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INDEPENDENT THOUGHT OF INDIA Vs. **UNION OF INDIA**

AUTHORED BY - DISHIMA JAIN

INTRODUCTION

The subsequent commentary deals with the case of Independent Thought of India Vs. Union of India which is a seminal ruling delivered by a coram of judges comprising Justices Madan Lokur and Deepak Gupta. In this landmark judgment of the Supreme Court of India in 2017, the longest-standing legal anomaly with regard to Exception 2 of Section 375 of the Indian Penal Code (hereinafter referred to as the “IPC”) was challenged. The exception had provided an exemption to non-consensual sexual intercourse with wife of age 15 to 18 years from the definition of rape. The main reason for this case to be brought forward and the stemming confusion rests in the fact that the IPC itself, after it had amended the provision in 2013, wherein the age of consent for any sexual activity was increased to 18 years. This case, therefore, served as an important instance to finally pay heed to the fundamental problem of marital rape of child brides and also laid the foundation of amendment within the section during the draft of Bharatiya Nyaya Sanhita, 2023.

The challenge was brought forward in the form of a writ petition by a child rights organization, i.e., Independent Thought, urging the Supreme Court to look into Exception 2, which was severely violating the fundamental rights of child brides, particularly their right to bodily integrity, dignity, and freedom from sexual violence. To buttress their argument, they had emphasized recent enactments such as the Protection of Children from Sexual Offences Act (POCSO), 2012, which criminalizes all sexual activity with a minor, whether such other person was or was not married.

This comment critically examines the Court's reasoning through the lens of equality, dignity, and bodily autonomy, while highlighting the broader implications of the judgment for statutory interpretation, gender justice, and judicial activism in India.

UNDERSTANDING THE LEGAL FRAMEWORK

The legal framework surrounding child marriage and marital rape in India is marked by conflicting provisions within various statutes. Section 375 of the IPC defines 'rape'¹. This Section was inserted in the IPC in the present form by an amendment carried out in 2013 and it provides that a man is said have to commit rape if he has sexual intercourse with a woman under any of the seven descriptions mentioned within the clauses of the section.

Exception 2 to Section 375 of the IPC as stood earlier provided that if a man has sexual intercourse with his wife who is aged above 15 years is not rape, which further implies that if a woman is between 15 and 18 years of age and her husband has sexual intercourse with her even against her willingness then it is not rape and her willingness or consent is irrelevant.

This implies that husband of a girl child between 15 and 18 years of age has been given a blanket liberty and freedom to have non-consensual sexual intercourse with his wife which protects him from the law and he gets out with clean hands under the IPC since such non-consensual sexual intercourse is not rape for the purpose of Section 375 of the IPC. Even though by way of amendment the Parliament had raised the age of consent to 18 years in 2012 by way of POSCO Act, 2012.

This provision is inherently flawed and is in direct conflict with several progressive and protective statutes enacted in India. Most notably, it contradicts the **Prohibition of Child Marriage Act, 2006**, which criminalizes the solemnization of marriages involving girls below 18 years of age, and the **Protection of Children from Sexual Offences Act, 2012 (POCSO)**, which unequivocally criminalizes all forms of sexual activity with individuals under the age of 18, irrespective of marital status.

The actual confusion therefore that is created is that if a husband has sexual intercourse with a girl child between 15 and 18 years of age, then such husband of the girl child is said to have

¹ Government of Odisha (2022) 'Appointment of Para Legal Volunteers – Information and Guidelines' (5 August 2022) <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080544.pdf> accessed 3 July 2025.

not committed rape as defined in Section 375 of the IPC but is said to have committed aggravated penetrative sexual assault in terms of Section 5(n)² of the POCSO Act³.

FACTS

The petitioner is a registered society and a non-profit organization registered on August 6, 2009, working in the area of child rights. The petitioner in 2017 filed for a Writ Petition before the Supreme Court under Article 32 of the Indian Constitution, which provides the right to go to the Supreme Court in case of violation of Fundamental Rights as enshrined in Part III of the Constitution. The petitioners' main contention was that Exception 2 to Section 375 of the IPC (as prevailed then) served as a source of grave infringement of the rights of minor girls and a reason for their hardships since it permitted sexual intercourse, against their consent. Secondly, they stated that the law treated a married minor girl and an unmarried minor girl differently, even though both were considered legally minors under the Protection of Children from Sexual Offences Act (POCSO) and the Prohibition of Child Marriage Act (PCMA).

