



INDEPENDENT THOUGHT v. UNION OF INDIA: A CRITICAL COMMENT

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On October 17, 2017, the Supreme Court of India, in *Independent Thought v. Union of India*¹ held that sexual intercourse between a man and his wife aged between 15 to 18 years is rape. The judgment which was prospective in effect thus read down the marital rape exception. The State had defended the exception on the grounds that child marriage, though illegal vide Prohibition of Child Marriage Act (PCMA), continues to be a stark reality and the sanctity of the institution of marriage needs to be preserved. Rightly rejecting both these arguments, the Court declared the exception arbitrary and discriminatory and thus violating Articles 14, 15 and 21 of the Constitution.

The Court refrained from making any comments on the marital rape exception; instead it framed the issue in reference to the ill-effects of the practice of child marriage. It was emphasized that child marriage violates the human rights of a child and is particularly detrimental to the rights of the girl child, the right to bodily integrity, reproductive choice and “the right to develop into a mature woman”, amongst others.

The Court through this decision sought to address a glaring anomaly in the age of consent law: while the Protection of Children from Sexual Offences Act (POCSO Act), 2012, prescribes the age of consent as 18 years for both male and female, the rape law provision in the Indian Penal Code postulated 15 years as the age of consent for married girls. Thus, in law, consensual sex by an unmarried girl below 18 years is deemed to be without consent, but if a girl is married, even when she does not consent to sexual acts with her husband, it will be presumed to be consensual.

In other words, a girl below 18 years, otherwise unable to give consent, is presumed to have consented to her husband for all sexual acts, at all times. This discrepancy, the Court held, is preposterous given the “interest of the child”, especially the girl child. Moreover, such inconsistency cannot stand, especially in view of section 42A of the POCSO which provides that in case of any inconsistency, the provisions of POCSO would override other laws.

According to the Court, the legislature is categorical and unambiguous that anyone below the age of 18 years is a child. The increase in the age of consent to 18 years in the 2013 Criminal Law Amendments is in tune with various other enactments such as the POCSO Act, the Juvenile Justice (Care and Protection) Act, 2015 the Protection of Women from Domestic Violence Act, 2005, the Majority Act, 1875, the Prohibition of Child Marriage Act, 2006, the Guardians and Wards Act, 1890, the Indian Contract Act, 1872 and many other laws.

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¹Writ Petition (CIVIL) NO. 382 OF 2013.

While this decision has been applauded and seen as a dent in the marital rape exception, it remains embedded in the larger objective of the regulation of female sexuality. It is important to note that in all its talk of the rights of the girl child, there is no mention at all of the right to sexual agency, within or outside marriage. In fact, the Court uncritically buys into and consolidates the notion of a child/adolescent as an asexual being, also problematically encoded in the POCSO Act, and the girl/woman as mere object of male sexuality and not the subject of one.

The slippages and contradictions in the Court's understanding of the figure of the (girl) child are too glaring to be overlooked: while Justice Madan Lokur approvingly cited a study by the Government of India on child sexual abuse stating that "minor girls have not achieved full maturity and capacity to act and lack ability to control their sexuality"², concurring Justice Deepak Gupta emphasised that "the girl child must not be deprived of her right of choice...[and] her right to develop into a mature woman."³

Both the judges subscribe to the age of sexual consent as postulated in the POCSO Act. In the zeal to save the girl child from the oppression of marital sex, the Court sidetracked the issue of familial violence, through age of consent laws, on adolescents who sexually express themselves. The slippages in lacking "the ability to control their sexuality" (which admits to sexual desires below 18) and the question of "choice" (which does not specify choice to what and surely must include the right to sexual expression before and outside marriage) are papered over with the rhetoric of victimisation with no serious thought to the sexual agency of the young, and further strengthens the idea that a girl below the age of 18 years is incapable of consent.

For the Court, there is no space for sexuality outside marriage. By collapsing all sexual intercourse into intercourse within heterosexual marriage, the Court left no space for non-procreative, out-of-marriage sex between young people which, interestingly is seen as a threat to the state. Moreover, in reducing sexual intercourse even within marriage to the economic logic of a burden on the nation, the Court neatly sidesteps both the issue of the mental and physical costs of marital rape that are borne by women above 18, in the artificial distinction they endorse between marital rape victims above 18 years and those less than 18 but, more importantly, of any sexual agency both within and outside of heterosexual marriage and certainly below the age of 18.

At best, this decision is a step towards the abolition of heterosexual child marriage (the Court calls upon all state legislatures to follow the example of Karnataka and declare child marriages to be void *ab initio*). However, it would be fallacious to conclude that it has created a dent in the marital rape exception, even though the marital rape exception in criminal law is read down in the specific case of child marriages.

The reading down is not because minor wives are accorded equal rights as subjects or in the marriage, but because the minor wives were not *really* wives in the first place (Justice Gupta use the terms wife and husband in quotation marks to refer to marriages of girls less than 18 years, suggesting they are not really wives and husbands). They are sexless children on whom sexual intercourse will be an act of violence with the possible unfortunate effect of malnourished children. Despite the language of choice, this is not about choices before the

²*Id.* at para 16 (Lokur J).

³*Id.* at para 70 (Gupta J).

girl as an independent subject at all. She is merely the object of male sexuality, not ready for sexual activity and the reproducing of children just yet. What the Court naively termed as mere inconsistencies in different legislations on the age of consent and marriage, is actually reflective of the State's overt interest in the preservation of the institution of heterosexual marriage as the only vocation for the girl/woman, on the one hand, and the regulation of all young, especially female sexuality on the other.

While the marital exception (even for child marriages) is crafted to safeguard the patriarchal and sexist logic of the institution of heterosexual marriage, the increased age of consent only reflects the anxiety of the State around adolescent and child sexuality and not any concern for the choices or sexual agency of the young, especially girls/women. Throughout the judgment, the discussion on the age of consent has been tied to adulthood in relation to marriage, completely erasing questions of the sexual agency of the young, especially girls and women who are, once again, mere objects of the law, both within and outside marriage.