



The Indian Journal for Research in Law and Management

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Editor-in-Chief – Dr. Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

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CASE COMMENTARY: INDEPENDENT THOUGHT V UNION OF INDIA

~ *Gunn Bhardwaj*

INTRODUCTION

The Indian Supreme Court rendered a historic ruling in *Independent Thought v. Union of India* on October 11, 2017, concerning the intersection of criminal law, constitutional morality, and children's rights. *Independent Thought*, a child welfare-focused non-governmental organization, had filed a public interest litigation (PIL) which precipitated the case. The Court's main issue was whether Exception 2 of Section 375 of the Indian Penal Code (IPC), which exempted marital rape of a wife between 15 and 18 years from the offence of rape, was constitutional.

The petitioner contended that the exception was contrary to the Protection of Children from Sexual Offences (POCSO) Act, 2012, and Articles 14, 15, and 21 of the Constitution, which promise equality, dignity, and protection against exploitation. It was averred that by essentially legalizing child marriage and allowing sexual exploitation under such marriages, this exception was overrunning the rights of minor girls.

The Court, while giving its judgment, balanced the Prohibition of Child Marriage Act of 2006 and the POCSO Act with the provisions of the IPC. The Court laid down that the exception contravened the basic rights of the girl child by permitting sexual intercourse with a wife who is between 15 and 18 years old. The Court stressed that young girls should not be subjected to coercive sexual acts and are given the same legal protection under the law regardless of whether they are married or not.

This ruling was an important step towards advancing gender equality and protecting children's rights. It also paved the way for progressive interpretation of laws that involve vulnerable

sections of society by highlighting the intersection of consistent legal standards in dealing with child abuse and exploitation cases.¹

FACTS OF THE CASE

The petitioner is a society that has been involved in child rights since its registration on August 6, 2009. In a number of Indian states, the society offers non-governmental groups, government agencies, and multinational enterprises technical and handholding assistance. It has also conducted research, provided training, and intervened in court disputes pertaining to children's rights. The group has filed a petition under Article 32 of the Constitution in the public interest to highlight the violations of the rights of girls married between the ages of 15 and 18².

Issues

1. Is sexual intercourse between a man and his wife, or a girl 15-18 years old, rape
2. Is Section 375's Exception 2 of the IPC unreasonable and violative of fundamental rights and, therefore, unconstitutional?
3. How discriminatory is Exception 2 to Section 375 of the IPC
4. Does the court create a new offense³

Relevant Provisions

Sec 375(6), Sec 375- Exception 2⁴, Protection of Human Rights Act of 1993⁵ defined in Section 2(1)(d), Section 9 of the PCMA⁶, Section 3 of the POCSO Act⁷

Ratio Decidendi

¹ *Independent Thought v. Union of India*, Case Brief, The Legal Lock (on file at <https://thelegallock.com/test/case-brief-independent-thought-v-union-of-india-2017-10-scc-800/>)

² *Independent Thought v. Union of India & Anr.*, Judgment, ALec (on file at <https://www.alec.co.in/judgement-page/independent-thought-v-union-of-india-and-anr>)

³ Rachit Garg, *Independent Thought v. Union of India*, iPleaders (Sept. 15, 2022), <https://blog.iplayers.in/independent-thought-v-union-of-india/>

⁴ **Indian Penal Code**, Act No. 45 of 1860, § 375 (India), available at https://www.indiacode.nic.in/bitstream/123456789/15289/1/ipc_act.pdf#page=14.06 .

⁵ *The Protection of Human Rights Act*, No. 10 of 1994, § 2(d) (India), <https://indiankanoon.org/doc/1108582/>

⁶ **The Protection of Human Rights (Amendment) Act**, No. 6 of 2007 (India), available at <https://www.indiacode.nic.in/bitstream/123456789/2055/1/A2007-06.pdf#page=4.00>

⁷ **The Protection of Children from Sexual Offences Act**, No. 32 of 2012 (India), available at <https://www.indiacode.nic.in/bitstream/123456789/9318/1/sexualoffencea2012-32.pdf#page=4.34>

If the child is a person below 18 years old who is enabled to safeguard her human rights, including the right to live with dignity, and she must be safeguarded from domestic violence as well. He referred to the Law Commission of India's 172nd Report, the Human Rights Council, the Protection of Human Rights Act of 1993, and the Juvenile Justice Act of 2015. If the husband of a girl child engages in sexual activity with her and commits a penetrative sexual assault, he is guilty of an offence under the POCSO Act.

