accomplices who all wanted to bring down a poor Bishop.

After the 2013 amendments in rape law, it was believed that victims of sexual violence would be in a better position to secure just legal outcomes but nothing seems to have changed in rape trials. Despite an explicit definition of consent in the statute, the courts have disregarded the mandate of the law to stubbornly focus on irrelevant considerations to ascertain whether sexual assault had taken place. In this case, the reasoning of the court revolved around 'torn hymen' and 'illicit relationship'to completely discredit the testimony of the complainant. This is how this year began, with a sad reminder that we are abysmally distant from any conception of gender and sexual equality and without a doubt, feminism is indeed the longest revolution.[4]

Starting with this dismal case of a sessions court, this survey seeks to offer a glimpse into how 2022 looked for women's rights and gender justice. I begin with the rider that what follows is an incomplete account of happenings on 'women and the law', not merely for the reason that it overwhelmingly focusses on the Supreme Court's reported decisions. This account is also grossly inadequate because, in getting caught within the logic of enumeration and summation of cases, it falls short of, what I imagine to be,the aspiration of *ASIL, i.e.*, to perform the task of re-statement of the law. Nevertheless, the reader will find in here many important decisions of this year which will go on to have real and material impact on the lives of women, and which can serve as signposts for researchers inviting deeper analysis and further research.

II RIGHTS

Property Rights

In *Kamala Neti (Dead) Thr. Lrs.*v. *Special Land Acquisition Officer*,[5] the issue before the court was whether the appellant, a member of a Scheduled Tribe, is entitled to a share in the compensation with respect to her father's acquired land, on the basis of survivorship under the provisions of Hindu Succession Act (hereafter 'HSA'). Since section 2(2) of HSA excludes the members of scheduled

4 Juliet Mitchell, *Women's Estate* (Penguin, 1971).

5 (2023) 3 SCC 528.

tribes from its scope, the high court had held that the appellant could not claim any right or benefit under HSA. Agreeing, the apex court observed that '[i]f the claim of the appellant on the basis of the survivorship under the Hindu Succession Act is accepted in that case it would tantamount to amend the law' and '[i]t is for the legislature to amend the law and not the Court'.[6] However, the court went on to observe:[7]

> [T]here may not be any justification to deny the right of survivorship so far as the female member of the Tribal is concerned. When the daughter belonging to the non-tribal is entitled to the equal share in the property of the father, there is no reason to deny such right to the daughter of the Tribal community. Female tribal is entitled to parity with male tribal in intestate succession. To deny the equal right to the daughter belonging to the tribal even after a period of 70 years of the Constitution of India under which right to equality is guaranteed, it is high time for the Central Government to look into the matter and if required, to amend the provisions of the Hindu Succession Act by which the Hindu Succession Act is not made applicable to the members of the Scheduled Tribe.

The court, thus, directed the Central Government to re-consider the exemptions provided under HSA taking into consideration the right to equality guaranteed under the Constitution of India.

In *Har Naraini Devi* v. *Union of India,*[8] the appellants, (son's widow and granddaughter of one Mukhtiar Singh), challenged the constitutional validity of section 50(a) of Delhi Land Reforms Act 1954 (hereafter, '1954 Act') on the touchstone of articles 14 and 15 of the Constitution, contending that the 1954 Act discriminates against women. The appellants sought equal rights of succession in the property on par with the grandsons, and to this effect argued that Hindu Succession Act 1956 (hereafter, 'HSA') must prevail over the 1954 Act. They also asserted that section 4(2) of HSA (which excluded the inheritance of tenancy rights in agricultural land from the purview of HSA and left the inheritance of tenancy rights in agricultural land to be governed by the State tenurial laws) was deleted in 2005 and therefore, rights conferred to women under HSA must be recognised. The high court had dismissed the petition on the ground that the 1954 Act was placed 'in the Ninth Schedule to the Constitution much prior to the judgment in the case of Kesavananda Bharati vs. State of Kerala, and also in view of Article 31(B) of the Constitution of India extending immunity to such legislation.'[9]

The apex court agreed with the high court. The court noted that Mukhtiar Singh died in 1997, when section 4(2) of HSA was still in operation, and therefore 'its subsequent deletion would not have any impact on the rights of inheritance,

6 *Id.*, para 6.1.

7 *Id.*, para 7.1.

8 2022(14) SCALE 624.

9 *Id.*, para 7.

which had already accrued and crystallised, prior to the amendment.'[10] Moreover, 'all amendments are deemed to apply prospectively unless expressly specified to apply retrospectively or intended to have been done so by the legislature.'[11]

In *Arunachala Gounder (Dead) by LRs* v. *Ponnusamy,*[12] the question before the court was whether the property purchased by 'M' in court auction sale will devolve on to his sole daughter upon the death of her father intestate by inheritance, or will it devolve on to father's brother's son by survivorship (the father did not have any son, and his brother was also dead). The court noted that ancient texts, the Smritis, as well as renowned commentaries and judicial pronouncements have recognized the rights of several female heirs, the wives and the daughters being the foremost of them. And concluded:[13]

> If a property of a male Hindu dying intestate is a self- acquired property or obtained in partition of a coparcenery or a family property, the same would devolve by inheritance and not by survivorship, and a daughter of such a male Hindu would be entitled to inherit such property in preference to other collaterals.

In this case, 'since the property in question was admittedly self-acquired property […] despite the family being in state of jointness upon his death intestate, his sole surviving daughter Kupayee Ammal, will inherit the same by inheritance and the property shall not devolve by survivorship.'[14] Also, since the daughter, Kupayee Ammal, after inheriting the suit property, died after enforcement of Hindu Succession Act, 1956 which abolished all notions of a limited estate, she held the property as her absolute property, as a full owner (section 14).[15]

In *Smt. Kaithuami [L] through LRs* v. *Smt. Ralliani,*[16] a case in which inheritance claim was based on the Mizo customary law of inheritance (which provides that a son shall inherit the properties of a Mizo), the apex court came up with a strong qualification. Affirming the decision of the district council court, the court had held that inheritance depends on whether the person supported the deceased in his old age or not. Thus, even if there was a natural heir, the person who supported the deceased until death could inherit the properties. The court

10 *Id.*, para 22.

11 *Id*., para 23.

12 2022(1) SCALE 681.

13 *Id*., para 66.

14 *Id.*, para 67.

