

**IN THE HIGH COURT OF DELHI AT NEW DELHI  
(EXTRAORDINARY ORIGINAL JURISDICTION)**

**WRIT PETITION (C) NO. 284/2015**

**IN THE MATTER OF:**

Rit Foundation .....Petitioner

Versus

The Union of India ...Respondent

**AND**

**WRIT PETITION (C) NO. 6024/2017**

**IN THE MATTER OF:**

All India Democratic Women's Association (AIDWA) ...Petitioner

Versus

Union Of India ...Respondent

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NDOH: 10.01.2022

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NEW DELHI  
DATED: 09.01.2022

**BRIEF NOTE ON BEHALF OF PETITIONERS dt 09.1.2022**

The submissions below are made by Ms. Karuna Nundy, counsel for the Petitioners, All India Democratic Women's Association and Rit Foundation:

1. The Hon'ble Supreme Court has taken an emphatic view (per Lokur, J.), in *Independent Thought v. Union of India*: “On a combined reading of *C.R. v. UK* and *Eisenstadt v. Baird* it is quite clear that a rapist remains a rapist and marriage with the victim does not convert him into a non-rapist.” (@ para 73, pdf p. 872, Vol II). In this decision part of Exception 2 to s375 of the IPC was struck down, and the judgment confined to rape by husbands of their minor wives only. To the extent all female citizens (whether adult or minor wives) are guaranteed the same constitutional rights to bodily integrity, equality and free expression the ratio explicitly applies to all women (@ para 71, pdf p. 871, Vol II).
2. The three limbs of submission are: (i) There is **no presumption of constitutionality of a pre-constitutional provision.** (ii) As held by courts in various jurisdictions, including our Supreme Court, striking down the marital rape exception ('MRE'), will **not create a new offence.** and (iii) The MRE & other **impugned provisions fail to pass Constitutional muster (since they are violative of Art. 14, 15, 19 & 21)**, and it is the constitutional courts explicit mandate under **Art 13** to set it aside, without awaiting legislative action.

*No presumption of constitutionality of pre-constitutional statutes*

3. The Supreme Court in a number of decisions, (most recently in *Navtej Singh Johar v. Union of India* (@ para 88-91, pdf p. 1526-1529, Vol II) and *Joseph Shine v. Union of India* (@ para 10, pdf p.1179, Vol II) (per Nariman, J. and Indu Malhotra, J. respectively)), held that, “10. ..There would be no presumption of constitutionality in a pre-constitutional law (like Section 497) framed by a foreign legislature. The provision would have to be tested on the anvil of Part III of the Constitution.” This along with the fact that MRE is an ex-facie infringement of fundamental rights by the statute, the onus to prove that the law is constitutional, shifts to the State.

*Striking down the MRE doesn't create a new offence*

4. Striking down the MRE, s. 376B IPC and s. 198-B of the CrPC, will not lead to the creation of a new offence. Deepak Gupta, J. in *Independent Thought (supra)* (@ para 81-85 pdf. p. 951-952, Vol II) held that, “[T]here can be no manner of doubt that by partly striking down Section 375 IPC, no new offence is being created. The offence already exists in the main part of Section 375 IPC as well as in Section 3 and 5 of POCSO. What has been done is only to read down Exception 2 to Section 375 IPC to bring it in consonance with the Constitution and POCSO.” The New York Court of Appeals in *People v. Liberta* (@ para V, pdf p. 28 of 'Reference Index & Additional Documents'), on this precise issue, held the statutory MRE to be “unconstitutionally underinclusive”, and as a result extended coverage of the statute to those formerly excluded i.e. to married men who raped their wives. The court held that striking down an exemption that is under-inclusive, does not amount to the “creation of crime”. In *R v. R* (@ pdf p. 230 Vol I), the House of Lords held that by striking down Lord Hale's common law fiction of implied consent in marriage, it was not creating a new offence, but was only removing a fiction which was “anachronistic and offensive”.
5. Indeed the Supreme Court has in *Hira Lal P. Harsora & Ors. v. Kusum Narottam Das Harsora & Ors.*(2016) 10 SCC 65 created a new class of offenders. The words “adult male” in the Domestic Violence Act (a quasi-criminal statute, which prescribes criminal penalties on non-compliance of protection orders) were struck down by Court from the definition of the term “respondent”, so persons of other genders could be impleaded as

“respondents” under the Act (@ para 46, pdf p. 2633 Vol II)

