IN THE HIGH COURT OF DELHI AT NEW DELHI
(EXTRA ORDINARY ORIGINAL JURISDICTION)
WRIT PETITION (CIVIL) NO. 284/2015

IN THE MATTER OF:

RIT FOUNDATION …..PETITIONER

VERSUS

THE UNION OF INDIA …RESPONDENT

AND IN THE MATTER OF:

ALL INDIA DEMOCRATIC WOMEN'S ASSOCIATION (AIDWA)

…PETITIONER/ INTERVENOR

VERSUS

UNION OF INDIA ...RESPONDENT

WRITTEN SUBMISSIONS ON BEHALF OF THE PETITIONERS

The submissions below to be made by Ms. Karuna Nundy, counsel for the Petitioners, are organized as follows:

I. SUMMARY

1. The fiction of legal marital rape created by Exception 2 of Section 375 of the Indian Penal Code, 1860 (henceforth 'IPC') has caused millions of women to be legally raped. It is the case of the Petitioner RIT Foundation, and the Petitioner/ Intervenor AIDWA (referred to hereinafter as 'Petitioners') that all adults have a right to sexual autonomy and bodily integrity. That without the right not to be raped, married women are legally reduced to sexual and reproductive subjects. That the inability to say no to sexual intercourse, whether it is recreational or for procreation, also takes away the right of married women to say an affirmative 'yes' to consensual sexual intercourse with their husbands and to make reproductive decisions.

2. A nine judge bench of the Supreme Court in **Justice (Retd) KS Puttuswamy vs Union of India** recognized on August 24, 2017 in Writ Petition (CIVIL) NO 494 OF 2012 (annexed below), the value of physical integrity and sexual autonomy under Article 21:

> 106 Life is precious in itself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the state is to safeguard the ability to take decisions – the autonomy of the individual – and not to dictate those decisions. 'Life' within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfilment of life is as much within the protection of the guarantee of life.

3. It is respectfully stated that even if one married woman suffers her constitutional rights being violated by legal rape, she must have the protection of the Constitution of India. As the Supreme Court stated in Justice (Retd) KS Puttuswamy (supra)

> The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion.

4. However, according to a 2014 study conducted by the Research Institute for Compassionate Economics (RICE Institute):

> Using data from the National Crime Records Bureau and the National Family Health Surveys, this article estimates, conservatively, the under-reporting of violence against women in India...in 2005, only about six of every hundred incidents of sexual violence committed by "men other than the survivor's husband" are estimated to be reported to the police**. Most incidents of sexual violence, however, were committed by husbands of the survivors**: the number of women who experienced sexual violence by husbands was forty times the number of women who experienced sexual violence by non-intimate perpetrators.

5. The RICE Institute Report is annexed and marked here as **Annexure P-1**. The UN Women Global Database also reports that the proportion of women aged 18–74 experiencing intimate partner physical and/or sexual violence at least once in their lifetime is as high as 37%. Extracts of the UN Report are annexed here as **Annexure P-2.**

6. Rape within marriage in the twenty first century, continues to be legalised by criminal laws of 1860. Exception 2 to Section 375 of the Indian Penal Code, 1860 (henceforth 'IPC') provides for an explicit exemption for rape within a marriage. Section 376B of the Indian Penal Code, 1860 and Section 198B of the Criminal Procedure Code, 1973 provide for unequal treatment of a rape victim separated from her husband at the time of rape.

7. The Exception to Section 375 was drafted on the basis of the Victorian patriarchies of 1860 that did not recognize men and women as equal. From 1950, the Indian Constitution provided key fundamental rights, to all citizens of India, irrespective of class, religion, race, sex and place of birth; further vide Article 13(1) it declared *void*, all provisions of laws existing as of 1950, found to be inconsistent with these inalienable fundamental rights of a citizen.

8. In contemporary India the abovementioned impugned provisions that legalise marital rape and treat the rape of separated women unequally, are fundamentally opposed to women's constitutionally recognized basic rights of equality, right to life and dignity.

9. Hence, the Petitioners are before this Hon'ble Court seeking that the impugned provisions allowing the legal rape of married women and leniency in the rape of separated women be set aside; and that women's fundamental rights to equality, freedom of speech and expression, and most significantly, to life be recognized.

II. ANALYSIS OF PLEADINGS

1. The present Counter-Affidavit filed by the Union of India skirts the main issue at hand i.e. the un-constitutionality of Exception 2 of Section 375 of the IPC. Instead the

Respondent State contends only that the issue of recognizing rape within a marriage is already *sub-judice* before the Supreme Court. However, the gravamen of Writ Petition no. 382/2013 filed before the Supreme Court of India is different in essence from what is being contended by way of this petition. The former is limited to the issue of rape of a minor and the petition, facts and grounds do not concern the marital rape exemption as a whole. The order of the Hon'ble Apex Court in Writ Petition 382 of 2013 dated 9.8.2017 is attached herewith as **P- 3.**

2. Additionally, the said objection raised by Respondent in its Counter Affidavit is also *res-judicata* as the same has already been heard and decided by this Hon'ble Court on 23rd September, 2015 in Review Petition no. 439/2015 filed by the Petitioner RIT. The said Review Petition was filed against order dated 8th July 2015, as the Union had objected that a similar matter was pending before the Hon'ble Supreme Court and the present writ petition had been dismissed. Vide order dated 23.09.2015 the Petitioner's review petition was allowed by this Hon'ble Court. The order of this Hon'ble Court dated 23.9. 2015 is attached as **Annexure P- 4.**

3. In **Bhanu Kumar Jain vs. Archana Kumar and Anr. ((2005) 1 SCC 787) (para 18)** the Supreme Court has cited a number of judgments for the proposition that "It is now settled that principles of res judicata apply in different stages of the same proceedings".

4. Thereafter, the present petition was presented and this Hon'ble Court was pleased to issue notice vide order dated 11th of January, 2016 in pursuance of the relief prayed for by the Petitioner in the aforementioned Writ Petition, counter affidavit was filed on 20th May 2016, and pleadings are complete.

5. That the stand of Union of India seems to be an attempt at ensuring that they do not officially have to take a stand one way or the other on an issue on the issue of such legalised rape, although in oral submissions Petitioners' prayers are opposed. Meanwhile married women all over the country are being legally raped, everyday.