15 On the application of s. 14(2) of HSA, see *Jogi Ram* v. *Suresh Kumar,* 2022(2) SCALE 713. The will of 'T' bequeathed his land equally between the appellant (his son from his first wife who had passed away) and 'R' (his second wife). While the appellant was given absolute ownership, R was given limited ownership (the land would pass on to the appellant after her lifetime). R's daughter claimed that she had become owner in possession of the half of the land willed to her mother. R also executed two sale deeds qua the land in favour of the daughter. But R passed away before these deeds could be executed. The Supreme Court, relying on s. 14(2), held that R had not become the owner of the land as she only had a life interest in her favour.

16 2022(6) SCALE 788.

reached this decision 'based on the consideration of equity and the responsibility of a legal heir to look after the elders in the family.'[17] In this case the youngest, divorced daughter who came to live with the parents and took care of them was entitled to the inheritance.

Reproductive Rights

A 25-year-old unmarried woman who was in a consensual relationship, found out that she was 22 weeks pregnant in July 2022.[18] While the Medical Termination of Pregnancy Act, 1971 (hereafter 'MTP Act') allows termination of pregnancy up to 20 weeks (section 3(2)(a)), in case the pregnancy poses risks to the woman's life or mental health or there is a substantial risk that the child will be born with 'any serious physical or mental abnormality', the Act further allows for termination between 20-24 weeks (section 3(2)(b)). However, as per the MTP Rules such an abortion would be permissible only in cases of rape survivors, minors, women with changed marital status during pregnancy, mentally-ill women, or in cases of foetal malformation. Rule 3B(c) of the MTP Rules specifically permitted termination between 20-24 weeks if there was a 'change of marital status' during pregnancy (widowhood and divorce). The appellant argued that her partner had refused to marry her at the last stage and she should be allowed to terminate her pregnancy. Specifically, her contention was that rule 3B(c) was discriminatory as it did not permit unmarried women to secure an abortion.

In what is definitely one of the most important decisions of this year, the court ruled that unmarried women should be allowed to secure an abortion between 20-24 weeks under rule 3B of the MTP Rules.[19] For this a 'purposive interpretation' of the legal provision was needed. The Supreme Court noted:[20]

> The social stigma surrounding single women who are pregnant is even greater and they often lack support from their family or partner. This leads to the proliferation of persons not qualified / certified to practice medicine. Such persons offer the possibility of a discreet abortion and many women may feel compelled by their circumstances to engage the services of such persons instead of opting for a

17 *Id.*, para 19.

18 *X* v. *The Principal Secretary Health and Family Welfare Department Govt. of NCT of Delhi*(2023) 9 SCC 433.

19 Rule 3B: "The following categories of women shall be considered eligible for termination of pregnancy under clause (b) of sub-section (2) Section 3 of the Act, for a period of up to twenty-four weeks, namely:- (a) survivors of sexual assault or rape or incest; (b) minors; (c) change of marital status during the ongoing pregnancy(widowhood and divorce); (d) women with physical disabilities [major disability as per criteria laid down under the Rights of Persons with Disabilities Act, 2016 (49 of 2016)]; (e) mentally ill women including mental retardation; (f) the foetal malformation that has substantial risk of being incompatible with life or if the child is born it may suffer from such physical or mental abnormalities to be seriously handicapped; and (g) women with pregnancy in humanitarian settings or disaster or emergency situations as may be declared by the Government."

20 *Supra* note 18, para 29.

> medically safe abortion […] this often leads to disastrous consequences for the woman.

In this context, the court highlighted the MTP Amendment Act 2021, which recognises that 'the anguish caused by a pregnancy (up to twenty weeks) arising from a failure of a contraceptive device used by "any woman or her partner" [in place of "married woman or her husband"] either for limiting the number of children or for preventing pregnancy can be presumed to constitute a grave injury to a woman's mental health.'[21] Thus, the legislature sought to broaden the scope of section 3 and 'bring pregnancies which occur outside the institution of marriage within the protective umbrella of the law'.

Construing Rule 3B, the court noted:[22]

> The common thread running through each category of women mentioned in Rule 3B is that the woman is in a unique and often difficult circumstance, with respect to her physical, mental, social, or financial state. All the different categories in Rule 3B represent women who seek an abortion after twenty weeks either due to a delay in recognizing pregnancy, or some other change in their environment impacting their decision on whether the pregnancy is wanted or unwanted. The law recognizes the myriad ways in which a pregnancy may cause distress in such situations and cause grave injury to her physical and mental health. It gives such women latitude in seeking out the termination of an unwelcome pregnancy by extending the gestational period up to which the termination is legally permissible.

Recognizing that '[m]arried women may also form part of the class of survivors of sexual assault or rape',[23] the court held that 'the meaning of the words "sexual assault" or "rape" in Rule 3B(a) includes a husband's act of sexual assault or rape committed on his wife […] Any other interpretation would have the effect of compelling a woman to give birth to and raise a child with a partner who inflicts mental and physical harm upon her.'[24]

The court also took the opportunity to straighten out a bizarre anomaly that existed between the protection conferred on minors by the POCSO Act, on the one hand and the MTP Act, on the other. Under section 19 of the POCSO Act (which requires mandatory reporting),[25] a registered medical practitioner (RMP) when

21 *Id.*, para 53.

22 *Id.*, para 69.

23 *Id.*, para 71.

24 *Id*., para 75.

25 On the importance of the provision of mandatory reporting in suspected cases of abuses, see *State of Maharashtra* v. *Dr. Maroti s/o Kashinath Pimpalkar,* 2022(15) SCALE 518. In this case of sexual assault of 17 minor tribal girls in a girls' hostel, FIR was filed against the respondent doctor for his failure to report the offence under the POCSO Act even though he had knowledge about the sexual abuse. The high court's order to quash the FIR against him, was found unsustainable by the Supreme Court.

approached by a minor for a medical termination of pregnancy arising out of a consensual sexual activity, is obliged to provide information pertaining to the 'offence' to the concerned authorities. Such insistence on disclosure of name of the minor by the RMP may lead to reluctance and fear in the minor and her guardians who may not want to get involved in criminal proceedings. To address this legal embroglio, the court held:[26]

> To ensure that the benefit of Rule 3B(b) is extended to all women under 18 years of age who engage in consensual sexual activity, it is necessary to harmoniously read both the POCSO Act and the MTP Act. For the limited purposes of providing medical termination of pregnancy in terms of the MTP Act, we clarify that the RMP, only on request of the minor and the guardian of the minor, need not disclose the identity and other personal details of the minor in the information provided under Section 19(1) of the POCSO Act. The RMP who has provided information under Section 19(1) of the POCSO Act (in reference to a minor seeking medical termination of a pregnancy under the MTP Act) is also exempt from disclosing the minor's identity in any criminal proceedings which may follow from the RMP's report under Section 19(1) of the POCSO Act. Such an interpretation would prevent any conflict between the statutory obligation of the RMP to mandatorily report the offence under the POCSO Act and the rights of privacy and reproductive autonomy of the minor under Article 21 of the Constitution. It could not possibly be the legislature's intent to deprive minors of safe abortions.

