

A STUDY ON INDEPENDENT THOUGHT V UNION OF INDIA (2017) WITH SPECIAL REFERENCE TO MARITAL RAPE IN INDIA

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Introduction

Section 375 of the Indian Penal Code defines "rape". This provision was amended by the Criminal Code Amendment Act in 2013, incidentally after the Nirbhaya case. With the amendment of the said section, the age of intercourse was raised to 18 years. However, exception-2 of the said provision was not amended, which stated that "sexual intercourse by a man with his wife of 15 years or older is not rape". The 2013 amendment was intended to bring it in line with the Juvenile Justice (Care and Protection of Children) Act (2012), the Protection of Children from Sexual Offenses (2012) and the Prohibition of Child Marriage Act (2006); where the child is a person under 18 years of age. The non-amendment of Article 375 exception-2 has led to an unusual situation where forced sexual intercourse of a man with a minor woman between the ages of 15 and 18 is permitted. That is why the procedure was started.

FACTS OF INDEPENDENT THOUGHT V. UNION OF INDIA

On August 6, 2009, the registered association and the non-governmental organization submitted a statement. This NGO specializes in legal research and provides assistance and advice on children's rights and other rights affecting children. Many other NGOs receive mentoring, technical assistance and legal assistance from this NGO. It also extends support to various state governments.¹

Independent Thought initiated a Writ Petition W.P.(C) 382/2013 in the Hon'ble Supreme Court relying on the provisions of Article 32 of the Constitution of India. The goal was to draw attention to the violation of the rights of married girls between the ages of 15 and 18 years.²

¹ Available at: <http://www.ithought.in/> (visited on: 10 Feb, 2024)

² Available at: <https://www.constitutionofindia.net/articles/article-32-remedies-for-enforcement-of-rights-conferred-by-this-part/#:~:text=Constitution%20of%20India&text=Remedies%20for%20enforcement%20of%20rights%20conferred>

The petitioner wishes to receive a letter stating that Exception 2 of Section 375 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") is inconsistent with Articles 14, 15 and 21 of the Constitution. According to the Exception of Section 2. of Section 375 of the IPC, sexual activity between a man and between his 15-18-year-old wife for rape, regardless of her consent or knowledge.

ISSUES RAISED IN THE CASE: INDEPENDENT THOUGHT V. UNION OF INDIA

1. Is sexual activity considered rape if it involves a man and his wife or a girl between the ages of 15 and 18?
2. Is Exception 2 of Section 375 IPC unreasonable?
3. To what extent is Exception 2 of IPC Section 375 promote discrimination?
4. Does the court establish a sufficiently new crime?

RELEVANT LEGAL PROVISIONS

Section 375 of the IPC defines rape as non-consensual sexual activity by a male with a woman, subject to meeting all seven conditions outlined in its clauses. It also considers sexual contact with a girl under 16 as rape, irrespective of her consent, commonly known as "statutory rape." Previously, penetration by a penis into the vagina, urethra, anus, or mouth constituted rape, but today, any insertion of an instrument or body part into these regions is considered rape.

Exception 2 of Section 375 exempts a husband from rape charges if the wife is over 15, with or without her consent. However, engaging in sexual activity with a girl under 15, regardless of marital status or consent, is illegal. Thus, marriage does not absolve the husband of rape charges when the girl is under 15.

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(visited on: 10th Feb, 2024)

The court also considered the Protection of Human Rights Act of 1993, which guarantees rights to liberty, life, equality, and dignity. Forcing sexual activity on a minor wife violates her constitutional rights to equality, liberty, and dignity.

Under the Protection of Women from Domestic Violence Act, 2005, a husband who harms, endangers, or sexually abuses his minor wife violates her rights and dignity, warranting legal action.

According to the Prohibition of Child Marriage Act, 2006 (PCMA Act), a person is considered a 'child' if they are over 21 years of age if male and over 18 years if female. When one of the parties involved in a marriage is a minor, it qualifies as a child marriage. If a minor seeks it, the marriage can be annulled under Section 3 of the PCMA Act.

Under Section 9 of the PCMA Act, marrying a girl under 18 years of age carries a penalty of up to two years in prison or a fine. Therefore, it is immaterial whether the male partner is a minor; what matters is if he marries a girl who is a minor, which entails legal repercussions. Section 10 of the PCMA Act deems anyone involved in organizing, directing, facilitating, or conducting a child marriage as guilty.

