



## CONSTITUTIONALITY OF MARITAL RAPE: A CRITICAL ANALYSIS

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The recent judgment of Supreme Court of India in the landmark judgment of *Independent Thought v. Union of India*<sup>1</sup> (Hereinafter “Independent Thought case”) has decided that “sexual intercourse whether consensual or non-consensual by the husband with his wife aged between 15 years to 18 years shall be punishable as rape.”

### I. WHAT IS “RAPE”?

The word ‘rape’ has been derived from Latin term “Rapio” which literally means “to seize”. Rape is “forcibly ravishing a woman against her will or without her consent”. As per Merriam-Webster dictionary meaning of the term ‘rape’ is “unlawful sexual activity and usually sexual intercourse carried out forcibly or under threat of injury against a person's will or with a person who is beneath a certain age or incapable of valid consent because of mental illness, mental deficiency, intoxication, unconsciousness, or deception”.

Section 375 of Indian Penal Code, 1860<sup>2</sup> (hereinafter “IPC”) has defined the term ‘Rape.’ As per this definition, the following constitutes rape -

1. Sexual intercourse with any woman without her will or consent (non-consensual sexual intercourse).

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<sup>1</sup>*Independent Thought v. Union of India*, W.P. (Civil) No. 382 of 2013 (decided on 11<sup>th</sup> October 2017 by Division Bench consisting of Madan B. Lokur and Deepak Mishra JJ).

<sup>2</sup> “375. Rape- A man is said to commit “rape” if he—

- a. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- b. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- c. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- d. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation 1.—For the purposes of this section, “vagina” shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

2. Sexual inter course with a girl less than 18 years with or without her consent (statutory rape).
3. If a woman is less than 15 years then sexual inter course by her husband with or without her consent will constitute rape.
4. Exception 2 appended to section 375 lays down an exception for sexual intercourse by the husband with his wife between 15 years and 18 years.
5. Sexual intercourse by husband with wife even though all the ingredients of section 375 are being fulfilled is not rape (Marital Rape).

The last two circumstances stated above are those in which the offender is not liable to be penalized for the offence of rape although it satisfies the conditions laid down in section 375 IPC just because the victim and the offender are related through matrimonial ties, i.e. rape within the boundary of marriage by husband of his wife also known as marital rape.

The term 'marital rape' is not defined by our legislature as sexual intercourse by husband with his wife without her consent is not considered an offence in the Indian legal system. However, on perusal of definition of rape given under section 375 IPC 'Marital Rape' can be defined as non-consensual sexual intercourse by husband with his wife; it may involve actual use of force, threat of force or by resorting to physical violence.

In Indian patriarchal system the condition of woman is worse. We still follow the 17<sup>th</sup> Century Common Law Principles when women were considered nothing more than a chattel, they were their father's property before marriage and after marriage the husband was considered their owner; once they are married they had no right to say 'No' to their husband if he wants to enjoy her company. It comes forth from the statement of Sir Matthew Hale Chief Justice in England that: "*The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract.*"<sup>3</sup>

Section 375 of IPC lays down that "sexual intercourse by a man with a girl under the age of 18 years (with or without her consent)" constitutes statutory rape. To analyze the concept of statutory rape we have to know on what basis such distinct offence is made. It is well known fact that a minor is considered by law an incapable entity so as to decide for himself or herself what is in his/her best interest. So, law has taken this responsibility on its own shoulders. Legislature has enacted various laws and from the time of Privy Council till now the courts in India are also taking care of the interest of a minor. The term 'child/ minor' is defined in various statutes; in case of a girl every statute deems a girl under the age of 18 years as a child.<sup>4</sup> The law is duty bound to protect the interest of a child under 18 years of age. Hence section 375 sixthly penalizes sexual intercourse with a girl who is below 18 years of

<sup>3</sup> Matthew Hale, "History of the Pleas of the Crown", 1 *Hale PC* 629 (1736). See further, S. Fredman, *Women and the Law* 55-57 (OUP, 1997).