Coming to the factual matrix that led to this case, the court through an interim order, granted the appellant permission to terminate her pregnancy under the MTP Act, subject to opinion of the medical board constituted under the All India Institute of Medical Sciences (AIIMS). Significantly, the court read rule 3B in the following terms:[27]

> The object of Section 3(2)(b) of the MTP Act read with Rule 3B is to provide for abortions between twenty and twenty-four weeks, rendered unwanted due to a change in the material circumstances of women. In view of the object, there is no rationale for excluding unmarried or single women (who face a change in their material circumstances) from the ambit of Rule 3B. A narrow interpretation of Rule 3B, limited only to married women, would render the provision discriminatory towards unmarried women and violative of Article 14 of the Constitution.

Mothers' Rights

The issues in *Mrs. Akella Lalitha* v. *Sri Konda Hanumantha Rao,*[28] were whether the mother, who is the only natural/legal guardian of the child after the

26 *Supra* note 18, para 81.

27 *Id*., para 121.

28 2022(11) SCALE 249.

death of the biological father can decide the surname of the child; whether the mother can give the child the surname of her second husband whom she has remarried after the death of her first husband; and whether she can give the child for adoption to her husband. The paternal grandparents of the child in this case had filed a petition under the Guardian and Wards Act for appointing them as guardians. During the proceedings, it was brought to notice of the high court that the surname of the child was changed. Disposing the petition, the high court directed the mother to restore the surname of the child to that of his natural (deceased) father, and wherever possible, change the records to reflect the name of the natural father (and where this change is impermissible, reflect the name of her second husband as step-father).

The Supreme Court, recognizing the bizarreness of these observations, affirmed that the mother who is the only natural/ legal guardian of the child after the death of the biological father has the right to decide the surname of the child. She can very well choose to give the minor child the surname of her second husband, and can also give the child for adoption to her second husband. Admonishingly, the court observed:[29]

> The direction of the High Court to include the name of the Appellant's husband as step-father in documents is almost cruel and mindless of how it would impact the mental health and self-esteem of the child. A name is important as a child derives his identity from it and a difference in name from his family would act as a constant reminder of the factum of adoption and expose the child to unnecessary questions hindering a smooth, natural relationship between him and his parents.

Maternity Leave

In *Deepika Singh* v. *Central Administrative Tribunal,*[30] appellant's application for maternity leave was rejected on the ground that she had two surviving children (from her spouse's first marriage) for whom she had previously availed of child care leave. The employer reasoned that the child borne by her would be considered her third child, and thus, maternity leave was not allowed under rule 43. The Appellant challenged the rejection of her maternity leave before the Central Administrative Tribunal (hereafter 'CAT'). According to CAT, 'for all practical purposes and as far as respondent department is concerned, she has already two surviving children and she is taking benefit for them from the respondent department by way of Child Care Leave and other benefits.' The appellant appealed to the Punjab and Haryana High Court, but her appeal was dismissed. She then preferred an appeal to the Supreme Court. The court held that the appellant was entitled to maternity leave under rule 43(1) for her first biological child. Her right to maternity leave for her biological child remained unaffected by the fact that her spouse had two children from his prior marriage for whom she had

29 *Id*., para 11.

30 2022 SCC OnLine SC 1088.

taken child-care leave. The court observed rule 43 of Service Rules must be construed liberally to promote social welfare.[31] These rules must enhance non-discrimination principle of article 15 of the Constitution, as they are in the nature of beneficial provisions for women underarticle 15(3) of Constitution to create beneficial provisions for women.

The intention of the Service Rules as also the Maternity Benefit Act, 1961 is to facilitate continued participation of women in the workforce by ensuring that an individual is not disentitled from being paid their wages during a period of leave for childbirth or child-care. Conceding that women undertake a disproportionate share of child-care, the court emphasised that 'atypical family units deserve equal benefits' (such as the present case) and held that the appellant 'should not be denied maternity leave merely because she entered into a parent-child relationship or undertook child-care responsibilities in ways that may not find a place in the popular imagination.'[32]

Covid-19 vaccination of pregnant women and lactating mothers

The Delhi Commission for Protection of Child Rights (DCPCR) approached the Supreme Court under article 32 seeking specific reliefs to provide effective access to Covid-19 vaccination to pregnant women and lactating mothers.[33] The petitioner gave many suggestions like modification of the Co-Win portal to incorporate a declaration at the time of registration, which would facilitate the monitoring of the health of the vaccinated women or mothers. It was also submitted that to further support the surveillance measures instituted by the government to monitor adverse events following immunization, targeted tracking of pregnant women and lactating mothers can be considered to bolster the process. These suggestions were shared with the government to streamline the ongoing vaccination process.

Interestingly, an intervenor in this case argued that there are studies which reflect that COVID-19 vaccines pose a risk to pregnant women and the foetus. On this basis, the intervenor sought a direction from the court to stop the administration of vaccination to pregnant women. The court, however, bypassed this concern stating that these 'clearly lie in the policy domain and this Court cannot take medical decisions regarding the safety of COVID-19 vaccination among pregnant and lactating persons.'[34] The court closed the matter with the assurance that 'the affidavits of the Union of India indicate that NTAGI and NEGVAC have taken great care in recommending vaccination for these groups only after receiving guidance from the World Health Organization and other domain experts.'[35]

31 *Id.*, paras 15-16.

32 *Id.*, para 26.

33 *Delhi Commission for Protection of Child Rights* v. *Union of India,* 2022(2) SCALE 842.

34 *Id.*, para 13.

35 *Ibid*.