*The MRE is violative of Article 14*

6. The IPC classifies the crime of rape based on the marital status of the victim, viz.
  - a) unmarried women (single, live-in partner and/or divorced) or women raped by a person/(s) other than her husband (punishment u/s 376(1) is 10 years to life (as amended in 2018));
  - b) married women (when perpetrator is husband, currently not recognised as ‘rape’)
  - c) married but separated (de jure or de facto) women (again, when the perpetrator is her separated husband) (punishment is 2-7 years. s. 376B; s.198B CrPC, inserted in 2013). Section 198B CrPC limits cognisance of such rape to courts.
7. This classification has no relation or nexus with the object of the statute to criminalise rape - i.e. to prevent and punish non-consensual sexual intercourse, and to protect a woman’s bodily integrity, sexual and personal autonomy and dignity. The object of the provision cannot be, as is sought to be advanced by the Union of India, the protection of the so called ‘institution’ of marriage.
8. Further, the Exception suffers from irrationality and manifest arbitrariness inasmuch as it provides immunity to a man for forcibly having sex with his wife, but not to a man forcibly having sex with a woman who is not his wife (but may, for instance, be his live in partner). Such privilege of the purported sanctity of an ‘institution’ over the rights of the individuals involved is manifestly arbitrary and thus in violation of Art. 14. The Supreme Court stated in response to the State’s defence of the MRE w.r.t. minors, that “marriage is not institutional but personal - nothing can destroy the ‘institution’ except a statute that makes marriage illegal and punishable” (Lokur, J. in *Independent Thought* (@ para 90, pdf p. 884, Vol II). Chandrachud J in *Joseph Shine* (@ para 66, pdf p. 1134, Vol II) has held: “(T)he delineation of private or public spheres become irrelevant as far as the enforcement of constitutional rights is concerned. Therefore, even the intimate personal sphere of marital relations is not exempt from constitutional scrutiny”
9. As noted by the Supreme Court in *Independent Thought* the MRE results in an anomaly: a husband can be prosecuted for lesser sexual offences u/s. 354, 354-B, 377 IPC etc., but not for rape (@ para 32, @ pdf p. 848 Vol II). Indeed slapping your wife or killing her in the bedroom is specifically criminalised, but not raping her.
10. The Supreme Court usually analyses under-inclusiveness in the Art 14 context. A classification is bad as under-inclusive when a State benefits or burdens persons in a manner that furthers a legitimate purpose but does not confer the same benefit or place the same burden on others who are similarly situated.[*State of Gujarat v. Ambica Mills* (1974) 4 SCC 656 @ para 55, pdf p. 50 of ‘Reference Index & Additional Documents’]. Section 375 serves a legitimate purpose - to criminalise rape; however, it is underinclusive inasmuch as it excludes men who rape who have forced non-consensual intercourse with their wives. It is for this precise reason that the New York Court of Appeals in *Liberta* found the MRE unconstitutionally underinclusive.
11. Generally, courts interrogate the constitutionality of exemption and exception clauses in the following manner: when a provision which is in the nature of an exception to a general statute is invalid, the general provisions of the statute are not invalidated thereby, unless it clearly appears that the exception is so intimately and inherently related to and connected with the general provisions to which it relates that the legislature would not have enacted the latter without the former. [Per *Motor General Traders & Anr. v. State of Andhra Pradesh* (1984) 1 SCC 222 @ para 26 pdf p. 70 of ‘Reference Index & Additional

**Documents’]**

12. **Lack of protective provisions for survivors of marital rape:** Women raped by their husband do not get protections under law available to other rape victims including s. 357A CrPC (provision re: compensation to all victims of crime), s. 357C CrPC (all hospitals to provide free, immediate first-aid to rape victim), s. 164A CrPC (protocols for medical examination of a rape victim), s. 228A IPC (penalises publication of the identity of rape victims.) etc.

