

**IN THE HIGH COURT OF DELHI AT NEW DELHI
(EXTRAORDINARY ORIGINAL JURISDICTION)
WRIT PETITION (CIVIL) NO. 284 OF 2015**

IN THE MATTER OF PUBLIC INTEREST LITIGATION

RIT FOUNDATION & ORS

..... PETITIONER

VERSUS

THE UNION OF INDIA & ORS

..... RESPONDENT

MEN WELFARE TRUST

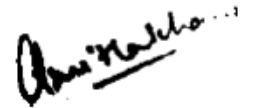
..... INTERVENER/RESPONDENT

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Date: New Delhi

Place: 12/Jan/2022


(Amit Lakhani)


(Ritwik Bisaria)

WRITTEN NOTE TO SUMMARISE ARGUMENTS OF MEN WELFARE TRUST

That the applicant vehemently opposes the Petition, which comes with a presumption that Exception 2 in IPC 375 is unconstitutional & is a license given to Husbands to Rape their wife, with following strong arguments:

1. **REBUTTAL TO JUDGMENTS CITED BY PETITIONERS**: We wish to submit that the Petitioners have made serious misrepresentations on all the cited international judgments with an intention to influence:
 - a. **NEPAL JUDGMENT** (*Forum for Women, Law and Development (FWLD) Vs His Majesty Government of Nepal (HMG/N) and others [Writ No. 55 of the year 2058 BS (2001-2002)]*): The Hon'ble Supreme Court of Nepal has quashed the writ petition and infact directed the legislature to introduce a Bill to fill the gaps. Petitioners have misquoted the submissions of the parties wrongly as observations of the Hon'ble Supreme Court of Nepal (as in Page U, Page 21 of the Petition of Khushboo Saifi vs Union of India and Anr). The Hon'ble Supreme Court had infact clearly observed the difference between a married and unmarried relationship. Hence, this citation isn't supporting Petitioner's prayers.
 - b. **United Kingdom Judgment** (*European Court of Human Rights in C.R. Versus the United Kingdom. Application Number: 00020190/92, November 22.1995*): The parties in this case were already living separately & had already communicated to each other about the separation, which intum implied as withdrawal of consent. In a similar situation in India, even within the existing legal framework, IPC 376B covers it. Hence, this citation isn't relevant for instant case.
 - c. **Supreme Court of Canada Judgment** (*JR Vs J.A, 2011 SCC 28, 27th May 2011*): This case is not even of a Husband-Wife but of a live-in couple w.r.t. to sexual experimentation. There is no exception in IPC 375 for live-in relationships & there are various examples of Rape convictions in live-in relationships in India. Hence, this judgment is neither applicable, nor a relevant reference here.
 - d. **House of Lords Judgment** (*Citation 1991 LawSuit (UKHL) 69 dated: 23rd October 1991*): In this judgement, the court did not strike-off any exception in the legislative law as contended by the petitioner. It only harmonized the legislative law and common law. Moreover, this judgment is the preceding judgment to the *European Court of Human Rights in C.R. Versus the United Kingdom. Application Number:*

00020190/92, November 22.1995 and the same case is being presented as an additional citation by the Petitioners.

- e. New York Judgment (*People Versus Liberta before the Court of Appeals of New York. 64 NY 2d 152 (1984)*): This case is again about legally separated married couple, In India, IPC 376B already protects a wife in similar situation of separated couple. Hence, the citation is not relevant in this case.
- f. High Court of Australia (*Judgment of the High Court of Australia dated: 20th May 2012. PGA vs The Queen [2012] HCA 21*): This judgment discusses and decides more on the retrospective applicability of the Law, hence it's not applicable in instant writ.

It is pertinent to mention here that there are citations quoted by the Petitioners which are not even related to the instant writ. They are either the case of Separated Married couple or of Live-in relations, which are already covered under IPC 375, 376B and cannot be taken as a reference/precedence.

- g. Independent Thought Judgement (*Independent thought vs Union of India, 2013*): The Judgement is being interpreted by the petitioners just to suit their narrative; the pertinent point is that the Hon'ble court observed "2. *We make it clear that we have refrained from making any observation with regard to marital rape of a woman who is 18 years of age and above since that issue is not before us at all, therefor we should not be understood to advert to that issue even collaterally*". Hence the observations of that judgements cannot be used as reference in the instant matter, even as per the Hon'ble Supreme Court (*advert to that issue even collaterally*).