Rights of sex workers

Exercising the power to do complete justice under article 142 of the Constitution, the Supreme Court in *Budhadev Karmaskar* v. *State of West Bengal*[36] recognised the legislative gap with respect to the rights and protections of sex workers, and issued many directions to the Union of India. These, *inter alia*, include (i) immediate medical assistance in accordance with Section 357C of the Code of Criminal Procedure, 1973 read with "Guidelines and Protocols: Medico-legal care for survivor/victims of sexual violence", Ministry of Health and Family Welfare, if any sex worker becomes a victim of sexual assault, (ii) conducting survey of all ITPA Protective Homes (by state governments) so that cases of adult women, who are detained against their will can be reviewed and processedfor release in a time-bound manner, (iii) sensitisation of the police and other law enforcement agencies towards the rights of sex workers so that they are treated with dignity and not subjected to abuse and violence, (iv) the Press Council of India to issue guidelines for the media to ensure that the identities of sex workers, during arrest, raid and rescue operations, whether as victims oraccused are not revealed, (v) the newly introduced section 354C of the IPC which makes voyeurism a criminal offence, to be strictly enforced against electronic media, to prohibit telecasting photos of sex workers in the garb of capturing the rescue operation, (vi) measures that sex workers employ for their health and safety (e.g., use of condoms, etc.) must neither be construed as offences norseen as evidence of commission of an offence, (vii) state authorities, through National Legal Services Authority, State Legal Services Authority and District Legal Services Authority, must conduct workshops for educating the sex workers about their rights vis-a-vis the legality of sex work, rights and obligations of the police and access to the judicial, (viii) Aadhar cards to be issued to sex workers on the basis of a proforma certificate issued by UIDAI and submitted by the Gazetted Officer at NACO or the Project Director of the State Aids Control Society, along with Aadhar enrolment form; this process should be undertaken respecting the confidentiality of sex-worker.

As an important step towards recognising sex work as a profession, the court observed: 'notwithstanding the profession, every individual in this country has a right to a dignified life under article 21 of the Constitution of India. The Constitutional protection that is given to all individuals in this country shall be kept in mind by the authorities who have a duty under Immoral Traffic (Prevention) Act,1956.'[37]

Gender cap

In *Hotel Priya, A Proprietorship* v. *State of Maharashtra,*[38] the appellants who were either owners or operating the restaurants and bars where orchestra performances happened challenged certain conditions that had to be complied

36 2022 SCC OnLineSC704.

37 *Id*., para 7.

38 2022(3) SCALE 663.

with to procure the necessary licenses for operation of orchestra bars. One of the conditions was a cap on the number of men and women permitted to perform on the stage. Only four women and four men singers/artists were permitted on the stage. The appellants argued that imposing any restrictions on the number of artists, whether male or female, had no basis and violated articles 14 and 19(1)(g) of the Constitution. The respondent, on the other hand, urged that orchestra bars are a new form of dance bars where the same women who were previously employed in the dance bars, now perform as orchestra artistes. These places are exploitative where women are made to do obscene dance moves and engage in sexual activities with customers. Thus, the condition of having only four women was made under article 15(3) for the safety of women employees/artistes and in the interest of general public.

The court rejected the protectionist argument of the petitioners and held:[39]

> In case there were any real concern for the safety of women, the state is under a duty - as highlighted by Anuj Garg, to create situations conducive to their working, to run that extra mile to facilitate their employment, rather than to thwart it, and stifle their choice. Such measures – which claim protection, in reality are destructive of Article 15 (3) as they masquerade as special provisions and operate to limit or exclude altogether women's choice of their avocation.

The court thus held that the gender cap imposed by the impugned condition to be void.

Hijab ban case

On February 5, the Karnataka government, in exercise of powers under the Karnataka Education Act, 1983, issued an order prescribing a uniform for all students in state-run educational institutions. The order prohibited the students from wearing the hijab inside the classroom. This order was challenged and validated by a three-judge bench of the Karnataka High Court, holding that wearing of hijab is not an essential religious practice (ERP) for Muslims. In the appeal preferred before the Supreme Court,[40] it was argued that 'the right to dress inheres in the right to freedom of speech and expression, right to identity, and the right to dignity under Article 21 of the Constitution of India' and 'that Muslim women wearing hijab is a symbolic expression of their identity to the public as a woman who follows Islam.'[41] It was also contended that the order violates article 25 since 'wearing of a headscarf is an essential religious practice' followed by the women following Islam since time immemorial [...] the same has been provided for in their religious scriptures and thus is essential to the religion.'[42] The state, on the other hand, averred that

39 *Id*., para 46.

40 *Aishat Sifha* v. *State of Karnataka* (2023) 3 SCC 1.

41 *Id*., para 83 (per Gupta J).

42 *Id.*, para 90 (per Gupta J).

'wearing of hijab may be a practice, it may be an ideal or a permissible practice' but it is not an essential practice, and article 25 only protects essential practices.[43]

A division bench of the Supreme Court heard the matter and delivered a split verdict. Hemant Gupta J confirmed the high court decision. In his view, it is within the powers of the state 'to direct that the apparent symbols of religious beliefs cannot be carried to school maintained by the State from the State funds.'[44] He held that the order does not abridge any fundamental right of the girl student. The hijab ban does not even restrict the right to education in any way, since 'it is the choice of the student to avail such right or not. The student is not expected to put a condition, that unless she is permitted to come to a secular school wearing a headscarf, she would not attend the school. The decision is of the student and not of school when the student opts not to adhere to the uniform rules.[45]

Sudhanshu Dhulia J set aside the order in categorical terms. He noted that that the high court had erroneously made the issue about ERP. Making an important clarification with respect to the scope of article 25, he remarked that 'the question of Essential Religious Practices […] was not at all relevant in the determination of the dispute.'[46] Article 25(1) of the Constitution is not restricted to an essential religious practice, '[i]t may simply be any religious practice, a matter of faith or conscience.'[47] Displacing ERP, Dhula J placed the affected individual at centre of this debate: the girl child who was being denied her right to education. His words, reproduced below, offer a renewed way to approach this question, taking it away from the stale debate of essential versus non-essential practices:[48]

> One of the best sights in India today, is of a girl child leaving for her school in the morning, with her school bag on her back. She is our hope, our future. But it is also a fact, that it is much more difficult for a girl child to get education, as compared to her brother. In villages and semi urban areas in India, it is commonplace for a girl child to help her mother in her daily chores of cleaning and washing, before she can grab her school bag. The hurdles and hardships a girl child undergoes in gaining education are many times more than a male child. This case therefore has also to be seen in the perspective of the challenges already faced by a girl child in reaching her school. The question this Court would therefore put before itself is also whether we are making the life of a girl child any better by denying her education, merely because she wears a hijab!

The case has now been placed before the Chief Justice of India who will refer it to a larger bench.

43 *Id.*, paras 93-94 (per Gupta J).
44 *Id.*, para 125 (per Gupta J).
45 *Id.*, para 175 (per Gupta J).
46 *Id.*, para 17 (per Dhulia J).
47 *Ibid* (per Dhulia J).
48 *Id.*, para 66 (per Dhulia J).

