THE CAREFUL QUESTIONING OF SOCIO-LEGAL PREMISES: A STEP TOWARDS CRIMINALIZING MARITAL RAPE

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INTRODUCTION

The recent judgment of the Supreme Court of India on the criminality of sexual intercourse between a man and his wife, being a girl between 15 to 18 years of age, is likely to lead to important social and legal repercussions.

Though the Court categorically refrained from making any observations with regard to the issue of marital rape of a woman aged 18 years or above, the judgment has opened further channels of debate on this issue. Despite clarity in keeping the scope of the judgment limited to the issue of criminalising marital rape of girls aged between 15-18 years of age, many of the contentions and observations in the judgment may as well apply to marital rape of adult women.

Even though the question of marital rape of adult women has been left open, various dichotomies pertaining to legal provisions affecting female children aged between of 15 to 18 years, now stand harmonised.

The present article explores various aspects discussed in the judgment.

- **Legal Provisions protecting girls aged between 15 to 18 years**

- **Prohibition of Child Marriage Act, 2006 (PCMA)**

- **Section 3 of PCMA provides that child marriage is voidable at the option of any of the parties to the marriage. Interestingly, Section 9 of the same Act provides that any male adult over 18 years of age, marrying a "child", shall be punishable with rigorous**

imprisonment extendable up to two years. Further, Section 10 and 11 of the Act penalise abetment and solemnisation of child marriage.

Thus, under this statute, child marriage itself is recognised as an offence.

- **Protection of Children from Sexual Offences Act, 2012 (POCSO)**

The Act recognises sexual exploitation and sexual abuse of children as "heinous crimes" and defines a "child" as any person below the age of 18 years. A combined reading of Sections 3, 5(n) and 6 establishes that if a husband of a girl child commits penetrative sexual assault on his wife, he would be penalised for "aggravated" penetrative sexual assault, which is punishable with rigorous imprisonment of not less than 10 years, extendable to a life term.

Under the Act, a girl under the age of 18 years is a child, and hence, does not have the capacity — physical, emotional or mental — to make an informed decision about engaging in sexual intercourse.

- **Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act)**

This Act also defines "child" as a person who has not completed 18 years of age and provides for, inter alia, protection of a child "who is at imminent risk of marriage before attaining the age of marriage"

- **Protection of Women from Domestic Violence Act, 2005 (DV Act)**

Section 3 of this Act protects a girl child from any act of her husband that may harm or injure or endanger her health, safety, limb, life or well being, whether mental or physical, including protection from physical and sexual abuse by husband.

The Discordant Note – Section 375, Exception 2 of the Indian Penal Code

All the provisions mentioned above are congruous and recognise a person under the age of 18 years as a child who needs to be protected and cared for. However, as observed by the Supreme Court, Exception 2 to Section 375 of the IPC is a "jarring note in (the) scheme of pro-child legislations…"

Under **Section 375 IPC**, sexual intercourse between a man and a woman where the woman is below the age of 18 years is statutory rape. However, Exception 2 of Section 375 provides that a husband can have sexual intercourse with his wife provided she is over 15 years of age. Therefore, sexual intercourse with a girl under the age of 15 years of age will be considered statutory rape, irrespective of her consent and regardless of the fact that the man is her husband.

Interestingly, **Section 354(B) IPC**, which defines and penalises assault or use of criminal force with an intention to disrobe a woman, does not provide any specific protection against husbands. The provision clearly uses the term "any man" and there is no exception like there is to Section 375 IPC. Therefore, a husband can be legally penalised for outraging the modesty of his wife, but not for raping her.

The Supreme Court, while harmonising the **IPC, POCSO Act, JJ Act and PCMA**, categorically rejected the distinction between a married girl child and an unmarried one, terming the distinction as "artificial". It held that a child remains a child, regardless of her marital status. When the age of consent per se is fixed at 18 years and has not been reduced under any statute, there is no justification for carving out an exception for a married relationship.

The Court thus read down Exception 2 to **Section 375 IPC**, and held that the same should now be meaningfully read as "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape".

