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Judging in the Presence of Women as Legal Persons – Feminist  
Alternative to the Indian Supreme Court Judgment in  
*Sakshi v. Union of India*

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**Introduction**

In this paper I will present an alternative to the Supreme Court of India's judgment in the case of *Sakshi v. Union of India* AIR 2004 SC 3566. The purpose of this exercise, inspired by the Feminist Judgments Project in the UK<sup>1</sup> and elsewhere,<sup>2</sup> is to implement feminist theory in judicial practice and to provide an alternative to the supposedly 'universal' voice of judicial authority. Alternative judgments, in this case feminist judgments, have the potential to destabilise the claims of universality and neutrality in judicial decision-making and expose the underlying inevitable positionality of the decision-makers and their political leanings.<sup>3</sup> I have chosen this particular judgment because its inadequacies affect women's lives profoundly in relation to sexual violence, for reasons I will discuss later.

The original case was a writ petition submitted to the Supreme Court of India in its original civil jurisdiction under Article 32 of the Constitution of India. Article 32 empowers any

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<sup>1</sup> R. Hunter, C. McGlynn and E. Rackley (eds.), *Feminist Judgments from Theory to Practice* (Oxford: Hart Publishing, 2010)

<sup>2</sup> Canada at <http://www.thecourt.ca/decisions-of-the-womens-court-of-canada/>

<sup>3</sup> R. Hunter, 'An Account of Feminist Judging' in R. Hunter, C. McGlynn and E. Rackley (eds.), *Feminist Judgments from Theory to Practice* (Oxford: Hart Publishing, 2010) 30-43

person or group of persons within the jurisdiction of the Constitution, to move the Supreme Court for the enforcement of her/his Fundamental Rights.<sup>4</sup> The Fundamental Rights too are listed in the Constitution.<sup>5</sup> The fundamental rights that the petitioner was seeking to enforce through this petition were the right to equality contained in Articles 14 and 15 and the right to life contained in Article 21 of the Constitution.<sup>6</sup> The petition was a Public Interest Litigation (henceforth PIL), that is, it was brought by a party on behalf of a group of persons even though the party is not a part of the group.<sup>7</sup> In the next sections I will summarise the facts of the case and the Supreme Court's original decision before writing my feminist version of the judgment.

### **Overview of the original judgment in *Sakshi v. Union of India***

Indian criminal law constructs 'rape' as heterosexual violence perpetrated by the insertion of a man's penis into a woman's vagina without the legitimate consent of the woman involved. The Indian Penal Code 1860 (henceforth IPC), which contains the rape provision, was codified and enacted by the colonial British government.<sup>8</sup> It was part of the attempt to consolidate the power of the newly declared direct rule of India by the British government after the Indian

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<sup>4</sup> Article 32, Constitution of India

<sup>5</sup> Part III of the Constitution of India

<sup>6</sup> Article 14 and 21, Constitution of India

<sup>7</sup> For the origin and history of PIL in India, see P.N. Bhagwati, 'Judicial Activism and Public Interest Litigation', 23 *Columbia Journal of Transnational Law* (1984-1985) 561-577; for a critical overview of current problems and prospects of PIL see H. Dembowski, *Taking the State to Court: Public Interest Litigation and the Public Sphere in India* (New Delhi: Oxford University Press, 2000)

<sup>8</sup> D. Skuy, 'Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century', 32(3) *Modern Asian Studies* (1998) 513-557

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Mutiny of 1857 and to give India an overall modern legal system by codifying most of its laws.<sup>9</sup> The other laws that were codified in this period included the Indian Divorce Act 1869,<sup>10</sup> the Indian Contract Act 1872, the Indian Evidence Act 1872, and the Guardians and Wards Act 1890. However, David Skuy has argued that the motivation for enacting the Indian Penal Code had nothing to do with the state of the contemporary Indian laws. It was more of an experiment in codifying the British criminal laws and implementing them –

‘...the Code's substantive and procedural provisions were motivated by shortcomings in England. The Indian Penal Code represents the transplanting of English law in India, not because Indian law was primitive, but because English law needed reform. Once the Indian Penal Code is placed within its proper historical perspective, it becomes quite clear that India was rarely a factor in determining the Code's form or content.’<sup>11</sup>

The enactment of the IPC coincided with a long-drawn political debate that had been raging in India, especially in Bengal, since the end of the 18<sup>th</sup> century and had reached its peak at the later half of the 19<sup>th</sup>. The debate was between the British government and the Indian reformists on one side and the Indian cultural nationalists on the other side on the matter of legislative interventions in religious and social customs that disadvantage women.<sup>12</sup> The image of the quintessential Indian woman had become a battleground for the coloniser and the colonised male at the time. The ideological justification of colonial rule was often based on the mission to civilise India and save its women from their own barbaric traditions.

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<sup>9</sup> Skuy (1998) at 553

<sup>10</sup> This contains the Christian law of Divorce in India

<sup>11</sup> Skuy (1998) at 538

<sup>12</sup> P. Chatterjee, ‘Colonialism, Nationalism, and Colonialized Women: The Contest in India’, 16(4) *American Ethnologist* (1989) 622-633

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‘Alongside the project of instituting orderly, lawful and rational procedures of governance, colonialism also saw itself as performing a “civilizing mission.” In identifying this tradition as “degenerate and barbaric,” colonialist critics invariably repeated a long list of atrocities perpetrated on Indian women ... By assuming a position of sympathy with the unfree and oppressed womanhood of India, the colonial mind was able to transform this figure of the Indian woman into a sign of the inherently oppressive and unfree nature of the entire cultural tradition of a country.’<sup>13</sup>

A section of the Western-educated urban elite Hindu men of India had started to conceive of customs like child marriage, ascetic widowhood and sati<sup>14</sup> as a national embarrassment and branded them ‘social evils’. These groups had begun organising campaigns to lobby the colonial government for legislative interventions and had undertaken a wider program of female emancipation through education.<sup>15</sup> On the other side of the debate, the emerging cultural nationalists of India resisted zealously the legislative and other measures in favour of ‘female emancipation’ as an alien influence.<sup>16</sup> The fundamental problem for Indian nationalists was to support the general modernisation of indigenous society to keep pace with Western standards, and at the same time to affirm a distinctive cultural identity for the nation. The nationalists ‘resolved’ the problem by conceptually dividing the spiritual and material domains of culture as

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<sup>13</sup> Chatterjee (1989) at 622

<sup>14</sup> The tradition of ‘voluntary’ self-immolation of widows at their dead husband’s funeral pyre; for a deeper understanding of the history of the Sati controversy in 19<sup>th</sup> century India, see L. Mani, *Contentious Traditions: The Debate on Sati in Colonial India* (Berkeley, California: University of California Press, 1998); and for a picture of Sati in modern day India, see Mala Sen, *Death by Fire: Sati, Dowry Death and Infanticide In Modern India* (London: W&N, 2001)

<sup>15</sup> S. Sen, ‘Toward a Feminist Politics? The Indian Women’s Movement in Historical Perspective’, *Policy Research Report on Gender and Development Working Paper Series No. 9*, The World Bank Development Research Group/Poverty Reduction and Economic Management Network (2000) at 7-8

<sup>16</sup> Chatterjee (1989) at 627-632

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autonomous spheres and analogising them to the social roles of women and men.<sup>17</sup> Indian women became the repository of the inner/spiritual life of the colonised nation and had to be defended against the reach of the alien colonial power.<sup>18</sup> Among a storm of passionate political debate, the colonial state supported by Indian reformers passed a number of legislative measures to rescue women from 'oppressive' customs – such as the prohibition of Sati in 1829, legalisation of widow remarriage in 1856 and raising the age of consent within marriage in 1891.<sup>19</sup>

The law of rape within the Indian Penal Code was enacted at this time of strong political friction between the cultural nationalists and the colonial state supported by Indian reformers over the meaning and status of the quintessential Indian womanhood. Yet the rape law does not seem to be predominantly shaped by the above controversy, in all probability because the law of rape had no particular socio-religious connotation and with its marital rape exemption was perfectly compatible with the nationalistic patriarchal necessities of life. The criminal laws including the rape law was probably seen by the nationalists as part of the laws governing public life, similar to the other laws mentioned before, which were implemented without much controversy at all. Moreover, the rape law was not so much an infringing alien norm interfering with an Indian man's authority over his women (as the other laws that outlawed established customs were); it was rather a tool for safeguarding his women from illegitimate intrusion (Indian or foreign) and strengthening his title through the marital rape exemption.

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<sup>17</sup> M. Sinha, 'Reading Mother India: Empire, Nation and the Female Voice', 6(2) *Journal of Women's History* (1994) 6-44 at 6-7

<sup>18</sup> Chatterjee (1989) at 623-627

<sup>19</sup> T. Sarkar, 'A Pre-history of Rights: The Age of Consent Debate in Colonial Bengal', *Feminist Studies* 26(3) (2000) 601- 622

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In the year 1997, fifty years after independence and more than one hundred and thirty years after the original rape laws came into force, Sakshi, a sexual violence intervention and victim support organisation, filed a writ petition in the Supreme Court of India arguing for broadening of the definition of rape by judicial interpretation to include all other kinds of penetrative sexual violence against women. The respondents were the Union of India, the Indian Central Government's Ministry of Law and Justice and the Commissioner of Police, National Capital Territory of New Delhi.

The legal provision under scrutiny here was Section 375 of the IPC – the provision that defines rape as the act, committed by a man, of having sexual intercourse with a woman without her consent and/or against her will by using force, intimidation, blackmail or deceit. The term 'sexual intercourse' has not been specifically defined by the statute, except for the assertion that even the slightest 'penetration' would amount to intercourse. 'Penetration' again has not been defined. Yet the law enforcers and judiciary have habitually adopted the definition of penetration of the vagina of the victim by the penis of the perpetrator. Sakshi argued that such a narrow interpretation of 'sexual intercourse' renders the provision inadequate to provide redress in the considerable variety of penetrative sexual violence which does not involve vaginal-penile penetration. It asked the Court to give the provision a broader judicial interpretation to safeguard the interests of the victims of these 'other' kinds of non-consensual sexual penetrations. The petition argued that such a narrow interpretation of the definition of rape infringes the fundamental rights of equality<sup>20</sup> and of life with human dignity<sup>21</sup> of women as

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<sup>20</sup> Articles 14 and 15, Constitution of India

<sup>21</sup> Article 21, Constitution of India

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a group. The arguments of the petitioner and the respondents will be elaborated fully in the alternative feminist judgment later on in the paper. Here it would suffice to say that much of the arguments of the petitioner, in spite of their stance in support of justice for women, were problematic from a feminist viewpoint. The fact that I have chosen to write an alternative feminist judgment for this case, does not endorse the petitioner's arguments as unproblematically feminist. Sakshi did not include important feminist arguments in its petition, for example, the essential patriarchal nature of the division between 'real' rapes and 'non-real' ones.<sup>22</sup> Most significantly it conflated the issue of legal non-recognition of the harms of 'other' kinds of penetrative sexual violence with the issue of protection of girl-children from sexual abuse. Sakshi's arguments frame the adverse effects of the narrow definition of rape in terms of legal inadequacy regarding child sexual abuse and argues that the rape law needs to acknowledge other kinds of rapes because the 'modern' times have seen an increase in the sexual abuse of girl-children. These two are related issues but in no sense they are the same, nor should they be substituted for one another.

It is true that India has gross legal shortfalls when it comes to the criminalisation of sexual abuse of children. Unless child sexual abuse involves vaginal-penile rape, it is prosecuted under provisions of unnatural sex (which does not depend on absence of consent, and until 2009 was primarily meant for consensual homosexual relations)<sup>23</sup> or the law that criminalises outraging

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<sup>22</sup> I will elaborate this point in the judgment.

<sup>23</sup> In 2009 a Delhi High Court decision in *Naz Foundation v. Government of NCT of Delhi*, WP(C) No.7455/2001, Delhi High Court, Order dated 2<sup>nd</sup> July 2009, barred the application of Section 377 IPC (law of unnatural sex) to consensual adult homosexual relationships.

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the modesty of women.<sup>24</sup> Both these laws are inappropriate for prosecuting sexual abuse for reasons I will elaborate in my feminist judgment. Sakshi contended that the ‘other’ kinds of penetrative sexual violence that are left out of the current definition of rape are primarily endured by girl-children.<sup>25</sup> This is not a proven fact, nor is this the primary reason why the definition of rape needs expansion.