Section 11 of the PCMA Act explicitly forbids promoting or allowing the solemnization of child marriages. Judicial officers or courts have the authority, as per Section 13 of the PCMA Act, to issue injunctions to prevent such marriages. Notably, Section 14 of the PCMA Act stipulates that any marriage conducted after a court injunction will be declared void. In Karnataka, recent reforms render marriages involving a minor party null and void from their inception.³

The Protection of Children from Sexual Offenses Act of 2012, referenced by the court, stipulates the paramount importance of safeguarding the best interests of children. In alignment with the principles enshrined in the Convention on the Rights of the Child, the Government of India is obligated to ensure the protection of children's welfare. Section 3 of the POCSO Act defines "penetrative sexual assault," extending its scope to include instances of "aggravated penetrative sexual assault" involving a minor connected to the perpetrator's wife. The term "aggravated

³ Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> (visited on: 10th Feb, 2024)

penetrative sexual assault," as delineated in Section 5 of the POCSO Act, shares commonalities with the offense of rape under Section 375 of the IPC, thereby warranting analogous punitive measures. The distinguishing factor lies in the marital status of the victim, with the IPC requiring the victim not to be married, and procedural differences in the trial process. The court's verdict underscores the negligible disparity in consequences between convictions under the IPC or the POCSO Act, as the severity of punishment remains consistent. Section 42-A of the POCSO Act establishes its primacy in cases of conflict with other legislations, reflecting its specialized focus on safeguarding children from sexual offenses.⁴

The Juvenile Justice (Care and Protection of Children) Act, 2015, defines a 'child' as an individual below the age of 18, aligning with Article 15(3) of the Constitution, which mandates specific legislation by Parliament to safeguard women and children. This Act provides protection to children who are at immediate risk or in jeopardy before attaining marriageable age.

Additionally, the Supreme Court has invoked fundamental rights enshrined in Articles 14, 15, and 21 of the Indian Constitution. Article 21 mandates the state to safeguard the bodily integrity of girls, affirming their right to live with dignity. However, certain exceptions infringe upon Article 21 by granting husbands absolute physical control over their wives, allowing sexual activity without the girl child's consent.

The girl child is entitled to reproductive freedom and bodily integrity, as engaging in sexual activity without consent can lead to unwanted pregnancies, curtailing reproductive choices and impacting the health of both mother and child. This can contribute to malnutrition, neonatal mortality, and adverse effects on girl children.

CONTENTION OF PARTIES IN THE CASE OF INDEPENDENT THOUGHT V. UNION OF INDIA

Arguments by the petitioner

⁴ Available at: https://www.indiacode.nic.in/show-data?actid=AC_CEN_13_14_00005_201232_1517807323686§ionId=12892§ionno=42A&orderno=43 (visited on: 2nd March, 2024)

The petitioner contended that the definition of rape under Section 375 of the IPC, which encompasses sexual intercourse with or without consent when the victim is under 16 years old, renders the marital status irrelevant in determining whether the act constitutes rape. Hence, the assumption of rape immunity for a husband under Exception 2 to Section 375 of the IPC, solely based on marital rights, is unwarranted.

The learned counsel for the petitioner argued that Exception 2 to Section 375 of the IPC not only discriminates but also contravenes Article 15(3), mandating special provisions for women and children. Instead of empowering these groups as intended, the provision disadvantageously impacts the girl child, contradicting the objectives outlined in Article 15(3).

Marriage of a female child does not imply automatic consent for sexual relations or conjugal rights with her spouse. Additionally, the petitioner's counsel contended that historical practices should not dictate contemporary legality, highlighting the disparity between the treatment of married girls aged 15-18 and unmarried girls under 18 in cases of sexual activity and consent. The petitioner outlined how marriage before 18 years of age adversely affects a girl's emotional, physical, and mental well-being, impacting her overall health, education, and employability. It was emphasized that girls under 18 never provide implicit or explicit consent for sexual activity.

Recognizing the emotional and medical repercussions of early marriage, legislation sets the minimum marriage age at 18 years. Child marriages often result in unintended pregnancies, leading to neonatal mortality and poor health outcomes for both mother and child.

