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PROTECTING GIRLS, IGNORING WOMEN: THE PARADOX OF MARITAL RAPE LAW IN INDIA IN INDEPENDENT THOUGHT VS UNION OF INDIA & ANR¹

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In 2013, a writ petition under Article 32 was filed by *Independent Thought*, a child rights organization who contested the legality of Exception 2 to Section 375 of the *Indian Penal Code*³, 1860 (now Section 63 of the *Bharatiya Nyaya Sanhita 2023*⁴). *Section 375* defines rape and establishes 18 as the legal age of consent for sexual intercourse. However, *Exception 2* permitted a husband to engage in sexual activity with his wife between the ages of 15 and 18 without incriminating it as rape. Consequently, having sexual intercourse with a female under the age of eighteen was considered rape but, if the girl was married and older than fifteen, the same offense was not punishable.

This contradiction was highlighted because the *Criminal Law (Amendment) Act, 2013*⁵ had already raised the age of consent from 16 to 18 years, and the *Protection of Children from Sexual Offences (POCSO) Act, 2012*⁶ also criminalized all sexual acts with children below 18. The petitioners argued that Exception 2 undermined these legal protections and created a discriminatory distinction between married and unmarried girls, since it not only legitimized child marriage but also sanctioned marital rape of minor wives, thereby violating their rights to equality, dignity, and bodily integrity guaranteed under Articles 14, 15, and 21 of the Constitution.

The Supreme Court invalidated Exception 2 to Section 375 IPC in the case of *Independent Thought v. Union of India & Anr*⁷ as it decriminalized forced sexual relations with a wife who was between the ages of 15 and 18. Although child marriage is prohibited by the *Prohibition of Child Marriage Act, 2006*

¹Independent Thought v. Union of India & Anr AIR 2017 SUPREME COURT 4904.

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³ Indian Penal Code 1860, s 375.

⁴ *Bharatiya Nyaya Sanhita* 2023, s 63.

⁵ The Criminal Law (Amendment) Act 2013

MINISTRY OF LAW AND JUSTICE, "THE CRIMINAL LAW (AMENDMENT) ACT, 2013" (2013)

https://www.indiacode.nic.in/bitstream/123456789/15357/1/criminal_law_ammend_act_2013.pdf.

⁶ Protection of Children from Sexual Offences (POCSO) Act 2012, s4(2).

⁷ *ibid*1.

(PCMA)⁸, the State has justified the exception on the grounds that marriage should be respected and that child marriage was a societal reality. The exemption, according to *Justice Lokur*, made an artificial distinction between married and unmarried minors, which is against Articles 14, 15, and 21 of the Constitution. *Justice Gupta*, in his concurring opinion, emphasised that forced sexual intercourse with a minor wife is discriminatory and arbitrary, since an unmarried minor is protected under POCSO while a married minor is not⁹.

The judgment, while progressive in protecting minor girls and criminalising non-consensual acts within child marriages missed an opportunity to extend its reasoning to adult women. Justice Gupta avoided a detailed discussion on privacy noting that it could open the door to questioning the legality of marital rape more broadly. While non-married men who commit rape are punishable under Section 375, husbands who commit similar acts are granted blanket immunity. This establishes a hierarchy in legal protection, subordinating married women to a different legal standard. Safeguarding marital bonds does not warrant permitting a specific category of husbands to evade criminal accountability for acts of rape.

In order to recognize the dehumanizing consequences of rape, the Court also referred to *Justice Verma Committee Report 2013*¹⁰, European and American case law, and Indian precedents such as *Bodhisattva Gautam v. Subbra Chakraborty*¹¹. Though the same values of equality, decency, and bodily integrity apply to both minors and adults, the Court specifically restricted its application to child marriage, ignoring adult marital rape.

Justice Lokur said that young girls are naturally vulnerable because they are not mature and don't have control over their sexuality. Justice Gupta, on the other hand, said that they had the right to mature and make their own decisions. The contradiction is that, while the law aims to protect children, it simultaneously diminishes girls' sexual agency, reinforcing patriarchal norms by perceiving them as passive, asexual beings rather than autonomous individuals with the authority to make decisions about their bodies.

⁸Parliament of India, *THE PROHIBITION OF CHILD MARRIAGE ACT, 2006* (2007)

https://www.indiacode.nic.in/bitstream/123456789/15943/1/the_prohibition_of_child_marriage_act%2C_2006.pdf.