Sakshi also submitted that Article 15(3) of the Constitution of India stipulates that the state can make special provisions in favour of women and children, under which power Section 376(2)(f) IPC has been enacted which stipulates an aggravated penalty for the rape of girl-children below the age of 12. According to Sakshi, the special provisions that the state is empowered to make must be adequate to serve the purpose, but the narrow definition of rape renders Section 376(2)(f) ineffective in cases of child abuse involving other kinds of rape. It is again true that as long as only one kind of rape is defined as rape by the law, child abuse involving other kinds of rape will fall through the cracks of law. But it is the same for sexual violence against adult women. Therefore this argument of Sakshi again somehow usurped the focus of the legal point from the need to acknowledge the sexual harms of all women to the need to protect girl-children. Sakshi’s move here to focus its arguments on the plight of the girl-child had grave consequences for the outcome of the case – the judgment dealt at length with the issue of treatment of child victims of sexual violence in the criminal justice system. In my view, if the petition had not diluted the issue of whether women in general have the right to have their sexual harms acknowledged by the criminal law by concentrating disproportionately

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<sup>24</sup> Section 354 is primarily used to prosecute sexual harassment.

<sup>25</sup> *Sakshi* 2004, para 4

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on the issue of child abuse, the Court might not have found the easy way out. By easy way, I mean the way of making provisions in favour of protection of girl-children, often preferred by patriarchal institutions to make up their liberal credentials, than to make provisions that safeguard the sexual rights of women. Another example of such preference for the easy way is the 172<sup>nd</sup> Report of the Law Commission of India which advises against the deletion of the marital rape exemption on privacy grounds,<sup>26</sup> but instead proposes that the protection from marital rape that is available to girl-children below the age of fifteen should be extended to children until the age of sixteen. It is again preferred by the Commission to extend its benevolence of 'protection' to women under the age of sixteen rather than to acknowledge the right of all women to be free from sexual violence in a marital relationship irrespective of their age. And this preference in all probability is due to the fact that protecting a female child from sexual violence, because she is not ready in mind and body, does not challenge the patriarchal ideas of male property in women's sexuality the way recognising the independent sexual rights of adult women does.

Here I would like to clarify that I do not disagree with the fact that absence of appropriate criminal laws addressing child sexual abuse is a serious issue and that laws should be enacted and implemented to address it sufficiently. Yet, in spite of its seriousness, it cannot usurp the other significant issue of whether the law acknowledges and upholds the sexual rights of women irrespective of their age. In the absence of sincere attention to the latter, a disproportionate focus on the former will only serve to hide the deeper inadequacies of law

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<sup>26</sup> 'We are not satisfied that this Exception should be recommended to be deleted since that may amount to excessive interference with the marital relationship' – 172<sup>nd</sup> Report of the Law Commission of India (2000), para 3.1.2.1

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and mystify the actual reasons why laws dealing with child abuse have still not materialised six decades after independence.

After long drawn deliberation, the Court decided in 2004 that judicially broadening the scope of the said provision is not appropriate and instead urged the Indian legislature to make laws to specifically deal with child abuse.<sup>27</sup> I will summarise here the key points of the Supreme Court's judgment delivered on 26<sup>th</sup> May 2004.

The Court referred to the 'well settled principle' of not reading words into the statute but gathering the legislative intent from a plain reading of the words used. It was held to be all the more 'wrong and dangerous' to substitute the words of a statute with other words if the statute concerned is a penal one.<sup>28</sup> It was not made clear what wrongs the broadened definition of rape would cause and on whom the potential dangers would lie. The Court then went on to mention that the provisions under scrutiny have come up on numerous occasions before different courts in India at different points of time but a broadened definition of 'rape' has never been considered or accepted. The court also expressed its concern that widening the definition of rape would contravene the constitutional right of the accused under Article 20(1) of the Indian Constitution, which guarantees that no person will be punished for a crime that did not exist at the time of its commission, i.e. an act that was not designated as a crime at the time of its commission.<sup>29</sup> The court agreed with the Respondents that the broad definition of rape as laid down by the International Criminal Tribunal for former Yugoslavia (henceforth

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<sup>27</sup> *Sakshi v. Union of India & Ors.* AIR 2004 SC 3566; 2004 Supp(2) SCR 723, para 42; I discuss this judicial focus on legislative measures regarding child abuse later in the paper.

<sup>28</sup> *Sakshi* 2004, para 26

<sup>29</sup> Article 20(1), Constitution of India

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ICTY)<sup>30</sup> in a judgment dated 10<sup>th</sup> December 1998,<sup>31</sup> did not apply in the present context as ‘The judgment is not at all concerned with interpretation of any provision of domestic law in peace time conditions.’<sup>32</sup> The court did not spare any words to refute the content of the ICTY’s broadened definition of rape or to justify how and why the domestic ‘peace time’ notion of rape in India needs to be different from the international ‘war time’ notion favoured by the ICTY.

As for the petitioner’s claim of giving a broader interpretation to the definition of ‘penetration’ in Section 375 IPC purposively, to bring all forms of penetrative sexual violence within its ambit, the court concluded that such an exercise in the absence of any ambiguities in the definition of rape would be against the interest of society at large.<sup>33</sup> The interests of the larger society that the court was concerned about are summed up in the following passage from the judgment:

‘It may be noted that ours is a vast and big country of over 100 crore people. Normally, the first reaction of a victim of crime is to report the incident at the police station and it is the police personnel who register a case under the appropriate Sections of the Penal Code. Such police personnel are invariably not highly educated people but they have studied the basic provisions of the Indian Penal Code and after registering the case under the appropriate sections, further action is taken by them as provided in Code of Criminal Procedure. Indian Penal Code is a part of the curriculum in the law degree and it is the existing definition of ‘rape’ as contained in s 375 IPC which is taught to every student of law. A criminal case is initially handled by a Magistrate and thereafter such cases [which] are exclusively triable by

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<sup>30</sup> Official name – International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

<sup>31</sup> Prosecution v. Anto Furundzija, Case No IT-95-17/1-T (10<sup>th</sup> Dec 1998) ICTY, para 185 – full judgment available at <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>

<sup>32</sup> *Sakshi* 2004, para 28

<sup>33</sup> *Sakshi* 2004, para 29

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Court of Session are committed to the Court of Session. The entire legal fraternity of India, lawyers or Judges, have the definition as contained in s 375 IPC ingrained in their mind and the cases are decided on the said basis. The first and foremost requirement in criminal law is that it should be absolutely certain and clear. An exercise to alter the definition of rape, as contained in s 375 IPC, by a process of judicial interpretation, and that too when there is no ambiguity in the provisions of the enactment, is bound to result in good deal of chaos and confusion, and will not be in the interest of society of large.<sup>34</sup>

The above judicial reasoning safeguards the interests of the police personnel who are assumed by the court to be 'not highly educated', the legal fraternity who apparently are unable to absorb and retain new legal developments and indeed the whole population of India who again supposedly will be disadvantaged by the uncertainty of the law caused by the broadening of the legal definition of rape. In my view, this is a condescending view of the police and legal community of India and a distorted understanding of the interest of the society. If the women victims of 'other' kinds of penetrative sexual violence, whose harms are invalidated by the narrow definition of rape, are part of the larger society, then it is problematic to say that ensuring their harms are recognised and redressed adequately is against the interest of the society. To me this reasoning comes across as a way of glossing over the glaring inadequacies of the current rape law in relation to the redress of 'other' kinds of rape and of circumventing the truly relevant arguments in the case. The inability of the law to safeguard the fundamental entitlement of a woman to have her harms recognised by the legal system she lives under is not addressed by the court. Instead the remote interests of the 'police personnel', the 'legal fraternity' and the 'wider society' become the crux of the decision.

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<sup>34</sup> *Sakshi* 2004, para 29

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The Supreme Court next concentrated its analytical energies on the rule of *stare decisis* –

‘...where a principle of law has become established by a series of decisions, it is binding on the courts and should be followed in similar cases. It is a wholesome doctrine which gives certainty to law and guides the people to mould their affairs in future’.<sup>35</sup>

Further reference was made to a series of previous Supreme Court decisions, which have upheld this principle. It was emphasized that rules of law when ‘clearly’ laid down by a court of last resort must not be disregarded. So much of the court’s effort was spent analysing the degree of ‘clarity’ of the current definition of rape under Section 375 that none was left to analyse its justifiability and constitutionality. The fact that the unjustness and unconstitutionality of the definition was challenged by the petitioner and not its ‘clarity’ was conveniently overlooked. The court admitted that the rule of *stare decisis* does not altogether forbid departure from it but the rule can only be bent if its application is found to perpetuate a grievous wrong.<sup>36</sup> In all other cases *stare decisis* must be strictly applied. It is clear then that the existing narrow definition of rape was not considered to be perpetuating any grievous wrong. The Court finally ruled that the petition must fail for the following reasons –

‘Accepting the contention of the writ petitioner and giving a wider meaning of s 375 IPC will lead to a serious confusion in the minds of prosecuting agencies and the courts which instead of achieving the object of expeditiously bringing a criminal to book may unnecessarily prolong the legal proceedings and would have an adverse impact on the society as a whole.’<sup>37</sup>

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<sup>35</sup> *Sakshi* 2004, para 30

<sup>36</sup> *Sakshi* 2004, para 31

<sup>37</sup> *Sakshi* 2004, para 33

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At the same time the court accepted the petitioner's claim that the absence of laws that adequately redress 'other' kinds of penetrative sexual violence affects female children most adversely because, as discussed earlier, apparently female children are most often raped in 'other' ways. Again, I must admit that India truly and urgently needs appropriate criminal laws addressing the sexual abuse of children, yet the absence of such laws cannot be held to be the only problem with the narrow definition of rape. The current law makes an unfair and unconstitutional differentiation between different kinds of rapes and redresses some of them. As a result a considerable proportion of victims of sexual assaults are deprived of proper legal recourse. No amount of laws on child abuse can justify the continuance of this narrow definition.

It might also seem that the Supreme Court was simply refusing to engage in judicial activism, insisting on sticking to its role of only implementing the existing laws and leaving the business of law-making to the parliament. But there are two problems with this interpretation of the court's stance – firstly, the petition did not ask the court to make new law against the original intention of the legislature; on the contrary the petition asked the court to clarify an ambiguous term in the statute, and to give it an interpretation best suited to its Constitutional obligation of safeguarding the fundamental rights of its people. Secondly, the Indian Supreme Court is no stranger to judicial activism. In spite of a fair dose of attendant controversies the

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Supreme Court has a sustained history of judicial activism.<sup>38</sup> An ex-Supreme Court Judge writes

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‘...judicial activism is an undeniable part of the judicial process in a democracy and the only relevant question is what should be the degree and extent of judicial activism... [The Supreme Court of India] has invented an impressive range of concepts in both private and public law.... We in India are trying to move away from formalism and to use juristic activism for achieving distributive justice or, as we in India are accustomed to labelling it, “social justice”.... Judges in India are not in an uncharted sea in the decision-making process. They have to justify their decision-making within the framework of constitutional values. This is nothing but another form of constitutionalism which is concerned with substantivization [sic] of social justice. I will call this appropriately “social activism”... The modern judiciary cannot afford to hide behind notions of legal justice and plead incapacity when social justice issues are addressed to it. This challenge is an important one, not just because judges owe a duty to do justice with a view to creating and molding [sic] a just society, but because a modern judiciary can no longer obtain social and political legitimacy without making a substantial contribution to issues of social justice.’<sup>39</sup>

In my view, this particular petition to broaden the definition of rape to safeguard the constitutional rights of women failed primarily because the woman envisaged in the relevant criminal law does not match the person who can claim his rights under Indian constitutional law; and the Court’s judgment, in its simplest purport, refused to align the construction of the woman in criminal law with that of the rights-holding person in constitutional law. This claim warrants explanation. It is clear that the woman in the criminal law is understood to be harmed

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<sup>38</sup> U. Baxi, ‘Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India’, *Third World Legal Studies* (1985) 107-132; S.P. Sathe, ‘Judicial Activism: The Indian Experience’, *Journal of Law & Policy* 6 (2001) 29-107; M. Khosla, ‘Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate’, *Hastings International and Comparative Law Review* 32 (2009) 55-100

<sup>39</sup> Bhagwati (1985-1985) above at note 7

only if she experiences vaginal-penile rape; all other kinds of penetrative sexual violence are not conceptualised as equally harmful. In fact they are thought to be so much less harmful that they are tried under inadequate laws like those of sexual harassment (outrage of the modesty of a woman) and homosexuality (unnatural sex), none of which were originally enacted for the purpose of prosecuting serious penetrative sexual assaults.<sup>40</sup> This idea of differential harm depending on the combination of the instrument of rape and the orifice invaded cannot be sustained when non-consensual sexual penetration is understood in terms of violation of the rights of the victim to her physical integrity and freedom from sexual invasion. In these terms it is immaterial whether the rapist's penis invaded her vagina or her anus, or whether her vagina was violated by a penis or a bottle. Yet the law in India understands them as different harms, which can only be justified on the basis of the idea of chastity. Just as virginity of a virgin woman is affected only when her vagina is accessed by a man's penis, the chastity of a non-virgin chaste woman (i.e. married woman) is affected only in one kind of penetrative sexual intercourse. Therefore this one kind of sexual assault is the most harmful. The rest do not affect her chastity/virginity implying that they cannot be 'rapes'; and so can be accommodated under legal provisions that are less serious and inadequate. The idea of chastity is inseparably associated with the patriarchal idea of male sexual property in women. A woman's vagina and consequently her womb must be ideally accessed by one man, her married husband. Any other man's access is an affront to the husband's (or future husband's) property rights. Rape laws in

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<sup>40</sup> Either Section 354 or Section 377 IPC; the inadequacies of these laws will be discussed in the feminist judgment.

