REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 382 OF 2013

INDEPENDENT THOUGHT ...PETITIONER(S)

Versus

UNION OF INDIA & ANR. ...RESPONDENT(S)

J U D G M E N T

Deepak Gupta, J.

1. I have gone through the extremely erudite and well written judgment of my learned brother Lokur, J.. I fully agree with both the reasoning given by him and the conclusions arrived at. However, I am expressing my own views in this separate concurring judgment wherein I have given some other reasons while reaching the same conclusion.

2. "Whether Exception 2 to Section 375 of the Indian Penal Code, in so far as it relates to girls aged 15 to 18 years, is unconstitutional and liable to be struck down" is the question for consideration in this writ petition.

3. At the outset, it may be mentioned that in the main petition the challenge is laid to the entire Exception 2. However, during the course of arguments Mr. Gaurav Agarwal, learned counsel for the petitioner, Independent Thought, a registered Society and Ms. Jayna Kothari, learned counsel for the intervener, the Child Rights Group, submitted that they are limiting their challenge to Exception 2 only in so far as it deals with the girl child aged 15 to 18 years.

4. Section 375 of the Indian Penal IPC (for short 'IPC') defines rape and reads as follows:

> "**375. Rape**.- A man is said to commit "rape" if he-—
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> 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
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> 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
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> 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
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> 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:—
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> First.—Against her will.
>
> Secondly.—Without her consent.
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> 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.
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> Explanation 1.—For the purposes of this section, "vagina" shall also include *labia majora*.
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> 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."

5. A husband who commits rape on his wife, as defined under Section 375 of the IPC, cannot be charged with the said offence as long as the wife is over 15 years of age. It may be made clear that this Court is not going into the issue of "marital rape" of women aged 18 years and above and the discussion is limited only to "wives" aged 15 to 18 years. A man is guilty of rape if he commits any act mentioned in Section 375 IPC, without the consent of the women if she is above 18 years of age. If a man commits any of the acts mentioned in Section 375 IPC, with a girl aged less than 18 years, then the act will amount to rape even if done

with the consent of the victim. However, as per Exception 2 of Section 375 IPC, if the man is married to the woman and if the "wife" is aged more than 15 years then the man cannot be held guilty of commission of the offence defined under Section 375, whether the wife consented to the sexual act or not.

6. Section 375 of the IPC creates three classes of victims:

(i) The first class of victims are girls aged less than 18 years. In those cases, if the acts contemplated under Section 375 IPC are committed with or without consent of the victim, the man committing such an act is guilty of rape.

(ii) The second class of victims are women aged 18 years or above. Such women can consent to having consensual sex. If the sexual act is done with the consent of the woman, unless the consent is obtained in circumstances falling under clauses thirdly, fourthly and fifthly of Section 375 IPC no offence is committed. The man can be held guilty of rape, only if the sexual act is done in absence of legal and valid consent.

(iii) The third category of victims is married women. The exception exempts a man from being charged and convicted under Section 375 IPC for any of the acts contemplated

under this section if the victim is his "wife" aged 15 years and above.

To put it differently, under Section 375 IPC a man cannot even have consensual sex with a girl if she is below the age of 18 years and the girl is by law deemed unable to give her consent. However, if the girl child is married and she is aged above 15 years, then such consent is presumed and there is no offence if the husband has sex with his "wife", who is above 15 years of age. If the "wife" is below 15 then the husband would be guilty of such an offence.

7. The issue is whether a girl below 18 years who is otherwise unable to give consent can be presumed to have consented to have sex with her husband for all times to come and whether such presumption in the case of a girl child is unconscionable and violative of Articles 14, 16 and 21 of the Constitution of India.