MARITAL RAPE OF WOMEN OVER 18 YEARS OF AGE

Even as the law protecting the rights of girls under the age of 18 years stand harmonised by the judgment, the question of rights of adult married women against sexual abuse remains open.

The debate on the issue of criminalising marital rape has always been a raging one. On one side are the increasing genuine instances of sexual abuse within marriage that are being reported by women, while on the other side, there is a real possibility of such a law being abused, with devastating consequences.

The Law Commission of India in its 172nd Report considered the issue of marital rape, but chose to ignore the voices that demanded the deletion of Exception 2 to s. 375 IPC on the ground that "it may lead to excessive interference with marital relationship" and may destroy the institution of marriage.

The Supreme Court, while deciding the issue of marital rape of girls below the age of 18 years, made certain observations and comments that are equally applicable and pertinent to married women over 18 years of age.

One of the foremost issues is that of the right to bodily integrity and reproductive rights. While referring to various precedents, the Court found that a woman's right to make reproductive choices is also a dimension of "personal liberty" as under Article 21 of the Constitution. This right, in effect, would include a woman's right to refuse participation in sexual activity.

The Supreme Court also noted views expressed by the Justice (Retd.) JS Verma Committee, where reference was made to a decision of the European Commission of Human Rights that concluded that a rapist remains a "rapist regardless of his relationship with the victim".

The Court referred to Eisend v. Baird, where the US Supreme Court observed that a marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. It was further noted that marriage is not institutional but personal – nothing can destroy the institution of marriage except a statute that would make marriage illegal.

In fact, in a recent order, the High Court of Gujarat in Nimeshbahi Bharatbahi Desai v. State of Gujarat [1] observed,

"Marital rape is in existence in India, a disgraceful offence that has scarred the trust and confidence in the institution of marriage It is a non-consensual act of violent perversion by a husband against the wife where she is abused physically and sexually"

Exception 2 to Section 375 IPC finds roots in the archaic English notion that a wife is but a subservient chattel of her husband. Under what is known as 'Hale's Principle', a husband could not be held guilty of raping his wife on the ground that the wife gives up her body to her

[1] Criminal Misc. Application No.26957/2017

husband at the time of marriage. However, this notion has since been given up in the United Kingdom itself, where marriage is now understood as an equal partnership between man and wife.

While determining criminality, motive and mens rea are of foremost relevance. Exception 2 to S. 375 IPC, as it stands today for adult married women, circumvents this basic aspect of criminal law. Legislators and courts now have the task of finding a balance between the criminality of the act and a possible misuse of the law protecting married women from sexual abuse.

Marital Rape ought to be a crime: Justice Pardiwala of Gujarat HC

In a judgment that has garnered a lot of attention over the past week, the Gujarat High Court has urged that marital rape be made a punishaable offence.

Justice JB Pardiwala, in his 150-page judgment, has also made a number of pertinent observations regarding sexual offences and the rights of married women.

The observations were made in case wherein a woman had filed an FIR against her husband and his parents, alleging the offences of the Sections 376, 377, 498A, and 114 of the Indian Penal Code. It was the case of the informant that her husband used to force her to indulge in oral sex with him, and had sexual intercourse with her forcibly, and against her consent.

The husband subsequently filed an application before the High Court, seeking quashing of the FIR.

After hearing the arguments, Justice Pardiwala framed the following questions to determine the merits of the case:

At the outset, Justice Pardiwala acknowledged that Section 375 does not recognize the concept of marital rape, stating that sexual intercourse between a husband and wife would not constitute an offence of rape even if it was by force, violence or against her wishes.

The judge then went on to explore the applicability of the Section 377 to the case at hand.

Section 377

A long discussion on the Supreme Court's 2014 judgment in **Suresh Kumar Koushal vs. Naz Foundation & Ors**[2] ensued, after which the Court held,

"Section 377 IPC does not criminalize a particular class of people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence…

Thus, when the husband is alleged to have forced his wife for oral sex and actually indulges into the same, the same would constitute an offence under section 377 IPC. To put it in other words, having regard to the decision of the Supreme Court, referred to above, section 377 IPC would be applicable in case of heterosexual couples, wherein the husband has compelled the wife into carnal penetration of the orifice of the mouth…"

However, the Court did not feel that the current case fell under the ambit of Section 377. After relying on a number of case on the issue, the Court held,

" if a person accused of this offence, voluntarily had carnal intercourse with any man, woman or animal with a little bit of penetration against the order of nature such an act would fall within the clutches of the section in committing the unnatural offence liable to be punished thereunder. In this view of the matter, except the sexual perversions of sodomy, buggery and bestiallity, all other sexual perversions, as catelogued above, would not fall within the sweep of this section.