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their earliest version were indeed property laws that forbade trespass into other men's legitimate property rights in their own women.<sup>41</sup>

In the *Sakshi* judgment, the Supreme Court of India, through its refusal to broaden the definition of rape to 'other' kinds of penetrative sexual assaults, in effect lent its support to this understanding of rape as an attack on a woman's chastity and hence on legitimate male sexual rights. The existing marital rape exemption in Indian law too supports this explanation – there is no rape when a man sexually violates his wife, because the right to access her womb is already his. So in this conceptualisation of what is rape and what is not rape, the harm to a woman's person is of no consequence. Her personal harms are invalidated when it causes no corresponding harm to any man who holds sexual rights in her. In my view then, this construction of the woman does not match the concept of the person in the Constitution who has the right to be equally treated by law as any other person; who also possesses the right to life with human dignity, which must include the right to be free from sexual violations; more so, when the same Court has already named (vaginal–penile) rape and sexual harassment as violations of the constitutional right to life.<sup>42</sup> And because the court failed to construct the woman in criminal law as a person with constitutional rights, the interests of all kinds of other entities trumped her fundamental entitlement to have her harms of sexual violation validated by the law. The rule of stare decisis was upheld as no 'grievous harm' was held to be caused when the harm caused to her by penetrative sexual violence is graded on the basis of whether her chastity has been adversely affected. If the woman was constructed as a person, her rights

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<sup>41</sup> N. Lacey, 'Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law', *Canadian Journal of Law and Jurisprudence* 11(1) (1998) 47-68

<sup>42</sup> *Vishaka v. State of Rajasthan* AIR 1997 SC 3011

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to be free from all kinds of sexual violence would have been equally respected. In my view, the inordinate emphasis on the interests of the society, legal fraternity and police personnel in the judgment and the absence of any meaningful discussion about the effect of inadequate redress of sexual violence on the victim's constitutional rights is the result of her absence as a legal person.

Her presence as a victim subject here is no more than a white-wash. She is not the victim subject unless the harms recognised by law are her harms. As the law stands now, the harms redressed are male harms, therefore the victim here is the man whose woman has been raped. The other victim envisaged here might be the patriarchal social order that is protected through the rape law – a social order where men respect each other's sexual property in their women. In other words, the law is serving the same purpose as the criminal law of trespass. In trespass laws, the property accessed illegitimately is not the victim. Similarly, in Indian rape law, the woman raped is not the victim. The judicial discourse on rape too, however well-packaged in the language of rights of the woman betrays a deep alignment with the patriarchal ideas of chastity and honour. The Supreme Court wrote in 2004 –

'Sexual violence apart from being a dehumanizing act is an unlawful intrusion [in] the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity; it degrades and humiliates the victim .... A rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman, i.e. her dignity, honour, reputation and not the least her chastity.'<sup>43</sup>

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<sup>43</sup> *State of Himachal Pradesh v. Shree Kant Shekari* AIR 2004 SC 4404

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My alternative judgment will align the concept of the woman in criminal law with the constitutional person. She will be constructed as a holder of constitutional rights, and non-recognition and inadequate redress of her harms will be understood as violation of those rights. Harms inflicted on a woman by sexual invasion will be conceptualised solely as her personal harms and not as property harms to related men. The court will decide in favour of bringing a disconnection between the patriarchal notion of harms to female chastity and the concepts of rape and sexual violence in law; and consequently will judge in favour of the petition.

### **Legal developments since the *Sakshi* judgment**

The *Sakshi* judgment was delivered by the Supreme Court of India in 2004. Seven years on, at the time I am writing the feminist alternative to it, not all of the laws being referred to have remained static and unchanged. The most relevant of the laws that have changed since 2004 is the application of the criminal law of unnatural sex. Section 377 IPC criminalised sexual intercourse against the order of nature, which included homosexual intercourse, sodomy and bestiality.<sup>44</sup> It was also used to prosecute rapes of 'other' kinds though the crime of unnatural intercourse did not depend on absence of consent.

In 2001, Naz Foundation, an NGO, filed a writ petition in the Delhi High Court challenging the constitutionality of Section 377 in relation to consensual homosexual intercourse. This too was a PIL brought under Article 226 of the Indian Constitution which confers on all High Courts in the country the power to enforce fundamental rights of individuals and groups by way of

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<sup>44</sup> Section 377 IPC

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issuing writs. The petition by Naz Foundation was dismissed by the Court in 2004 'on the ground that there is no cause of action in favour of the petitioner and that such a petition cannot be entertained to examine the academic challenge to the constitutionality of the legislation,'<sup>45</sup> whatever that means. The matter went to the Supreme Court on appeal. The Supreme Court by an order dated 3<sup>rd</sup> February 2006 set aside the High Court's decision of dismissal 'observing that the matter does require consideration and is not of a nature which could have been dismissed on the aforesaid ground.'<sup>46</sup> The petition was remitted to the Delhi High Court for consideration.

On 2<sup>nd</sup> July 2009, the High Court declared that the criminalisation of consensual sexual activity of adults in private indeed violates Articles 21 (right to life), 14 (right to equal legal treatment) and 15 (right to non-discriminatory treatment by the state) of the Constitution.<sup>47</sup> Section 377 IPC will continue to be applicable in cases of non-consensual non-vaginal-penile penetrative sexual violence until the Parliament chooses to amend the law to make better provisions for these 'other' kinds of rapes.<sup>48</sup>

So as the law stands now, Section 377 applies to only penetrative sexual violence of the 'other' kinds and not to consensual sex. This solves the problem for persons seeking decriminalisation of homosexual intercourse and is indeed a legal landmark in the struggle to attain recognition for the constitutional rights of sexual minorities. But this does not solve the problem of inadequate redress for 'other' kinds of rapes. The fact that Section 377 now only

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<sup>45</sup> *Naz Foundation* 2009, para 1

<sup>46</sup> *Naz Foundation* 2009, para 1

<sup>47</sup> For an online version of India's Constitution, see [www.lawmin.nic.in/legislative/Art1-242%20\(1-88\).doc](http://www.lawmin.nic.in/legislative/Art1-242%20(1-88).doc)

<sup>48</sup> *Naz Foundation* 2009, para 132

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applies to non-consensual sex with adults and consensual or non-consensual sex with minors has brought the factor of consent into play here, which was absent from the earlier version of the provision and which is perfectly desirable. Yet the provision still marks 'other' kinds of rapes and hence sexual intercourse as 'unnatural', and separates them from the 'proper' kind of rape and hence sexual intercourse which is penile-vaginal. In spite of the remarkable and extremely important 2009 High Court judgment in the *Naz Foundation case*, a feminist alternative version of the *Sakshi* judgment is still relevant as the division of natural and unnatural rapes, hence natural and unnatural sex is steeped in the patriarchal ideas of compulsory heterosexuality and male sexual property in women, and is unsustainable from a feminist point of view. The current narrow definition of rape still needs to be contested.

The High Court decision also says that this partial application of Section 377 will hold until the Parliament makes the necessary amendments in the law to implement the recommendations of the 172<sup>nd</sup> report of the Law Commission of India<sup>49</sup> which the Court thinks will remove 'a great deal of confusion.'<sup>50</sup> This report has recommended a complete overhaul of the rape laws into the following provision on sexual assault. According to the High Court – 'pertinently, the major thrust of the recommendation is on the word 'Person' which makes the sexual offences gender neutral unlike gender specific as under the 'Rape Laws' which is the current position in statute book.'<sup>51</sup> I will not go into a detailed discussion of this recommended gender neutral law of sexual assault, both because such a law has still not been enacted, and

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<sup>49</sup> Law Commission of India, 172<sup>nd</sup> *Report on the Review of Rape Laws* (2000), para 3.1.2., for an online version see <http://lawcommissionofindia.nic.in/rapelaws.htm> (last accessed 25.10.2011)

<sup>50</sup> *Naz Foundation* 2009, para 132

<sup>51</sup> *Naz Foundation* 2009, para 83

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also because I do not want the current paper on the alternative feminist judgment to *Sakshi v. Union of India* to go off on a tangent from its central focus. Yet I would like to quote what Ngaire Naffine has to say on the gender neutral laws of sexual assault in Australia –

‘In the modern Australian law of rape, men and women are now formal equal legal subjects (and objects). Each is now recognised to have the ability to rape the other... The liberal solution to equal sexual rights for women has been to effect a crude reversal and reciprocity of sex rights and responsibilities – to make women the same as men. The modern grant of sexual subjectivity to women, taken to its logical liberal end, as Australia has done, seems to entail the legal recognition of women’s sexual ability to rape. Women are now seen to have so much potency to do what it was once thought only men could do to women that there now needs to be a law to prevent us from doing this to men. What this neatly steps around is the nature of the male violence which (ostensibly) rape laws are designed to punish. ... The published crime statistics make clear that it is still men who rape women, while the unofficial statistics reveal that most women feel too powerless to do anything about it. And so what could be read as a recognition of the potential sexual power of women has (of course) not turned women into rapists. The gender neutrality of the new laws only mystifies the profoundly sexed nature of the crime of rape and the unequal nature of the society which allows it to occur. Indeed, the new laws seem no longer to be about the very behaviour that the crime of rape was meant to proscribe.’<sup>52</sup>

## **Guidelines to feminist judgment-writing**

Before I embark on the exercise of writing the feminist judgment, some general points about the technicalities of judgment writing must be made.

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<sup>52</sup> N. Naffine, ‘Possession: Erotic Love in the Law of Rape’, *Modern Law Review* 57(1) (1994) 10-37 at 24-25

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Firstly, I am following the Indian judicial convention here of outlining the primary arguments of the parties in detail before stating the court's own opinion about the points in contention. Accordingly the ensuing judgment starts with a detailed outline of the arguments put forward by the petitioner, followed by the arguments submitted by the respondents and then ultimately followed by the court's own reasoning leading to its decision. So I would request the reader not to mistake the initial paragraphs to be the court's own reasoning. I have made every effort to make clear at the beginning of each paragraph whose argument is being presented.

Secondly, as it is a judgment and not a case note or article, the mode of presentation is fundamentally different.<sup>53</sup> Feminist scholars most often are mindful of their own positionality and the non-universality of their positions. A nuanced, self-reflexive approach is the hallmark of effective feminist writing. Yet, in a feminist judgment, the judge's voice has to attain and maintain the authority that will sustain its credibility. Therefore it may not be possible to acknowledge the positionality of the feminist judge or other possible alternative approaches in the judgment. Moreover as there are many strands of feminism, my feminist judgment may not be able to encompass all feminist positions or theorisations. It is one of many feminist judgments that are possible on a certain case. But that too cannot be acknowledged within the judgment. In gist, even though the stated aim of the writing of the feminist judgment is to expose the positionality of the original judges, it is not done in the usual way of critiquing their

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<sup>53</sup> D. Majury, 'Introducing the Women's Court of Canada' at <http://womenscourt.ca/wp-content/uploads/2009/12/Majury-Intro.pdf> (accessed 16.10.2011) at 9

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positionality; it is simply done by providing one of the many possible alternatives to the original judgment. In her introduction to the Women's Court of Canada, Diana Majury writes –

'One of our points in writing these decisions is to demonstrate that the Supreme Court of Canada decision in each of these cases is but one of many decisions that could have been written. The same of course applies to the decisions of the Women's Court of Canada. We hope that future judges of the Women's Court, as well as others, will review our decisions and challenge, extend, or revise our equality analysis.'<sup>54</sup>

Thirdly, again because this is a judgment and not a critical case-note, the voice that speaks has to be decisive and not suggestive.<sup>55</sup> In my judgment I have taken care so that the judge's voice may sound more authoritative than that of a legal scholar. This is an emulation of the actual voices that speak judgments in Indian courts and is necessary to be adopted in order to make the feminist alternative as close as possible in style to an original judgment by the Indian judiciary.