⁹ Centre for Law & Policy Research, "Press Conference on Supreme Court Decision in Independent Thought v. Union of India - Centre for Law & Policy Research" (*Centre for Law & Policy Research*, October 17, 2018)

<https://clpr.org.in/blog/press-conference-on-supreme-court-decision-in-independent-thought-v-union-of-india/>.

¹⁰ REDDY GK, "J. S. Verma Committee Report" (2020) <https://www.mha.gov.in/MHA1/Par2017/pdfs/par2020-pdfs/rs-11032020/1959.pdf>.

¹¹ *Bodhisattva Gautam v. Subbra Chakraborty* 1996 AIR 922.

The Court focused on safeguarding underage wives while neglecting adolescent sexual agency outside of marriage like consensual sexual activity and romantic relationships. By putting all sexual behaviour within the marital framework, it promoted the concept that heterosexual marriage as the only acceptable space for sex, erasing recognition of non-procreative or out-of-marriage sexuality. Sexual activity outside of marriage is perceived as a threat, particularly among girls, indicating a legal and social commitment to regulate female bodies rather than supporting sexual liberty. While raising the consent age to 18 appears to be protective, it mostly serves to regulate adolescent sexuality in accordance with cultural ideals about marriage and reproduction, rather than truly respecting or empowering young people's sexual autonomy.

One significant shortcoming of this judgment is that it failed to address circumstances in which both spouses are minors. In many rural and semi-urban areas, child marriages occur through familial arrangements or consensual elopement. By criminalizing intercourse solely because the wife is under 18, the Court views the boy as the offender, disregarding the possibility that he might not have the mental capacity to freely consent¹². The decision places the entire burden on the husband, despite *POCSO*'s recognition of both parties as children. This creates a legal asymmetry that could unfairly penalize teenage boys while the girls are legitimately recognized as in need of protection, ignore the agency of both minors, and undermine the principle that child protection must apply equally to both boys and girls.

In India, legislative reforms that impact marital relationships, such as recognizing marital rape a crime, are sometimes viewed as interfering with the institution of marriage because marriage is governed by the personal laws of each religious group. Marriage is valued more highly than women's rights in society, which makes it difficult to make marital rape a criminal offense. Eugen Ehrlich emphasized that the law must battle with dominant social norms when he said, "*The centre of gravity of legal development lies...in society itself.*"¹³ Given this, the opposition to making marital rape a crime is a reflection of long-held views that the institution of marriage is more important than individual liberty and dignity.

The judgment's silence on the broader issue of marital rape is also because the State usually avoids interfering in the private sphere to protect individual privacy. However, such non-intervention can be harmful when a wife faces cruelty or sexual violence, as she is left without legal recourse. This also reflects selective intervention by the State in matters of privacy: it has criminalized adultery and

¹² Akanksha Yadav, "Over 9000 thousand!" (*latestlaws.com*) <https://www.latestlaws.com/case-analysis/sc-case-analysis-on-marital-rape-independent-thought-v-union-of-india-and-another-by-akanksha-yadav/>.

¹³ Murphy T, "Living Law, Normative Pluralism, and Analytic Jurisprudence" [2012] SSRN Electronic Journal <https://papers.ssrn.com/sol3/Delivery.cfm?abstractid=2146667>.

consensual same-sex intercourse in the past, while refusing to criminalize marital rape under the guise of privacy. This results in a legally sanctioned double standard. Marital rape, though occurring within the private sphere, violates a woman's fundamental rights and it is the State's responsibility to intervene to ensure protection and justice.

Marital rape needs to be acknowledged as a "special crime" because its exclusion from criminal law is based on patriarchal presumptions rather than sound legal reasoning. Women are viewed as marital property in India, since marriage is regarded as a 'sacrament' that implies perpetual consent of the wife. Considering marital rape, a crime, contradicts the patriarchal idea of implicit consent, confirming that a wife "*cannot be treated as a commodity having no say over her body*" (*Independent Thought v. Union of India*¹⁴) and that marriage does not take away one's autonomy (*Joseph Shine v. Union of India*¹⁵). This judgement by overturning *Exception 2 of Section 375 IPC*, improved child protection but avoided discussing adult marital rape. Therefore, by following the *Justice Verma Committee Report* ¹⁶(2013), Exception 2 must be eliminated, and marital rape should be 'fully' criminalized in order to guarantee that marriage does not conceal abuse and to guarantee that women have equal constitutional standing.

¹⁴ *ibid*1.

¹⁵ *Joseph Shine v. Union of India* WP (Crl.) 194/2017.

¹⁶ *ibid*9.