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A CONSTITUTIONAL FAULT LINE LEFT UNRESOLVED: A COMMENTARY ON RIT FOUNDATION V. UNION OF INDIA

~Aysha Shanza

1. Introduction: Statement Of Facts And Procedural History

The petitioners in this case were led by the NGO RIT Foundation and joined by other parties, who approached the Delhi High Court seeking a declaration that exception 2 of section 375 of the Indian Penal Code was unconstitutional.¹ This exception states that sexual intercourse by a man with his wife, the wife not being under the age of eighteen years, does not constitute rape. The petitioners also argue that this exception violated Articles 14, 15 and 21² by denying married women the same protection against non-consensual sexual offences that is provided to every other woman, whether married or not. This challenge was not targeted on marriage as an institution but on a single statutory fiction that assumes a married woman's consent to be continuous and irrevocable for the duration of the marriage.

The matter came before a division comprising Justices Shakti Dhara and C. Hari Shankar. On 11 May 2022, the bench delivered a verdict that eventually made this case not just doctrinally significant

¹ Indian Penal Code, 1860, § 375, Exception 2 (India).

² India Const. art. 14; India Const. art. 15; India Const. art. 21.

but analytically interesting as well.³ The two judges gave starkly differing opinions, and there was no majority. The consequence of this verdict was such that the exception survived, not just because a bench of the High Court upheld it but because a split verdict cannot overturn the existing law. The matter has since been presented before the Supreme Court by way of appeal and a special leave petition arising from *Hrishikesh Sahoo v. State of Karnataka*⁴ and, more recently, with a further petition filed by the *Red Rot Foundation*,⁵ which concerns whether the exception would shield the husband from prosecution for offences such as grievous hurt, culpable homicide, or non-consensual sexual conduct.

1. The Holding By Justices Shakti and C. Hari Shankar

Justice Shakti held that exception 2 was unconstitutional. His reasoning comes from the premise that the exception rests on an outdated and colonial-era law that extinguishes a woman's independent sexual agency and her capacity to withhold a specific sexual act on a specific occasion. He treated this exception as being inconsistent with the recognised bodily autonomy principle that the Supreme Court had most notably developed in *Justice K.S. Puttaswamy v. Union of India* and had already shown itself willing to read down every exception to protect minor wives in *Independent Thought v. Union of India*.⁶ Justice Shakti asked why the same autonomy given to a minor wife cannot be applied to an adult wife.

The dissenting opinion was by Justice Shankar, who upheld the exception. He did not state that non-consensual relations were not harmful; instead, he was of the opinion that within the institution of marriage, sexual access carried a very distinct legal and social character from what exists outside of it, and the structure is defined by important aspects like continued cohabitation, mutual expectations, and the structure of the matrimonial law itself, which provides for remedies such as judicial separation and divorce for spouses who do not wish to continue the relationship. According

³ *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404 (India).

⁴ *Hrishikesh Sahoo v. State of Karnataka*, 2022 LiveLaw (Kar) 89 (India).

⁵ *Red Dot Foundation v. Union of India*, Special Leave Petition (Crl.) (pending before the Supreme Court of India) (India).

⁶ *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India);
Independent Thought v. Union of India, (2017) 10 SCC 800 (India).

to him, criminalising this conduct as rape would essentially mean that the judiciary is overriding the powers of the parliament.

2. The Roadmap Of This Commentary

This commentary argues that the reasoning given by Justice Shakti Chaudhary is correct. But the argument given by both the judges missed a sharper argument, one that this author wishes to highlight. That the exception cannot survive on its internal logic alone because it does not merely decline to criminalise a particular conduct; it selectively refuses to give a statutory protection to one class of woman based on her marital status. It does so in a manner that falls short of rational scrutiny under Article 14 and Article 21. Three important points are to be highlighted here. *Firstly*, Justice Shakti Chaudhary's argument, although institutionally serious, mistakes a question of statutory classification for a question of social policy. *Secondly*, Article 14 remains underused in both opinions because it is, in fact, the more secure reasoning for striking down the exception. And *thirdly*, it reveals the limitations of constitutional adjudication when a split occurs and what that means as the matter now sits before the Supreme Court.

3. Analysis: The Deference Argument Misidentifies The Question

Justice Shakti Chaudhary's dissenting opinion rests on an assumption that deserves closer scrutiny than what it received in either opinion. He stated that criminalising marital rape would alter the character of marriage as an institution in a way that only the parliament could otherwise authorise. This argument shows judicial restraint, but it misidentifies what the petitioners were actually asking the court to do. The petitioners did not ask the court to create a new law, redefine marriage, or even describe matrimonial intimacy; they asked the court to remove a carve-out in the already existing law, an offence that has already been defined and applied to every other category of woman in India. The question here is not whether the judiciary should legislate and describe what a marriage ought to look like. The question is whether the parliament may, consistent with Article 14, exempt one class of women based on their marital status. In this manner, the deference argument loses much of what it was aimed at, because striking down the exemption does not create a new law; it only restores the existing general law.

Both opinions given by the judges also give considerable importance to Article 21. Most widely known in the case of *K.S. Puttaswamy* and the trajectory that was laid down with respect to bodily

autonomy. But this commentary argues that the stronger route lies in Article 14, and neither of the opinions captures it fully. Exception 2 differentiates between married and unmarried women to determine whether nonconsensual sexual intercourse constitutes an offence. Article 14 only allows classification when it rests on a genuine distinguishing factor that is logically connected to the law's underlying purpose. The objective of section 375 is to punish non-consensual sexual conduct, and the marital status has no connection as to whether consent was present during the act. A wife's consent on one occasion does not automatically establish consent for another occasion, any more than a girlfriend's or a former partner's would. The classification therefore fails here because the court does not delve deeper into the questions of what marriage actually entails. This is the narrow argument that prevailed in Justice Shakti Singh's opinion, and narrow arguments ultimately leave less room for disagreement.

4. What The Split Actually Reveals

There is a temptation to consider this case simply as a judicial disagreement, the sort of thing that happens when a bench considers a difficult question. This commentary suggests that it reveals something far deeper, which is a doctrinal fault line over how marriage operates, how constitutional purposes are different, and the status that ultimately modifies a person's individual relationship that is not consistent with Articles 14 and 21. This is not a new issue in Indian constitutional law; it has also persisted in the matters of restitution of conjugal rights, where courts have long heard arguments on whether the state can compel cohabitation, and in this case, that very tension shows up in a starker form. The unresolved question in the *RIT Foundation* is not, in that sense, just a mere gap. It reflects the underlying constitutional question of whether marital status can condition access to the ordinary protection of criminal law or not, a question that courts have not given a definite answer for.

5. Conclusion

This commentary has argued that Justice Shakti Singh reached the outcome in the RIT verdict, but the strongest justification for that outcome does not lie in the bodily autonomy reasoning but in a much narrower understanding of Article 14, that a statutory classification bears a rational relationship to its object. Exception 2 fails at the threshold because marital status bears no relationship to whether there was consent present during a given occasion. The split verdict did not settle this question; it left the question open, and currently it remains open before the Supreme Court. Until then, this

exception survives not because it has been tested against every scrutiny, but because the scrutiny has not yet been completed.