The petitioner's counsel emphasized that the Law Commission of India's 84th report highlighted numerous inconsistencies in laws concerning the rape of girls under 18. In its 172nd report, the Commission suggested amending Section 375 of the IPC to raise the age from 15 to 16, exempting sexual activity with a husband if the girl was over 16. However, the Supreme Court did not accept this proposal. Hence, it's unreasonable to assume that a married girl has consented to sexual intercourse. The law necessitates adaptation when required. Why is the age of a married woman set at 15 in Exception 2 to Section 375, while it's 18 in other laws? This arbitrariness is unfair to the rights of the girl child.

Actions that are arbitrary violate our Constitution, and when a constitutional provision is breached, it becomes arbitrary and can be deemed unconstitutional. The respondents' arguments were illogical and arbitrary. Merely because something has been a customary practice for a long time doesn't mean it's lawful; it may contravene societal standards and constitute a criminal offense.⁵

Arguments by the respondents (UOI)

The respondents presented arguments against the petitioner's counsel, contending that the nation's economic and educational advancement is lacking and stagnant. They advocated for maintaining the age of 15 years, as stipulated in Exception 2 to Section 375 of the IPC, to safeguard the rights of spouses regarding criminalization of sexual acts between them.

Citing the third report of the National Health Survey, it was revealed that 46% of women in India are below the age of 18, with an estimated 23 million being child brides. Hence, linking the consummation of marriage to the severe crime of rape is deemed inappropriate and impractical. Given India's socioeconomic context, penalizing child marriage under Exception 2 to Section 375 of the IPC is deemed unjustifiable, as it has long been entrenched in societal norms, realities, and tradition.⁶

In its 172nd Report, the Law Commission of India (LCI) proposed increasing the minimum age of marriage for women to 16 years old. However, this proposal was ultimately discarded after extensive consultations with various stakeholders. Mere adherence to tradition should not suffice to absolve a husband of rape charges if the marriage was consummated when the wife was 15 years old. Given the necessity for laws to evolve in line with standards that safeguard against adverse impacts on specific classes or communities, while also respecting social and historical traditions and norms, retaining the 15-year threshold in Exception 2 to Section 375 of the IPC is warranted.

It has been argued that the Constitution offers protection for minors under 18 years of age facing immediate peril, as evidenced by the Juvenile Justice (Care and Protection of Children) Act, 2015. Before determining the arbitrariness of Exception 2 to Section 375 of the IPC, it is crucial to ascertain whether a law, regulation, or provision can be invalidated solely on the grounds of

⁵ Available at: <https://lawcommissionofindia.nic.in/> (visited on: 12th Feb, 2024)

⁶ Available at: <http://rchiips.org/nfhs/nfhs3.shtml> (visited on: 12th Feb, 2024)

arbitrariness. In the case of *Indira Gandhi v. Raj Narain* (1975), the insertion of Article 329A was contested due to its arbitrary nature, which was seen to undermine the essence of the rule of law as defined by A.V. Dicey, thereby causing harm.⁷

According to Exception 2 of Section 375 of the Indian Penal Code (IPC), a husband is exempt from rape charges; however, he remains liable for other offenses under different legal provisions. For instance, if a husband assaults a minor girl and engages in sexual activity with her, he can be held accountable under Sections 323, 324, and 325 of the IPC, but he cannot be charged with rape. This discrepancy results in the husband being convicted of lesser offenses, which is peculiar.

One of the issues raised during the pronouncement of judgment is whether the court, by partially or fully invalidating a specific law or rule, is essentially creating a new offense. This doesn't suggest that the court lacks the authority to establish a new offense. However, by partially invalidating Section 375 of the IPC, the court effectively introduces a new offense.

RATIO DECIDENDI

Justice Madan Lokur

He contended that a child, defined as an individual under 18 years old, is entitled to the protection of her human rights, including the right to live with dignity and be shielded from domestic violence. He referenced various legal frameworks such as 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 a husband engages in sexual activity with a minor girl, committing penetrative sexual assault, he violates the provisions of the POCSO Act. This action falls under Exception 2 of Section 375 IPC, which, though not categorized as rape, is addressed in the pro-child legislation system. Article 15(3) of the Constitution, aimed at empowering women and mitigating their socio-economic disadvantages, contributes to fostering gender equality. Additionally, Article 21 of the Indian

⁷ 1976 2 SCR 347

Constitution, which defines a woman's right to choose her reproductive options as a "personal liberty," further strengthens this stance.