III VIOLENCE OF FAMILY AND MARRIAGE

Dowry related death

In *State of UP* v. *Veerpal,*[49] the trial court convicted the accused father-in-law and mother-in-law of the deceased woman under section 302 of the IPC. The high court reversed the trial court's verdict noting that there were two dying declarations: in the first the deceased had said that she attempted suicide because of the fear of her father-in-law, but in the second she stated that she was set on fire. The high court acquitted the accused based on the belief that the deceased might have poured kerosene on herself. The Supreme Court, however, restored the decision of the trial court because there was 'a common thread in the statements of the deceased' that she was attacked by the accused -respondent. The court also emphasised that the statements made by the deceased in her dying declaration were 'consistent with medical evidence […] burns are at such parts as could have resulted when a person, other than the deceased poured kerosene and set fire.'[50]

In yet another case of dowry death,[51] the deceased was 18 years old when she got married. In less than four years of her marriage, when she was five months pregnant, she committed suicide by setting herself on fire. The trial court convicted the respondents, the husband and father-in-law of the deceased under sections 304B, 306 and 498A of the IPC. The high court acquitted the father-in-law, and convicted the husband only under 498A. According to the high court, demanding money for the construction of house could not be treated as a dowry demand. The Supreme Court corrected the interpretation of both facts and the law. It held that the high court was wrong in drawing the inference that the deceased had herself joined her husband and father-in-law in asking her natal family to contribute money to construct a house. In fact, evidence on board revealed that 'the deceased was pressurized to make such a request for money to her mother and uncle. It was not a case of complicity but a case of sheer helplessness faced by the deceased in such adverse circumstances.'[52] Thus, the demand for construction of the house was a dowry demand.

Cruelty and harassment

In *Meera* v. *State by the Inspector of Police, Thiruvotriyur Police Station Chennai*,[53] the appellant's daughter-in-law had succumbed to her pressure and had committed suicide in 2006. The apex court upheld the conviction of the mother-in-law under section 498A of the IPC. On the question of the sentence, it was argued that since the appellant was 80 years old, the court should take a lenient view. Dismissing this plea, the court observed that 'it was the duty of the appellant, being the mother-in-law and her family to take care of her daughter-in-law, rather than harassing and/or torturing and/or meting out cruelty to her daughter-in-law

49 2022(2) SCALE 665.

50 *Id.*, para 10.2.

51 *State of Madhya Pradesh* v. *Jogendra,* 2022(1) SCALE 351.

52 *Id.*, para 14.

53 2022(1) SCALE 364.

regarding jewels or on other issues.'[54] However, given her age, the court reduced the sentence from one year to three months rigorous imprisonment.

Evidence of a deceased wife

In *Surendran* v. *State of Kerala,*[55] the apex court held that the evidence of a deceased wife with respect to cruelty could be admissible in a trial under section 498A of the IPC under section 32(1) of the Evidence Act. The court overruled its previous judgments wherein it was held that the evidence of the deceased could not be admitted under section 32(1) of the Evidence Act to prove the charge under section 498A of the IPC only because the accused was acquitted of the charge relating to the death of the deceased. However, to admit the dying declaration, certain pre-conditions must be met: first is that her cause of death must have come into question in the matter (*eg.*, the prosecution should have charged the accused under section 302, 306 or 304B, along with the charge under section 498A of the IPC), even though the charge related to death may not have been proved. The second condition for admissibility is that the prosecution must show that the evidence that is sought to be admitted with respect to section 498A of the IPC must also be connected in some way to the circumstances of the transaction of the death.

General omnibus allegations

'[F]alse implication by way of general omnibus allegations made in the course of matrimonial dispute, if left unchecked would result in misuse of the process of law', declared the Supreme Court in *Kahkashan Kausar @ Sonam* v. *State of Bihar.*[56] The complainant had filed a complaint against her husband and his parents in 2017 alleging demand of dowry and harassment. The magistrate had concluded that no case was made against the in-laws since allegations against them were not specific in nature. However, the court had taken cognizance for section 498A against the husband. The dispute however was eventually resolved and the complainant came back to her matrimonial home. In 2019, she again filed a complaint that her husband and the in-laws were pressurizing her for dowry and were threatening to forcibly terminate her pregnancy if demands were not met. The accused filed a petition in the high court for quashing of the FIR. According to the high court, a *prima facie* case was made out and therefore, further investigation by the police was needed. The Supreme Court quashed the complaint against the appellant in-laws since 'no specific and distinct allegations' were made and one could not 'ascertain the role played by each accused in furtherance of the offence.'[57] Here, it is important to add that while the courts must safeguard against the abuse of process of law, in cases of matrimonial violence, they should be more vigilant against subtle, everyday forms of cruelty and harassment which cannot be translated into concrete templates of specific allegations.

54 *Id.*, para 8.
55 2022(7) SCALE 806.
56 2022(3) SCALE 8.
57 *Id.*, para 19.

Domestic Violence

In *Prabha Tyagi* v. *Kamlesh Devi*,[58] the court made some important clarifications with respect to the scope, applicability and procedure of the Protection of Women from Domestic Violence Act, 2005 (DV Act). First, the court declared that 'it is not mandatory for the aggrieved person, when she is related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are family members living together as a joint family, to actually reside with those persons against whom the allegations have been levelled at the time of commission of domestic violence.'[59] If a woman has the right to reside in the shared household under section 17 of the DV Act, and she becomes a victim of domestic violence, she is entitled to the reliefs under the DV Act. Second, it was clarified that it is not necessary that at the time of filing of an application under the Act, the domestic relationship between the parties should be subsisting. Thus, even if an aggrieved person is not in a domestic relationship with the respondent in a shared household in the present, an application under section 12 of the DV Act can nevertheless be filed. If the aggrieved person has at any point of time lived in the shared household or even had the right to live (as was evident in the present case), she is entitled to file an application under section 12 of the DV Act. Third, it was held that Domestic Incidence Report is not mandatory before initiating the proceedings under DV Act. Particularly, section 12 does not make it mandatory for a magistrate to consider a Domestic Incident Report filed by a protection officer or service provider before passing any order under the DV Act. Even in the absence of a Domestic Incident Report, a magistrate can pass both ex parte or interim as well as a final order under the DV Act.

Limitation period

Kamatchi v. *Lakshmi Narayanan*[60] made another vital clarification with respect to the limitation period under section 468 of the Code of Criminal Procedure (CrPC) to applications filed under section 12 of the DV Act. The court noted that 'the High Court was in error in observing that the application under Section 12 of the Act ought to have been filed within a period of one year of the alleged acts of domestic violence.'[61] Emphasising that the remedies sought under section 12 of the DV Act are civil remedies, distinct from criminal proceedings, the court observed:[62]

> The provisions of the [DV] Act contemplate filing of an application under Section 12 to initiate the proceedings before the concerned Magistrate. After hearing both sides and after taking into account the material on record, the Magistrate may pass an appropriate order under Section 12 of the Act. It is only the breach of such order

58 2022(8) SCALE 123.
59 *Id.*, para 52.
60 2022(6) SCALE 247.
61 *Id.*, para 20.
62 *Id.*, para 15.