III. STATUTORY FRAMEWORK UNDER THE INDIAN PENAL CODE, 1860

(i) The impugned provisions:

The marital rape exception Section 375, Exception 2, IPC

> Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

Rape of a separated wife, Section 376 B, IPC:

> Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Cognizance of rape of separated wife, Section 198B CrPC

> No court shall take cognizance of an offence punishable under Section 376B of the Indian Penal Code where the persons are in a marital relationship, except upon *prima facie* satisfaction of the facts which constitute the offence upon a complaint having been filed or made by the wife against the husband.

The latter two provisions were inserted via the Criminal Law Amendment Act, 2013.

ii. In the case of rape of a woman by any man, protective provisions get activated with Section 376 of the Indian Penal Code. However, the act of sexual intercourse or penetration by a husband, without the consent of his wife, is not recognized as an offence under Section 376; lesser offences and remedies can sometimes be obtained with FIRs registered in some police stations, and recognized by some courts under Section 354 and Section 377 of the Indian Penal Code. Section 498A is another such provision, as limited in Rajesh Sharma & Ors vs State of UP and Anr in Criminal Appeal No. 1265 of 2017. The above remedies do not however activate the protective provisions, (available to another woman who has been raped by a man not her husband), *inter alia*, as below:

a. Section 357 A of the Code of Criminal Procedure provides provisions for compensation to rape victims. In the case of **Tekan v. State of Madhya Pradesh**, (AIR 2016 SC 817) the Hon'ble Court reiterated the scheme of giving compensation to rape victims.
b. Section 357C of the Criminal Procedure Code places a responsibility on hospitals to provide free first-aid and medical treatment to victims of any offence covered under section 326A, 376,376A, 376B, 376C, 376D or section 376E of the Indian Penal Code.
c. Section 164 A of the Criminal Procedure Code provides for protocols for medical examination of a rape victim. The Department of Health Research, Government of India has further issued guidelines on forensic medical care and procedure for victims of rape.
d. Section 228A of the Indian Penal Code prohibits the publication of the identity of rape victims.

e. As Ld. ASJ Dr. Kamini Lau, North West Rohini, Delhi stated in **State vs Vinod Saini**, on 3/3/2014 (attached here as **Annexure P-5)**:

> "(T)hough our Legislatures are yet to take a serious note of the rampant marital sexual abuse which the women in our country suffer silently as has happened in the present case but that does not mean that a battered wife who has been sexually abused and has invoked the Legal System of our Country is not entitled to any State assistance which help is already available to other victims of sexual abuse? She is the responsibility of the State and s required to be taken care of just as any other victim of aggravated sexual assault and abuse and the State cannot abdicate its responsibility and she cannot be discriminated only because she happens to be the wife of the sexual aggressor."

iii. Further, the provisions under which aspects of marital rape could be treated as a criminal offence, being sections 354, 354B, 377, 498A, do not provide for a proportionate punishment:

a. Section 354 of the Indian Penal Code criminalises assault or criminal force to woman with intent to outrage her modesty. The maximum punishment under Section 354 for unwelcome physical contact and advances is seven years, the minimum is five years.

b. Section 377 of the Indian Penal Code does not distinguish between consent and absence of consent. It further does not criminalise non-consensual penile-vaginal sexual intercourse and hence leaves from the ambit of criminality a case of marital rape where the non-consensual act is in the form of penile-vaginal sexual intercourse.

c. Section 498A IPC makes cruelty by husband or his relatives a punishable offence. The maximum term of imprisonment under this section is three years.

For rape of a woman (without causing death or persistent vegetative state) under Section 376 IPC, the maximum term is life imprisonment and the minimum is seven years. The latter two provisions were inserted via the Criminal Law Amendment Act, 2013. In specifying different sentences for the same crime the above classifications of rape victims violate the principle of proportionality fundamental to valid criminal law.

IV. THE CONSTITUTIONAL FRAMEWORK

A. ARTICLE 13

As per Article 13 of the Constitution of India, the Petitioner's case is that the impugned provisions are *void ab initio* due to their consistency with Part III of the Constitution.

Article 13

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void."

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void

i. It is trite law that legislation is the prerogative of the legislature, the judiciary is the protector of fundamental rights against any encroachment. As such when a provision of law is unconstitutional, a plea may not be made to Parliament to amend the provision. The provision must be set aside as unconstitutional.

ii. The Apex Court in the case of **Peerless General Finance vs Reserve Bank Of India, 1991 CriLJ 1391 (Paras 48, 50)** held that once it is established that a statute is *prima facie* unconstitutional, it is the State that must establish that the restrictions imposed are reasonable and the objective test which the court to employ is whether the restriction bears reasonable relation to the authorized purpose or an arbitrary encroachment under the garb of any of the exceptions envisaged in Part III. It is the duty of the Court to zealously and actively protect and enforce fundamental rights and a law found to be encroaching upon a fundamental right of a citizen, must mandatorily be struck down and declared as unconstitutional.

iii. In **Romesh Thapar v. The State of Madras**, **AIR 37 (1950) SC 124 (para 13)** the Hon'ble Supreme Court held that, "*Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right,* ***it is not possible to uphold*** *it even so far as it may be applied within the constitutional limits, as it is not severable.* ***So long as the possibility of its being applied for purposes not sanctioned by the Constitution*** *cannot be* ***ruled out, it must be held to be wholly unconstitutional and void***."

iv. Again in **Shreya Singhal vs. Union of India**, AIR 2015 SC 1523 **(para 96)**, the Apex Court while striking down Section 66A of the IT Act, held that. "*In an Article 19(1)(g) challenge,* ***there is no question of a law being applied for purposes not sanctioned by the Constitution*** *for the simple reason that the eight subject matters of Article 19(2) are conspicuous by their absence in Article 19(6) which only speaks of reasonable restrictions in the interests of the general public. The present is a case where, as has been held above, Section 66A does not fall within any of the subject matters contained in Article 19(2) and the possibility of its being applied for purposes outside those subject matters is clear.* ***We therefore hold that no part of Section 66A is severable and the provision as a whole must be declared unconstitutional****."*

v. In the case of **State Of Punjab vs Dalbir Singh (paras 27 to 29)** on 1 February, 2012 passed in criminal appeal no. 117/2006, the Apex court held that Article 13 made it obvious that only the judiciary could give the declaration that a law being in contravention of the mandate of Part-III of the Constitution is void.