<sup>4</sup> The Child Marriage Restraint Act, 1929 was repealed by the Prohibition of Child Marriage Act, 2006 and this Act defines a child as follows: "2. Definitions.—In this Act, unless the context otherwise requires,— (e) "child" means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age. Under the Protection of Women from Domestic Violence Act, 2005, a child has been defined under Section 2(b) to mean any person below the age of 18 years; Section 3 of the Majority Act, 1875 provides that a person shall attain the age of majority on completing the age of 18 years and not before." It would, however, be pertinent to mention that Section 2 of the Indian Majority Act contains a non-obstante clause excluding laws relating to marriage, divorce, dower and adoption from the provisions of that Act. Under Section 4(i) of the Guardians and Wards Act, 1890, "a minor has been defined to mean a person, who has not attained majority under the Majority Act". Under Section 4(a) of the Hindu Minority and Guardianship Act, 1956 a minor has been defined to mean "a person who has not completed the age of 18 years". Under the Representation of the People Act, 1951, "a person is entitled to vote only after he attains the age of 18 years".

age. But by virtue of Exception 2 to Section 375 of the IPC, if a girl child between 15 and 18 years of age is married, her husband can have consensual or non-consensual sexual intercourse with her, without the fear of being prosecuted for the offence of rape, just because such minor child happens to be his wedded wife. Such girl child loses her right to bodily integrity and to refuse to have sexual intercourse with her husband because IPC takes away this right from her.

It is often argued that such provision is kept on our statute books so that the institution of marriage can be saved. But the people who give this argument don't understand the fact that institution of marriage cannot be disturbed just by not giving the right to the husband to have sexual intercourse with his wife without her consent. The bond of marriage becomes strong when both the partners have equality in making the choices of their personal lives. If one partner is given preference over the other then the institution of marriage becomes weak. This can definitely lead to disturbing the institution of marriage. Another justification often raised is that because the girl child got married, she gives consent either expressly or impliedly, to have sexual intercourse with her husband. This justification in itself sounds absurd as on the one hand law says that a child under the age of 18 years is incapable of giving consent to sexual intercourse in case she is unmarried, so needs protection at the hands of law; hence the law penalize such act by virtue of section 375 sixthly of IPC and on the other hand it says if such girl child is married then she acquires that level of maturity that she is capable of giving free consent to have sexual intercourse with her husband. No objective seems to have achieved by keeping such a retrogressive provision on our statute books per-se; just because a girl child between 15 and 18 years of age is married, she does not cease to be a child or attain the capacity to consent for sexual intercourse. Hence, "Exception 2 to Section 375 of the IPC is not only arbitrary but is also discriminatory and contrary to the beneficial intent of Article 15(3) of the Constitution which enables Parliament to make special provision for women and children."<sup>5</sup> Moreover, it amounts to an unreasonable classification being made between girls under the age of 18 years only on the basis of their marital status and their right to life and personal liberty is also violated by not providing her the freedom to make choices as to her own body. Hence, it needs to be wiped out of the statute books.

## II. CONFLICT BETWEEN VARIOUS LAWS APPLICABLE IN INDIA

India is a multi-religious country. All the citizens of India in matters of Marriage, Divorce and Succession are governed by laws of their respective religion. For the purposes of application of Hindu Laws every person is Hindu if he is not Muslim, Christian, Parsi or Jew by religion.<sup>6</sup> Hindu law under section 5 lays down five essential conditions for a valid Hindu Marriage. It says that two Hindus can marry each-other if they don't have a spouse living, they are in fit state of mind, the bride is above 18 years of age and the groom is above 21 years of age and they are not related to each-other within the degree of prohibited relationship or in *sapinda* relation.<sup>7</sup>

<sup>5</sup>*Supra* note 1.

<sup>6</sup> Hindu Marriage Act, 1955, s. 2.

<sup>7</sup>*Id.*, s.5. "Condition for a Hindu Marriage.- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

- (i) neither party has a spouse living at the time of the marriage;
- (ii) at the time of the marriage, neither party,- (a) is incapable of giving a valid consent of it in consequence of unsoundness of mind; or  
(b) though capable of giving a valid consent has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or  
(c) has been subject to recurrent attacks of insanity or epilepsy;
- (iii) the bridegroom has completed the age of twenty one years and the bride the age of eighteen years at the time of the marriage;

If a marriage is solemnized in contravention of condition of bigamy, degree of prohibited relations and sapinda relation then such marriages are void *ab initio* by virtue of section 11 of Hindu Marriage Act, 1955 (Hereinafter "HMA").<sup>8</sup> Whereas section 12(1)(b) HMA<sup>9</sup> provides if a marriage is solemnized in contravention of section 5(ii) HMA then such marriage is voidable and the parties to the marriage can go to the court and get their marriage annulled. But if the condition as to the age of bride and groom given in section 5(iii) HMA is violated then such marriage is neither void nor voidable as per HMA rather such marriage is perfectly valid marriage. Even if a child marriage is solemnized, which is prohibited by law and punishable, it does not invalidate the marriage until the parties to such union ask for its dissolution. Such a situation is called *factum valet*. i.e. something prohibited by law but if done the act does not become invalid but stays valid. However, in such a marriage two consequences are provided in the form; (i) right to divorce under section 13 (2) (iv) HMA<sup>10</sup> to the minor girl wherein she can repudiate such marriage after attaining the age of 15 years till she attains the age of 18 years and (ii) section 18 HMA<sup>11</sup> which punishes the person with one year of imprisonment or with fine upto one lakh rupees or with both.