Fourthly, I have not referred to feminist theories within the judgment. This is because a too overt assertion of the theoretical lenses used by the judge may destabilise the authority of the view taken through the lens. My judgment is not intended to be a discourse on feminist theories. It is, on the contrary, a judicial decision taken from a feminist viewpoint. The allusions to feminist theorisations are kept to the minimum, so that it can compete in credibility and authority with the original patriarchal judgment which does not of course acknowledge its positionality. Rosemary Hunter writes regarding the place of feminist theorising in feminist judgments –

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<sup>54</sup> Majury, 'Introducing the Women's Court of Canada' at 8

<sup>55</sup> Hunter, McGlynn and Rackley (eds.) (2010) at 15

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‘As a technical matter, feminist or any other kind of scholarship does not constitute legal authority, and thus cannot form part of the *ratio* of a judge’s decision. What is important is the account of the facts, the exposition of the law, and the application of the latter to the former. Empirical research and policy material may properly be incorporated as part of the reasoning process involved in the performance of these tasks, but the philosophical approach underlying their execution does not form part of the judgment itself. ...feminist judging is not about theorising, but requires moving from theory to practice.’<sup>56</sup>

And finally, as this is a 2004 judgment of the Supreme Court of India, I have not incorporated any legal developments since. For example, as discussed earlier in the paper, in 2009 the law criminalising ‘unnatural’ sexual intercourse among consenting adults was declared unconstitutional by the Delhi High Court.<sup>57</sup> But I have not talked about it in the judgment as it is intended to be an alternative judgment that the Court could have written in 2004 if women’s rights were afforded the importance warranted under the constitutional mandate.

## **The Feminist Judgment**

Sakshi v Union of India

Equivalent Citations – AIR 2004 SC 3566; 2004 (2) ALD Cri 504; [2004] 3 LRI 242

Writ Petition (CRL) No. 33 of 1997 (Under Article 32, Constitution of India) with SLP (CRL) Nos. 1672-1673 of 2000

Supreme Court of India (Civil Original Jurisdiction)

Decision Date: 26 May 2004

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<sup>56</sup> R. Hunter (2010) at 42

<sup>57</sup> *Naz Foundation v. Government of NCT of Delhi*, WP(C) No.7455/2001, Delhi High Court

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Bench – M. Mukherjee J.

**Judgment:**

M. Mukherjee J. – [1] This public interest litigation under Article 32 of the Indian Constitution has been filed by Sakshi, a charitable support organisation for providing legal, medical, psychological, residential and other support to women, especially to victims of sexual violence.

The Respondents named in the petition are –

- i. Union of India
- ii. Ministry of Law and Justice, and
- iii. Commissioner of Police, New Delhi.

[2] The reliefs claimed by the Petitioners are to –

- a) Declare by appropriate writ or direction that the definition of ‘sexual intercourse’ in Section 375 of the Indian Penal Code 1860 (henceforth IPC) shall include all forms of penetrative sexual acts such as vaginal-penile, oral-penile, anal-penile, vaginal-finger, anal-finger, anal-object and vaginal-object penetration;
  - b) Consequently issue a writ, order or direction to the Respondents and its servants and agents to register all cases of penetrative sexual violence as offences falling within the broadened interpretation of sexual intercourse under Section 375 IPC 1860;
  - c) Issue such other writ, order or direction, as the Court may consider appropriate.
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[3] In the petition, the Petitioner professes growing concern at the striking growth in incidences of sexual violence towards women and children in India in recent times. In response to this growing trend, the Respondents have increasingly implemented Sections 354 (outraging the modesty of a woman), 375/376 (rape) and 377 (unnatural sexual intercourse) IPC for prosecuting these offences. It is submitted that the Respondents apply the rape provisions in Sections 375/376 IPC only for the prosecution of sexual violence that involves penile penetration of the vagina. All other types of penetrative sexual violence (henceforth referred to as PSV) are treated as lesser offences and prosecuted under Sections 354 and 377 of the IPC. The Petitioner claims that the offences of sexual abuse of children and women that often involve PSV other than vaginal-penile are no less traumatic for the victims. Therefore they should be brought within the ambit of the definition of rape under Section 375 IPC.

[4] The Petitioner argues that the narrow interpretation of rape in the IPC as involving only vaginal-penile penetration does not conform with the contemporary understanding of rape as an act aimed at sexually humiliating, violating and degrading a woman or child, adversely affecting their sexual integrity and autonomy.

[5] The Petitioner refers to the established body of feminist theory which argues rape to be an act of violence with intent to degrade and humiliate the victim and not merely a sexual act. The Petitioner quotes feminist scholar Susan Brownmiller –

‘...in rape ...the intent is not merely to “take”, but to humiliate and degrade... Sexual assault in our day and age is hardly restricted to forced genital copulation, nor is it

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exclusively a male-on-female offence. Tradition and biologic opportunity have rendered vaginal rape a particular political crime with a particular political history, but the invasion may occur through the mouth or the rectum as well. And while the penis may remain the rapist's favourite weapon, his prime instrument of vengeance... it is not in fact his only tool. Sticks, bottles and even fingers are often substituted for the "natural" thing. And as men may invade women through other orifices, so too, do they invade other men. Who is to say that the sexual humiliation suffered through forced oral or rectal penetration is a lesser violation of the personal, private inner space, a lesser injury to mind, spirit and sense of self?' (Susan Brownmiller, *Against Our Will*, 1986)

[6] The Petitioner further submits that the term 'sexual intercourse' has not been defined in Section 375 IPC. Therefore it is open to judicial interpretation. Moreover, the IPC does not define the term 'penetration' as only vaginal-penile penetration. Therefore the term 'penetration' too can be interpreted by the Court to include all types of sexual penetration. The wording of the definition of rape contained in Section 375 IPC is in itself wide enough in scope to cover all kinds of penetrative sexual violence. The narrow interpretation of the definition by the respondent authorities particularly defeats the purpose of the Criminal Law Amendment Act 1983 that inserted sub-section (2)(f) in Section 376 IPC.<sup>58</sup>

[7] The Petitioner claims that the narrow interpretation of rape denies victims of sexual abuse access to justice and thus violates their fundamental rights under Articles 14<sup>59</sup> and 21<sup>60</sup> of the Constitution.

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<sup>58</sup> S. 376(2)(f) provides for increased punishment for rape of a girl below 12 years of age.

<sup>59</sup> Article 14: 'Equality before law – The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.'

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[8] The Petitioner further submits that the respondent authorities have failed to take into account the legislative purpose of Section 377 IPC.<sup>61</sup> This provision was enacted for criminalising certain kinds of homosexual intercourse and using it for prosecuting penetrative sexual violence is against its legislative purpose. The Petitioner refers to the Law Commission Report (No. 42) of 1971<sup>62</sup> where the Commission discusses the relevance of Section 377 only in relation to homosexual offences (pages 280-282).

[9] In light of the Law Commission's statement regarding the purpose of Section 377 IPC, the Petitioner claims that the Respondents have been wrongly prosecuting cases of PSV under the section. Penetrative sexual assaults are crimes of violence and not of moral turpitude as may seem from their prosecution under Section 377. The respondents have wrongly stretched the meaning of 'unnatural sexual offences' to bring penetrative sexual assaults within its purview and have trivialised serious cases of sexual assault by equating them with the offence of 'consensual homosexuality'. This trivialisation too is a violation of the victims' fundamental rights to equality under Article 14 and to life with human dignity under Article 21 of the Constitution.

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<sup>60</sup> Article 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', interpreted as the right to life with human dignity by the Supreme Court of India.

<sup>61</sup> S. 377 IPC – 'Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine. Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.'

<sup>62</sup> 42<sup>nd</sup> Report of the Law Commission of India, 'Indian Penal Code', June 1971

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[10] It is also submitted by the Petitioner that Article 15(3) of the Constitution of India permits the State to make special provisions for women and children. 'Special provision' necessarily implies 'adequate' provision. The narrow interpretation of rape under Sections 375/376 used by the respondent authorities and their agents have rendered the effect of the 'special provision' under Section 376(2)(f)<sup>63</sup> meaningless and ineffective in certain cases, which is a violation of Article 15(3) of the Constitution of India.

[11] The Petitioner further refers to the United Nations Convention on Right of the Child (CRC) ratified by the Union of India (Respondent No. 1) on 11<sup>th</sup> December 1992 and the United Nations Convention on the Elimination of Discrimination against Women (CEDAW) ratified by the same Respondent on 9<sup>th</sup> July 1993. Consequently, Respondent No. 1 and the other Respondents, as agents of Respondent No. 1, have an international legal obligation to honour its commitments under the respective Conventions. In the present case the narrow interpretation of rape imposed by the Respondents and their other agents completely violates such commitments.

[12] The Petitioner has also argued that Section 375 IPC should be interpreted in relevance to recent times when child abuse has assumed alarming proportions. In support of the submission, the petitioner has referred to F.A.R. Bennion's *Statutory Interpretation* (Butterworths 1984) at page 355-356:

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<sup>63</sup> S. 376(2)(f) IPC specifies increased punishment for rape of girls below 12 years of age

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‘While it remains law, an Act is to be treated as always speaking. In its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law. ...

It is presumed that Parliament intends the Court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed.

In particular where, owing to developments occurring since the original passing of an enactment, a counter-mischief comes into existence or increases, it is presumed that Parliament intends the Court so to construe the enactment as to minimise the adverse effects of the counter-mischief.’

[13] In this connection, the Petitioner has also referred to *S. Gopal Reddy v. State of A.P.* 1996 SCC (4) 596, the Court quoted the following words of Lord Denning in *Seaford Court Estates v. Asher* [1949] 2 All ER 153 –

‘... It would certainly save the Judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give “force and life” to the intention of the legislature ... A Judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases.’

[14] Accordingly, the Court in *S. Gopal Reddy* held that it is a well-known rule of interpretation of statutes that the text and the context of the entire Act must be looked into while

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interpreting any of the expressions used in a statute and that the courts must look to the object which the statute seeks to achieve while interpreting any of the provisions of the Act, and a purposive approach is necessary.

[15] In support of the claim for purposive interpretation of Section 375 IPC, the Petitioner has also made reference to *Directorate of Enforcement v. Deepak Mahajan and Anr.* AIR 1994 SC 1775, where the Court held that a mere mechanical interpretation of the words devoid of concept or purpose will reduce most legislation to futility and that it is a salutary rule, well established, that the intention of the legislature must be found by reading the statute as a whole. Accordingly, certain provisions of Foreign Exchange Regulation Act (FERA), which has since the current petition been replaced by the Foreign Exchange Management Act (FEMA) in 2000, and the Customs Act were interpreted keeping in mind that the said enactments were enacted for the economic development of the country and the augmentation of revenue. The Court did not accept the literal interpretation suggested by the respondent therein and held that sub-section (1) and (2) of Section 167 Criminal Procedure Code (CrPC) are evenly applicable with regard to the production and detention of a person arrested under the provisions of Section 35 of FERA and Section 104 of the Customs Act and that a magistrate has jurisdiction under Section 167(2) CrPC to authorise the detention of a person arrested by an authorised officer of the Enforcement Directorate under FERA and taken to the magistrate in compliance with Section 35(2) of FERA.