vi. Recently, vide judgment dated 22/08/2017 the Constitutional bench of the Supreme Court in W.P.(C) 118 of 2016 titled **Shayara Bano vs. UOI**, the Hon'ble Court with a majority in the ratio of 3:2 declared that a Triple Talaq at one go by a Muslim husband which severs the marital bond, as bad in constitutional law. Justice R. Nariman at para 28 at page 335 of the judgment relied upon a judgment of the US Supreme Court, decided on June 26, 2015, wherein the U.S. Supreme Court had observed that: "*The dynamic of our constitutional system is that individuals* ***need not await legislative action before asserting a fundamental right*** *……..* ***An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act***."

vii. Justice Nariman in **Shayara Bano (supra)** further relied upon the case of **Prem Chand Garg v. Excise Commissioner, U.P.,** 1963 (Supp.) 1 SCR 885 and vide **para 26-29 opined that in cases of such constitutional invalidity, the courts must act and it was not sufficient that Courts send the matter back to the legislature to remedy such a wrong**. Thus, under Article 13(1) of the Constitution, triple talaq at one go, was struck down, as being opposed to fundamental rights under Article 14, 15, 19 and 21 of the Constitution. Thus in the present instance also, the impugned provisions, if and when adjudicated as being in violation of constitutional provisions (i.e. arbitrary and unreasonable, having no rational nexus with the object sought to be achieved with the classification of rape victims as per their marital status), will mandatorily have to be struck down and declared *void*.

viii. It is to be noted that recommendations have also been made to Parliament, calling for the impugned provisions to be removed and the law to be amended, in consonance with constitutional and treaty obligations. Such calls by the Justice Verma Committee and bodies monitoring India's commitment as State Party to international treaties, are detailed hereinbelow in Part V of the present submissions. However the legislature has failed to act.

ix. The submissions below seek to demonstrate that the impugned provisions are patently inconsistent with Part III of the Consitution of India, and as such liable to be set aside under Article 13(1).

B. ARTICLE 14

Article 14: "*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India"*.

i. The impugned provisions i.e. Exception 2 to section 375, Section 376B of IPC and Section 198B of the Criminal Procedure Code, 1973 classify rape victims into three categories based on their marital status i.e. married, married but separated, and unmarried. In order to pass the test of permissible classification under Article 14 two conditions must be fulfilled, filled namely;

   a. that the classification is founded on intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group **and**,
   b. that differentia must have a rational relation to the object sought to be achieved by the statute in question.

Article 14 prohibits discrimination not only by a substantive provision of law but also by procedural law.

ii. In the present case, the impugned provisions create three classes of rape victims without any intelligible differentia between the harms they suffer and without a plausible rational nexus to an object sought to be achieved by the criminal law. The three classes of rape victims are:

   a. Women suffering <u>rape at the hands of a man who is not their husband,</u> are protected by the criminal law under Section 375 and 376 IPC and are de-jure afforded the full protection of the present law.
   b. A woman who is married to a man who rapes her, cannot approach police or the judiciary and seek punishment under penal provisions for rape. Such act of sexual violation and assault on the woman is not only deemed legal as per section 375 exception 2, but also amounts to encouraging the rapist husband to continue to sexually violate and assault his wife at will, with the sanction of the law.
   c. A rape victim, *de facto* or *de jure* separated from her assailant husband, under section 376B IPC as inserted in 2013, may have her rapist sentenced to between 2 to 7 years upon conviction. The said offence is cognizable, only on a complaint by the victim, and bailable. Further, as per Section 198B CrPC courts are also barred from taking cognizance of a rape of a woman by her separated

husband except upon *prima facie* satisfaction of the facts, leaving such a woman vulnerable to violent backlash in the interim.

iii. The above three classifications of women who are victims of rape would be constitutional **if and only if the classification** is based upon sound intelligible differentia which has a rational relation to the **object sought to be achieved** by the impugned provisions. In the present case, the Union of India has failed to disclose the object or purpose sought to be achieved by itself in classifying rape victims into these three categories. Indeed through the impugned provisions, the Union has purposefully refused to recognize and accord equal rights to women in a marriage.

iv. While marriage may be a legitimate basis of classification for certain reasons (imposing special rights and duties between parties to the marriage, or providing immunity from providing evidence against one's spouse), it can never be a legitimate basis for exempting a party to the marriage from the criminal law. Indeed, under Sections 354, 377, 302, 323 IPC there is so such exemption – if sodomy, sexual assault, murder and simple hurt is not de-criminalised in marriage, there is no reason rape should be. Jurisprudence on Article 14 and the mandatory criteria for a constitutionally valid classification/intelligible differentia is laid down by the Apex Court as below:

a. In the case of **Anuj Garg & Ors. Vs. Kotlal Association of India and Ors**. (2008) 3 SCC (1), the Hon'ble Supreme Court examined Section 30 of the Punjab Excise Act that prohibited employment of "*any man under the age of 25 years*" or "*any woman*" from bars and held the same as violate of Article 14 of the Constitution.

The Hon'ble Court at para 46 stated that: "*It is to be borne in mind that legislations with pronounced* ***"protective discrimination"*** *aims, such as this one, potentially serve as double edged swords.* ***Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means***.

The Court at para 47 further stated that: "***No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which cannot be compromised*** *in the name of expediency until unless there is a compelling state purpose. Heightened level of scrutiny is the normative threshold for judicial review in such cases*"

The Apex court cited the approach of European Court of Human Rights to review a discriminatory statue. At para 50, the Court stated that:

"*The test to review such a Protective Discrimination statute would entail a two pronged scrutiny:*

(a) the legislative interference (induced by sex discriminatory legalisation in the instant case) should be justified in principle,

(b) the same should be proportionate in measure."