Exception 2 of Section 375 IPC, not being rape under this exception, exists under this regime of pro-child law. For women's empowerment and putting an end to their socioeconomic disadvantaged status, Article 15(3) of the Constitution was incorporated, which can lead to gender equality. Nor can there be any question Article 21 of the Indian Constitution enunciates a woman's right over her reproductive options as a "personal liberty."

Rape may be labelled as a horrific crime since it traumatizes the victim and robs her of her autonomy to determine if she will or will not bear children. This calls for solemn consideration and discussion. As a result, there is a contradiction between the provisions of the POCSO Act and IPC. Thus, Exception 2 to Section 375 of the IPC clarifies that rape of a married girl who is between 15 to 18 years is not an offence under the IPC; rather it's a crime of aggravated penetrative sexual assault under Section 5(n) of the POCSO Act and is punishable under Section 6 of the POCSO Act. Furthermore, Indian Constitution's Articles 14 and 21 are the focal points of concern in this case. Legislative history makes it clear that all people under the age of 18 years are children because a person under the age of 18 years is still a developing person and does not know the result of his or her own act. He further declared that it is entirely at the discretion of Parliament to fix the age of marriage as well as the age at which consent can be granted under clause(6) of Section 375 IPC

Additionally, a girl under the age of 15 who is compelled to be uncovered to sexual relations by her husband cause damage to her physical and mental self as they have not yet matured. Therefore, the state cannot be invoked for the protection of the custom and sanctity of girl-child marriage, a gross affront to Articles 14, 15, and 21 of the Indian Constitution. So far as concerns issues of girl child, there are some other aspects which make Exemption 2 of Section 375 IPC completely discriminatory⁸.

SC Judgement

⁸ ID 3

By criminalizing the rape of minor wives and establishing that marriage does not create protection for such crimes, the Supreme Court effectively closed a significant legal loophole. In its ruling, the Supreme Court held that having sex with a girl under the age of eighteen, even if you were wedded, constituted rape. The court then expounded further that the exception provided under Section 375 of the IPC violated the fundamental rights of girl children by making an arbitrary and irrational dichotomy between married and unmarried girls. It continued to make the point that, despite the PCMA's continued prohibition of child marriage, millions of girls are still victims of child marriage in India. The verdict further harmonized the IPC with the POCSO Act, which penalizes sexual intercourse with a girl under the age of eighteen, regardless of whether the girl is married or not. When the wife was younger than eighteen years of age, the court considered Exception 2 of Section 375 IPC to be unlawful. Hence, this milestone judgment bridged a significant legal gap in the Indian juridical structure by penalizing wife rape of teenage girls⁹.

Comment on the interpretation of the judgement

While forward-looking, this decision also showed the need for further and more substantial reforms, including improved PCMA (Prohibition of Child Marriage Act) administration, increased social welfare delivery, child brides' protection, and a more extensive debate on marital rape for women of full age. Although by criminalizing the rape of minor wives and holding that marriage does not give a presumption of protection to such offenses, the Supreme Court actually closed a very big legal loophole. But where is the big issue untouched and which is the adult women marital rape pending, and still flourishing in India. The dark fact is that India does not have an affirmation of the rights of adult women to bodily autonomy in marriage. The Court's non-decision on holding marital rape for adult women unconstitutional leaves a big loophole in protection against sexual violence by law. All believe the continuing existence of Exception 2 even after decades in 2023 creates a discriminatory legal regime for wedded adult wives. It denies wedded adult women recourse to redress for unwanted sex, violating Article 21 and international law.

Conclusion

This case was a first step toward the legal recognition of marital rape in India, where it is currently illegal. Due to this case, marital rape is now partially criminalized, meaning that it is

⁹ ID 3

punishable up until the age of 18, but not beyond. In order to render the exemption consistent with the main clause and the POCSO and Juvenile Justice Act, the Court used the harmonious construction concept. Instead of deeming it illegal in its entirety, the court's interpretation of the exemption settled the matter. In the development of Indian culture, this example marks a major breakthrough¹⁰.

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¹⁰ ID 1

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