[16] The Petitioner has submitted that such a purposive judicial approach to the interpretation of statutes has been adopted in countries like the UK and South Africa to prevent offenders slipping out of the loopholes in law. Some decisions of the House of Lords have been cited to support the claims, the most notable being *R v. R* (1991) 4 All ER 481 where it was held that the marital rape exemption can no longer form part of the law of England as the proposition that by marriage the wife submits herself irrevocably to sexual intercourse in all circumstances is unacceptable under modern socio-moral standards. Hence the word 'unlawful' in the definition of rape in Section 1(1) of the Sexual Offences (Amendment) Act 1976, is to be interpreted as mere surplusage and not as meaning 'outside marriage', as it is clearly unlawful to have sexual intercourse with any woman without her consent.

[17] The other decision cited by the counsel for the Petitioner is *Regina v. Burstow and Regina v. Ireland* [1997] 4 All ER 225 where a person accused of repeated silent telephone calls to women accompanied on occasion by heavy breathing was held guilty of causing psychiatric injury amounting to bodily harm under Section 42 of the Offences against the Person Act 1861. In the course of the discussion, Lord Steyn observed that criminal law has moved on in the light of a developing understanding of the link between the body and psychiatric injury and, as a matter of current usage, the contextual interpretation of 'inflict' can embrace the idea of one person inflicting psychiatric injury on another. The Petitioner has laid emphasis on the following passage in the judgment:

'The proposition that the Victorian legislator when enacting Sections 18, 20 and 47 of the Act of 1861, would not have had in mind psychiatric illness is no doubt correct. Psychiatry

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was in its infancy in 1861. But the subjective intention of the draftsman is immaterial. The only relevant enquiry is as to the sense of the words in the context in which they are used. Moreover the Act of 1861 is a statute of the “always speaking” type: the statute must be interpreted in the light of the best current scientific appreciation of the link between the body and psychiatric injury.’

[18] The counsel for the Petitioner has also referred to a decision of the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality and Ors. v. The Minister of Home Affairs and Ors.* (Case CCT 10/99) wherein it was held that Section 25(5) of the Aliens Control Act 96 of 1991, by omitting to confer on persons, who are partners in permanent same-sex life partnerships, the benefits it extends to spouses, unfairly discriminates, on the grounds of their sexual orientation and marital status, against partners in such same-sex partnerships who are permanently and lawfully resident in the Republic. Such unfair discrimination limits the equality rights of such partners guaranteed to them by Section 9 of the Constitution and their right to dignity under Section 10. It was further held that it would not be an appropriate remedy to declare the whole of Section 25(5) invalid. Instead, it would be appropriate to read in, after the word ‘spouse’ in the section, the words ‘or partner, in a permanent same-sex life partnership’. For similar reasoning, in relation to the increased incidence of child abuse in recent times, it has been argued that the words ‘sexual intercourse’ in Section 375 IPC must be given a larger meaning than has been traditionally understood.

[19] The Petitioner has, furthermore, placed before the Court judgments dated 10<sup>th</sup> December 1998 and 22<sup>nd</sup> February 2001 by the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the

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Territory of the Former Yugoslavia since 1991 (ICTY). Under Article 5 of the Statute of the International Tribunal, rape is a crime against humanity. Rape may also amount to a grave breach of the Geneva Conventions, a violation of the laws or customs of war or an act of genocide if the requisite elements are met, and may be prosecuted accordingly. The Trial Chamber took note of the fact that no definition of rape could be found in international law and therefore formulated the following definition:

‘... the Trial Chamber finds that the following may be accepted as the objective elements of rape: (i) the sexual penetration, however slight:

- (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
- (b) of a mouth of the victim by the penis of the perpetrator;

(ii) by coercion or force or threat of force against the victim or a third person.’

In the second judgment of the Trial Chamber dated 22<sup>nd</sup> February 2001, the interpretation of rape which focussed on serious violations of a sexual autonomy was accepted.

[20] Mrs. G. Mukerjee, Director in the Ministry of Home Affairs, has filed the counter-affidavit on behalf of Respondents Nos. 1 and 2. The main points of the counter-affidavit are –

- a) That the respondents have kept in mind their obligation under Article 15(3) to make special/adequate provisions for women and children. Sections 375 and 376 have been substantially changed by the Criminal Law (Amendment) Act 1983. The same Act has also introduced several new Sections viz. 376A, 376B, 376C and 376D IPC. These

amendments have been effected with a view to provide special/adequate provisions for women and children.

- b) The term 'rape' has been clearly defined under Section 375 IPC and there is little scope for confusion as to the purported meaning of the offence.
- c) Penetrations other than vaginal-penile penetration are unnatural sexual offences. Section 377 provides severe punishments for such offences. The punishment provided under Section 377 is imprisonment for life or imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine. Punishment under Section 377 is no less severe than that provided for rape in Section 376. Therefore, it cannot be said that penetrative sexual violence other than vaginal-penile rape is not dealt with seriously by the respondent authorities. The offences as mentioned by the petitioner i.e. anal-penile penetration, oral-penile penetration, anal-finger penetration, vaginal-finger penetration or vaginal-object penetration are serious sexual offences of unnatural nature and are sufficiently covered under Section 377 which provides stringent punishment. Therefore, the plea of the petitioner that offences under Section 377 are treated as lesser offences is incorrect.
- d) Sections 354 and 506 have been framed with a view to punish the lesser offence of criminal assault in the form of outraging the modesty of a woman. Section 354 IPC provides for punishment for assault or criminal force on a woman to outrage her modesty. Unnatural sexual offences cannot be brought under the ambit of this Section.
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- e) Section 376(2)(f) provides stringent punishment for committing rape on a woman when she is under the age of 12 years. But child sexual abuse other than vaginal-penile penetration is obviously unnatural and is to be dealt with under Section 377 IPC. Rape defined under Section 375 is vaginal-penile penetration and all other sorts of penetrations are considered to be unnatural sexual offences. Section 377 provides stringent enough punishment to adequately deal with such offences.
- f) It is denied that current interpretation of Sections 375, 376 and 377 violate the fundamental rights under Articles 14, 15(3) and 21 of the Constitution of India. Sections 375 and 376 clearly deal with only penile-vaginal rapes and all types of unnatural sexual offences are adequately dealt with under Section 377 IPC.

[21] Shri R.N. Trivedi, Additional Solicitor General, appearing for the Respondents, has submitted the following –

- a) The international treaties ratified by India can be taken into account for framing guidelines in respect of the enforcement of fundamental rights but only in the absence of municipal laws as held in *Vishaka v. State of Rajasthan* AIR 1997 SC 3011 and *Lakshmi Kant Pandey v. Union of India* AIR 1984 SC 469. In the presence of existing law, subsequent ratification of international treaties would not render existing municipal laws ultra vires of treaties in cases of inconsistency. In such an event the State through its legislature may modify the law to bring it in accord with treaty obligations. Such matters are in the realm of State policy and are, therefore, not enforceable in a Court of

law. It has been further submitted that in International law, ratified treaties can be deemed incorporated in customary law but only if the former are consistent with the domestic laws or decisions of its judicial tribunals.

- b) The decision of the ICTY cannot be used for interpretation of Section 354 and 375 IPC and other provisions, due to the limited temporal and territorial jurisdiction of ICTY. Even decisions of the International Court of Justice (henceforth ICJ) are binding only on the parties to a dispute in view of Articles 92, 93 and 94 of the UN Charter and Articles 59 and 63 of the ICJ Statutes.
- c) No writ of mandamus can be issued to the Parliament by the judiciary to amend any law or to bring it in accord with treaty obligations. It is also submitted that Sections 354 and 375 IPC have been interpreted in innumerable decisions of various High Courts and also of the Supreme Court and the consistent view is that to hold a person guilty of rape, penile penetration is essential. The law on the point is similar both in England and USA. In *State of Punjab v. Major Singh* 1966 (Supp) SCR 266 it was held that if the hymen is ruptured by inserting a finger, it would not amount to rape.
- d) A writ petition under Article 32 of the Constitution would not lie for reversing earlier decisions of the Court on the supposed ground that a restrictive interpretation has been given to certain provisions of a statute.

[22] The Respondents have placed reliance on Volume 11(1) of Halsbury's Laws of England para 514 (Butterworths 1990) wherein unlawful sexual intercourse with a woman without her

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consent has been held to be an essential ingredient of rape. Reference has also been made to Volume 75 Corpus Juris Secundum para 10, wherein it is stated that sexual penetration of a female is a necessary element of the crime of rape, but the slightest penetration of the body of the female by the sexual organ of the male is sufficient.

[23] The Respondents have also referred to the Principles of Public International Law by Ian Brownlie, where the author, after referring to some decisions of the English courts has expressed an opinion that the clear words of a statute bind the court even if the provisions are contrary to international law and that there is no such thing as a standard of international law extraneous to the domestic law of a Kingdom and that international law as such can confer no rights cognisable in the municipal courts.

[24] The counsel for the Respondents has also referred to Dicey and Morris on The Conflict of Laws wherein, in the Chapter on the Enforcement of Foreign Law, the following rule has been stated:

‘English Courts will not enforce or recognise a right, power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the fundamental public policy of English law.’

With regard to penal law, it has been stated as under:

‘The common law considers crimes as altogether local and cognisable and punishable exclusively in the country where they are committed... Chief Justice Marshall, in delivering

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the opinion of the Supreme Court, said: “The Courts of no country execute the penal laws of another”.’

[25] This Court on 13<sup>th</sup> January 1998 referred the matter to the Law Commission of India for its opinion on the main issues in the Petition, namely, whether all forms of PSV should come within the ambit of Section 375 IPC and whether any change in statutory provisions is advisable. The Law Commission considered the matters in its 172<sup>nd</sup> Report<sup>64</sup> and recommended substitution of the rape laws altogether with the laws of ‘sexual assault’ in the IPC. The criminal provision for sexual assault will contain other kinds of PSV within its ambit.<sup>65</sup> As is evident, these amendments can only be done by the legislature; therefore the Law Commission did not favour the widening of the meaning of ‘penetration’ by judicial interpretation, though it agreed in principle with the arguments of the Petitioner.

[26] Relevant here is an earlier report (156<sup>th</sup> Report)<sup>66</sup> of the Commission. Initially, after the referral on 13<sup>th</sup> January 1998, the Law Commission by an affidavit dated 25<sup>th</sup> March 1998 brought to the notice of this Court that the 156<sup>th</sup> Report of 1997 has dealt, inter alia, with the issues raised in the current petition. On the Court’s insistence that the Commission deals with the precise issues of the current petition anew, the 172<sup>nd</sup> Report was born. The following are the relevant extracts from the Commission’s recommendations from the earlier report –

‘9.59 Sexual-child abuse may be committed in various forms such as sexual intercourse, carnal intercourse and sexual assaults. The cases involving penile penetration into vagina

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<sup>64</sup> 172<sup>nd</sup> Report of the Law Commission of India, ‘Review of Rape Laws’, 2000

<sup>65</sup> Para 3.1.2, 172<sup>nd</sup> Report of the Law Commission of India, 2000

<sup>66</sup> 156<sup>th</sup> Report of the Law Commission of India, 1997

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are covered under Section 375 of the IPC. If there is any case of penile oral penetration and penile penetration into anus, Section 377 IPC dealing with unnatural offences, i.e., carnal intercourse against the order of nature with any man, woman or animal, adequately takes care of them. If acts such as penetration of a finger or any inanimate object into vagina or anus are committed against a woman or a female child, the provisions of the proposed Section 354 IPC whereunder a more severe punishment is also prescribed, can be invoked and, as regards the male child, the penal provisions of the IPC concerning 'hurt', 'criminal force' or 'assault' as the case may be, would be attracted. A distinction has to be naturally maintained between sexual assault/use of criminal force falling under Section 354, sexual offences falling under Section 375 and unnatural offences falling under Section 377 of the Indian Penal Code. It may not be appropriate to bring unnatural offences punishable under Section 377 IPC or mere sexual assault or mere sexual use of criminal force which may attract Section 354 IPC within the ambit of 'rape' which is a distinct and graver offence with a definite connotation.'

[27] Regarding Section 377 IPC, the Law Commission recommended that in view of the on-going instances of sexual abuse in the country where unnatural offences are committed on persons under the age of eighteen years, there should be a minimum mandatory sentence of imprisonment for a term not less than two years but may extend to seven years and a fine, with a proviso that for adequate and special reasons to be recorded in the judgment, a sentence of less than two years may be imposed.