Hence it was noted that personal freedom cannot be compromised in the name of expediency until and unless there is a compelling state purpose. It is stated that there can be no compelling state purpose in treating rape victims differently based on marital status and their prior relationship to the rapist. It is to be noted that Sections 354 and 509 on verbal sexual assault, Section 323 on simple assault, Section 302 on murder, do not make any differentiation between married murder sexual assault and sexual harassment victims and unmarried or separated victims The differentia therefore between the above mentioned category does not have a rational nexus to the goal of criminal laws prohibiting sexual violence, which is to protect physical integrity of women.

b. That in **Ram Krishna Dalmia & Ors. Vs. Justice S R Tendolkar** 1959, SCCR 279 a constitutional bench of the Hon'ble Supreme Court followed Budhan Choudhary vs. State of Bihar passed by seven judges on the true meaning and scope of Article 14 reiterating the tests of intelligible differentia being required to have a rational relation with the object of the legislation. The Court at **para 11 and 12** of the judgment held that:

> "*while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed,* ***if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonable be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation***."

c. In the case of **Dr. Subramanian Swamy v. Director, CBI** (AIR 2014 8 SC 682), made on 6th May 2014 in W.P.(C) 38/1997 with W.P.(C) 21/2004 at para 57 it was held that"

> "*the Constitution permits the State to determine, by the process of classification, what should be regarded as a class for purposes of legislation and in relation to law enacted on a particular subject. There is*

bound to be some degree of inequality when there is segregation of one class from the other. However, such segregation must be rational and not artificial or evasive. ***In other words, the classification must not only be based on some qualities or characteristics, which are to be found in all persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. Differentia which is the basis of classification must be sound and must have reasonable relation to the object of the legislation. If the object itself is discriminatory, then explanation that classification is reasonable having rational relation to the object sought to be achieved is immaterial.***"

d. Similarly in the **Air India vs. Nargeesh Meerza and Ors**. (1981) 4SCC 335 the apex court at para 71 observed that, " *we might mention here that even though the conditions mentioned above may not be violative of Article 14 on the ground of discrimination but* ***if it is proved to our satisfaction that the conditions laid down are entirely unreasonable and absolutely arbitrary. Then the provisions will have to be struck down***". In the said case the Court at para 82 struck down the regulation made by Air India which provided for the termination of services of an Air Hostess upon pregnancy. The Court observed that, " *it seems to us that the termination of the services of an AH under such circumstances is not only a callous and cruel act but an open insult to Indian womanhood- the most sacrosanct and cherished institution……..****Such a provision is not only manifestly unreasonable and arbitrary but contains the quality of unfairness and exhibits naked despotism and is clearly violative of Art. 14***"

e. In **Mithu, Etc. vs State Of Punjab 1983 (2) SCC 277 (para 23)**, the Apex Court upheld fundamental rights vis-à-vis section 303 of IPC as an unreasonable distinction was being made between murderers and murderers who were already subject to a life sentence. The Court found that the classification created by the impugned section did not meet the standards of reasonableness. At para 31 the court observed that:

"*On a consideration of the various circumstances which we have mentioned in this judgment, we are of the opinion that section 303 of Penal Code violates the guarantee of equality contained in Article 14 as also the right conferred by Article 21 of the Constitution that no person shall be deprived of his life or personal liberty except according to procedure established by law.* ***The section was originally conceived to discourage assaults by life-convicts on the prison staff, but the Legislature chose language which far exceeded its intention***.

The section also assumes that life- convicts are a dangerous breed of humanity as a class. That assumption is not supported by any scientific data*."*

f) A natural progression of the principle of intelligible differentia and reasonablenes is the test of arbitrariness. The test was further developed by Justice R. Nariman in the case of **Shayara Bano vs. UOI (supra) (At para 55, page 390)**, where the doctrine of arbitrariness was used to determine the constitutionally of trip talaq., it was observed that: "***Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14***"

iv. In the present instance, the purpose of criminal laws prohibiting rape or indeed any kind of physical violence or unwanted touching is to maintain a person's bodily integrity. The marital rape exception and the lenient rape laws for separated women fail the test of reasonable intelligible differentia having any rational nexus to the object of protecting women's physical integrity.

v. It is sometimes argued that the object of the impugned provisions is to protect men against misuse of laws by their wives, in case of a bitter marriage/divorce. However, the said object is not only unfounded and misplaced but also disentitles innocent rape victims who face violent sexual assault by their husbands (such as the intervener in the present matter, Kushboo Safi, vide W.P (C) 5858/2007), without adequate protection or support from the law. Indeed any law may be misused, the law of cheating under Section 420 is often cited when contracts break down in order to pressurize a defaulting party, however the laws on perjury and malicious prosecution are appropriate remedies rather than the decriminalization of cheating. It is respectfully stated that when any systemic power is displaced a little, such as patriarchal power, the backlash is strong to suppress such challenge

vi. Additionally, the said object – preventing the misuse of a law – would in any case be contrary to a constitutional Bench judgment in **Lalita Kumari versus Govt. of UP** (2014) 2 SSC 1 in which the Supreme Court at paras 114 held that apprehension of misuse by indiscriminate arrest is misplaced. The Court noted at para 105 that, "*As already discussed above, there are already sufficient safeguards provided in the Code which duly protect the liberty of an individual in case of registration of false FIR. At the same time, Section 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 of the Constitution as purported by various counsel."

vii. Further, Parliament passed the Protection of Women from Domestic Violence Act, 2005, clearly recognizing the need to protect women suffering violence in their relationships, i.e. at the hands of the husband or a live-in-partner and/or their in-laws. The threat of misuse of the said law did not prevent Parliament from empowering women and protecting them from physical, mental, emotional and economic violence committed in a domestic relationship and from standing up to violence inflicted by their own husbands.

viii. The impugned provisions are manifestly opposed to the legitimate objects of the criminal law and the fundamental right of a woman to bodily integrity and sexual autonomy and hence her right to personal liberty. Indeed the said Union have no sound basis for the classification so made, as it emerges from ancient and outdated ideas of marriage and a woman's inferior status in a marriage. The said treatment of women is *per se* unconstitutional while also being in contravention of several human rights conventions, as ratified by the Union of India. Indeed the impugned provisions that classify rape victims into three categories, affording different treatment, do not satisfy the tests of rational nexus with the object of the classification and are also arbitrary. Hence the same must be declared unconstitutional and *void*.