***MRE amounts to a violation of Article 15(1)***

13. Recent jurisprudence of the Supreme Court (*Anuj Garg @ para 49-52 at pdf p. 873 Vol I, & Navtej Johar (@ para 52-53, pdf p.1601-1602, Vol II & para 41, pdf p. 1585 Vol II)*) has held ‘discrimination on the basis of sex’ to mean any discrimination founded on a stereotypical understanding of the sex in question. Thus, MRE, which is founded on a stereotypical understanding of ascribed gender roles in a marriage - would render it discriminatory under Art.15(1) of the Constitution;

***MRE violates the right to dignity, liberty and personal & sexual autonomy under Art. 21***

14. A woman’s right to make reproductive choices is a dimension of “personal liberty” and her physical integrity flows from her right to life, dignity & bodily privacy under Art. 21. *“This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman’s right to refuse participation in sexual activity”*(per **Suchita Srivastava v. Chandigarh Administration**, 2009 (9) SCC 1 @ **para 22, pdf p. 141 Vol II** & affirmed in *Justice KS Puttaswamy (Retd) vs Union of India* Supreme Court @ **para 72, pdf p. 222 Vol II**) The Supreme Court in *Puttaswamy (@ para 140(d), pdf p. 348 Vol II*) also held that gender violence is often treated as a matter of family honour (much like in the present case), and **privacy must not be a cover to conceal and assert patriarchal mindsets.**

***MRE violates a married woman’s right to self-expression under Art. 19(1)(a)***

15. The expression of one’s sexual desire is part of self-expression protected under Article 19(1)(a). Misra, CJI in *Navtej Johar (@ pdf p. 1299 Vol II, para 29)* held “[A]rticle 19(1)(a) which protects the fundamental right of freedom of expression including that of LGBT persons to express their sexual identity and orientation, through speech, choice of romantic/sexual partner, expression of romantic/sexual desire, acknowledgment of relationships or any other means”. The Supreme Court in *NALSA v. Union of India (@ pdf p. 56, Vol II, para 69)* stated that *“Self-identified gender can be expressed through dress, words, action or behavior or any other form...subject to the restrictions contained in Article 19(2) of the Constitution.”* As such, the impugned provisions of law do not recognize the right of a married woman to say no to sexual intercourse with her husband. As a corollary, the impugned provisions also take away a married woman’s ability to say ‘Yes’ to sexual intercourse, both aspects of Exception 2 to 375 being contra Article 19(1)(a) and limiting a married woman’s right to freedom of sexual expression and behaviour.

***MRE fails the strict scrutiny test***

16. Pre-constitutional statutes like the IPC do not enjoy a presumption of constitutionality. When the same is coupled with an ex-facie infringement of fundamental rights (such as a discrimination against a protected category under Art. 15(1)), the burden of proof shifts to the State to demonstrate constitutionality. When such provisions are challenged, the Court

undertakes a **strict scrutiny** of the infringing legislation. (*Anuj Garg* (@ pdf. 872, Vol I, para 46, 47, 50, 51, 52), *Subhash Chandra v. Delhi Subordinate Services Selection Board* [(2009) 15 SCC 448] @ pdf p. 2507-2508 Vol II & *Ashoka Kumar Thakur* (@ pdf. p. 2038, Vol II, para 184)) as interpreted in *Naz Foundation* (Paras 110-115 @ pdf p. 1857 - Vol II).

17. Thus, the burden of proof to be discharged by the State is to show (i) the impugned provision serves a compelling state interest; (ii) that it is narrowly tailored and the least restrictive measure possible to achieve the object sought to be achieved by the said state interest. The application and formulation of the strict scrutiny test as in *Anuj Garg* (@ pdf. 872, Vol I, para 46, 47, 50, 51, 52) has since been noted with approval in *Independent Thought* (per Lokur, J., @ pdf p. 880-881, Vol II, para 85) and *Navtej Singh Johar* (per Nariman, J., para 46 @ pdf p. 1475-1476, Vol II).
18. It is submitted that MRE fails the strict scrutiny test - that there is no compelling state interest in “protecting the institution of marriage” as claimed by the State per *Independent Thought*, in response to the State’s argument in that matter (per Lokur, J. @ para 90, pdf p. 884, Vol II) Further, MRE cannot be saved on purported grounds of protecting the “privacy” of marriage. (Held by DY Chandrachud, J. in *Joseph Shine supra* @ pdf p. 1134, Vol II, para 66)

#### ***Effect of unconstitutionality of the MRE***

19. Per Article 13, and per various judgements of the Supreme Court, if a provision is found unconstitutional, the Court **must act**, and cannot send the matter back to the Legislature (*Shayara Bano v. Union of India* (per Nariman, J.) @ para 26-29, pdf p. 793-796, Vol I.; *Peerless General Finance v. RBI* (@ para 48-50, pdf p.363-365, Vol I) & *Independent Thought* supra per Deepak Gupta J. @ para 57, 58, pdf p. 932-933 of Vol II)
20. In *Navtej Singh Johar* (*supra*) the Court negated as irrelevant considerations, the failure of the Legislature to amend the law despite Committee/Law Commission recommendations to do so (per Nariman, J.) and the affected persons being only a “miniscule minority” (per Nariman, J., DY Chandrachud, J., and Kaul, J.) (@ para 92-95, pdf p. 1529-1532 Vol II & @ para 95, pdf p. 1532 Vol II.) The failure of the government or Parliament to act can be no excuse.