2. **WHY SELECTIVE REPRESENTATION OF OTHER COUNTRY LAWS:** The countries listed by Petitioners are selectively represented to suit their prayer/arguments. The laws need to be seen in totality. We hereby submit the vital aspects of these other country laws to make the right comparisons:

- a. United States of America: We have detailed laws of major states and all of them have various checks and balances apart from being gender neutral on sexual violence and domestic violence laws. In these states, in spousal sexual violence, the use of force or threat of force are important elements to constitute the said offence. Others pertinent checks in few of the states are as under:
 - i. Limitation Period for filing a complaint

- ii. Separation of stipulated time (indicating explicit withdrawal of consent)
 - iii. Separate laws on Spousal Sexual Violence & that by 3rd person
 - iv. Option of Forgiveness upon completion of therapy
- b. United Kingdom: Firstly, the Sexual Offences Act 2003, made penetration and sexual assault as gender neutral. Secondly, Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015, is also gender neutral. Thirdly, for Domestic Sexual Violence, duplication is avoided, and one law refers to the other existing law to avoid Double Jeopardy.
- c. Nepal: Firstly, the law clearly differentiates between Marriage relation to other relations. The law provides for maximum Six Months term in case of conviction of Husband as against 3rd party conviction. In India, IPC 498A conviction already provides three-year term. Secondly, Limitation period to file complaint as a check provided within the law. Thirdly, the Domestic Violence Law of Nepal is gender neutral as well.
- d. Philippines: Firstly, the law (Article 266-A, Subsection 2) is gender neutral, in contrast to Section 375 of IPC. Secondly, Article 266-C gives special provision of effecting a pardon in case of a valid marriage.

It is also pertinent to submit here that while the laws of most of the countries referred by the Petitioners are gender neutral (including Domestic Violence Laws), why Petitioners have conveniently done a selective submission to the Hon'ble Court. IPC 375 is already under a sharp contrast to the laws of various other countries which have various riders such as use of force, threat, separation & treating the marriage relation separately.

It is very pertinent to additionally submit that none of these countries have a separate matrimonial law like IPC 498A.

Inspite of these facts, it is a very important point to ponder if following "West" blindly, will be right or not? Petitioners are referring to the society, which witnesses, more than 40% of births from outside marriage. Most western societies are plagued with withdrawal from marriage as a relationship and a majority of divorces within those marriages.

3. **EXCEPTION ISN'T A LICENSE TO COMMIT CRIME**: Firstly, there are various exceptions in the Indian laws. Entire Chapter II of IPC deals with exceptions. Any Exception (in a statute) must not be called a license to commit a crime. e.g. exception given to a child under 7 years of age on crimes (Chapter II, Section 6 of IPC), shouldn't be called as a license to commit crime.

Secondly, not just in IPC 375, similar Exceptions are there in various other sections of IPC as well where marital relationship is treated differently. e.g. IPC 136, which exempts wife from prosecution for harbouring deserter husband. IPC 216A, which exempts spouse from prosecution for harbouring robbers/dacoits. It is pertinent to add here that such exception is not provided to even Mother /Father /Sister /Brother, but only to a spouse & such exception does not imply any license to a wife to commit respective criminal acts of harbouring a deserting Husband etc.

4. **ABOUT CONSTITUTIONALITY:** there are 2 most important factors are:
- a. Article 15 of the Constitution of India clearly prohibits classification of citizens based on religion, race, caste, sex, place of birth only and doesn't restrict it based on Marital Status. Thus, any classification based on Marital Status is not unconstitutional.
 - b. Article 14 provides Equal Protection of the Law and IPC 375 itself deprives any protection to men against sexual violence (inside/outside marriage) & thus is in violation of Article 14. Additionally, with multiple existing laws for protection of wife in a marriage relationship from the said crime, the said objected exception is no violation of Article 14.
 - c. Article 13 is under no violation by the said exception in IPC 375 as contended by the Petitioners. Various existing Laws address the exclusive protection of a wife from spousal sexual abuse. The Article does not mandate that the redressal must be within the same section.
 - d. The Petitioners argument that the exception violates the right of the wife to say NO under Article 19(1) is flawed, as the exception does not take away or inhibit the right of a married women to either say "Yes" (Conjugal rights under Section 9 of HMA) or to say "No" and withdraw her consent (protected under DV Act, IPC 498A, IPC 377, IPC 376B, IPC 354)
 - e. The Petitioner's argument that the said exception in violation of Article 21 is incorrect as, when it comes to right to protect life and personal liberty & integrity etc, a married woman already has multiple recourses under existing legal framework.

Additionally, we wish to bring to the notice of the Hon'ble court that the Article 15(3) provides for only Provisions exclusively for Women (& Children). Article 15(3) is about,

“provision” unlike Article 15(5) which clearly provides for “provision, by law”. Hence, all the gender-based laws in India are under direct violation of Article 14 and 15.

