



INDEPENDENT THOUGHT V. INDIA

On October 11, 2017, the Supreme Court of India issued a landmark judgment recognizing every girl's right to bodily integrity, and penalizing rape within child marriage. In *Independent Thought v. Union of India and Another*, the highest court of India articulated for the first time the government's constitutional and human rights obligation to address child marriage and respect the rights of married girls.¹ This legal change affects girls across India, which has the highest number of child marriages globally and where married girls are three times more likely to experience rape than women married above 18 years of age.²

Legal Context

Though child marriages are legally prohibited, husbands of girls between 15-18 years old were previously exempt from criminal prosecution for rape under Exception 2 of Section 375 of the Indian Penal Code. The Prohibition of Child Marriage Act (PCMA) establishes 18 as the minimum legal age of marriage for girls, and recognizes such marriages as voidable on the request of a child married under the legal age.³ The exception in the Indian Penal Code allowed child marriage to legitimize what would otherwise be considered rape, and created impunity for sexual violence faced by married girls under 15 years old. Exception 2 was also inconsistent with a recent Indian Penal Code amendment, which raised the age of sexual consent to 18, and with legal protections for children established under the Juvenile Justice Act and the Protection of Children from Sexual Offences Act.⁴

Case History

In 2013, the child rights organization Independent Thought filed a petition in the Supreme Court against the Union of India

Why this case is important

This decision provides groundbreaking recognition that child marriage is linked to a continuum of sexual and reproductive health harm, in violation of the government's obligation to ensure girls' rights to reproductive choice and bodily integrity. The judges specifically sought evidence relating to the health risks of rape within child marriage, and repeatedly cited studies establishing that child marriage triggers serious reproductive rights and other human rights violations, including exposing girls to an increased risk of coerced sex; early, frequent, and unintended pregnancy; maternal mortality and morbidity; and sexually transmissible infections.⁵ The Court expressed concern that the girls most at risk of child marriage were also those who lacked the information, education, and means to exercise decision-making authority over their number of pregnancies and access to nutrition or health care.

The Supreme Court judgment states that given these health risks, denying girls the ability to refuse sex within marriage violates their fundamental right to reproductive choice. It goes on to affirm that this right must be enforced "all the more"⁷ in the case of married girls, who face risks to their lives from early pregnancies resulting from forced sex.

challenging the constitutionality of Penal Code Exception 2 and seeking clarification to harmonize this provision with existing laws on child marriage and children's rights. Child Rights Trust, an organization based in Karnataka, joined as an intervener and was represented by the Centre for Law and Policy Research.

The Supreme Court heard the challenge to Exception 2, although limited its inquiry solely to marital rape of girls under 18 years old. The Government of India opposed modifying the exception, stating that it was justified due to respect for tradition, an assumption of sexual consent arising out of marriage, and concern that the recognition of marital rape would “destroy the institution of marriage.”⁵

Decision Highlights

In two opinions written by Justices Madan Lokur and Deepak Gupta, the Supreme Court ruled to criminalize rape in child marriages, and also called for several other legal reforms to prevent and address violations of girls' rights from child marriage.

Nonconsensual sexual intercourse within child marriages is rape. The Court stated that, “There can be no doubt that if a girl child is forced by her husband into sexual intercourse against her will or without her consent, it would amount to a violation of her human right to liberty or dignity guaranteed by the Constitution.”⁸ Relying on these rights and the right to equality, the Court progressively interpreted Exception 2 of Section 375 of the Indian Penal Code to read, “Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.”⁹ The Court states that this opinion is in line with the age of sexual consent established in several statutes,¹⁰ noting that it is in the legislature's purview to determine whether this age requires modification.

Child marriage and marital rape violate a girl's constitutional and human rights. This decision marks the first Supreme Court judgment recognizing that child marriage violates India's constitutional and human rights obligations. The Court explicitly highlights the way rape within child marriage constitutes an attack on girls' bodily integrity and reproductive choice, and prevents them from living a life with dignity. The Court notes that child marriage denies girls equality in all aspects of their lives, including their health, education, and economic self-sufficiency, in violation of their rights protected under the Constitution and international human rights treaties. The decision emphasizes that the fundamental rights of girls must be upheld regardless of their marital status and that to deny married girls certain rights would only “dilute” implementation of the law against child marriage.¹¹

The government must implement and strengthen child marriage laws. Citing data concerning the widespread violation of the PCMA and recommendations by U.N. human rights bodies to India

to end impunity for child marriage, the Court emphasized the need for greater efforts by national and state governments to implement the PCMA and end child marriage. Justice Lokur stated, “Welfare schemes and catchy slogans... must be backed up by focused implementation programmes [and] other positive and remedial action.”¹² The judgment positively highlighted the State of Karnataka's recent PCMA amendment, which declared all child marriages legally void from the outset.

The judgment called for harmonization of the legal framework and addressed several other areas of ambiguity. For example, Justice Gupta clarified that the PCMA takes primacy over religion-based personal laws with regards to children's rights. The opinions also emphasized that married girls should be considered “children in need of care and protection” under the Juvenile Justice Act, and be able to avail of the act's protective measures.

Tradition cannot be used to justify rape or child marriage. The Court strongly rejected the government's defense of child marriage as part of culture and tradition, particularly given growing awareness of the associated risks and harms. The Court stated that as “times and situations change, so must views, traditions, and conventions,” and affirmed that “constitutional morality” requires preventing the endangerment of girls.¹³

Next Steps

Girls will only be able to utilize this judgment when civil society, policymakers, law enforcement, and judiciary work together to raise awareness that nonconsensual sex within child marriage is a crime, and address practical and social barriers married girls may face in filing complaints when rape occurs. Meaningful implementation of the decision's recognition of girls' constitutional rights to bodily integrity and reproductive rights will also require a holistic review of laws and policies that impact adolescent autonomy to identify areas of reform.

Endnotes

- ¹ Independent Thought v. Union of India & Anr., W.P. (C) 382 of 2013, S.C.C, 11 Oct. 2017 [hereinafter Independent Thought].
- ² Press Release, World Health Organization, Child Marriages: 39,000 every day (Mar. 2013); NATIONAL COMMISSION FOR PROTECTION OF CHILD RIGHTS & YOUNG LIVES INDIA, A STATISTICAL ANALYSIS OF CHILD MARRIAGE IN INDIA: BASED ON CENSUS 2011 (2017).
- ³ S. 2 & 3, Prohibition of Child Marriage Act, 2006.
- ⁴ S.375, Exception 2, Indian Penal Code, 1860; S.8, Criminal Law (Amendment) Ordinance, 2013.
- ⁵ Independent Thought supra note 1, para. 91 (Lokur J.) (Senior Advocate Rana Mukherjee, referencing the 167th report of the Parliamentary Standing Committee, para. 5.9).
- ⁶ GOVT OF INDIA, LAW COMMISSION, REPORT 205: PROPOSAL TO AMEND THE PROHIBITION OF CHILD MARRIAGE ACT, 2006 AND OTHER ALLIED LAWS 6 (2008).
- ⁷ Independent Thought supra note 1, paras. 13, 59-64 (Lokur J.).
- ⁸ *Id.*, para 33.
- ⁹ Independent Thought supra note 1, para. 88 (Gupta J.), *emphasis added*.
- ¹⁰ S.8, Criminal Law (Amendment) Ordinance, 2013; S.2(d), Protection of Children from Sexual Offences Act, 2012.
- ¹¹ Independent Thought supra note 1, para. 78 (Lokur J.).
- ¹² *Id.*, paras. 86, 104.
- ¹³ *Id.*, para. 78.