Thus, in the aforesaid view of the matter, I have reached to the conclusion that no case is made out against the accused-**husband so far as the offence punishable under sections 376 and 377 of the IPC is concerned."**

Section 498A IPC

As a precursor to its discussion on marital rape, the Court then delved into spousal relations and what sort of behavior attracts **Section 498A of the IPC**. It was observed,

"If between the two spouses one spouse wants healthy and normal sexual relations and the other is desirous of having perverted sexual relations, such as cunnilingus and fellatio as

[2] Civil Appeal No. 10972 OF 2013 Supreme Court.

alleged by the wife in the present case, then the normal sexual relation between the spouses which forms the basis of a happy marital life, would be floundered on the bed-rocks of sexual aversion on the part of the spouse who is normal and not deviant, and the insistence of the other spouse who is psychologically so disturbed as not to enjoy the normal sexual relations, would tantamount to mental as well as physical cruelty.

Some innocuous sado-masochistic practices may at times form an integral part of the marital relations but if they degenerate into practices which may cause physical harm or psychological trauma to one of the partners, or if they tend to verge on the pathological (sic) they would undoubtedly amount to physical and mental cruelty."

Section 354

The Court next shifted its focus on whether a man can be held guilty of outraging the modesty of his own wife, as per Section 354 of the IPC. With a view to answering the question, the Court highlighted certain specific instances by which the same could happen.

"(I) If the husband expresses his affection towards his wife in public in an unkind manner such conduct will

(a) amount to an indecent behaviour;

(b) be against 'public morality'; and

(c) amount to an outrage under section 354.

(ii) In case the husband and wife are alone, it may be essential that some liberty be permitted to the spouses with regard to certain acts which are a necessary part of the conjugal relationship. Certain overtures or acts of affection and love in private by the husband, which may not be acceptable to the wife in public, will have to be conceded as not amounting to outrage under the provision.

(iii) Highly personal acts of love and affection by the husband which may or may not be liked by the wife, if done in public, may go against public morality and fall under section 354 as all its essential ingredients are present in such a situation.

(iv) Such personal acts done by the husband as are not acceptable to the wife even in private and also not approved by society, should also fall under the scope of section 354. Today no woman or society would approve of perverted sexual acts as being a legitimate part of the spousal relation."

It was also held that the husband's knowledge, intention or the wife's "developed sense under the modern set up" would become irrelevant while determining whether or not a husband has outraged the modesty of his wife. The Court went on to enumerate how outraging the modesty of a woman would differ according to culture and custom.

"For instance, uplifting the veil of a woman's pardah in presence of her father-in-law, she being a village lady, would be justly regarded as an indecent act outrageous to her modesty. Pulling of hair or hand, pushing, obstructing the way, waylaying, may all come within the mischief of the provision. Similarly, hurting her by putting a strong arm-hold around her neck or waist will be covered by the scope and ambit of section 354. Catching hold of a woman by her arm and dragging her may also amount to an outrage irrespective of the fact that the act is done in the presence of others or not (principle derived from throwing her on the ground is outrageous"

MARITAL RAPE

Finally, the Court gives its view on what ought to be the legal status of the marital rape. Calling it a "widespread problem" that has received little attention from society in the past, Justice Pardiwala states that it has been made an offence in fifty American states, and in Australia, Canada, New Zealand, and a host of European countries.

The judge also calls out the government for failing to criminalize the act.

"The government is hesitant to criminalize the marital rape because it would require them to change the laws based on the religious practices, including the Hindu Marriage Act, 1955 which says a wife is duty bound to have sex with her husband…It was, therefore, felt that if marital rape is brought under the law, the entire family system will be under great stress and the committee may perhaps be doing more injustice.