THE LEGISLATIVE BACKGROUND

8. The IPC was enacted in the year 1860 and the age given in Exception 2 of Section 375 has been changed from time to time. Till 1929, no minimum age of marriage was legally fixed. It was only after passing of the Child Marriage Restraint Act, 1929 (for short 'the Restraint Act') that the minimum age for marriage was fixed. The Restraint Act was repealed by the Prohibition of Child Marriage Act, 2006 (for short 'the PCMA'). A chart showing the ages of consent,

from time to time, under clause Sixthly of Section 375 IPC, in Exception 2 to Section 375 IPC and the Restraint Act/PCMA is as follows:

Year	IPC	Age of Consent under Section 375, 6th Clause I.P.C	Age under Exception 2 to Sec. 375 I.P.C	Minimum Age of Marriage under the Restraint Act/PCMA
1860	-	10 Years	10 Years	-
1891	Act 10 of 1891 (After the Amendment of IPC)	12 Years	12 Years	-
1925	(After the Amendment of IPC)	14 Years	13 Years	-
1929	(After Passing of Child Marriage Restraint Act)	14 Years	13 Years	14 Years
1940	After the Amendment of the I.P.C and Child Marriage Act	16 Years	15 Years	15 Years
1978	-	16 Years	15 Years	18 Years
2013	-	18 Years	15 Years	18 Years

9. A perusal of the aforementioned chart clearly shows that when the IPC was originally enacted in the year 1860, the age of consent under clause Sixthly of Section 375 IPC and under Exception 2 of Section 375 IPC was 10 years. In this regard, the IPC was amended in 1891 and the age under both the provisions was raised to 12 years. In 1925, the age of consent was raised under clause Sixthly to 14 years but under the Exception 2 the age was retained at 13 years. In 1929, the Child Marriage Restraint Act was enacted. Section 3 of this Act provided that the

minimum age of the girl child, to be eligible for marriage, was 14 years. In 1940, the IPC was again amended and the age of consent under clause Sixthly was raised to 16 years, but under Exception 2 to Section 375 IPC, the age was raised to 15 years and the minimum age of marriage under the Restraint Act was also 15 years. In 1978, the IPC was again amended and the age of consent was raised to 16 years but under Exception 2 to Section 375 IPC, no change was made. In 1978, the minimum age for marriage of the girl child was raised to 18 years but no consequential amendment was made in the IPC. In 2013, after the unfortunate "Nirbhaya" incident took place, the Parliament raised the age of consent under clause Sixthly to 18 years. The minimum age for marriage of a girl child remained at 18 years, but no change was made in Exception 2 to Section 375 IPC and a girl child who was married before the minimum age of marriage, could be subjected to sexual intercourse (forcible or otherwise) by her husband and if she was over 15 years of age, the husband could not be charged with any offence.

10. At this stage, reference may be made to the Hindu Marriage Act. In the Hindu Marriage Act, as originally enacted in 1955, the minimum age for marriage of a bride was 15 years and of a groom 18 years. The Hindu Marriage Act was amended in 1978 and the minimum age of marriage for a bride was enhanced to 18 years and for a groom to 21 years. Identical amendment was made in the Restraint Act.

11. 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."

12. Section 3 of the PCMA makes child marriages voidable at the option of the contracting party who is a child and reads as follows:

> "**3. Child marriages to be voidable at the option of contracting party being a child.**—(1) 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:
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> 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.
>
> (2) If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend alongwith the Child Marriage Prohibition Officer.
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> (3) The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority.
>
> (4) While granting a decree of nullity under this section, the district court shall make an order directing both the parties to the marriage and their parents or their guardians to return to the other party, his or her parents or guardian, as the case may be, the money, valuables, ornaments and other gifts received on the occasion of the marriage by them from the other side, or an amount equal to the value of such valuables, ornaments, other gifts and money:
>
> Provided that no order under this section shall be passed unless the concerned parties have been given notices to appear before the district court and show cause why such order should not be passed."

13. It would be pertinent to note that under the Restraint Act the punishment under Section 3 for a male aged 18 years to 21 years, contracting a child marriage was simple imprisonment, which could extend up to 15 days or with fine up to Rs.1000/- or both and under Section 4, if a male over 21 years contracted a marriage with a female child, the punishment was simple imprisonment which could extend up to 3 months. Section 5 provided punishment of simple imprisonment up to 3 months and fine with regard to those who performed, conducted or directed any child marriage. Similar provisions existed in Section 6 with regard to the punishment of parents or guardians, who acted to promote child marriage or permitted it to be solemnized or negligently failed to prevent the child marriage to be solemnized. Surprisingly, the proviso to Section 6 provided that no women could be punished with imprisonment. The punishments provided under the Restraint Act were virtually illusory and no minimum punishment was prescribed.