In Muslim law also if a girl is given in marriage during her minority, her marriage is valid. But Dissolution of Muslim Marriage Act, 1939 gives her a right to get such marriage repudiated after she attains the age of 15 years but before she turns 18.

Section 3(1) of the Prohibition of Child Marriage Act, 2006 (hereinafter 'PCMA') says that a child marriage is voidable at the option of the party who was minor at the time of such marriage.<sup>12</sup> Though PCMA makes child marriage voidable it has been made an offence and provides punishment for contracting child marriage. Section 9 of PCMA<sup>13</sup> provides punishment for the groom if he is above 18 years of age and marries a girl under 18 years of

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(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two; (v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two"

<sup>8</sup> *Id.*, s.11. "Nullity of marriage and divorce- Void marriages.- Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, against the other party be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v), s. 5."

<sup>9</sup> *Id.*, s. 12. "Voidable Marriages.- (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:- (a) that the marriage has not been consummated owing to the impotency of the respondent; or (b) that the marriage is in contravention of the condition specified in clause (ii) of s. 5; or ..."

<sup>10</sup> *Id.*, s.13(2)(iv). "A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years."

<sup>11</sup> *Id.*, s. 18. "Punishment for contravention of certain other conditions for a Hindu marriage.- Every person who procures a marriage of himself or herself or to be solemnized under this Act in contravention of the conditions specified in clauses (iii), (iv), and (v) of s. 5 shall be punishable- (a) in the case of a contravention of the condition specified in clause (iii) of s. 5, with imprisonment which may extend to one year, or with fine which may extend to one lakh rupees, or with both"

<sup>12</sup> S. 3(1) of PCMA: "Child marriages to be voidable at the option of contracting party being a child.— Every child marriage, whether solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage: Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage."

<sup>13</sup> *Id.*, s. 9. "Punishment for male adult marrying a child.—Whoever, being a male adult above eighteen years of age, contracts a child marriage shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both."

age. Section 10<sup>14</sup> provides for punishment for any person who conducts, abets or perform such child marriage. Section 11<sup>15</sup> provides punishment for those who promote or permit solemnization of child marriage. In all these cases punishment is rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees. Section 14<sup>16</sup> provides that if a child marriage was injuncted by jurisdictional judicial officer and the marriage was still performed then such child marriage shall be void.

Protection of Children from Sexual Offences Act, 2012 (hereinafter ‘POCSO’) in its statement of objects and reasons states that the National Crime Record Bureau data indicates that there is a sharp increase in sexual offences against children in recent times. This finding was corroborated by the study on Child Abuse: India 2007 by the Ministry of Women and Child, Government of India. Child marriage is seen as a mild form of violence against children. It also took into consideration the Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter ‘CEDAW’) to which India is signatory. This Convention in Article 16.2 provides that “*The betrothal and marriage of a child shall have no legal effect, and all necessary action including legislation, shall be taken to specific minimum age for marriage and to make the registration of marriages in official registry compulsory.*”<sup>17</sup>

The Convention on the Rights of the Child (hereinafter ‘CRC’) by virtue of Article 34, provides that the Government of India is bound to “undertake all appropriate national, bilateral and multi-lateral measures to prevent the coercion of a child to engage in any unlawful sexual activity.” The key words are “unlawful sexual activity” but the IPC declares that “a girl child having sexual intercourse with her husband is not unlawful sexual activity within the provisions of the IPC, regardless of any coercion.”<sup>18</sup>

Further the Constitution of India under Article 15(3) provides that the “Legislature is empowered to enact any law for the benefit of women and children.”<sup>19</sup>

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<sup>14</sup>*Id.*, s.10. “Punishment for solemnising a child marriage.—Whoever performs, conducts, directs or abets any child marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees unless he proves that he had reasons to believe that the marriage was not a child marriage.”

