

## **INDEPENDENT THOUGHT v. UNION OF INDIA (2017)**

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### **I. INTRODUCTION**

The recent judgment passed by the Supreme Court of India<sup>1</sup> has spurred up a debate by the decision to narrow down the scope of marital rape. Rape under Section 375 of the Indian Penal Code (herein referred to as IPC) involves sexual intercourse, which is initiated by one or more persons against another person without that person's consent. The act may be carried out by physical force, coercion, abuse of authority or with a person who is incapable of valid consent, such as one who is unconscious, incapacitated, or below the legal age of consent.<sup>2</sup> It also clarifies that sexual acts between married couples would not amount to rape except if the girl is below the age of fifteen. Predominantly, in several statutes an individual is considered to be a child when they are below the age of eighteen and do not have the faculty to consent for sexual intercourse. Drawing from this, when a husband is sexually involved with his wife who is below the age of eighteen it should primarily amount to rape.

The case arose out of a petition filed by the society Independent Thought under Article 32 of the Constitution of India drawing the attention to how the rights of the girls who are married between the ages of fifteen and eighteen are violated. The question before the Court was whether the Exception 2 to Section 375<sup>3</sup> of the IPC is unconstitutional and should be struck down. It was claimed that Section 375 of the IPC prescribes the age of consent for sexual intercourse at only eighteen while by the virtue of Exception 2 of the same Section, if a girl child between the ages of fifteen to eighteen is married it gives a blanket liberty to her husband to have non-consensual intercourse with her. This provision does not only attack the bodily

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<sup>1</sup> Writ petition (Civil) No. 382 of 2013, decided by Madan B. Lokur and Deepak Gupta JJ.

<sup>2</sup> DR. P.V. PANCHOLI, LAW ON VIOLENCE AGAINST WOMEN 2 (Cyber Tech Publications, 2014).

<sup>3</sup> Section 375, Exception 2 - Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

integrity of a girl child but also is arbitrary, discriminatory and violative of the Constitution of India. The court having heard both the sides passed its verdict on October 11, 2017 with the finding that:

- The Exception 2 to Section 375 of the IPC should be struck down to protect the rights of a girl child.

The court gave the direction to harmonise the inconsistency between The Protection of Children from Sexual Offences Act, 2012 (POCSO) and the IPC and therefore the Exception 2 to Section 375 would be read as:

*“Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years”<sup>4</sup>*

## **II. ANALYSIS**

On the offset, one can perceive this decision as an appropriate and exemplary judgment, as it harmonizes the law and stripes Exception 2 of Section 375 the IPC of its validity. Even in a marriage, if the wife is under the age of eighteen, she is nonetheless a child making her incapable to consent to any sexual relationship. Therefore, with or without her consent such an act should be unconditionally considered as rape.

The most crucial consequences of violence against women and girls is the denial of fundamental human rights to women and girls.<sup>5</sup> There are various international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRC) which provide for their protection. India is a signatory to various international treaties. Article 3 of the CRC states that ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’ This makes it amply clear that the best interest of the child is of foremost importance. Similarly, reference was made to Article 16.2 of the CEDAW which impedes child marriage. Therefore, non-consensual sexual intercourse would amount to a violation of her human right to liberty or dignity embodied in international

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<sup>4</sup> Independent Thought v. UOI, CDJ (2017) SC 1163.

<sup>5</sup> DR. SURUCHI SHUKLA & DR. ANJNA FELLOWS & DR. NEELMA KUNWAR, VIOLENCE ON WOMEN 16 (Discovery Publishing House Pvt. Ltd., 1<sup>st</sup> ed. 2012).

conventions accepted by India such as the CRC and the CEDAW<sup>6</sup> and it is the duty of the state to protect and prevent any misuse of these crucial rights provided to them.

Secondly, the exception is arbitrary as it is violative of Articles 14, 15 and 21 of the Constitution of India. The age of consent to have any sexual intercourse has been fixed at eighteen and the minimum age to qualify for a marriage is also the same. This raised questions on the irrational lowering of the fixation of age to fifteen which is against the concept of equality. Further, the Exception creates an artificial distinction between a married and an unmarried girl. The defence of such classification holds no rational nexus and therefore was held to be arbitrary and violative of Article 14.

The state according to Article 15(3) of the Constitution reserves itself the right to make special provisions for the protection of women and children in the country. Abetting child marriage is a criminal offence.<sup>7</sup> The presence of the exception makes no rational justification as child marriage per se is wrong but since it prevails all over India, it is not invalid but voidable. The argument that it will affect the sanctity of marriage holds no value and thus this classification is discriminatory.

Article 21 of the Constitution of India provides us with a right to life with human dignity. This right also includes the right to proper healthcare, education and livelihood. When a girl child is married and pushed into sexual intercourse whether consensual or not, it deprives her of both physical as well as mental wellbeing. It stripes her from the opportunity to gain education. In all, it takes away the right to grow into a healthy woman. Additionally, it takes away the right to her own reproductive choice.

POCSO defines a child under Section 2(d) as any person below the age of eighteen years, but the Exception disregards this. POCSO also states that a girl child does not have the capacities physical, emotional or mental to take an informed decision about engaging in sexual intercourse, so the question of consent does not arise in the preposition of a girl below the age of eighteen. The act of maintaining physical and sexual relations with a girl child after marriage did fall under Section 3 of the POCSO Act which defines 'Penetrative Sexual Assault' but was inconsistent with the Exception and so was not punishable. The judgment lead to the

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<sup>6</sup> *Independent Thought*, CDJ (2017) SC 1163.

<sup>7</sup> *Id.*

harmonizing of the laws making the act of sexual intercourse with a child married with or without her consent between the ages of fifteen to eighteen punishable.

The social evil that the judgment mainly concerns itself with, is that of child marriage. In a child marriage, we see that the rights and choices of a child is completely ignored. She now has responsibilities beyond her age which hinders her ability to develop physically, emotionally and mentally which ultimately affects her overall growth. Due to biological reasons, the girl is not physically fit to have sexual intercourse at such a young age as it exposes her to high risk of HIV/AIDs and various other sexually transmitted diseases.<sup>8</sup> In the sea of criticism of this practice, we see various justifications, including that of customs, explaining that criminalizing marital rape of a girl child has the potential of destroying the institution of marriage which is predominantly wrong, as the act per se is personally damaging.

### **III. CONCLUSION**

In conclusion, it is momentous to state that the Court has laid down an appropriate law for the development of laws that protect both the women and children in the country especially since there exists the plague of child marriage. It provides for a contributory and beneficial instrument that will protect essential human rights. The court has also inevitably laid down the reasons for abolishing marital rape even though they have explicitly refrained from dealing with that matter. This groundwork will prove to be an asset and be seen as a key to the ignition to countervail the laws for marital rape of women aged eighteen and above. The bodily integrity of girls between the ages of fifteen and eighteen are protected and we hope for a future where marital rape of women above the age of eighteen will come under this umbrella.

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<sup>8</sup> SHOBHA SAXENA, CHILD MARRIAGE IN SOUTH ASIA, BRUTAL MURDER OF INNOCENCE 103 (Regal Publications 2007).