[28] Therefore, the legal questions under contention in the current case before the Court are –

- a) Whether the definition of 'rape' under Section 375 IPC should include all kinds of penetrative sexual violence;

- b) Whether the narrow interpretation of the term 'rape' by the Respondent authorities violates the victim's fundamental rights under Articles 14, 15(3) and 21 of the Constitution;
- c) Whether this Court can use its power of Judicial Review to widen the interpretation of 'rape';
- d) Whether widening the definition will amount to a violation of the rule of *stare decisis* which will adversely affect the stability of the criminal law;
- e) Whether the State's commitments under international law may be taken in consideration in judicial decisions even if the legislature has not implemented the international commitments into municipal laws;
- f) Whether decisions of Courts in other common law jurisdictions may influence domestic judicial decisions; and
- g) Whether the decisions of International Courts may influence domestic judicial decision-making in India.

[29] The first point of contention is the meaning of the term 'rape'. Should penile penetration of the vagina be essential to constitute the offence of rape? To answer this, we must get to the root of the differentiation between vaginal-penile 'rape' and other kinds of PSV (the not-rapes). The Law Commission, in its 156<sup>th</sup> Report, says – 'A distinction has to be naturally maintained between sexual assault/use of criminal force falling under Section 354, sexual offences falling

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under Section 375 and unnatural offences falling under Section 377 of the Indian Penal Code.’ The Commission describes vaginal-penile rape under Section 375 IPC as a ‘distinct and graver offence with a definite connotation.’

[30] The assumptions behind the Commission’s opinion are – vaginal-penile rape is ‘naturally’ distinct from other kinds of PSV; and vaginal-penile rapes are graver violence than all other PSV and somehow that special gravity is connected with the ‘definite connotation’ attached to vaginal-penile rapes. The Commission does not expand on what it means by the natural distinction between the various kinds of PSV or the definite connotation of vaginal-penile rape or on why vaginal-penile rape is seen as the graver one.

[31] This Court deems it necessary to clarify this ‘natural distinction’ between different kinds of PSVs. Historically, the law of rape was concerned with the theft of a woman’s virginity (if she is unmarried) or chastity (if she is married). Just as a woman’s virginity is lost only when a penis accesses her vagina, and not when it accesses her anus or mouth, so too is the case of chastity. A woman’s chastity is perceived to be lost only in one kind of PSV – vaginal-penile rape. A woman’s virginity and chastity are preserved as long as her vagina is not accessed by the penis of a man other than her legally married husband. Chastity therefore is not mere sexual faithfulness in marriage but exclusive sexual access to the wife’s vagina by the husband. Anal rape or forced fellatio do not affect a woman’s virginity, and nor do they affect her chastity in case she is married. This is where vaginal-penile rape gets its traditional ‘definite connotation’ from. It is a graver offence because it affects a woman’s status as ‘exclusive to one-man’.

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[32] The understanding of rape as taking away of a woman's chastity is likely to have stemmed from a patriarchal concern to ascertain a child's paternity. A woman who is sexually exclusive will give birth to the offspring of one man. The concern for sexual 'purity' of a woman is a way of controlling and channelling female sexuality (and reproductive capacity) to serve patriarchal interests – maintaining the patrilineal family line. The woman in India very rarely maintains her own familial line. Her children cannot take forward her father's lineage; they continue her husband's familial line. To ascertain the paternity of her children she must be exclusive to one man. Vaginal-penile rape within this understanding is an interference with the essential sexual exclusivity of a woman. For the same reason the Indian Penal Code does not criminalise husbands who rape their wives.

[33] So the emphasis here is not on the personal harm of the woman, but on whether her chastity is affected by the rape. PSV that does not involve the penis and vagina does not affect her chastity; hence it is not termed rape. As marital rape does not violate a husband's right to exclusive access to his wife's sexuality and reproductive capacity, it is not criminalised. As only non-marital vaginal-penile sexual violence affect a woman's ability to be 'exclusive to one man' in present or in future, it is termed rape and criminalised.

[34] This classification may have seemed reasonable at the time this law was brought into force, yet it should not be continued as law in today's context. Every person within the territory of India has the Constitutional right to demand equal protection from the laws. A woman who is sexually violated has the right to demand redress for the violation of her bodily and sexual

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integrity irrespective of whether her (present or future) husband's right to exclusive sexual access to her is affected or not. She is entitled to redress for the harm that has been inflicted on her physical and mental state and for the infringement of her right to privacy and sexual autonomy.

[35] A woman, irrespective of her marital status, has the right to decide when, where and with whom she wants to participate in sexual intercourse and the law must protect that right with its full force. And having sex can include all kinds of penetrative sexual acts. Sexual penetration when non-consensual is injurious because of the absence of consent and not because of the particular combination of body parts. Therefore, there is no reason to believe that insertion of penis into the anus or mouth of the woman and the insertion of other things like a finger or inanimate objects into the vagina and anus of the woman are lesser injuries than the insertion of penis into a woman's vagina.

[36] This Court agrees that there is ample reason why the definition of rape in Section 375 should include anal-penile, anal-object, anal-finger, vaginal-finger, vaginal-object, and oral-penile PSV along with vaginal-penile PSV. And even if there are other provisions in the IPC that adequately redress these other kinds of violations, there is no justification for maintaining the distinction between vaginal-penile rape and the other kinds. The very distinction indicates the patriarchal essence of rape as an offence against the male right to exclusive access to a womb. The offence of rape must be reformulated as harm against the person of a woman; as an infringement to her right to choose when, where and with whom she wants to act sexually; and

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a violation of her integrity as a person. And in this understanding there is no distinction between the different kinds of penetrative sexual violence. They all equally violate the woman.

[37] The Respondents argued that there are provisions other than Section 375 which adequately deal with the other kinds of PSV. For reasons stated earlier adequate redress by other provisions should not affect the decision whether to broaden the definition of rape. The definition of rape should include all kinds of PSV primarily because of the need to effect a shift in the understanding of rape as a violation of chastity to a violation of individual rights to personal integrity and sexual choice. At the same time, the related and relevant question of whether acts of PSV other than vaginal-penile rapes are adequately redressed by the current law needs to be settled.

[38] The two provisions that presently deal with other kinds of PSV are Sections 354 and 377 IPC. Section 354 criminalises the application of criminal force to a woman with intent to outrage her modesty. The maximum punishment stipulated is imprisonment for two years and/or fine. In this Court's view this provision is not adequate to deal with any kind of PSV as the wording is ambiguous and the punishment negligible. Modesty has not been defined in the statute. This Court has attempted to define the term in the recent case of *Aman Kumar and Anr. v. State of Haryana* 2004 AIR SC 1497 in the following way –'Modesty can be described as the quality of being modest; and in relation to women, "womanly propriety of behaviour; scrupulous chastity of thought speech and conduct". It is the reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions.' The online version of the Oxford English dictionary

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defines 'modest' as – '(of a woman) dressing or behaving so as to avoid impropriety or indecency, especially to avoid attracting sexual attention; (of clothing) not revealing or emphasizing a person's figure'. The idea of a woman's modesty therefore is intimately connected to the ideas of 'scrupulous chastity', 'womanly propriety of behaviour', 'decency', etc. Therefore, outrage of a woman's modesty actually means the outrage of her decency, chastity and sense of propriety. To reiterate the same point made before, offences as serious as PSV needs to be disconnected from patriarchal ideas of chastity and modesty of a woman as they are fundamentally opposed to our Constitutional ideas of individual rights and the equality of the sexes. PSV of all kinds are serious assaults on a woman's person and her rights; and it needs to be perceived by law as such. Constructing PSV as an 'outrage of modesty' trivialises and misstates the harm. This Court agrees with the Petitioner that all kinds of PSV must be understood as an act of physical and sexual invasion aimed at harming, humiliating and degrading the victim.

[39] Section 354 also stipulates a punishment that is far lesser than the one prescribed by the rape provision (Section 376). In this Court's view there is no justification in grading different kinds of PSV on a scale of gravity depending on the orifice of the body violated and the instrument of violation. All kinds of non-consensual sexual penetration of the female body are equally grave because they equally violate a woman's right to sexual choice and her physical and sexual integrity. There may be different amounts of punishment awarded depending on the circumstances of each case, but not by definition on the combination of orifice and instrument of violation.

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[40] Section 354 may be adequate to deal with sexual harassment or molestation. But it is certainly not adequate to deal with any kind of non-consensual sexual penetration of the female body.

[41] The other provision that is used by the Respondents to prosecute cases of PSV is Section 377 IPC. This provision criminalises sexual intercourse against the order of nature. The Respondents claim this to be an appropriate provision for the purpose, as PSV involving anal-penile or oral-penile intercourse is 'unnatural' sex. This Court agrees that within the meaning of Section 377, such kinds of intercourse are deemed to be against the order of nature. But that does not make this an appropriate provision to deal with PSV. This provision criminalises intercourse, whether consensual or not, on the basis of its non-conformity to the generally accepted vaginal-penile norm. The section does not criminalise the act on the basis of absence or presence of consent and the consequent absence or presence of personal harm to one of the parties. It does not contemplate a 'victim' and a 'perpetrator'. 'Unnatural offences' are crimes even in the absence of a harm or offence to a person because this particular provision seeks its moral legitimacy from the principle of 'legal moralism'.

[42] Such a principle endeavours to punish immorality 'that can be committed not only in publicly harmful and offensive ways, but also discreetly by consenting and hence unharmed parties, in private or before consenting (hence unharmed and unoffended) audiences' (Joel Feinberg, *Harmless Wrongdoing: Moral Limits of the Criminal Law*, 1988, 3). Such actions are

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condemned by society and law because they do not conform to a particular social conception of morality.

[43] Non-consensual penetration of the female body involving whichever combination of acts needs to be criminalised due to the absence of the woman's consent. She is the person who is harmed – her rights are infringed, her body is invaded, she is forced to become the object of another's end. She is harmed because she has to act sexually without her own free consent. Section 377 does not recognise her personal harm because it criminalises the act irrespective of whether she consents or not. This can in no way be said to be an appropriate provision to deal with PSV of any kind. The fact that it carries equivalent punishment to the rape provision is no reason at all to call it appropriate. There are many other provisions in the IPC dealing with other offences that carry equivalent punishment to rape. But they cannot be used to prosecute sexual violence as they are not appropriate in content. It is the same with Section 377. It may stipulate similar punishment but it is not made for criminalising sexual violence. The Petitioner has correctly argued that the Respondents have misconstrued the legislative intent of Section 377.

[44] This Court finds enough reasons to conclude that neither Section 354 nor Section 377 IPC are adequate provisions for prosecuting any kind of PSV. They are inappropriate in content and form; and undermine and invalidate the victim's personal harm through their language and construction. This Court also finds the Respondents responsible for trivialising PSV by equating it with voluntary unnatural sexual relations.

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[45] The next question is whether the narrow interpretation of rape as only vaginal-penile penetration infringes the fundamental rights of women under Articles 14, 15(3) and 21 of the Constitution. Article 14 of the Constitution guarantees equal legal protection and equal treatment by the law to all persons within its jurisdiction irrespective of, among other attributes, their sex. The Petitioner argues that the non-inclusion of most kinds of PSV within the definition of rape under Section 375/376 IPC, leads to inadequate access to justice for victims of such violence and therefore infringes the right to equality under Article 14. This Court agrees that the provisions currently used to prosecute PSV other than vaginal-penile rapes are inadequate and inappropriate. Consequently victims of such violence are denied proper redress of their injury.

[46] Section 377 prescribes punishment of 'imprisonment for life' or 'imprisonment for either description ... which may extend to ten years'. But the sentences actually awarded are rarely ever as grave as the stipulated punishment. In *Chitranjan Dass* 1975 CrLJ 30 (SC), where the crime under Section 377 was proved, the Supreme Court awarded a punishment of two months imprisonment. In *Mihir v. State* 1992 CrLJ 488 (Orissa), where unnatural offences were committed on a minor girl the accused was sentenced to two years imprisonment. Such sentences may be justified if the case is one of consensual unnatural sex between adults as was originally contemplated by the provision. But sexual violence against minors is being treated equally trivially under this section. When we compare these sentences with the sentences awarded under Section 375/376, the difference is huge.

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[47] In *T.K. Gopal @ Gopi v. State of Karnataka* [2000] 4 LRI 1045, this Court upheld a High Court sentence of 10 years rigorous imprisonment for the vaginal-penile rape of a minor girl. In *State of Rajasthan v. Om Prakash* [2002] 2 LRI 297, this Court reinstated the sentence of seven years imprisonment awarded by the trial Court for the vaginal-penile rape of a minor girl and overturned the High Court's judgment in favour of acquittal. So in similar types of offences (PSV against a child) the punishments vary hugely depending on whether the vagina has been violated by a penis or not.