Rape, recognized as a heinous crime, inflicts trauma upon the victim and deprives her of the autonomy to decide on matters of childbirth. This aspect merits profound deliberation and discourse. Consequently, a discrepancy emerges between the provisions of the POCSO Act and the IPC. Thus, the rape of a married minor girl aged between 15 and 18, falling under Exception 2 of Section 375, is not classified as a crime under the IPC. Instead, it constitutes aggravated penetrative sexual assault under Section 5(n) of the POCSO Act and is punishable under Section 6 of the same Act.⁸

Justice Deepak Gupta

According to his perspective, Articles 14 and 21 of the Indian Constitution emerge as pivotal considerations in this context. The legislative history unequivocally establishes that individuals below the age of 18 are categorized as children, recognizing their ongoing developmental phase and limited understanding of the consequences of their actions. He further asserted that Parliament holds the authority to determine the legal age for marriage and consent, as outlined in clause (6) of Section 375 of the Indian Penal Code.

Moreover, he concurred with Justice Madan's view that subjecting a girl under 15 to forced sexual activity by her spouse inflicts physical and psychological harm, given their incomplete growth and maturity. Consequently, the state cannot invoke customary or sanctimonious justifications to defend practices like child marriage, which blatantly contravene the provisions of Articles 14, 15, and 21 of the Indian Constitution.

Regarding issues concerning girl children, certain aspects render Exemption 2 of Section 375 of the Indian Penal Code inherently discriminatory.

OBITER DICTA

Considering Article 15(3) of the Indian constitution, the Supreme Court referenced Dr. B. R. Ambedkar's writings to discern that the amendment aimed to introduce specific provisions

⁸ Available at: <http://ncwapps.nic.in/acts/TheProtectionofHumanRightsAct1993.pdf> (visited on: 9th Feb, 2024)

benefiting women and children, with the objective of integrating them into society and liberating them from patriarchal dominance. However, it was observed that extending similar provisions to Scheduled Castes and Scheduled Tribes would not achieve the same objective; rather, it might isolate them from the mainstream populace, yielding unintended consequences.

The court recognized the right to privacy for all individuals, including marginalized women, while also weighing the rights to bodily integrity and reproductive autonomy. Additionally, judges deliberated on the necessity of legal safeguards concerning the collection of voice samples, which could potentially impact women's bodily autonomy.

Responding to the defence's arguments, the court asserted, "The only force capable of dismantling the 'institution' of marriage is legislation that deems it illegal and punishable. Marriage is not merely an institution but a personal matter. It is a personal bond rather than a ceremony sanctioned by the state. The institution of marriage can only be undermined through laws that render it unlawful and subject to punishment."

According to the court's interpretation of special laws pertaining to children, it emphasized that the subject matter and perspective of a statute are crucial in determining whether it is a general law or a special law. Thus, a statute may be considered a special law for specific reasons but could also function as a general law in comparison to another statute for various purposes.

Justice Deepak Gupta, in his ruling, underscored the principle of separation of powers within our constitutional framework, where each branch of power must respect the others. This principle guided his scrutiny of Parliament's wisdom in setting the age limit of 15 in exception 2 of Section 375 of the IPC. He emphasized the need for the court to accord due deference to the decisions of Parliament, recognizing that lawmakers cannot be faulted for lacking knowledge. However, he also stressed the judiciary's responsibility to invalidate laws that contravene the constitution or infringe upon citizens' fundamental rights.⁹

⁹ Available at: https://lawcommissionofindia.nic.in/old_reports/rpt172.pdf (visited on 30 Jan, 2024)

3.9 CONCLUSION

With this important decision, the case of Independent Thought made a significant leap in recognizing the rights of married girls and gave them the opportunity to flourish in a safer and freer environment. This petition was a defining moment in the recognition of the rights of married girls. The court's decision to read Exception 2 to Section 375 of the IPC, which earlier protected spouses from rape charges, marks a huge change. Previously, men could have sex with their wives regardless of their consent if she was over 15 years old. But with the court's decision to cancel this exemption, having sex with a woman without her consent, even if she is over 15, is now a heinous crime. This decision saved the lives of countless young girls and gave women equal rights with men.



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