14. The Restraint Act was repealed and replaced by the PCMA. The provisions of the PCMA are slightly more stringent. Under Section 9 of the PCMA, if a male adult above 18 years of age contracts a child marriage, he can be sentenced to rigorous imprisonment up to 2 years or fine which may extend up to one lakh rupees or both. However, no minimum sentence is provided even under this Act. Section 10 of the PCMA provides punishment for those persons who perform,

conduct, direct or abet a child marriage and the same sentence is provided. As far as the guardians and parents are concerned, the punishment for them is provided under Section 11 and it is the same. Again, the proviso lays down that no woman shall be punishable with imprisonment. Though this Court is not dealing with this question directly in the present petition, it is obvious that a woman would be placed in the forefront by any person who gets a child marriage conducted. Such a woman cannot be sentenced to undergo imprisonment and at the most, a fine can be levied. The punishments provided are neither sufficiently punitive nor deterrent. Therefore, the PCMA has been breached with impunity. I think the time has come when this Act needs serious reconsideration, especially in view of the harsh reality that a lot of child trafficking is taking place under the garb of marriage including child marriage. More stringent punishments should be provided and some minimum punishment should definitely be provided especially to those mature adults who promote such marriages and who perform, conduct, direct or abet any such marriage. Otherwise, this legislation will never act as a sufficient deterrent to prevent or even reduce child marriages.

15. Under Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000, a "juvenile" or "child" was defined to mean a person, who had not completed 18 years of age. The Juvenile Justice (Care and Protection of Children)

Act, 2015 defines a child under section 2(12) to mean a person who has not completed 18 years of age.

16. 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.

17. Section 2(vii) of the Dissolution of Muslim Marriages Act, 1939 entitles a women married under Muslim law to obtain a decree of dissolution of marriage if she is given in marriage by her father or other guardian before she attained the age of 15 years and she repudiates the marriage before attaining the age of 18 years provided that the marriage has not been consummated. This provision deals with girls below the age of 15 years who are got married. Such a girl is required to repudiate her marriage before she attains majority and she can only repudiate the marriage if the marriage has not been consummated. This virtually makes mockery of the PCMA. Therefore, even in a marriage which is void under PCMA, the girl will have to obtain a decree for dissolution of her marriage, that too before she attains the age of majority and only if the marriage has not been consummated. Another anomalous situation is that if the husband has forcible sex with such a girl, the marriage is consummated and the girl child is deprived of her right to get the marriage annulled.

18. Similarly under Section 13(2)(iv) of the Hindu Marriage Act, 1955, a Hindu girl can file a petition for divorce on the ground that her marriage, whether

consummated or not, was solemnized before she attained the age of 15 years and she has repudiated her marriage after attaining the age of 15 years but before attaining the age of 18 years. This is also not in consonance with the provisions of PCMA, according to which marriage of a child bride below the age of 15 years is void and there is no question of seeking a divorce. A void marriage is no marriage. Another anomaly is that whereas a child bride, who is above 15 years under PCMA, can apply for annulment of marriage up to the age of 20 years, under Section 13(2)(iv) of the Hindu Marriage Act, a child bride under the age of 15 years must repudiate the marriage after attaining the age of 15 years but before she attains the age of 18 years, i.e. even before she attains majority. The question that remains unanswered is who will represent or help this child, who has been forced to marry to approach the Courts.

19. It is obvious that while making amendments to various laws, some laws are forgotten and consequential amendments are not made in those laws. After the PCMA was enacted both the Hindu Marriage Act, 1955 and the Dissolution of Muslim Marriages and Divorce Act, 1939 also should have been suitably amended, but this has not been done. In my opinion, the PCMA is a secular Act applicable to all. It being a special Act dealing with children, the provisions of this Act will prevail over the provisions of both the Hindu Marriage Act and the Muslim Marriages and Divorce Act, in so far as children are concerned.

20. 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.

21. Under the provisions of the aforesaid Acts a person, who is a minor and not a major, is not entitled to deal with his property. The property of such a minor can be sold or transferred only if such sale or transfer is for the benefit of the minor and after the permission of the court. Section 11 of the Indian Contract Act, 1872 provides that only a person who has attained the age of majority and is of a sound mind is competent to enter into a contract. A contract entered into by a minor is treated to be a void contract.