> which constitutes an offence as is clear from Section 31 of the Act. Thus, if there be any offence committed in terms of the provisions of the Act, the limitation prescribed under Section 468 of the Code will apply from the date of commission of such offence. By the time an application is preferred under Section 12 of the Act, there is no offence committed in terms of the provisions of the Act and as such there would never be a starting point for limitation from the date of application under Section 12 of the Act. Such a starting point for limitation would arise only and only after there is a breach of an order passed under Section 12 of the Act.

Sexual governance of minors

In *Mafat Lal* v. *State of Rajasthan*,[63] the appellant (and his wife) approached the apex court to quash a FIR which was filed against him by his wife's father. In 2005, a FIR was filed that the appellant had abducted a minor girl to compel her to marry under sections 363 and 366 of the IPC. In 2020, the couple had filed a petition with the high court, invoking section 482 of the CrPC, for quashing of the said FIR. They stated that they both were in love but the relationship was not acceptable to the girl's father. This compelled them to leave their respective families to get married and start a life together. Now 15 years had passed, they were happily married, they had an eight-year old son but the loveless, lawful law had not forgotten the 'crime'. The high court declined to quash the prosecution since the appellant had in fact abducted a minor, he had 'evaded the investigation and had been successful in keeping away from the process of law for several years.'[64] Fortunately, for this family and all those who retain faith both in love and law, the Supreme Court saw the futility of this entire exercise and quashed the proceedings against the appellant.

Via the defense of provocation

The defense of provocation in India is an uninterrogated doctrine where judges uncritically embrace and rescue affective states of those who kill to avenge their misplaced notions of honour. In *Sabitri Samantaray* v. *State of Odisha*[65] one finds a lingering impact of provocation as an honour-based defense. In this case, the appellants, husband and wife, were accused of strangulating the victim to death, and attempting to conceal his identity by pouring acid over his body. The prosecution furnished evidence that the victim was in love with the accused persons' daughter and would also visit their house sometimes. The sessions court had convicted the accused (as well as their daughter) for murder. The high court had acquitted the daughter as 'she was not present at the scene of offense' and the accused-appellants' conviction was reduced to section 304 Part II. The reason for mitigation of liability was that 'there was a strong possibility of existence of grave and sudden provocation, which was discernible from adduced

63 2022(6) SCALE 37.

64 *Id*., para 6.

65 2022(8) SCALE 767.

evidence.'[66] Here, it is important to note here that grave and sudden provocation was invoked to perform the 'evidential function' to deny intention to kill or cause grievous bodily injury.[67] The apex court rejected the appellant's plea and maintained the decision of the high court.

IV SEXUAL VIOLENCE

Two-finger test

In *State of Jharkhand* v. *Shailendra Kumar Rai*,[68] the Supreme Court noted that despite being declared illegal, 'two-finger test' was still being performed. The court declared in categorical terms that a person who conducts the 'two-finger test' while examining a person alleged to have been subjected to a sexual assault shall be guilty of misconduct. The court reiterated that the test is based on the fallacious assumption that the sexual history of a woman has any connection whatsoever with her having been raped. Foregrounding section 53A of the Evidence Act, the court highlighted that evidence of a victim's character or of her previous sexual experience with any person is not relevant to the issue of consent.

Outlining the guidelines issued by the Ministry of Health and Family Welfare for health providers in cases of sexual violence, it was re-emphasised:[69]

> Per-Vaginum examination commonly referred to by lay persons as 'two-finger test', must not be conducted for establishing rape/sexual violence and the size of the vaginal introitus has no bearing on a case of sexual violence. Per-vaginum examination can be done only in adult women when medically indicated.
>
> The status of hymen is irrelevant because the hymen can be torn due to several reasons such as cycling, riding or masturbation among other things. An intact hymen does not rule out sexual violence, and a torn hymen does not prove previous sexual intercourse. Hymen should therefore be treated like any other part of the genitals while documenting examination findings in cases of sexual violence. Only those that are relevant to the episode of assault (findings such as fresh tears, bleeding, edema etc.) are to be documented.

The Union Government as well as the State Governments were directed to (i) ensure that the guidelines formulated by the Ministry of Health and Family Welfare are circulated to all government and private hospitals. (ii)conduct workshops for health providers to communicate the appropriate procedure to be adopted while examining survivors of sexual assault and rape, and (iii)review the curriculum in medical schools to bring it in consonance with the procedural law pertaining to sexual violence.[70]

66 *Id*., para 7.

67 For a distinction between 'doctrinal' and 'evidential' function of provocation, see Ian Leader-Elliott, "Provocation" in wing-Cheong Chan *et al (eds.),* Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal of Criminal Law Reform (Routledge, 2011).

68 2022(15) SCALE 500.

69 *Id.*, para 64.

70 *Id.*, para 66.

Promise to Marry

In *Shambhu Kharwar* v. *State of Uttar Pradesh,*[71] the complainant and the appellant got into a relationship. After some time, the complainant got married to someone else, but her relationship with the appellant continued. He convinced her to get out of the marriage and he started living with her. After some time, he got engaged to someone else. The complainant filed an FIR alleging that the appellant kept sexually assaulting her, he kept making lame excuses and gave false assurances that he would marry her. The appellant filed an application for quashing of the criminal proceedings against him. The apex court quashed the criminal proceedings, noting that the parties were in a consensual relationship from 2013 until December 2017. They were both educated adults and the complainant was in a relationship with the appellant prior to her marriage, during the subsistence of the marriage and even after securing divorce by mutual consent.

The court usefully recounted the law on this question which is verbatim produced below:[72]

> [T]here is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled […]
>
> Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent". On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The "consent" of a woman under Section 375 is vitiated on the ground of a "misconception of fact" where such misconception was the basis for her choosing to engage in the said act […]

The above case must be contrasted with *Ms. P.* v. *State of Madhya Pradesh*,[73] where the appellant alleged that the second respondent/ accused had induced her into a physical relationship on the false pretext of marrying her. It was her case that when she informed the accused that she was pregnant, he started ignoring her and refused to marry her. The high court granted him bail on the ground that there was a delay on the part of the appellant in lodging the FIR without giving any plausible explanation. Without going into merits, the apex court cancelled the bail order owing to the peculiar circumstances of the case where the accused was involved in at least four criminal cases and had a political clout.

71 2022(12) SCALE 33.
72 *Id.*, para 11.
73 2022(7) SCALE 411.