C. Article 15

Article 15 (1): *The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them*

The exception to Section 375 assumes non-retractable consent of women to sexual intercourse upon marriage. This assumption reinforces various gender stereotypes leading to the subordination of women and hence is violative of Article 15 of the Constitution. The impugned provisions also further discriminate against married women *vis-a vis* women who are either separated from their husbands and/or not married, thereby violating not only Article 14 but also discriminating on the basis of marital status, which is an implied ground of protection under Article 15. The Apex Court in **NALSA vs Union of India 2014 (5) SCC 438** made clear that the specific categories in Article 15 are not exhaustive, and include gender identity, for instance. As such marital status of women may be read into 'sex', and may be recognized as a ground for sexual and gender non-discrimination.

i. The Supreme Court in the case of **Anuj Garg (supra)** (**para 52)** relied with approval on the judgment of Justice Ruth Bader Ginsburg in United States vs Virginia 518 US 515, 532 233(1996) and the need for an "intrusive multi-stage review in sex discrimination statutes". the Apex Court stated **: *"****The heightened review standard our precedent establishes does not make sex a proscribed classification…. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," to "promote equal employment opportunity," to advance full development of the talent and capacities of our Nation's people*. ***But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women"***

As Prof. Tarunabh Khaitan of the University of Oxford has observed in the Journal of Indian Law, Volume 50 "a measure that disadvantages a vulnerable group defined on the basis of a characteristic that relates to personal autonomy must be subject to RGR" (a rigorous standard of review).

At para 21 the court in **Anuj Garg** (supra) also observed the parameters of Articles 14 and 15 and said that: "*The makers of the Constitution intended to apply equality amongst men and women in all spheres of life.* ***In framing Articles 14 and 15 of the Constitution, the constitutional goal in that behalf was sought to be achieved. Although the same would not mean that under no circumstance, classification, inter alia, on the ground of sex would be wholly impermissible but it is trite that when the validity of a legislation is tested on the anvil of equality clauses contained in Articles 14 and 15, the burden therefor would be on the State***.")

At para 26, the Court further noted that a heightened standard of scrutiny is required under Article 15: "*When a discrimination is sought to be made on the purported ground of classification, such classification must be founded on a rational criteria.* ***The criteria which in absence of any constitutional provision and, it will bear repetition to state, having regard to the societal conditions as they prevailed in early 20th century, may not be a rational criteria in the 21st century***"

The Union has failed to show that the discrimination meted out to victims of rape by the husband is based upon a sound, rational and logical reason in tune with today's world of equal rights of men and women.

ii. In another case, **P. Jeya vs Union Of India (para 33)** on 16 August, 2004 the Madras High Court in W.P. (C) 30841/2002 stated that the Constitution of India prohibited discrimination but permitted reasonable classification. The Court examined the scope of Article 15 at para 33, observing that; "*while such being the equality before law and the equal protection of laws as enshrined in Article 14 of the Constitution of India,* ***it is Article 15 of the Constitution of India which gives***

still more expression to the scope of equality and equal protection, prohibiting discrimination on grounds of religion, race, caste, sex or place of birth and this Article eliminates all kinds of discriminations, including gender discrimination and place of birth*. ……. Even barely accepting Article 15(4) of the Constitution of India, the State empowers to make special provisions for the advancement of socially and educationally backward classes or for the Scheduled Caste and Scheduled Tribes and regarding sex,* ***Article 15 of the Constitution of India still persists, whereunder no discrimination could be made.*****"**

iii. In **Mahila Utkarsh Trust Thro its President vs. Union of India (para 6)**, the Gujarat High Court vide order dated 13/12/2003 passed in Special Civil Application no. 2984 of 2012 was faced with the question of whether Section 66(1) (b) of the Factories Act, 1948 and it is proviso are ultra vires the Constitution of India being violative of Articles 14, 15, 16, 19(1) (g) and 21 of the Constitution of India. The impugned provision provided that no woman shall be required or allowed to work in any factory except between the hours 6 A.M. and 7 P.M. and the proviso to the same read that: " *Provided that the State Government may, by notification in the Official Gazette, in respect of any factory or group or class or description of factories, vary the limits laid down in clause (b), but so that no such variation shall authorise the employment of any woman between the hours of 10 P.M. and 5 A.M*".

The Hon'ble High Court held that; "*We have no doubt in our mind that the provision of the Act impugned in these applications* ***has definitely infringed the fundamental right of a female citizen not only in the matter of equal opportunity of employment but also in carrying on with her own business with the same privileges a male citizen enjoys unless she decides to employ male workmen for the night shift for overcoming the above statutory provision***" (para 6). Relying upon the decision of the apex court in the case of Anuj Garg, the impugned provisions were found to be in violation of the fundamental rights of women and *ultra vires* the Constitution. The same were also struck down by the Madras High Court and the Andhra Pradesh High Court in respective petitions before themselves.

D. ARTICLE 19(1) (a)

Article 19 (1): *All citizens shall have the right—*

(a) *to freedom of speech and expression*;

i. 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).

ii. The Supreme Court in **NALSA v. Union of India** [(2014) 5 SCC 438],**in para 69** stated that *"..Article 19(1) (a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender.* ***Self-identified gender can be expressed through dress, words, action or behavior or any other form. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution.****"* Given that the marital rape Exception trammels a woman's sexual "behaviour" and cannot be justified under any of the heads of Article 19(2), on this ground alone the provision is liable to being struck down.

E. ARTICLE 21

Article 21: *No person shall be deprived of his life or personal liberty except according to procedure established by law*.

All women's physical integrity flows directly from the fundamental right to life, dignity and bodily privacy; her right to sexual and reproductive autonomy flows directly from the right to liberty.

i. In the case of **Suchita Srivastava v. Chandigarh Administration**, [2009 (9) SCC 1], the Supreme Court recognised a woman's right to make reproductive choices as a dimension of "personal liberty" under Article 21 of the Constitution. At para 22, the Court explicitly stated that:

> *"it is important to recognize that* ***reproductive choices can be exercised to procreate as well as to abstain from procreating****.* ***The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected****.* ***This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse to participate in sexual activity*** *or alternatively the insistence on use of contraceptive methods.* "

The above observations of the Hon'ble Court do not make a distinction between the rights of married women and unmarried women. The right to abstain from sexual reproductive activity has been recognised for *all* women, irrespective of their marital status; the impugned provisions of the Indian Penal Code as also the Criminal Code are in clear violation of the basic fundamental rights of women and must be struck down and declared as unconstitutional.