[48] This shows that vaginal-penile rapes are routinely treated as graver offences than other kinds of non-consensual sexual penetrations. This is so in spite of equivalent punishments prescribed in Sections 375 and 377 IPC. And this is made possible by the exclusion of other kinds of PSV from the definition of rape under Section 375 IPC.

[49] The narrow definition of rape as only non-consensual vaginal-penile intercourse hampers access to justice for many scores of women who are victims of PSV of the other kinds. The unreasonable and unsustainable difference between vaginal-penile and other kinds of PSV constructed by the Respondents unfairly treats some victims of rape as not-as-harmed as other victims of rape and infringes their right to equality before the law. In this sense such a definition is indeed a violation of the right to equal treatment by the law under Article 14 of the Constitution.

[50] All victims of PSV deserve equal treatment by the law and the equal recognition that their rights to physical integrity and sexual autonomy have been infringed. Grading of the suffering

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caused by different kinds of PSV is both impossible and undesirable as suffering is subjective and contextual; how a particular person will experience a particular PSV is likely to be different from another person and the context may greatly affect the nature and degree of harm. It is not the law's task to evaluate harms in terms of subjective experience. The law should look uniformly at legal injuries sustained in terms of rights and freedoms of an individual irrespective of a victim's subjective experience. A victim who has recovered from the trauma of PSV in a relatively shorter time may have managed to suffer less than the victim who has suffered long term PTSD<sup>67</sup> and resorted to suicide, but to law the harms must be the same. Construing the harm inflicted in terms of its effect on the victim runs the risk of leniency towards rapists whose victims have proved themselves psychologically stronger than those of other rapists. The successful struggle of a woman to overcome her trauma should not work as a gain for her attacker who gets a lesser sentence. The law risks getting into murky waters when it starts talking in terms of subjective suffering, as suffering is rarely quantifiable. For the sake of fairness, all rapists irrespective the effect on the victim must be punished similarly for the infringement they have caused to their victim's legal and moral rights and entitlements.

[51] Article 21 of the Constitution guarantees the right to life with human dignity to all persons within the territory of India. In *Bodhisattwa Gautam v. Subhra Chakraborty* AIR 1996 SC 922, this Court has declared that rape is indeed a violation of the right to life of a woman; it is the violation of her right to live with human dignity. The same has been affirmed by this Court in many other occasions including *Chairman, Railway Board & Ors. v. Chandrima Das & Ors.*

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<sup>67</sup> Post-Traumatic Stress Disorder

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[2000] 2 LRI 273. In *Vishaka v. State of Rajasthan* AIR 1997 SC 3011, this Court has also affirmed that sexual harassment in workplace is a violation of the right to life of a woman under Article 21 of the Constitution.

[52] As said above, this Court does not find any justification to differentially treat vaginal-penile rapes from other kinds of PSV. The Respondents' contention and the Law Commission's opinion that such a distinction is 'natural' is not one for which there is concrete, demonstrable support. Therefore all kinds of PSV (and keeping in mind the judgment of this Court in *Vishaka*, indeed all kinds of sexual violence, penetrative or not) must be seen as violations of the right of the victim to live a life with human dignity. Being compelled to have sexual intercourse without one's consent is a traumatic experience; it is a violation of the basic bodily and sexual integrity of a person; it more often than not leaves deep psychological and often physical scars that interfere with a victim's life for a long time afterwards.

[53] Sexual violations of all kinds, especially those involving the invasion of intimate/internal parts of a woman's body are equal infringements of her fundamental right to live a life with human dignity. A life blighted by memories of sexual violation is an injured life. A woman subjected to such violence is injured in her entitlement to live a life of dignity and freedom. The Respondents' decision to exclude PSV other than vaginal-penile rape from the definition of rape under Section 375 IPC did violate the rights of the victims of such violence to live with human dignity. The narrow definition of rape favoured by the Respondents foreclosed the possibility of adequate redress of their harms for innumerable women. The decision to prosecute other kinds

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of coercive sexual penetrations under Section 377 IPC which do not recognise a victim at all is an outright invalidation of the harm of the affected woman. Therefore the Respondents have indeed through their narrow interpretation of the term 'sexual intercourse' in Section 375 IPC violated the fundamental right to life with human dignity of victims of other kinds of PSV under Article 21 of the Constitution.

[54] The Petitioner has also argued that the narrow definition of rape contravenes Article 15(3) of the Constitution by defeating the purpose of the Criminal Law Amendment Act 1983 which inserts sub-section (2)(f) in Section 376 IPC. Article 15(3) of the Constitution gives the State powers to make 'special provisions for women and children' without violating the right to equality. The Criminal Law Amendment Act 1983 has amended the original rape law to make provision for aggravated punishment for certain kinds of rapes, including the rape of a woman below 12 years of age. The Petitioner contends that the narrow definition of rape has precluded women below 12 years from taking advantage of this amendment when they have suffered PSV of other kinds.

[55] This Court agrees that the amendment in question was indeed made under the powers conferred on the state under Article 15(3) of the Constitution. This Court also agrees that PSV victims below 12 years have not been able to access this special provision if they did not fit the category of victims of vaginal-penile rape. Though it cannot be said that the narrow interpretation of rape by the Respondents directly contravenes Article 15(3) of the Constitution, yet by blocking access to the special provisions for children enacted under the

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powers conferred by the article, the interpretation used by the Respondents has effectively defeated the purpose of the Constitutional provision.

[56] The status of international law in relation to municipal law in India is also under contention in the current case. The Petitioner has put reliance on a number of international legal provisions to support the petition. The first among them is the Respondent's obligations under the U.N. treaties of CRC and CEDAW. India has ratified both of the Conventions. The Petitioner argues that the Union of India (Respondent No. 1) has an obligation under Article 19 of the CRC which enjoins the state party to 'take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment maltreatment or exploitation including sexual abuse...' Under Article 4 of CEDAW, India has the obligation 'to take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.' Sexual violence itself is a form of socio-cultural discrimination against women. Disproportionately more women are victims of sexual violence perpetrated by men than vice versa. India has an obligation under CEDAW to take legislative measures to minimise this discrimination. And that includes making appropriate laws to deal with PSV of all kinds. Under-regulation of sexual violence, especially male sexual violence against women, makes law and the State complicit in this discrimination.

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[57] The question here is whether the international obligations of the Union of India (Respondent No. 1) can be directly taken into consideration by this Court in the absence of domestic implementation of the obligations through appropriate legislation.

[58] In *Madhu Kishwar & Ors. v. State of Bihar & Ors.* (1996) 5 SCC 125, this Court held that the State was under an obligation to enforce the provisions of the CEDAW which provided that discrimination against women violated the principles of equality of rights and respect for human dignity.

[59] In *Vishaka & Ors. v. State of Rajasthan & Ors.* (1997) 6 SCC 241, this Court referred to the Statement of Principles of the Independence of the Judiciary in the LAWASIA region accepted at Beijing in 1995 by the Chief Justices of the countries in the Asia-Pacific. The principles accepted are those that represent the minimum observable standards to maintain the independence and effective functioning of the judiciary. Some of the stated objectives in the Beijing Statement are: '(a) to ensure that all persons are able to live securely under the Rule of Law; (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and (c) to administer the law impartially among persons and between persons and the State.' In light of the above, the Court in *Vishaka* decided, specifically in reference to Articles 11 and 24 of CEDAW, that 'There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity.'

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[60] In *Municipal Corporation of Delhi v. Female Workers (Muster Roll) & Anr.* 2000 (2) SCR 171, this Court referred to India's obligation under Article 11 of CEDAW and declared –'These principles which are contained in Article 11... have to be read into the contract of service between Municipal Corporation of Delhi and the women employees (muster roll); and so read these employees immediately become entitled to all the benefits conceived under the Maternity Benefit Act, 1961.'

[61] In *Githa Hariharan v. Reserve Bank of India* (1999) 2 SCC 228, this Court relied upon CEDAW and the Beijing Declaration and Platform for Action 1995 which urges state parties to take appropriate measures to prevent discrimination against women. It was held by the Court that the domestic courts are under an obligation to give due regard to international conventions and norms while construing domestic laws when there is no inconsistency between them.

[62] It is clear from the above examples that this Court has on various occasions decided in favour of taking India's international legal commitments into account while deciding domestic disputes. The Respondents have argued that this Court in *Vishaka* decided in favour of judicial implementation of international obligations, 'but only in absence of municipal laws'. As Sections 377 and 354 are not appropriate for prosecuting PSV, and rape under Section 375 IPC is currently interpreted as only vaginal-penile rape, this Court holds that there are no municipal laws to deal with other kinds of PSV. Therefore this Court is perfectly within its powers to implement international law while deciding this case.

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[63] The Respondents have also alleged that the implementation of international treaties is 'in the realm of State policy and are, therefore, not enforceable in a Court of law'. This Court has not in the past entirely agreed with this line of reasoning as is evident from the above-mentioned cases. International legal obligations, especially the ones safe-guarding human rights, should always be a part of judicial consideration in every relevant case because the Constitution very clearly intends to confer a wide variety of inalienable and judicially enforceable rights to the people. The Indian judiciary cannot close its eyes to the intention of the Constitution as expressed in the Fundamental Rights and Directives of State Policy. A decade after India's ratification of the CEDAW (on 9<sup>th</sup> July 1993) and accession to the CRC (on 11<sup>th</sup> December 1992) there is no appropriate criminal legal provision to deal with most types of PSV. If the Legislature does not pay heed to its obligations under international law, the Judiciary cannot simply fold its hands and not take account of the obligations while deciding cases. The legitimate expectation created by Respondent No. 1 through its ratification of the international human rights treaties must be honoured by the Respondent itself and its agents including the other Respondents. Lastly, because the Respondents have already ratified the treaties in question, it can also be reasonably expected that if this Court takes the treaty obligation into consideration it will not be against the intention of the Respondent.

[64] The Respondents have contended that 'foreign laws' do not bind the Indian domestic courts including this Court. The 'foreign laws' that the Petitioner has placed reliance on are some UK and South African domestic court judgments. It is true that no Indian Court is bound by the precedents of Courts of other jurisdictions. But because of the shared English common

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law origins of the Indian, US, UK, South African, Canadian and Australian legal systems, judgments from any of these jurisdictions has always been considered by the Indian Courts. It is nothing new. Nor is it unreasonable or undesirable.

[65] The Respondents have also submitted that reliance cannot be placed by this Court on the definition of rape devised by the ICTY because Indian Courts are not bound by International judicial decisions. Again this Court agrees that it is not bound by the pronouncements of ICTY. But in the absence of any other definition of rape in international law, the definition devised by ICTY is a sound guideline for an internationally aware domestic judiciary.

[66] The next question is whether this Court has the necessary powers to broaden the definition of rape contained in Section 375 IPC. Under Article 13 along with Article 32 of the Constitution of India, this Court has not only the power but also the responsibility of judicial review of existing laws to determine whether they conform to the fundamental rights of the people of India. If a particular law or its existing interpretation infringes any of the fundamental rights provisions, this Court has the responsibility to re-interpret the law to bring it in line with the Constitutional rights or if not possible, to declare the law void.

[67] A related question is the concern for legal uncertainty arising from over-zealous judicial review. Generally it must be conceded that for the sake of preserving legal certainty it is not advisable for the judiciary to change statutory definitions against the letter and intention of the legislative process. It may make statutory provisions confusing, ambiguous and against the wishes of a democratically elected legislature if the Courts start amending the provisions at will

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without due process in the parliament. But this is true only until the existing legislation does not result in infringement of the Constitutional framework. The purpose of the powers of judicial review is to circumscribe the power of the parliament to override the Constitution; and the judiciary, as guardians of the Constitution, must be mindful of this duty.

[68] Moreover in the present case, the broadening of the definition of rape by judicial intervention cannot be said to go against the legislative intent. The meaning of rape as vaginal-penile intercourse is not evident from the provision itself. The actual words in the IPC are – ‘A man is said to commit “rape” who... has sexual intercourse with a woman ...’ The term ‘sexual intercourse’ has not been defined as vaginal-penile anywhere in the statute. The only additional information about the term is in the Explanation contained in the provision which says – ‘Penetration is sufficient to constitute the sexual intercourse necessary [for] the offence of rape’. Here too the law does not expressly define penetration as vaginal-penile penetration. In other words a plain reading of Section 375 IPC does not make it clear that the legislature intended the definition of rape to be interpreted as vaginal-penile.