#### ***Errors in the criminal justice system and safeguards against misuse***

21. A very small proportion of marital rape cases are reported. Of these, ‘false cases’ and convictions are necessarily even smaller. Married women hesitate to report such incidents even to their lady health visitors. While all criminal justice suffers ‘false negatives’ i.e. acquittal of the guilty and ‘false positives’ or conviction of the innocent, there is no evidence that false cases concerning rape and sexual assault in cases where the assaulted and accused have a prior sexual relationship are misused more than other criminal laws.
22. Per the most recent, complete National Family Health Survey data 2015 - 16 (@ pdf p. 14 of Reference Index & Additional Documents), among married women (15-49 age) who were victims of sexual violence, over 83% experienced their current husband and 9% experienced a former husband as the perpetrators. Analysis of the NFHS data 2015-16 (@ pdf p. 16 of ‘Reference Index & Additional Documents’) suggests that only a minuscule portion of incidents of sexual violence is reported to the police. An estimated 99.1% of sexual violence cases are not reported, and in most such instances, the perpetrator is the husband of the victim. Evidence suggests that a woman is 17 times more likely to face sexual violence from her husband than from others. Even after excluding

marital rape and assault from the analysis, the extent of reporting sexual violence, only about 15% of sexual violence committed by others (someone other than the current husband) is reported to the police.

23. Courts have consistently held that the possibility of misuse of any law, is not a ground for setting it aside (*State of A.P. v. G. Jaya Prasad Rao* (@ pdf p. 2537, Vol II). In *Indira Jaising v. Supreme Court of India*, the Supreme Court has observed that, “*the possibility of misuse cannot be a ground for holding a provision of the Statute to be constitutionally fragile*”. (@ pdf p. 2572 Vol II, para 55). In *Lalita Kumari versus Govt. of UP* (@ pdf p. 1081 Vol I, para 114) the Supreme Court held that apprehension of misuse by indiscriminate arrest is misplaced, and in this context (@ pdf p. 1079, Vol I, para 107), said that, “*there are already sufficient safeguards provided in the Code which duly protect the liberty of an individual in case of registration of false FIR....[S]ection 154 was drafted keeping in mind the interest of the victim and the society. Therefore, we are of the cogent view that mandatory registration of FIRs under Section 154 of the Code will not be in contravention of Article 21..*”
24. The IPC itself imposes strict penalties for instituting any false criminal complaint, as provided for in Chapter X & XI (ref: s.182 IPC: False information, with intent to cause public servant to use his lawful power to the injury of another person; s. 191, IPC: False statement under oath or contrary to law with knowledge of falsehood; s. 211 IPC: False charge of offence made with intent to injure).
25. Further, the question of sentencing is a matter of policy which the court may not legislate (*Bachan Singh v State of Punjab AIR 1980 SC 898* (@ pdf p. 2793 Vol II, para 174-175). The Bombay High Court in *Indian Harm Reduction Network v. Union of India 2011 SCC Online Bom 715*(@ pdf p.2660-2661 Vol I, para 69) stated, “69. ..Besides, the proportionality of punishment is a matter for Parliament to decide as policy, and the Courts cannot sit in substantive judgment over the Parliament's legislative determination of what punishment is appropriate. In that sense, there is no encroachment on the domain of the Judiciary, as is sought to be contended.” The Court’s duty under Art. 13 is to strike down the law where it is unconstitutional. It is then for the Legislature to act (or not) in formulating minimum mandatory sentences proportional to the harm.
26. Further, the Verma Committee recognised that marital rape causes the same spectrum of harm as other rape, and cites with approval South African legislation that mandated that marital rape be sentenced with the same considerations as other rape. The Verma Committee in its report said that even if marital rape is criminalized, judges may regard marital rape as less serious than other forms of rape. The committee cited with approval the South African Criminal Law (Sentencing) Act of 2007 which provides that “*the relationship between the victim and the accused may not be regarded as a ‘substantial and compelling circumstance’ justifying a deviation from legislatively required minimum sentences for rape*” (@ pdf p. 87, Vol I, para 77)

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