ii. A nine judge bench of the Hon'ble Supreme Court stated in **Justice (Retd) KS Puttuswamy vs Union of India, decided on August 24, 2017 in Writ Petition (CIVIL) NO 494 OF 2012**, decided that all citizens, including married women, have a right to privacy. On page 167 Chandrachud J speaking for himself and three others observed that:

The constitutional validity of laws making sodomy an offence was challenged in ***National Coalition for Gay and Lesbian Equality v Minister of Justice275 (1999).*** *It was held that the common law offence of sodomy was inconsistent with the Constitution of the Republic of South Africa, 1996. Ackermann J. described how discrimination leads to invasion of privacy and held that:*

"Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. ***The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy…"***

Sachs J. discussed the interrelation between equality and privacy and held that:

"...equality and privacy cannot be separated, because they are both violated simultaneously by anti-sodomy laws. In the present matter, such laws deny equal respect for difference, which lies at the heart of equality, and become the basis for the invasion of privacy. At the same time, the negation by the state of different forms of intimate personal behaviour becomes the foundation for the repudiation of equality."

On the meaning of 'autonomy', the Court observed that:

"Autonomy must mean far more than the right to occupy an envelope of space in which a socially detached individual can act freely from interference by the state. What is crucial is the nature of the activity, not its site. While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is as an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. ...It is not for the state to choose or to arrange the choice of partner, but for the partners to choose themselves." (emphasis supplied)"

On page 198, four judges on the nine judge bench stated:

Many writers on feminism express concern over the use of privacy as a veneer for patriarchal domination and abuse of women. Patriarchal notions still prevail in several societies including our own and are used as a shield to violate core

constitutional rights of women based on gender and autonomy. As a result, gender violence is often treated as a matter of "family honour" resulting in the victim of violence suffering twice over – the physical and mental trauma of her dignity being violated and the perception that it has cause an affront to "honour". Privacy must not be utilised as a cover to conceal and assert patriarchal mindsets.

Catherine MacKinnon in a 1989 publication titled 'Towards a Feminist Theory of the State' 312 adverts to the dangers of privacy when it is used to cover up physical harm done to women by perpetrating their subjection. Yet, it must also be noticed that women have an inviolable interest in privacy. Privacy is the ultimate guarantee against violations caused by programmes not unknown to history, such as state imposed sterilization programmes or mandatory state imposed drug testing for women. The challenge in this area is to enable the state to take the violation of the dignity of women in the domestic sphere seriously while at the same time protecting the privacy entitlements of women grounded in the identity of gender and liberty."

iii. In the case of **Prem Shankar Shukla vs. Delhi Administration** (1983) 3 SCC 526, the apex court held that to handcuff an under trial prisoner is to punish humiliatingly. Thus provisions in para 26.22 (1)(a) and 26.22 of Punjab Police Manual, which required every under trial accused of a non-bailable offense punishable with more than 3 years' prison to be routinely handcuffed were found to be violative of Articles 14, 19 and 21. The Court further noted that the impugned provisions created two classes of prisoners i.e. the "better class" and ordinary prisoners was discriminatory, arbitrary and unconstitutional.

The Supreme Court, without discriminating between married and unmarried women, has already recognized **rape** as a violation of the principles enshrined and guaranteed by the Constitution of India and has also recognized the rauma and humiliation suffered by all rape victims, who have a human has a right to life with dignity.

iv. In the case of **Francis Coralie Mullin vs. Administrator, Union Territory of Delhi and Ors.** (1981) 1 SCC 608 the Apex Court held that Right to life and personal liberty included the rights of a detenue to confer with legal advisor and meet family members and friends and any unreasonable restrictions this regard would violate Articles 21 and 14. Examining the scope of right to life under Article 21 the apex court at **para 8** stated that:

> "***We think that the right to life includes the right to live with human dignity and all that goes along with it****, ……. Now obviously, any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be*

prohibited by Article 21 unless it is in accordance with procedure prescribed by law, ***but no law which authorises and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness****: it would plainly be unconstitutional and void as being violative of Articles 14 and 21.* ***It would thus be seen that there is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5of the Universal Declaration of Human Rights and guaranteed by Article 7 of the International Covenant on Civil and Political Rights***."

Thus the Apex Court recognized that even though a person's freedom could be taken away under due process of law, such a person would still be entitled to a live with human dignity including the right to meet his family and friends.

v. Similarly, in the case of **D.K Basu vs. State of West Bengal**, **1997 (1) SCC 416**, it was held that Article 21 protects the individuals from any form of torture or cruel, inhuman, or degrading treatment and at **para 22** of the judgment the Court held that a prisoner does not shed his right to life and dignity. Similarly, the right of married women to **choose,** the right to indulge or abstain from sexual intercourse with the husband cannot be far from the rights of a prisoner under law; married woman do not shed their right to choose/consent and be free from rape simply by being married.

vi. Reiterating the principles and scope of Article 21 as recognized in the Francis Coralie case (Supra), the apex court in **Bodhisattwa Gautam v. Subhra Chakraborty**, AIR 1996 SC 922, further at **para 9** stated that "*Women also have the right to life and liberty; they also have the right to be respected and treated as equal citizens.* ***Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life****. Women, in them, have many personalities combined. …….They must have the liberty, the freedom and, of course, independence to live the roles assigned to them by Nature so that the society may flourish as they alone have the talents and capacity to shape the destiny and character of men anywhere and in every part of the world*."

At para 10 the Court further stated that:

*"Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society****. It destroys the entire psychology of a woman and pushes her into deep emotional crises. It is only by her sheer will power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in***

Article 21. *To many feminists and psychiatrists, rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women.* ***The rape laws do not, unfortunately, take care of the social aspect of the matter and are inept in many respects***."

vii. The Court further laid out parameters for providing assistance to rape victims, including compensation and legal assistance by the State. Again in the case of **Prahlad v. State of Haryana**, **2015 (8) SCC 688**, the Supreme Court at **para 17** held that "***It has to be borne in mind that an offence of rape is basically an assault on the human rights of a victim. It is an attack on her individuality.*** *It creates an incurable dent in her right and free will and personal sovereignty over the physical frame. ……* ***Anyone who indulges in a crime of such nature not only does he violate the penal provision of the Indian Penal Code but also right of equality, right of individual identity and in the ultimate eventuality an important aspect of rule of law which is a constitutional commitment.*** *The Constitution of India, an organic document, confers rights. It does not condescend or confer any allowance or grant. It recognises rights and the rights are strongly entrenched in the constitutional framework, its ethos and philosophy, subject to certain limitation.* ***Dignity of every citizen flows from the fundamental precepts of the equality clause engrafted under Articles 14 and right to life under Article 21 of the Constitution, for they are the "fon juris" of our Constitution. The said rights are constitutionally secured***."