22. Keeping in view the mounting crimes against children, regardless of the sex of the victim, Parliament enacted the Protection of Children from Sexual Offences

Act, 2012 (for short 'POCSO'), which came into force on 14.11.2012. The Statement of Objects and Reasons of this Act reads as follows:

> "**STATEMENT OF OBJECTS AND REASONS** 1. Article 15 of the Constitution, *inter alia*, confers upon the State powers to make special provision for children. Further, article 39, *inter alia*, provides that the State shall in particular direct its policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.
>
> 2. The United Nations Convention on the Rights of Children, ratified by India on 11th December, 1992, requires the State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; and (c) the exploitative use of children in pornographic performances and materials.
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> 3. The data collected by the National Crime Records Bureau shows that there has been increase in cases of sexual offences against children. This is corroborated by the 'Study on Child Abuse: India 2007' conducted by the Ministry of Women and Child Development. Moreover, sexual offences against children are not adequately addressed by the existing laws. A large number of such offences are neither specifically provided for nor are they adequately penalised. The interests of the child, both as a victim as well as a witness, need to be protected. It is felt that offences against children need to be defined explicitly and countered through commensurate penalties as an effective deterrence.
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> 4. It is, therefore, proposed to enact a self contained comprehensive legislation *inter alia* to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Courts for speedy trial of such offences.
>
> 5. The Bill would contribute to enforcement of the right of all children to safety, security and protection from sexual abuse and exploitation."

23. POCSO is a landmark legislation for protection of child rights and to prevent the sexual abuse and exploitation of children. This Act deals with sexual offences committed against a child and a child has been defined to be a person below the age of 18 years under Section 2(d). POCSO does not define rape, but it defines penetrative sexual assault under Section 3 and aggravated penetrative sexual assault under Section 5 and the punishments are provided for them under Section 4 and 6 respectively. Section 7 of the POCSO defines sexual assault, Section 9 defines aggravated sexual assault and punishments for those offences are provided under Section 8 and 10 respectively. Section 11 defines sexual harassment and Section 12 provides the punishment for sexual harassment. Chapter III of the POCSO deals with use of children for pornographic purposes with which we are not concerned in the instant case. This Act creates Special Courts to deal with offences against children. Section 42 of the POCSO is very important for our purpose and it provides that where an offence is punishable both under POCSO and under IPC, then the offender found guilty would be liable for that punishment, which is more severe.

24. Section 42 and Section 42A of the POCSO read as follows:

> "**42. Alternate punishment**. - Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code (45 of 1860), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to

punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree."

"**42A. 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."

25. Section 42A provides that the provisions of POCSO shall be in addition to and not in derogation of the provisions of any other Act. Therefore, the legislature, in its wisdom, thought that POCSO would supplant and would be in addition to the other criminal provisions and where there was any inconsistency, the provisions of POCSO would override any other law to the extent of inconsistency.

26. Another important provision to which reference may be made is Section 198(6) of the Code of Criminal Procedure (for short 'the Code'). The same reads as follows:

"**198. Prosecution for offences against marriage**:

xxx xxx xxx

(6) No Court shall take cognizance of an offence under section 376 of the Indian Penal Code (45 of 1860), where such offence consists of sexual inter-course by a man with his own wife, the wife being under eighteen years of age, if more than one year has elapsed from the date of the commission of the offence."

The age "eighteen" was substituted for "fifteen" by Act 5 of 2009 w.e.f. 31.12.2009. A perusal of the aforesaid provision also makes it clear that a

complaint with regard to commission of offence under Section 375 IPC punishable under Section 376 IPC can be taken cognizance of by a court within one year of the commission of the offence even where "the wife" is below 18 years of age. It is, therefore, apparent that while amending Section 198 of the Code, the legislature was visualising that there can be marital rape with a "wife" aged less than 18 years but was prescribing a limitation of one year, for taking cognizance of such an offence. However, no consequential amendment was made to Exception 2 of Section 375 IPC.

WHO IS A CHILD?