It is high time that the legislature once again intervenes and go into the soul of the issue of marital rape. Marital rape is a serious matter though, unfortunately, it is not attracting serious discussions at the end of the Government."

On the rights of married women, the Court held,

"A woman is no longer the chattel–antiquated practices labeled her to be. A husband who has sexual intercourse with his wife is not merely using a property, he is fulfilling a marital consortium with a fellow human being with dignity equal to that he accords himself. He cannot be permitted to violate this dignity by coercing her to engage in a sexual act without her full and free consent."

It was also held that a husband who feels aggrieved by his indifferent or uninterested wife's absolute refusal to engage in sexual intimacy may legally seek the court's intervention to declare her psychologically incapacitated to fulfill an essential marital obligation. But sexual intimacy cannot be demanded from her coercively or violently.

"Husbands need to be reminded that marriage is not a license to forcibly rape their wives. A husband does not own his wife's body by reason of marriage. By marrying, she does not divest herself of the human right to an exclusive autonomy over her own body and thus, she can lawfully opt to give or withhold her consent to marital coitus. A husband aggrieved by his wife's unremitting refusal to engage in sexual intercourse cannot resort to felonious force or coercion to make her yield."

Addressing the concerns that criminalizing marital rape would lead to a slew of frivolous complaints filed in order to harass innocent husbands, the Court held that there are enough safeguards in place to prevent the same.

"In this regard, let it be stressed that the safeguards in the criminal justice system are in place to spot and scrutinize fabricated or false marital complaints, and any person who institutes untrue and malicious charges, can be made answerable in accordance with law. However, this fear, by itself, is not sufficient to just ignore the marital rape."

The Court concludes its discussion on the subject by stating that the law must uphold the bodily autonomy of all women, irrespective of their marital status, and that,

"Women should not have to tolerate rape and violence in the marriage. The total statutory abolition of the marital rape exemption is the first necessary step in teaching societies that dehumanized treatment of women will not be tolerated and that the marital rape is not a husband's privilege, but rather a violent act and an injustice that must be criminalized."

As regards the case itself, the Court partly allowed the quashing of the FIR as regards Sections 376 and 377, but directed the investigating officer to add the offence of Section 354 to the FIR.

The Gujarat High Court's observations on marital rape come at a time when the Delhi High Court is in the process of hearing a challenge calling for its criminalization.

MARITAL RAPE: MARRIED, MARRIED BUT SEPARATED, & UNMARRIED-CLASSIFYING RAPE VICTIMS IS UNCONSTITUTIONAL

If slapping and anal rape in marriage is criminal why isn't rape?

Pressing against provisions allowing "legal rape" of married women and the unconstitutional classification of rape victim as married, married but separated and unmarried, the RIT Foundation and The All India Democratic Women's Association (AIDWA) has submitted before the Delhi High Court that when sodomy, sexual assault, murder are not de-criminalised in marriage, there is no reason rape should be.

Counsel for petitioners RIT Foundation and AIDWA (intervenor) said through her oral and written submissions before the Hon'ble Delhi High Court, that the fiction of legal marital rape created by Exception 2 of Section 375 of the Indian Penal Code, 1860 has caused millions of women to be legally raped. The government's own latest data shows 6 per cent of married women were sexually assaulted by their husbands.

Relying on the Supreme Court's judgement in the Independent Thought case which criminalised the rape of child wives between 15 and 18, cited extensively aspects of the ratio which also apply to adult women. Relied upon also was the nine judge bench in Justice (Retd)

KS Puttuswamy vs Union of India[3] (Privacy judgement), the petitioners said the court has recognised the value of physical integrity and sexual autonomy under Article 21.

She 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 she cited the observation of the apex court in the privacy judgement wherein it is stated that, "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".

40 times more women raped by husbands

The petitioners have relied on a 2014 study conducted by Research Institute for Compassionate Economics which revealed that most incidents of sexual violence were committed by husbands of the survivors and 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.

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%.

Victorian patriarchies legalising marital rape in 21st century

Rape within marriage in the twenty first century, continues to be legalised by criminal laws of 1860.