<sup>15</sup>*Id.*, s. 11. “Punishment for promoting or permitting solemnisation of child marriages.—(1) Where a child contracts a child marriage, any person having charge of the child, whether as parent or guardian or 3 any other person or in any other capacity, lawful or unlawful, including any member of an organisation or association of persons who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, including attending or participating in a child marriage, shall be punishable with rigorous imprisonment which may extend to two years and shall also be liable to fine which may extend up to one lakh rupees: Provided that no woman shall be punishable with imprisonment.

(2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that where a minor child has contracted a marriage, the person having charge of such minor child has negligently failed to prevent the marriage from being solemnised.”

<sup>16</sup>*Id.*, s. 14. “Child marriages in contravention of injunction orders to be void.—Any child marriage solemnised in contravention of an injunction order issued under section 13, whether interim or final, shall be *void ab initio.*”

<sup>17</sup> India became a signatory to the CEDAW Convention on 30th July, 1980 (ratified on 9th July, 1993) but with a reservation to the extent of making registration of marriage compulsory stating that it is not practical in a vast country like India with its variety of customs, religions and level of literacy. Nevertheless, the Supreme Court in the case of *Seema (Smt.) v. Ashwani Kumar* (2006) 2 SCC 578 directed the “States and Central Government to notify Rules making registration of marriages compulsory”. However, the same has not been implemented in full.

<sup>18</sup> Art. 34 of CRC- “Sexual exploitation: Governments should protect children from all forms of sexual exploitation and abuse. This provision in the Convention is augmented by the Optional Protocol on the sale of children, child prostitution and child pornography.”

<sup>19</sup> Art.15 (3) of the Constitution of India: “Nothing in this article shall prevent the State from making any special provision for women and children.”

In light of above stated provisions the Parliament enacted POCSO. Its preamble provides that '*sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed*'. It directly contravenes Exception 2 appended to section 375 which does not criminalise sexual intercourse by husband with his wife between the age of 15 years and 18 years. IPC does not declare such sexual intercourse as penal offence. On the other hand, Section 5(n) of POCSO provides that if husband or any other member of family or friend commits 'penetrative sexual assault' with a child he shall be punished. Section 6 of POCSO provides minimum ten years of rigorous imprisonment which may extend for life and fine.<sup>20</sup>

The rape of a married girl child by her husband is termed as 'aggravated penetrative sexual assault' in the POCSO, but IPC does not recognize such sexual intercourse by husband with minor wife as rape. As per this scheme of law a person would be criminally liable under POCSO for having sexual intercourse with his wife but he would not be liable for any offence under IPC on the same facts. This dilemma was solved by section 42A of POCSO inserted by 2013 Amendment to Criminal Laws<sup>21</sup> which provides that the provision in POCSO are in addition to any existing law and in case of any inconsistency POCSO shall prevail. Moreover section 5 of IPC<sup>22</sup> read with section 41<sup>23</sup> provides that IPC does not affect the operation of any special law; POCSO being a special law shall prevail over IPC. Hence there is no inconsistency in POCSO and IPC.

On the analogy of the decision given by the Apex Court in the Independent Thought case marital rape of any women without looking at the age of such women shall be made an offence; as making a distinction on the basis of marital status or age of a women, whether the nonconsensual sexual intercourse would amount to rape or not is in violation of right to equality enshrined under Article 14 of the Constitution of India. Further it also violates the right to life and personal liberty of married woman if she is not allowed to refuse any sexual advances even from husband if she does not want to indulge in such act. It is ironical that a husband would be liable for outraging the modesty of his wife but if he has non- consensual sexual intercourse with her then he will not be liable for any offence.

Now time has come that we remove all the anomalies lying in our penal justice system to bring equality among both the sexes.

### III. CONCLUSION

In the end we can say that though criminalizing marital rape as such was not the question which was dealt by the Supreme Court in Independent Thought case, but by declaring Exception 2 appended to section 375 in case of sexual intercourse by husband with his wife who is between the age of 15 years and 18 years unconstitutional the court has opened the gate to bring in the issue of marital rape within the ambit of penal laws. All what

<sup>20</sup> S. 6 of POCSO- "Punishment for aggravated penetrative sexual assault Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine."

<sup>21</sup> *Id.*, s. 42. "Act not in derogation of any other law-The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency."

<sup>22</sup> Section 5 of IPC-"Certain laws not to be affected by this Act.—Nothing in this Act shall affect the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of the Government of India or the provisions of any special or local law."

<sup>23</sup> *Id.*, s. 41. "Special law- A "special law" is a law applicable to a particular subject."

needs to be done is to pick up from point where the present case has left and get marital rape declared an offence.