27. If one analyses the provisions of all the laws which have been referred to above, it is apparent that the legislature, in its wisdom, has universally enacted that a person below the age of 18 years is deemed to be a child unable to look after his or her own interests. It would be very important to note that, in 2013 the IPC was amended, post the unfortunate "Nirbhaya" incident and the age of consent under clause Sixthly of Section 375 IPC was increased to 18 years. The position as on date is that under the Protection of Children from Sexual Offences Act, 2012, Juvenile Justice (Care and Protection of Children) Act, Child Marriage Restraint Act, 1929, Protection of Women from Domestic Violence Act, 2005, The Majority Act, 1875, The Guardians and Wards Act, 1890, The Indian Contract Act, 1872

and many other legislations, a person below the age of 18 years is considered to be a child unable to look after his or her own interests.

28. As far as marriage laws are concerned, as far back as 1978, the minimum age of marriage of a girl child was increased to 18 years. The Restraint Act, was replaced by the PCMA wherein also marriage of a girl child aged below 18 years is prohibited. However, Section 3 of the PCMA makes a child marriage voidable at the option of that party, who was a child at the time of marriage. The petition for annulling the child marriage must be filed within 2 years of the child attaining majority. Therefore, a girl who was married before she attained the age of 18 years, can get her marriage annulled before she attains the age of 20 years. Similarly, a male child can get the marriage annulled before attaining the age of 23 years. Even when the child is minor, a petition for annulment can be filed by the guardian or next friend of the child along with the Child Marriage Prohibition Officer. Unfortunately, both the number of prosecutions and the number of cases for annulment of marriage filed under PCMA are abysmally low.

THE ILL EFFECTS OF A CHILD MARRIAGE

29. A lot of material has been placed before us both by Mr. Gaurav Agarwal, learned counsel appearing for the petitioner and Ms. Jayna Kothari, learned Counsel appearing for the Intervener, to indicate that child marriage is not in the

interest of the girl child. In my opinion, it is not necessary to refer to all the material cited by learned counsel. The fact that child marriage is a reprehensible practice; that it is an abhorrent practice; that it violates the human rights of a child, cannot be seriously disputed. I am not oblivious to the harsh reality that most of the child brides are even below the age of 15 years. There is a practice in many parts of the country where children, both girls and boys, are married off, even before they attain puberty. They are innocent children, who do not even understand what marriage is. The practice which is widely prevalent is that a girl who is married pre-puberty is normally kept at her parents' home and is sent to her matrimonial home after she attains puberty in a ceremony which is commonly referred to as '*gauna*'. Can the marriage of a child aged 3-4 years, by any stretch of imagination, be called a legal and valid marriage?

30. A Child marriage will invariably lead to early child birth and this will adversely affect the health of the girl child. In a report by the UNICEF[32], there is an article on ending child marriage and the ill effects of child marriage have been set out thus:-

> "Married girls are among the world's most vulnerable people. When their education is cut short, girls lose the chance to gain the skills and knowledge to secure a good job and provide for themselves and their families. They are socially isolated. As I observed among my former schoolmates who were forced to get married, the consciousness of their isolation is in itself painful.

32 Report of UNICEF "ON THE STATE OF THE WORLD'S CHILDREN 2016".
A fair chance for girls - End Child Marriage by Angelique Kidjo

> Subordinate to their husbands and families, married girls are more vulnerable to domestic violence, and not in a position to make decisions about safe sex and family planning – which puts them at high risk of sexually transmitted infections, including HIV, and of pregnancy and childbearing before their bodies are fully mature. Already risky pregnancies become even riskier, as married girls are less likely to get adequate medical care. During delivery, mothers who are still children are at higher risk of potentially disabling complications, like obstetric fistula, and both they and their babies are more likely to die."

31. In a study conducted on child marriages in India, based on the census of 2011[33], it was found that 3% girls in the age group of 10 to 14 years were got married and about 20% girls were married before attaining the age of 19 years. Unfortunately, this report deals with girls below the age of 19 years and not 18 years, but the report does indicate that more than 20% girls in this country are married before attaining the age of 18 years. Therefore, more than one out of every 5 marriages violates the provisions of the PCMA and the Hindu Marriage Act, 1955.

32. The World Health Organisation, in a Report[34] dealing with the issue of child brides found that though 11% of the births worldwide are amongst adolescents, they account for 23% of the overall burden of diseases. Therefore, a child bride is more than doubly prone to health problems than a grown up woman.