The petitioner further claimed that Exception 2 violated Articles 14, 15, and 21 of the Indian Constitution. The petitioner had also presented the duality in the Indian Law on one hand, law mandates that a woman must be at least 18 years of age to give consent to any sexual activity, on the other hand, Exception 2 to Section 375 provides an exception to the same as discussed earlier. This legal inconsistency perpetuates a discriminatory distinction that compromises the bodily integrity and reproductive autonomy of married minor girls

ISSUES

The questions before the court, therefore, were as follows:

- Whether sexual intercourse between a man and his wife, where the wife is a minor between the ages of 15 and 18 years, falls within the ambit of rape under Indian criminal law?

² POCSO ACT, 2012

Section 5(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child is said to commit aggravated penetrative sexual assault.

³ Reproductive Rights Collective, *Securing Reproductive Justice in India: Chapter 6 (Reproductive Rights Collective Foundation 2020)* <https://reproductiverights.org/wp-content/uploads/2020/12/SecuringReproductiveJusticeIndia-Chpt06.pdf> accessed 4 July 2025.

- Whether Exception 2 to Section 375 of the Indian Penal Code, insofar as it excludes the criminalisation of non-consensual sexual intercourse with a minor wife aged between 15 and 18 years, is manifestly arbitrary, discriminatory, and violative of the fundamental rights guaranteed under the Constitution of India?

ARGUMENTS BY THE PETITIONER

The petitioner's arguments were formulated around the following points:

Bodily Integrity And Reproductive Rights

The learned counsel for the petitioner argued that Section 375 of the Indian Penal Code (IPC) sets the age of consent for sexual intercourse at 18 years, thereby rendering any sexual activity with a girl under this age as statutory rape, regardless of her consent⁴. In support of this contention, the counsel cited multiple statutes that uniformly recognize girls below the age of 18 as children, emphasizing the need for legal consistency in acknowledging sexual intercourse with such minors as rape. However, he pointed out that Exception 2 to Section 375 IPC carves out an arbitrary exemption: if a girl aged between 15 and 18 is married, her husband is permitted to have non-consensual sexual intercourse with her without attracting penal consequences under the IPC.

Emphasis was placed on the case *Suchita Srivastava v Chandigarh Administration* (2009),⁵ where it was stated that it is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods.

State of Karnataka v Krishnappa (2000)⁶, "Sexual violence apart from being a dehumanising act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity-it degrades and humiliates the

⁴ *Shonee Kapoor, 'Judgement – Child Marriage – Minor – Sexual Intercourse: Independent Thought v Union of India & Anr' (Shonee Kapoor, 30 December 2022)* <http://www.shoneekapoor.com/independent-thought-vs-union-of-india-anr> accessed 4 July 2025.

⁵ *Suchita Srivastava v Chandigarh Administration* (2009) 9 SCC 1 : MANU/SC/1580/2009.

⁶ *State of Karnataka v Krishnappa* (2000) 4 SCC 75 : MANU/SC/0210/2000.

victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience”

*State of Punjab v Gurmit Singh*⁷, it was stated that rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process.

This exception effectively grants a husband blanket immunity. By way of this exception, the right of such a girl child to bodily integrity and the right to decline to have sexual intercourse with her husband has been statutorily taken away.

Lack of Rational Nexus

The counsel further contended that the marital status of a girl between 15 and 18 years bears no rational nexus to the objective sought to be achieved by this legal exception. He submitted that marriage should not alter the legal status of a girl under 18 as a child, nor does it imply her mental or physical preparedness for engaging in sexual or conjugal relations. On these grounds, he asserted that Exception 2 is not only arbitrary but also discriminatory⁸.