Therefore by not recognizing non-consensual sexual intercourse within marriage as the crime of rape and not ensuring adequate protection and criminal remedies for married women is a clear and gross violation of Article 14 and Article 21 of the Constitution of India.

viii. That in in the case of **Court on its Own Motion (Lajja Devi) v. State** 193(2012) DLT 619, at **para 32** noted the anomaly in the exception to Section 375 as follows, "*the exception to Section 375 specifically lays down that sexual intercourse of man with his own wife, the wife not being under fifteen years of age is not rape, thus ruling out the possibility of marital rape when the age of wife is above fifteen years. On the other hand, if the girl is not the wife of the man, but is below sixteen, then the sexual intercourse even with the consent of the girl amounts to rape****? It is rather shocking to note the specific relaxation is given to a husband who rapes his wife, when she happens to be between 15-16 years***."

ix. Further the Supreme Court in **NALSA v. Union of India** [(2014) 5 SCC 438], while interpreting right to personal autonomy under Article 21 as discussed in Anuj Garg v. Hotel Association of India, (supra), at para 75 stated that "***personal autonomy includes both the negative right not to be***

***subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in*.**"

x. The court in the case **of Vishaka vs. State of Rajasthan** AIR 1997 SC 3011 in **para 12,13 ,** the apex court recognized and reiterated that Article 21 also created a positive obligation upon the state to take active measures to protect and ensure the fulfillment of the right to life and liberty under Article 21 – here against sexual harassment. Again in **Tamil Nadu vs. K. Balu** vide order passed in December 2016 in CA NO. 12164-12166 of 2016 the Supreme Court found the State to be in breach of its positive obligations under Article 21 by failing to take any measures to prevent drunk driving deaths on highways.

V. FAILURE OF THE UNION AND PARLIAMENT TO CRIMINALISE MARITAL RAPE

i. That on 22/12/2012 the Central Government appointed a judicial committee, headed by (retd.) chief justice of India, Justice J.S. a to propose amendments in criminal law to check offences against women. Vide its report dated 23/01/2013, the committee made several recommendations, including the striking down of Exception 2 to Section 375, IPC and that the law should not consider the relationship (marital or other) between the accused and the victim as a defense. The committee further recommended the relationship between the accused and victim should not be taken as a mitigating factor for lower sentences for rape (**para, 72-80 at page 180- 185 of AIDWA petition, relevant extracts annexed to these submissions as Annexure P-6**). At para 79 the committee observes that:

"*We, therefore, recommend that: The exception for marital rape be removed. ii. The law ought to specify that: a. A marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation; b.* ***The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity****; c. The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape. ...We must, at this stage, rely upon Prof. Sandra Fredman of the University of Oxford, who has submitted to the Committee that that "training and awareness programmes should be provided to ensure that all levels of the criminal justice system and ordinary people are aware that marriage should not be regarded as extinguishing the legal or sexual autonomy of the wife*"

Despite assurances by the Union to accept and implement all recommendations of the committee, the Exception 2 to Section 375 was retained and the Criminal Law (Amendment) Act 2013 was passed and published in the official gazette on 02/04/2013 without removing the said unconstitutional exception.

i. For the implementation of the Universal Declaration of Human Rights, the Human Rights Council speaking through its Special Rapporteur on Violence against Women {at the invitation of the Govt. of India} observed that there was a need to "*include a definition of marital rape as a criminal offence*" in order to ensure India's compliance as a state party to the Universal Declaration of Human Rights. The marital rape exemption is a clear violation of Article 2 (1) of the **United Nations 1976 International Covenant on Civil and Political Rights (ICCPR)** which states that all states party to the said covenant undertake to respect and ensure to all individuals within their jurisdictions, the rights recognized in the covenant without discrimination on the basis of religion, sex, color, language, birth or status etc. are under an obligation to ensure equal rights for men and women. Article 3 further imposes a duty on the state to ensure equal right of men and women to the enjoyment of all civil and political rights. Article 7 provides protection against inhuman and degrading treatment while Article 9 recognises the right to liberty and security of person. **(page 105-112 of AIDWA petition, relevant extracts annexed to these submissions as Annexure P-7**). India despite being a signatory to the said convention has failed to provide equal protection against rape to married women in its territory.

ii. That Article 2 of the Convention on Elimination of Discrimination Against Women (**CEDAW**), as adopted and enforced in September 1981, states that, "*States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women*." (**page 114 of AIDWA petition, relevant extracts annexed to these submissions as Annexure P-8**).

ii. That the CEDAW committee has time and again expressed its concern over the narrow definition of rape in the Indian Penal Code including the exemption of marital rape. In 2007, in its 37th session, it urged India to "*widen the definition of rape in its Penal Code to*

reflect the realities of sexual abuse experienced by women and to remove the exception for marital rape from the definition of rape". (**recommendation 23 page 127 AIDWA petition**)

iii. That the **CEDAW** in its concluding observations on the combined fourth and fifth periodic reports of India in 2014 (CEDAW/C/IND/CO/4-5) expressed concern over the retention of the marital exemption. It further urged India to comply with the recommendations made by the Justice Verma Committee and amend the Criminal Law (Amendment) Act, ensuring that marital rape is defined as a criminal offence:

"*The Committee urges the State party to:*

iii. *(a) Implement the recommendations of the Justice Verma Committee regarding violence against women…(c) Amend the Criminal Law (Amendment) Act, 2013 ensuring that marital rape is defined as a criminal offence*." (**page 199-200 of AIDWA petition, relevant extracts annexed to these submissions , relevant extracts annexed to these submissions as Annexure P-9**. Relevant extract of the Special Rapporteur's report on Violence against Women is attached here as **Annexure P-10).**

iv. A comprehensive global report of 82 legal systems of the world titled, "*The World's shame: The global Rape Epidemic*" was carried out the international organization **EQUALITY NOW**. Data was collected from late 2014 to early 2015 which showed that India was amongst atleast 10 countries of the 82 that still legalized rape within a marriage and protected the rapist husband from prosecution, as opposed to protecting the wife who suffers rape/assault/abuse at the hands of the husband. (**page 257 of AIDWA petition, relevant extracts annexed to these submissions as Annexure P-11**)

v. Additionally, **UN Women** vide its report titled, "*Progress of World's Women: In pursuit of Justice*" showed that India was amongst the few nations that continue to justify violence by a man upon his wife. (**page 310 of AIDWA petition, relevant extracts annexed to these submissions as Annexure P-12s**)

VI. INTERNATIONAL LAW

With changing times, nations have also changed their laws, either statutorily or through judicial activism and recognized non-consensual sexual intercourse by a husband with his wife as rape:

b. **Nepal:** The Supreme Court struck down the marital rape exception through the case of *FWLD* v. *HMG* (Writ No. 55/2058, Supreme Court Bulletin 2058 (2002), Vol.5, p. 129 (2001–2002)):

"*In the light of the discussions made in the foregoing pages and spirit of equality guaranteed in the Constitution, various international human rights instruments ratified by Nepal and* ***changing norms and values in criminal law with the pace of time, it is appropriate reasonable and contextual to define marital rape too as a criminal offence. It can not be said that any man who commits heinous and inhuman crime of rape to a woman may be immune from criminal law simply because he is her husband. Such husband has to be liable to the punishment for the offence he has committed****".*

Further in the case of *Jit Kumari* v. *Government of Nepal,* (Writ No. 064-0035 of 2063), the Supreme Court while analyzing the discrepancy the punishment for marital rape and non-marital rape, ruled that where the **offence is the same, there is no rationality in differentiating between marital and non-marital rape**. It further issued a direction to the Ministry of Law, Justice and Parliamentary Affairs to bring about an amendment to settle this discrepancy in the law and to make the punishment for marital rape equal to that of non-marital rape. Copy of the same is annexed and marked herein as **Annexure P**

c. **Australia:** In the case of *R* v. *L* [(1991) 174 CLR 379], the court ruled that if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law." It further asserted that that a husband could be found guilty of raping his wife. Copy of the same is annexed and marked herein as **Annexure P**

d. **European Court of Human Rights:** Through the case of SW v. UK [(1995) 21 EHRR 363], while upholding the conviction of the accused for marital rape stated the following: "*the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom*". Copy of the same is annexed and marked herein as **Annexure P**

e. **Canada**: through the case of *R* v. *J.A*, ([2011] 2 SCR 40), the court held that consent does not depend on the relationship between the accused and the

complainant and that "*it is not open to the defendant to argue that the complainant's consent was implied by the circumstances, or by the relationship between the accused and the complainant*". Copy of the same is annexed and marked herein as **Annexure P**

f. **United Kingdom:** In 1991, marital rape exception through the case of R v. R ([1991] UKHL 12), was struck down by the House of Lords. In 1994 Parliament, by section 142 of the Criminal Justice and Public Order Act 1994, provided a broader definition for rape that included anal sex; and an even broader definition was created by the Sexual Offences Act 2003, including oral sex. The law on rape did not—ever since the removal of the marital exemption in 1991—provide for any different punishment based on the relation between parties. However, in 1993, in R v W 1993 14 Cr App R (S) 256, the court ruled:[148] "*It should not be thought a different and lower scale automatically attaches to the rape of a wife by her husband. All will depend upon the circumstances of the case. Where the parties are cohabiting and the husband insisted upon intercourse against his wife's will but without violence or threats this may reduce sentence. Where the conduct is gross and involves threats or violence the relationship will be of little significance."* Copy of the same is annexed and marked herein as **Annexure P**

The Respondent State has an additional duty to fulfill its obligations under International Law. Indeed, while recognizing the rights of the transgender community to seek gender identity alternate to the one assigned at the time of birth the Hon'ble Supreme Court in the case of **NALSA v. Union of India** [(2014) 5 SCC 438] also stated that it was the duty of the State to comply with its obligations made under international conventions. The Hon'ble Court at para 59 and 60 said that, "*Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions, e.g., Articles 14, 15, 19 and 21 of the Constitution to enlarge the meaning and content thereof and to promote the object of constitutional guarantee. Principles discussed hereinbefore on TGs and the International Conventions, including Yogyakarta principles, which we* ***have found not inconsistent with the various fundamental rights guaranteed under the Indian Constitution, must be recognized and followed****, which has sufficient legal and historical justification in our country*"

VII. CONCLUSION

Articles 14 the Constitution of India guarantees to each person, equality before the law and equal protection of the laws. The said protection of the law has been further reinforced in Article 15 which imposes a higher standard of scrutiny upon the State to not discriminate against its citizens on grounds of race, religion, caste, sex, place of birth. Any unequal treatment of a person, (in the present case, rape victims) has to be based upon an intelligible differentia that has a reasonable nexus with the object sought to be achieved

with such differentiation made by the Statute. The right to sexual autonomy, bodily integrity and the established right to reproductive choice includes the right not to be raped under Article 21.

As illustrated from above, the State has failed to demonstrate any rational object, in consonance with the status and rights of women in the twenty first century that is being achieved by discriminating against women raped by their husbands as opposed to women raped by a man not their husband. Also, the State vide the impugned provisions, delegates married women to the status of legal objects and second class citizens by nullifying their right to withhold or to give consent to sexual intercourse with the husband. By providing distinct/separate punishment for rape committed by a husband upon his wife separated from him versus rape by any man of any woman, the statute discriminates against married woman who are "separated" from their husbands.

The history of laws across the world allowed men to treat their wives as property, where even spousal murder was permitted, and the history of gender equality has been a move against that, towards the full recognition of women's independent personality. The marital rape provision is the last vestige of the paterfamilias idea

By refusing to recognize and criminalise rape within marriage the Statue continues to violate the dignity and liberty to millions of married rape victims, guaranteed to them as a basic fundamental right under the Constitution. As such, the impugned provisions are arbitrary, unreasonable and must be struck down and declared to be in *void*.

DATED: 26.8.2017