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33 A Statistical analysis of CHILD MARRIAGE IN INDIA, Based on Census 2011 published by Young Lives and National Commission for Protection of Child Rights (NCPCR)

34 World Health Organisation Report on "Early Marriages, Adolescent and Young Pregnancies", Sixty- Fifth World Health Assembly dated 16th March, 2012

33. In the Report of the Convention on the Rights of the Child[35], certain recommendations have been made and the relevant portion of the Report is as follows:-

> "**Harmful Practices**
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> **51**. The Committee is deeply concerned at the high prevalence of child marriages in the State party, despite the enactment of the Prohibition of Child Marriage Act (PCMA, 2006). It is further concerned at barriers impeding the full implementation of the PCMA, such as the prevalence of social norms and traditions over the legal framework, the existence of different Personal Status Laws establishing their own minimum age of marriage applicable to their respective religious community as well as the lack of awareness about the PCMA by enforcement officers. It is also concerned about the prevalence of other harmful practices against girls such as dowry and devadasi.
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> **52**. The Committee urges the State party to ensure the effective implementation of the Prohibition of Child Marriage Act (PCMA, 2006), including by clarifying that the PCMA supersede the different religious-based Personal Status Laws. It also recommends that the State party take the necessary measures to combat dowry, child marriage and devadasi including by conducting awareness-raising programmes and campaigns with a view to changing attitudes, as well as counselling and reproductive education, to prevent and combat child marriages, which are harmful to the health and well-being of girls."

34. The General Assembly of United Nations adopted a Resolution[36], relevant portion of which, reads as follows:

> "Expressing concern about the continued prevalence of child, early and forced marriage worldwide, including the fact that there are still approximately 15 million girls married every year before they reach 18

35 Report of the United Nations Committee on the Rights of the Child (CRC) on the Convention of the Rights of the Child, dated 13th June, 2014 , dealing with India

36 Resolution adopted by the United Nations General Assembly on 19th December, 2016 on "Child, early and forced marriage", Seventy-first session, Agenda Item 64(a)

> years of age and that more than 720 million women and girls alive today were married before their eighteenth birthday.
>
> Recognizing that child, early and forced marriage is a harmful practice that violates, abuses or impairs human rights and is linked to and perpetuates other harmful practices and human rights violations and that such violations have a disproportionately negative impact on women and girls, and underscoring the human rights obligations and commitments of States to promote and protect the human rights and fundamental freedoms of women and girls and to prevent and eliminate the practice of child, early and forced marriage."

35. In the National Family Health Survey-4, 2015-2016[37] some startling figures are revealed. It was found that at the time of carrying out the survey in 2014, amongst women in the age group of 20-24 years, almost 26.8% women were married before they attained the age of 18 years, i.e. more than one out of 4 marriages was of a girl child. In the urban areas the percentage is 17.5% and it rises to 31.5% in the rural areas.

36. In the National Plan of Action for Children, 2016[38], the Government of India itself has recognised the high rate of child marriages prevalent in the country and the fact that a child marriage violates the basic rights of health, development and protection of the child. Relevant portion of the report reads as follows:

> "A large number of children, especially girls are married before the legal age in India. According to NFHS 3 (2005-06), 47.4 percent of women in the age 20-24 were married before 18, the percentage being higher for rural areas. The situation has improved in 2013-14 as the RSOC data shows that 30.3 percent women in the age 20-24 were

37 India Fact Sheet- Issued by Government of India, Ministry of Health and Family Welfare

38 Drawn up by the Ministry of Women and Child Development, Government of India,
(Published on 14th January, 2017)

married before their legal age. Early marriage poses various risks for the survival, health and development of young girls and to children born to them. It is also used as a means of trafficking."

37. In a Report[39] based on the Census, 2011, the consequences of child marriages have been dealt with in the following terms:

"**5.1 Consequences**

Child marriage is not only a violation of human rights, but is also recognized as an obstacle to the development of young people. The practice of child marriage cut shorts a critical stage of self-discovery and exploring one's identity. Child marriage is an imposition of a marriage partner on children or adolescents who are in no way ready and matured, and thus, are at a loss to understand the significance of marriage. Their development gets comprised due to being deprived of freedom, opportunity for personal development, and other rights including health and well-being, education; and participation in civic life and nullifies their basic rights as envisaged in the United Nation's Convention on the Right of the Child ratified by India in 1989. Marriage at a young age prevents both girls and boys from exercising agency in making important life decisions and securing basic freedoms, including pursuing opportunities for education, earning a sustainable livelihood and accessing sexual health and rights.