5. **AVAILABLE FRAMEWORK**: We already have sufficient laws providing protection to a wife from sexual violence in a marriage relationship:
- a. **PWDVA 2005**: Section 3, Explanation I, Section (ii) defines sexual abuse as any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman. Extends to Jail in case of violation of a protection order under Section 18. PWDVA 2005 provides the similar remedies to a wife namely, free legal aid, medical support, financial support etc.
 - b. **IPC 498A**: covers every kind of cruelty (mental or physical) threatening the life, limb of a wife during marriage.
 - c. **IPC 376B**: protects a Wife (separated with or without a decree). This implies that withdrawal of consent holds strong importance in a marriage relationship. In this case the withdrawal by the act of separation.
 - d. **IPC 377**: protects against unnatural, non-consensual offences.

It is pertinent to add that the use of these sections/laws is not exclusive to each other.

6. **SIGNIFICANCE OF CONSENT**: The relationship of husband and wife legitimizes procreation unlike in any other relationships. Hence, viewing all relationships with the same lens will result to injustice.

Consent, as per Explanation 2 of IPC 375, is unequivocal voluntary agreement by words, gestures, verbal/non-verbal communication w.r.t. specific sexual act. “Consent under misconception of fact” is given under IPC 90 and if applied (by removal of Exception 2 in IPC 375) to a marriage relationship will result to gross injustice.

It is pertinent to add that withdrawal of the consent in a marriage relationship must be explicit e.g. a married couple living separately, as defined in IPC 376B, where a separation indicates the withdrawal of consent or any such explicit gesture/verbal/non-verbal communication.

Under a valid marriage, where there is no separation between husband and wife and are cohabiting together, sharing the same bed, thus the consent for sexual intercourse from the spouse and sexual intercourse against any woman by a 3rd person without her consent cannot be looked upon from the same lens.

7. **MISUSE & SOCIAL IMPACT:** Indian courts are already highly overloaded with the gross misuse of existing gender-based laws so much that it has resulted in various guidelines from Hon'ble Supreme Court and various Hon'ble High Courts.

Petitioners have argued that Misuse is not a valid argument in instant Writ. Though, "misuse" was the ground strongly pushed to the Ministry of Law and Justice to make the Gender-Neutral Rape Law of "Criminal Law (Amendment) Ordinance, 2013" back to Gender Based current IPC 375 of "Criminal Law (Amendment) Act, 2013" within 58 days (3rd Feb 2013 – 2nd April 2013). Gross misuse of gender-based law isn't an ignorable issue. As per NCRB data, over past few years (1997-2015), the increase of ratio of Husband Suicide to Wife Suicide (Marital Suicide Index - MSI) has increased from 1.43 to 2.28. It is also pertinent to mention here that Family Issues continue to be the biggest reason for suicides in India. While this data has been seen very seriously w.r.t. wife suicide but the same data about Husband suicide is ignored by the law makers as well. If the Rape Law misuse extends to marriage relationship too, the MSI is bound to increase multi-fold as the tag of a "Rapist", would make it further difficult for many accused to survive the social trauma (to the whole family).

It is pertinent to add here that, as per NCRB (<https://ncrb.gov.in/en/crime-india>), of the current cases registered under IPC 375, every year, almost 50% of total cases fall under the category of "*Friends/Online-Friends or Live in Partners on Pretext of Marriage/Separated Husband*". Adding the ones filed in case of elopement, this percentage would increase to about 65%-70%. This means, that majority of the Rape cases filed in India, don't involve any violence. If the exception in IPC 375 is removed, it would mean sending a Husband to a minimum of 10 years or life term for even a consensual sex not involving any violence, threat and on a mere "misconception of fact".

8. **REBUTTAL TO RESEARCH & DECLERATIONS QUOTED BY PETITIONER:**

We hereby respectfully submit that the Hon'ble Supreme Court, in the matter of *Shayara Bano vs. Union of India*, dated 22nd August 2017, clearly stated that the Constitution of India, is what needs to be relied on without falling back on international conventions & declaration. Though, it is also important to submit about the same conventions which petitioners have intentionally not submitted to the Hon'ble Court:

- a. UDHR – Universal Declaration of Human Rights: IPC 375 is in clear contravention of Article 1, 3, 5, 6, 7, 9, 16, 30 by keeping men devoid of any protection from sexual violence by either wife or any other female. With wife having protection

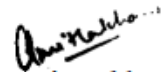
under multiple statutes, the Laws in India are in complete compliance of UDHR, for protection of Women.

- b. Most of the other reports referred by Petitioners, including ICCPR, CAT, ECHR and ICESCR advocate the neutrality of Gender either in forms of Rights or Laws.
- c. NFHS – National Family Health Survey: credibility of NFHS-3 and NFHS-4 is questionable as the survey questionnaire discriminates against men in terms of details, questions and hence the survey data. And even this biased data shows a downward trend from the responses of these biased surveys.

Thus, removal of the Exception 2 of IPC 375, would create more injustice in many ways, as substantiated in the above Submissions.

Through

Applicant in person


Amit Lakhani


Ritwik Bisaria
Men Welfare Trust

Dated: 10th January 2022