[69] The Petitioner has correctly submitted that this ambiguity in the meanings of the terms ‘sexual intercourse’ and ‘penetration’ in the statute affords an appropriate opportunity for judicial intervention. This Court can rightfully define any term in any statute that has been left undefined by the legislature. This is not only possible but also desirable for the smoother delivery of justice. Undefined and ambiguous terms make the law amenable to misuse. Especially in this particular case, the ambiguity in the definition of rape has made it possible for

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the Respondents to give it an interpretation that contravenes Constitutional guarantees of rights. Judicial re-interpretation of the law will bring it in line with the Constitution of India. Surely this cannot be detrimental to the ends of justice.

[70] The Petitioner has also asked the Court to give a purposive interpretation to the term 'rape' in Section 375 keeping in mind the rise of cases of sexual abuse of children involving PSV other than vaginal-penile rape. The recent rise in reported sexual violence against children is likely to be a fact. But that must not be taken to prove that actual incidence rates have increased. If the rate of a particular offence varies over time, there must be an explanation for that. No evidence has been submitted by the Petitioner to prove this claim and the Court finds no reason to assume without evidence that increase in reported cases directly reflects increase in incidence.

[71] The more feasible fact is that society's awareness about the phenomenon has increased in recent times. Moving towards a more liberal outlook, we as a society have come to respect individual rights over and above community interests; have become more intolerant of inter-personal abuses of power in different contexts. As our society changes to a progressively capitalist one causing the traditional joint families and closed communities to break up and form migrated mixed population communities consisting of nuclear families with less children and working parents, the power relations change within the family and society, giving the powerless a voice to protest and the public a glimpse within the privacy of extended families and communities where child abuse thrives and grows. Our society is still very reserved in

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disturbing the patriarchal status quo or in interfering within what is known as the privacy of the family but we are slowly starting to pull out the phantoms from the closet and face the facts. In all probability this is the reason for the increased reporting rate of child abuse.

[72] Sexual abuse of children is likely to have been always present in Indian society as in other societies elsewhere and is not something that has suddenly come into being. The claim that child sexual abuse is a new phenomenon is mistaken. In the words of distinguished historian, Sheila Rowbotham –

‘This mistaken belief arises because we can only grasp silence in the moment in which it is breaking. The sound of silence breaking makes us understand what we could not hear before. But the fact that we could not hear does not prove that no pain existed.’ (Sheila Rowbotham, *Woman’s Consciousness, Man’s World*, 1973, 29-30)

[73] Therefore this Court does not accept the argument that something fundamentally has changed in the Indian society resulting in hugely raised incidences of sexual abuse of children. What the Court does accept is that there is a changed scenario of increased reporting in child sexual abuse cases. This must lead the legal establishment to devise better laws to deal with child abuse. But in the present case, the reasoning in favour of widening the definition of rape in Section 375 IPC is more general and fundamental.

[74] The Petitioner has conflated the issue of the need for adequate laws to address the abuse of children with the problem of arbitrary categorisation of different kinds of rapes stemming from the legal non-recognition of the personal harms of raped women. This conflation is both

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unfortunate and misleading. Even if the rape law is made wider in its import by judicial interpretation, it will not fill the legal void regarding sexual abuse of children, firstly because sexual abuse of children can occur even without any kind of sexual penetration, and secondly because abuse of male children, even the penetrative kind, will not be covered by the widened rape law. Any law of sexual abuse of children needs to take into account that such abuse is not always straightforward PSV, that there are complex and myriad ways, aggravated by the child's young age and inexperience, in which she/he can be manipulated into participation in physically and psychologically damaging sexual acts. Therefore the argument that the definition of rape needs to be broadened in order to respond to the phenomenon of child abuse is ill-conceived and fallacious. As mentioned before, the rape law should recognise all kinds of PSVs as rapes due to a more fundamental need to shift the understanding of rape from violation of chastity to violation of the person and her fundamental rights. The broadened version of the rape law will redress sexual abuse of girl-children only to the extent such abuse involves PSV of any kind. And of course, in cases of children as opposed to adult women, presence of consent is no defence for the perpetrator.

[75] It has again been contended by the Respondents that broadening the definition of rape by a judicial writ would be against the rule of *stare decisis*. The rule of *stare decisis* directs the Courts to adhere to previous decisions of courts of equal or higher standing within the same jurisdiction for the sake of legal consistency. But it is not a rule without exceptions. The need to maintain consistency in the law cannot outweigh the need to correct unjust laws. If a previous

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decision of the Court is found to have perpetrated grievous wrong and injustice, it becomes essential to diverge from the decision to correct that wrong as soon as possible.

[76] This Court, in *Karnal Improvement Trust, Karnal v. Smt. Parkash Wanti (Dead) & Anr.* 1995 (1) Suppl. SCR 136, referred to a series of authorities from the Indian and other common law jurisdictions about the limits of the doctrine of *stare decisis* and decided –

‘...that normally the decisions which have been followed for a long period of time and have been acted upon by persons in the formulation of contracts or in the disposition of that property or other legal processes should generally be followed afterwards but this rule is not inexorable, inflexible and universally applicable in all situations. The appellate court will not shirk from overruling the decision or series of decisions which establish a ratio plainly outside the statute or in negation of the object resulting in defeating the purpose of the statute or when the Court is convinced that the view is clearly erroneous or illegal. Perpetration of such an illegal decision would result in grievous wrong.’

[77] In *State of Maharashtra v. Milind & Ors.* AIR 2001 SC 393, this Court observed that –

‘The rule of *stare decisis* is not inflexible so as to preclude a departure therefrom in any case but its application depends on facts and circumstances of each case. It is good to proceed from precedent to precedent but it is earlier the better to give quietus to the incorrect one by annulling it to avoid repetition or perpetuation of injustice, hardship and anything ex-facie illegal more particularly when a precedent runs counter to the provisions of the constitution.’

[78] The Respondents have specifically mentioned the particular decision in *State of Punjab v. Major Singh* 1966 (Supp) SCR 266 where it was held that the rupturing of the hymen by insertion of a finger is not rape. In the view of this Court today, this previous decision

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perpetrates a grievous wrong by unreasonably differentiating between vaginal-penile rapes and other kinds of penetrative sexual violence. As said before, this difference is based on an understanding of rape as an offence against a woman's chastity. This decision cannot be adhered to in light of the current understanding of rape as an offence against the person of a woman. This and all other decisions of this Court that have interpreted rape as vaginal-penile must be departed from as they infringe the fundamental rights of the victims of PSV.

[79] *Stare decisis* literally means 'to stand by what has been decided'. But no Court shall be justified in standing by what it believes to have been decided wrongly. The judiciary's first commitment is not to rules of conduct, but to the purpose of delivering justice. The rules are simply a way to the purpose, and not the purpose itself.

[80] An issue not covered by the Petition but relevant to it, is the legal redress for rape of men. The law in India provides no redress whatsoever for male rape. It is beyond the scope of this judgment to remedy this shortfall. The Respondents prosecute such cases under Section 377 IPC which as noted earlier, does not construct the crime in terms of non-consent. Section 377 IPC criminalises voluntary sexual relations that do not conform to the socially accepted heterosexual norm; it does not contemplate a victim and a perpetrator. Therefore it actively invalidates the harm inflicted on the victim in PSV. Male victims of PSV are inadequately dealt with under this section. In *Charanjit Singh* 1986 CrLJ 173 (Punjab & Haryana), where a truck-driver was prosecuted for committing sodomy on a boy, a lower court sentenced him to one-year imprisonment and a fine of 500 rupees. It is not possible judicially to broaden the

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definition of rape under Section 375 IPC to bring men under its purview due to the specific wording to the contrary. Instead this Court would like to take the opportunity to urge the legislature to immediately contemplate an amendment of the existing law of sexual violence to bring men under its ambit as victims.

[81] To summarise the decision of this Court –

- a. The definition of rape under Section 375 IPC should include all kinds of PSV, namely – anal-penile, oral-penile, vaginal-penile, anal-object, vaginal-object, vaginal-finger and anal-finger. PSV must be uniformly termed rape and must be understood in terms of violation of the victim's rights to physical and sexual integrity and autonomy/choice. No gradation of PSV into lesser and graver is warranted by the law.
- b. The current narrow interpretation of rape in Section 375 IPC as vaginal-penile rape is against the fundamental rights of the victims of PSV under Articles 14, 15(3) and 21 of the Constitution.
- c. The Court is within the bounds of its constitutional powers and responsibilities in re-interpreting an ambiguous statutory term whose current interpretation infringes the Constitution.
- d. The doctrine of *stare decisis* is not so rigid as to prevent a Court from departing from its previous decisions under all circumstances. Where following a precedent can result in

perpetuating a grievous wrong or a contravention of Constitutional rights, the rule of *stare decisis* must be abandoned.

- e. India's obligation to ratified international human rights treaties must be kept in mind by the Courts, especially when an unreasonably long time has passed and the legislature has not acted to incorporate the provisions of the treaties in municipal law.
- f. Judicial pronouncements by international courts and tribunals are not binding on Indian courts, but may appropriately act as guidelines for domestic courts for understanding various evolving international legal concepts.
- g. Similarly, decisions made in other common law jurisdictions do not act as precedents in Indian domestic judicial decision-making but they may be used as guidelines by Indian Courts.
- h. Victims of male rape are unjustifiably left with no proper legal redress in Indian criminal law. This Court asks the Indian Legislature to pay urgent attention to this serious and regrettable situation.

For the reasons mentioned before, this Special Leave Petition is allowed.

**Order:**

Order accordingly.

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## Conclusion

I will conclude with a speculation of what effects such a judgment would have had if the Supreme Court of India had written it in 2004. Firstly, the law of rape in the Indian Penal Code 1860 would have redressed all forms of PSV against women for the last seven years which would have saved many women and female children from inadequate redress of their harms. Secondly, the legal idea of rape as violation of chastity, often reiterated by judicial pronouncements in India<sup>68</sup> would have started shifting towards an understanding of rape as a violation of personal space and constitutional rights of an individual.<sup>69</sup> As the editors of the Feminist Judgments Project in the UK write –

‘...law is not simply a coercive force, but is also a powerful and productive social discourse which *creates* and reinforces gender norms. ... By intervening in law from a feminist perspective, one of the aims of the Feminist Judgments Project was to disrupt this process of gender construction, and to introduce different accounts of gender that might be less limiting for women.’<sup>70</sup>

Consequently, if this judgment was written by the Court in 2004, it would have been a powerful intervention into and disruption of the existing patriarchal understandings of rape in India. Thirdly, the idea that some kinds of rape can be legitimately prosecuted under the law of unnatural intercourse which does not depend on presence or absence of consent, and consequently that some kinds of intercourse might be branded unnatural, would not have

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<sup>68</sup> The Indian courts often define rape in terms of violation of supreme honour and chastity of a woman as I have discussed above.

<sup>69</sup> There are instances when rape has been judicially recognised as a violation of constitutional rights, yet that sounds like lip-service as long as the division between rapes and non-rape PSVs stand, and as long as the judiciary keep on describing rape as violation of a woman’s chastity, because both cannot be true at the same time.

<sup>70</sup> Hunter, McGlynn and Rackley (eds.), *Feminist Judgments: From Theory to Practice* (2010) 7

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found support in the highest court of the country. And finally, the amalgamation of the issue of protection of the girl-child with the quite different issue of upholding the constitutional rights of the woman would have been discouraged.<sup>71</sup>

Reiterating what has been said earlier, this judgment is being presented as one of the many feminist judgments possible in this particular case. The strength of feminism lies not in its uniformity but in its multiplicity and unevenness, in its internal conflicts and accommodations, and in its ability to stretch and encompass myriad voices without permanently privileging some of them over the others. This dynamism is a sign of feminism's vitality and potential. And I will be glad if my humble contribution to the enormous possibility of feminist judgments can spur others into writing their own feminist versions of the same judgment. I am immensely fortunate to have come across such a potent tool of feminist scholarship in the feminist judgment projects of Canada and the UK, and feel privileged to be able to add my voice to this movement.

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<sup>71</sup> This list of potential impacts of my feminist judgment was inspired by the Feminist Judgments Project in the UK. See Hunter, McGlynn and Rackley (eds.), *Feminist Judgments: From Theory to Practice* (2010) 27-28

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