The prevalent practice of child marriage has detrimental consequences for both boys and girls, but has more grave and far-reaching adverse effects on girls. Within a patriarchal family structure, girls have relatively little power, but young and newly married women are particularly powerless, secluded and voiceless. Adolescent girls have little choice about whom and when to marry, whether or not to have sexual relations, and when to bear children. This is well elaborated in a study of girls in the age group 10-16 years. It was found that they were oppressed in several ways such as:

- They had to submit unquestioningly to the parents' decision regarding their marriage.
- They were over-burdened with household chores.
- They had limited knowledge of their body and its functioning.
- They were unaware of sexual changes, contraception, child bearing and rearing.

39 A Statistical Analysis of Child Marriage in India, Based on Census, 2011 (Published by Young Lives and National Commission for Protection of Child Rights(NCPCR) June 2017, New Delhi

- They dropped out of school on attaining puberty.
- They had no time for leisure and social interaction.
- They were discriminated in matters of food intake and expressing their views within the family.

Imagine the fate of a young girl with the above profile if she is to face marital life and its challenges during adolescence. The adolescent married girl is more at risk. She is less likely to be allowed out of the house, to have access to services and usually, not be given space or freedom to exert agency. Within the marital home, which in majority of the cases is a joint family, she will probably not have much communication with her husband, and will end up socially isolated, with very little contact with her parental home."

38. This Report[40] also notices upswing of female deaths during pregnancy in the age groups of 15-19 years and attributes these deaths to the death of teenage mothers. The relevant portion of the report reads as follows:

"Census data have demonstrated an upswing of female deaths in the age group of 15-19 years. This high mortality rate could be attributed to the deaths of teenage mothers. Child marriage virtually works like a double-edged sword; lower age at marriage is significantly associated with worse outcomes for the child and worse pregnancy outcomes for the mother. All these factors push girls and their families into perpetuation of intergenerational poverty and marginalisation....."

39. This Report[41] deals with various other aspects and some apposite observations are as follows:

"A young girl who is still struggling to understand her own anatomy, when forced to make conjugal relations, often shows signs of post-traumatic stress and depression owing to sexual abuse by her

40 A Statistical Analysis of Child Marriage in India, Based on Census, 2011
(Published by Young Lives and National Commission for Protection of Child Rights(NCPCR), June 2017, New Delhi

41 A Statistical Analysis of Child Marriage in India, Based on Census, 2011
(Published by Young Lives and National Commission for Protection of Child Rights(NCPCR)
June 2017, New Delhi

> older partner. Neither the bodies of these young brides nor their innocent little minds are prepared, therefore, forced sexual encounters can lead to irreversible physical and psychological damage. A study conducted in 2013 showed that young girls are three times more likely to experience marital rape."

This report reveals a shocking aspect that girls below the age of 18 years are subjected to three times more marital rape as compared to the grown up women.

40. A perusal of the various reports and data placed before us clearly shows that marriage of the child not only violates the human rights of a child but also affects the health of the child.

41. Reference may be made to certain decisions cited before us. The Delhi High Court in ***Association for Social Justice & Research v. Union of India & Ors.***[42], was dealing with a case where a girl aged between 16 to 18 years was married off to a man stated to be over 40 years of age. The Court noted the ill effects of child marriage and gave a direction that the child will remain with her parents and her marriage will not be consummated till she attains the age of 18 years. Thereafter, a Full Bench of the Delhi High Court in ***Court on its own motion (Lajja Devi) & Ors.*** *v.* ***State & Ors.***[43]**,** while dealing with the provisions of PCMA and also referring to the provisions of Sections 375 and 376 IPC and after noticing the judgment passed in the case of ***Association For Social Justice & Research*** (supra), again reiterated that child marriage is a social evil, which endangers the

42 [2010 (118) DRJ 324(DB)]

43 W.P.(Crl.) No.338 of 2008

life and health of the child. The ill effects of child marriage have been summarised in the following manner:

> "(i) Girls who get married at an early age are often more susceptible to the health risks associated with early sexual initiation and childbearing, including HIV and obstetric fistula.
>
> (ii) Young girls who lack status, power and maturity are often subjected to domestic violence, sexual abuse and social isolation.
>
> (iii) Early marriage almost always deprives girls of their education or meaningful work, which contributes to persistent poverty.
>
> (iv) Child Marriage perpetuates an unrelenting cycle of gender inequality, sickness and poverty.
>
> (v) Getting the girls married at an early age when they are not physically mature, leads to highest rates of maternal and child mortality."