Incestuous rape

An eight-year old girl was raped and killed by her maternal uncle.[74] The trial court convicted him under sections 302 and 376(2)(i) of the IPC and section 6 of POCSO Act and awarded the death sentence. The same was upheld by the high court. The Supreme Court while upholding the conviction, commuted the sentence to life imprisonment.[75] While commuting the sentence, the court noted that 'we do not find any reason to rule out the possibility and the probability of the reformation and rehabilitation of the appellant',[76] at the same time stipulated that 'he shall not be entitled to premature release or remission before undergoing actual imprisonment for a period of thirty (30) years.'[77]

Sexual Harassment

In *Anusha Deepak Tyagi* v. *State of Madhya Pradesh,*[78] the court affirmed the duty of the trial courts in dealing with the aggrieved persons in an appropriate manner by allowing proceedings to be conducted in camera, where appropriate; allowing the installation of a screen to ensure that the aggrieved woman does not have to see the accused while testifying; ensuring that the counsel for the accused conducts the cross-examination of the aggrieved woman does so in a respectful fashion; and completing cross-examination in one sitting as far as possible.

Another case of sexual harassment records the ordeals of one Additional District and Sessions Judge after she was sexually harassed by Justice A.[79] She stated that at the instance of Justice A, the then D&AG addressed a complaint against her to the high court, on account of which she was transferred from Gwalior to Sindhi. She had sent her first representation to the Registrar General of the high court, requesting for an extension of eight months so that her daughter could complete her education, but her application was rejected. She then sent a second representation proposing alternative cities for transfer which would have enabled her to support her daughter's education. This was also rejected. Consequently, the petitioner resigned from her position. She then sent her complaint to the President and the CJI, with a prayer to consider the circumstances under which she was coerced to resign. After an inquiry into the conduct of Justice A, Rajya Sabha cleared him of all charges. But the inquiry committee also concluded that the petitioner's transfer was irregular, her resignation was coerced and thus her reinstatement was recommended. The petition filed in the high court for reinstatement was rejected. Correcting the course of action, the Supreme Court

74 *Veerendra* v. *State of Madhya Pradesh,* 2022(8) SCALE 47.

75 Also see,*Pappu* v.*State of Uttar Pradesh,* 2022(3) SCALE 45.

76 *Supra* note 74, para 56.

77 *Id.*, para 58. Also see, *Bhagwani* v. *State of Madhya Pradesh*, 2022(1) SCALE 642. For a clarification on the quantum of sentence to be imposed in the wake of different statutory provisions prescribing different versions of life imprisonment, see *Mohd. Firoz* v. *State of Madhya Pradesh,* 2022(6) SCALE 456.

78 2022(11) SCALE 789.

79 *Ms. X* v. *Registrar General, High Court of Madhya Pradesh,* 2022(3) SCALE 99.

held that the petitioner's resignation could not be considered voluntary,[80] and the transfer order was 'covered by 'malice in law' inasmuch as it was passed without taking into consideration the Guidelines provided in the Transfer Policy but on the basis of unverified allegations made in the complaint made by the then D & SJ, Gwalior.'[81] The respondents were thus directed to reinstate the petitioner as an Additional District & Sessions Judge.

POCSO: permission of the magistrate in non-cognizable case

In *Gangadhar Narayan Nayak @ Gangadhar Hiregutti* v. *State of Karnataka*,[82] the appellant who is the editor of the newspaper, in which a news report named a 16-year-old girl victim of sexual harassment, was charged under section 23 of POCSO Act which prescribes the procedure to be followed by the media in such cases. He filed an application for discharge under section 227 of the CrPC, stating that section 23 of POCSO was non-cognizable and hence, the police could not have investigated the offence without obtaining an order of the magistrate under section 155(2) of the CrPC. The issue were whether section 155(2) of the CrPC applies to the investigation of an offence under section 23 of POCSO. And, whether the special court is debarred from taking cognizance of an offence under section 23 of POCSO and if permission of the jurisdictional magistrate has not been taken. The high court had refused to quash the proceedings against the appellant under section 23 of the Act. However, the two-judge bench of the apex court gave a split decision in this case. While Indira Banerjee J observed that the appellant could not be discharged without trial, only because of want of prior permission of the jurisdictional magistrate to investigate into the alleged offence, Maheshwari J allowed the appeal. The matter was placed before the Chief Justice of India for constituting a larger bench to settle the issue.

Trafficking

In Sartaj Khan v. *State of Uttarakhand,*[83] a 30-year old Indian man was charged for enticing and trafficking a Nepali Minor girl in India. He was arrested near the Indo-Nepal border and charged under sections sections 363, 366-B, 370(4), 506 of the IPC and section 8 of the POCSO Act. The high court had set aside trial court's order of acquittal and convicted the appellant of the offences punishable under aforementioned sections. In appeal before the Supreme Court, the appellant-accused, inter alia, argued that he could not have been tried since no sanction for prosecution was taken which is mandated under section 188 of the CrPC. The apex court rejecting this argument clarified that the said sanction is required 'when the entirety of the offence is committed outside India'. In the present case, 'a part of the offence was definitely committed on the soil of this country' and hence, there was no need of sanction as mandated under section 188.

80 *Id.*, para 87.
81 *Id.*, para 62.
82 2022(5) SCALE 119.
83 2022(5) SCALE 384.

Vulnerable witnesses

In *Smruti Tukaram Badade*v. *The State of Maharashtra*,[84] the apex court, in exercise of its powers under article 142 of the Constitution, gave directions for establishing and strengthening Vulnerable Witnesses Deposition Centres (VWDC) in all high courts. Significantly, the court expanded the definition of 'vulnerable witness' (as contained in clause 3(a) of the 'Guidelines for recording evidence of vulnerable witnesses in criminal matters' set up by the High Court of Delhi). This category, the court declared, should not be limited only to those child witnesses who have attained the age of 18 years, but must also include, inter alia, victims of sexual assault (irrespective of age and gender), witnesses suffering from any mental illness, persons with disability.

V SERVICE AND OTHER MISCELLANEOUS MATTERS

Balancing employment with family needs

In *Union of India* v. *Manju Arora,*[85] respondents, all women, were offered promotion to the higher post of translation officer. However, due to personal grounds such as family needs or difficulty in moving to another station, they had refused the promotion. The question before the court was whether the respondents could claim the benefit of Assured Career Progression Scheme (ACP Scheme) which provided for financial upgradation to the next higher grade of pay for those employees who could not get promotion even after 12 years of service. The Supreme Court held that the benefits of the ACP Scheme cannot be claimed by an employee when she, despite offer for regular promotion, had refused to accept the same. These employees cannot be considered to be stagnating as they had opted to remain in the existing grade on their own will. This case reveals how women tend to have stunted career progression: where on the one hand their decisions of forgoing promotions for family needs are viewed as free, and in complete blindness to structural inequalities which impede professional advancement of women, on the other hand the state continues to hold on to formal application of even welfare provisions. Is it not revealing that all the employees who refused promotions were women and they all did so for 'personal reasons'?