Violation Of Fundamental Rights

The exception was said to be discriminatory towards the girl children aged 15 to 18 who were married in that it allowed their husbands to have sexual intercourse with them without their consent. It directly contravenes the beneficial intent of Article 15(3) of the Constitution of India, which empowers the State to make special provisions for women and children, thereby undermining the fundamental rights of minor married girls.

Violation of Human Rights

The learned counsel of the petitioner further argued that if a girl child face forced sexual intercourse by her husband, it violates her liberty and dignity and amounts to a violation of the human rights defined under Section 2(d) of the Protection of Human Rights, 1993.

⁷ *State of Punjab v Gurmit Singh* (1996) 2 SCC 384.

⁸ *Article 15 of the Constitution of India* (Wikipedia, 23 June 2025) https://en.wikipedia.org/wiki/Article_15_of_the_Constitution_of_India accessed 4 July 2025.

ARGUMENTS BY THE UNION OF INDIA

The respondent, the Union of India, advanced its defence drawing upon legal, societal, and cultural considerations to justify its continued validity as follows.

1. Preservation of Customary Practices:

The Union contended that the marital exception is essential to uphold the sanctity of customary practices prevalent in different parts of India. It was argued that the removal of this exception would result in the criminalisation of sexual intercourse between consenting spouses, thereby interfering with marital relationships.

2. Protection Against Criminal Liability:

The respondent emphasised that the exception serves to provide husbands with a liberty under criminal law for engaging in sexual relations with their minor wives due to the existence of such a conjugal relation between the spouses. It was contended that criminalising such conduct could lead to significant jeopardising of familial stability, and being a potential reason for dissolution of marriages, thereby adversely affecting different sections of society at different levels.

3. Inconsistencies concerning Age of Consent:

The respondent advanced its arguments in form of a concern regarding the harmonisation of the age of consent in marital relationships with that prescribed under the Protection of Children from Sexual Offences Act, 2012 (POCSO)—i.e., 18 years. It argued that such inconsistencies could generate confusion with respect to the legal status of consent in matrimonial relations.

4. Marital Privacy and Autonomy:

The respondent further asserted that subjecting marital sexual relations to criminal scrutiny, even when the wife is a minor, would constitute unwarranted state interference in the intimate domain of the marital relationship. This, they argued, would infringe upon the constitutionally recognised values of the right to privacy

5. Statutory Harmony Among Legal Enactments:

The Union maintained that the Indian legal framework had achieved a careful balance among the IPC, POCSO, and PCMA. Exception 2, it argued, plays a critical role in delineating offences involving sexual abuse of children outside marriage from sexual acts occurring within legally recognised (albeit underage) marital relationships, thereby avoiding overlapping jurisdictions and legal conflict.

6. Confusion between International Law and Domestic Sovereignty:

Finally, the respondent contended that while India is a signatory to international

instruments such as the United Nations Convention on the Rights of the Child (CRC), these cannot override national legislation or policy. It was submitted that matters such as the regulation of marriage must be adjudicated within the framework of India's unique socio-economic and cultural context, without being unduly influenced by international standards.

JUDGEMENT

RATIO DECIDENDI

Justice Madan B. Lokur

The Court observed that Article 21 of the Constitution guarantees every individual, including a girl child, the fundamental right to live with dignity. Laying emphasis on the documentary evidence presented to the court, the Court noted that early marriage not only severely undermines a girl child's self-esteem and confidence but also subjects her to institutionalised sexual abuse. The Court emphasized that Article 21 ensures a life of dignity and not just mere animal existence. A girl child being subjected to non-consensual sexual intercourse in a marriage cannot be said to be living a life of dignity., by allowing a husband to have non-consensual sexual intercourse with his wife aged between 15 and 18 years though Exception 2 to Section 375 of IPC, the law has granted him undue control over her body and thereby power to violate her right to bodily autonomy as and when he please.

The Court found this position inconsistent, as the same husband could be booked under IPC for molestation but not for rape. The Law Commission of India had acknowledged this inconsistency in its 172nd Report but did not address it adequately. This legal contradiction reflects a discrimination towards girl child within marital relationships, calling for necessary harmonization of various statutes and provisions of the IPC.