The petitioners go on to add in their written submission that, *"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".*

[3] WRIT PETITION (CIVIL) NO 494 OF 2012 SC

The irrational classification of rape victims

The petitioners highlight the classification as under:

A Women suffering rape at the hands of a man who is not their husband, are protected by the criminal law under Section 375 and 376 IPC and are de-jure afforded the full protection of the present law.

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.

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.

Stressing how **Exception 2 to Section 375 of IPC** provides for an explicit exemption for rape within a marriage while **Section 376B IPC 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, the petitioners said, "In contemporary India the 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".

It said while the married women across India are being legally raped everyday, the Centre is taking a contrary stand based on vagaries like 'the institution of marriage', is an institution destroyed by criminal behaviour in particular marriages, or those specific marriages? Surely it is the violence that harms the marriage, not protection from that violence by the State.

The touchstone of Constitutional framework

The petitioners also submitted that as per **Article 13 of the Constitution of India**, the impugned provisions are void ab initio due to their inconsistency with Part III of the Constitution.

It cited the observation of the Supreme Court in case titled Romesh Thapar v. The State of Madras[4] wherein it was 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."

To demonstrate the provisions are inconsistent with Part III of the Constitution and therefore, liable to be set aside, the petitioners tested it on the touchstone of Articles in Part III of the Constitution, as under:

Article 14

The petitioners said Article 14 prohibits discrimination not only by a substantive provision but also procedural law.

"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."

"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,

[4] 1950 SCR 594

the Union has purposefully refused to recognize and accord equal rights to women in a marriage," it says.

It also contended that while marriage may be a legitimate basis of classification for certain reasons (imposing special rights and duties between parties, or providing immunity from providing evidence against one's spouse) it can never be a legitimate basis for exemption 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," the petitioners say.

Quoting from Anuj Garg & Ors. Vs. Kotlal Association of India and Ors[5] where the 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 petitioners said, *"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".*

MARITAL RAPE VS PROTECTING MEN FROM MISUSE OF LAW

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.

To this, the petitioners say in the written submission, *"the said object is not only unfounded and misplaced but also dis-entitles innocent rape victims who face violent sexual assault by their husbands without adequate protection or support from the law".*

As an example, it say, *"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*

[5] Appeal (civil) 5657 of 2007 SC

laws on perjury and malicious prosecution are appropriate remedies rather than the decriminalization of cheating".

It also adds that 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.

Article 15 (1)

The Article says the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and 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.

Article 19(1) (a)

Article 19 (1) says all citizens shall have the right—to freedom of speech and expression;

The petitioners contend that exception to Section 375 does 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).

Article 21

Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law.

The petitioners say "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".

It cites the case of **Suchita Srivastava v. Chandigarh Administration** [6]wherein the Supreme Court recognised a woman's right to make reproductive choices as a dimension of "personal liberty" under Article 21 of the Constitution.

"In that judgement, the apex 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.The Supreme Court in Privacy judgement decided that all citizens, including married women, have a right to privacy."

Drawing a logical corollary between the SC observation in D.K Basu vs. State of West Bengal where it was held that a prisoner does not shed his right to life and dignity, the petitioners say, "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".

They also cite the court observation in Court on its Own Motion (Lajja Devi) v. State which 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

[6] S.L.P. (C) No. 17985 of 2009 SC

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 hocking to note the specific relaxation is given to a husband who rapes his wife, when she happens to be between 15-16 years."

The petitioners say on December 22, 2012, the Central Government appointed a judicial committee headed by (retd.) chief justice of India, Justice J.S.Verma which recommended striking down of exception 2 to section 375 IPC but the same was not included in the amendment.

INTERNATIONAL JURISDICTION

The petitioners also cite example of countries which have moved away from exception to marital rape.

In Australia, in the case of R v. L in 1991, 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.

In a 1995 case titled SW v UK, the European Court of Human Rights[7] while upholding the conviction of the accused for marital rape stated that, "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".

[7] [1995] 21 EHRR 363 , 20166/92, [1995] ECHR 52, [1995] ECHR 52

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.