The above case should be read alongside *S.K. Naushad Rahman* v. *Union of India*,[86] where speaking against the backdrop of a long-standing policy of Department of Personnel and Training for posting of spouses at the same station, the apex court emphasised that the state's transfer policy must give due importance to the employees' family life. The court emphasised the systemic discrimination suffered by women at the workplace on account of gender, which has compelled the state 'to adopt policies through which it produces substantive equality of opportunity as distinct from a formal equality for women in the workplace.'[87] Women are often burdened disproportionately with an unequal share of family

84 (2022) 18 SCC 24.

85 2022(1) SCALE 1.

86 *S.K. Naushad Rahman* v. *Union of India* (2022) 12 SCC 1.

87 *Id.*, para 48.

responsibilities and this ought to be accounted for by the state policies once a woman has gained access to the workplace. The court thus observed that provision made for spousal posting 'is in that sense fundamentally grounded on the need to adopt special provisions for women which are recognized by Article 15(3) of the Constitution.'[88]

'The disciplined force' has a gender

In *Anil Kumar Upadhyay* v. *The Director General, SSB,*[89] the appellant, head constable in SSB, was charged with violation of good conduct and discipline, for entering the Mahila Barrack of the battalion. A departmental enquiry found him guilty and he was punished with'removal from service'. He challenged his removal. The single judge of the high court set aside the punishment and asked the disciplinary committee to award him a lesser punishment. The reason behind single judge's order was that in parallel proceedings, the female constable who was on sentry duty and who had allowed the entry of the constable, was given the penalty of forfeiture of two years seniority in the rank of constable. The judge had thus found the punishment given to the constable as disproportionate. The division bench reversed this order. The apex court agreeing with the division bench noted that the appellant had compromised the security of the occupants of the Mahila Barrack, and his conduct could not be equated with that of the female constable: 'a member of the disciplined force is expected to follow the rules, have control over his mind and passion, guard his instincts and feelings and not allow his feelings to fly in a fancy. The nature of misconduct which has been committed by the appellant stands proved and is unpardonable.'[90]

VI IN LIEU OF A CONCLUSION

I would close the survey with the Delhi High Court decision in *RIT Foundation* v. *Union of India*.[91] Along with *Bishop Franco Mulakkal*'s case with which I started this survey, this case also exposes the underbelly of all promises of transformative and feminist constitutionalism. In *RIT Foundation,* the marital rape exception (MRE) which confers immunity on husbands from rape prosecution was challenged as unconstitutional on the ground of violating articles 14, 15(1), 19(1)(a), and 21 of the Constitution. The two-judge bench of the high court delivered a split judgment. In an appalling opinion ridden with the worst sexual stereotypes and myths, Hari Shankar's J upheld the constitutional validity of MRE. For the judge, the classification between married and unmarried women on which MRE rests, was both intelligible and reasonable for it would be 'unrealistic to presume that a wife, on whom a husband forces sex, against her will on a particular occasion, would suffer the same degree of violation as a woman who is ravaged by a stranger.'[92] He saw no merit whatsoever in the petitioners' case because marriage

88 *Ibid.*
89 2022(6) SCALE 497.
90 *Id*., para 9.
91 (2022) 3 HCC (Del) 572.
92 *Id*., para 135A.

is the 'most pristine institution of mankind';[93] it is 'the most sublime relationship that can exist between man and woman';[94] and '[s]ex between a wife and a husband is, whether the petitioners seek to acknowledge it or not, sacred.'[95] For Shankar J, there is no possibility of rape within marriage.

In contrast, Rajiv Shakder J held that MRE is unconstitutional on all the above-mentioned grounds: it makes an unreasonable classification between married and unmarried couples; it is discriminatory against married women; and it impairs their sexual agency and autonomy. In a sharp response to the argument that MRE seeks to protect the institution of marriage, Shadker J remarked: '[w]hen marriage is a tyranny, the State cannot have a plausible legitimate interest in saving it.'[96] Further, he noted 'modern-day marriage is a relationship of equals. The woman by entering into matrimony does not subjugate or subordinate herself to her spouse or give irrevocable consent to sexual intercourse in all circumstances. Consensual sex is at the heart of a healthy and joyful marital relationship.'[97] Countering the argument that striking down of the exception would amount to creation of an offense, the judge observed that the offense of rape is already defined in substantive law, and no new ingredients would be added to the offense if MRE is struck down. Many commentators have applauded Shakder J opinion and argued that it should be upheld by the Supreme Court,[98] but in my view his decision is far from perfect and we need to pay attention to both its overzealous haste mixed with a kind of self-righteousness as well as judicial slips. Particularly, the question of striking down an exception is criminal law has to be conceptually thought through for its larger implication for the liberal principles of criminal jurisprudence. It may be said here that the issue of striking down MRE is not as much about creation of a 'new' offense (as it is made out to be in the present case) but one of expanding the scope of an existing criminal provision. When we swear by rule of strict constriction of criminal law, can we overlook the fact that judicial removal of exceptions in criminal law tantamount to enlarging the scope of criminal law? Is that a judicial function? Further, in his zeal of attempting to author a pro-women opinion, how do we read Shadker's J bizarre comparisons where the fate of married women is seen as far worse than even the sex-workers! 'Sex- worker has been invested with the power to say "no" by the law', the judge moaned, 'but not a married woman.'[99] One wonders if these are slips in the judgment which betray the judge's own assumptions about legitimate hierarchies within which protections ought to be conferred to women.

93 *Id.*, para 116.

94 *Id*., para 118.

95 *Id*., para 119.

96 *Id.*, para 137.1.

97 *Id*., para 163.

98 Gautam Bhatia, 'A Question of Consent: The Delhi High Court's Split Verdict on the Marital Rape Exception' *available at*: https://indconlawphil.wordpress.com/2022/05/11/a-question-of-consent-the-delhi-high-courts-split-verdict-on-the-marital-rape-exception/ (last visited on Apr. 7, 2023).

99 *Id.*, para 137.1. Also see, para 164.

The split verdict in this case is symptomatic of the split in the social as well as the psychic realm. It is not merely that the social is split between progressive and regressive views, at the individual psychic level also there is a profound split between our desire to rid ourselves off the gripping power of institutions, and on the one hand, our emotional investment in the very same institutions. It is this split that we need to negotiate to dream a feminist future for women and the law.