Furthermore, the Court addressed the severe curtailment of reproductive choices for married minor girls. It cited the heightened risks of early pregnancy, maternal mortality, neonatal deaths, and child malnutrition, substantiated by empirical evidence. While acknowledging the traditional norms, the Court held that constitutional morality must prevail, and no interpretation of law should endorse practices that violate the right to life and bodily integrity of children.

Rejecting the argument that recognising marital rape of minor girls would threaten the institution of marriage, the Court stated that divorce and judicial separation may affect

individual marriages, but they do not undermine the concept of marriage itself. Hence, protecting minor girls from rape within marriage cannot be seen to be destructive to the institution of marriage.

Most importantly, the Court questioned the rational nexus between the objective of the exception and its real-life application. It highlighted that sexual intercourse with a married minor girl is deemed aggravated penetrative sexual assault under the POCSO Act, even though the same act is exempted under the IPC, pointing out the dichotomy prevalent between PCMA, 2002, and IPC as a factor undermining the legislative intent and leading to confusion concerning the legal position. The punishments under both statutes are identical. Thus, the only consequence of the exception is to shield the husband from prosecution under the IPC, while he remains prosecutable under the POCSO Act. The Court found this legal inconsistency unjustifiable and unsupported by any rational explanation.

Justice Deepak Gupta

The learned judge in advancement to the bench's observation added that only the Parliament possesses the legislative competence to determine the age of consent under clause sixthly of Section 375 of the Indian Penal Code, as well as to legislate on the minimum age of marriage. He further emphasized that under several statutory frameworks a person below the age of 18 years is uniformly recognized as a child incapable of fully safeguarding his or her interests citing certain examples of statutes such as the Protection of Children from Sexual Offences Act, 2012, the Juvenile Justice (Care and Protection of Children) Act, 2015, the Child Marriage Restraint Act, 1929, the Protection of Women from Domestic Violence Act, 2005, the Majority Act, 1875, the Guardians and Wards Act, 1890, and the Indian Contract Act, 1872.

After thorough consideration of the data and empirical evidence presented before the Court, it was noted that child marriage and non-consensual sexual intercourse with those minor girls constitutes a grave violation of their human rights, thereby severely impacting their physical as well as psychological health. The Court, therefore, unequivocally ruled that the State cannot randomly invoke custom as a defence to justify child marriage, particularly when it concerns the well-being of a minor girl.

Consequently, Exception 2 to Section 375 of the Indian Penal Code was held to be manifestly arbitrary, and in violation of the constitutional values enshrined in Articles 14, 15, and 21, and

therefore cannot be sustained in a constitutional democracy like India, which is committed to the protection of children's rights.

Conclusion

In my opinion the Supreme Court's judgement in *Independent Thought v. Union of India* stands as a progressive advancement in India's constitutional and criminal jurisprudence, wherein the Hon'ble Supreme Court has rightly recognized the need to increase the age of minor girls to 18 years old in Exception 2 to Section 375 of the Indian Penal Code for the reason of it being arbitrary, discriminatory, and violative of the fundamental rights enshrined under Articles 14, 15, and 21.⁹

I firmly believe that the Court's reasoning is rooted in the principles of bodily autonomy, human dignity, and constitutional morality, rightly recognizing that the marital status of a minor cannot serve as a legal justification to exempt the husband from criminal liability for non-consensual sexual intercourse. The judgment has not served as a bridge to the prevalent inconsistency between the IPC and protective legislations such as the POCSO Act, 2012, but also challenges the deep-seated patriarchal norms that have long pervaded the statutory law in India. The subsequent amendment in the age to 18 years under Exception 2 of Section 63 of the *Bharatiya Nyaya Sanhita, 2023*, in my view, marks a long-overdue legislative reform which will serve as a mark of justice for the minor girls' lives. It reflects an evolution in Indian jurisprudence showing its' commitment towards children betterment, with a focus on their rights, and alignment with international human rights standards, and one that I hope will serve as a foundation for further judicial and legislative progress in the recognition of marital rape in its entirety.

⁹ *Patna High Court, Sexual Harassment of Women at Workplace (POSH) Portal (Patna High Court, undated)* <https://patnahighcourt.gov.in/POSH/> accessed 7 July 2025.