42. The Full Bench, with regard to Section 375 IPC before its amendment in 2013, made the following observations:

> "**32**. It is distressing to note that the Indian Penal Code, 1860 acquiesces child marriage. The exception to Section 375 specifically lays down that sexual intercourse of man with his own wife, the wife not being under fifteen years of age is not rape, thus ruling out the possibility of marital rape when the age of wife is above fifteen years. On the other hand, if the girl is not the wife of the man, but is below sixteen, then the sexual intercourse even with the consent of the girl amounts to rape? It is rather shocking to note the specific relaxation is given to a husband who rapes his wife, when she happens to be between 15-16 years. This provision in the Indian Penal Code, 1860 is a specific illustration of legislative endorsement and sanction to child marriages."

43. A Full Bench of Madras High Court in ***T. Sivakumar v. Inspector of Police***[44]**,** dealt with the provisions of the PCMA. It held that a marriage contracted

44 H.C.P. No. 907 of 2011, vide its judgment dated 3rd November, 2011

with a female less than 18 years and more than 15 years is not a void marriage but is only a voidable marriage. However, the Court went on to hold that *stricto sensu* the marriage could not be called a valid marriage since the child bride had the option of getting the marriage annulled till she attains the age of 20 years. It held as follows:

> "The marriage contracted by a person with a female of less than 18 years is voidable and the same shall be subsisting until it is annulled by a competent Court under Section 3 of the Prohibition of Child Marriage Act. The said marriage is not a "valid marriage" *stricto sensu* as per the classification but it is "not invalid". The male contracting party shall not enjoin all the rights which would otherwise emanate from a valid marriage *stricto sensu*, instead he will enjoin only limited rights."

Reference to these judgments has been made only for the purpose of highlighting the concern shown by the Courts with regard to child marriage and the manner in which the Courts have consistently held that the child marriage is an evil which should be avoided.

THE KARNATAKA EXPERIENCE

44. A writ petition[45] was filed in the Karnataka High Court, raising the issue of validity of child marriages. In its order dated 10th November, 2010 the Karnataka High Court noted as follows:

45 Writ Petition No.11154/2006 (GM-RES-PIL), Muthamma Devaya & Anr. v. Union of India & Ors.

> "The narration of facts in the present writ petition is heart rendering. The photographs appended to the writ petition have been a cause of deep distress to us. The photographs reveal, the marriage of minor girls, not yet in their teens, to fully grown men. In one of the photographs, the girl has been made to stand on a chair, so that she could garland her tall and fully grown groom. Forced marriage of the girl child, one realises, is one of the manifestations of cruelty, possibly without any equivalent comparison. It seems that the practice is common place in this part of the world. It may have remained unchecked for a variety of reasons including, poverty, lack of education, culture and ignorance. We are of the view that allowing the evil to continue without redressing it, would make us a party to the disgraceful activity."

45. After making the aforesaid observations, the Karnataka High Court constituted a four Member committee, headed by Dr. Justice Shivraj V. Patil, former Judge of this Court, to expose the extent of practice of child marriage. The Committee was also requested to suggest ways and means to root out the evil of child marriage from society and to prevent it to the maximum extent possible. The Core Committee submitted its report and made various recommendations. One of its recommendations was that marriage of a girl child below the age of 18 years should be declared *void ab initio*. Pursuant to the report of the Core Committee, in the State of Karnataka an amendment was made in the PCMA and Section 1(A) has been inserted after sub-section 2 Section 3, which reads as under:

> "(1A) Notwithstanding anything contained in sub-section (1) every child marriage solemnized on or after the date of coming into force of the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016 shall be void ab initio."

46. Therefore, any marriage of a child, i.e. a female aged below 18 years and a male below 21 years is *void ab initio* in the State of Karnataka. This is how the law should have been throughout the country. Where the marriage is void, there cannot be a husband or a wife and I have no doubt that protection of Exception 2 to Section 375 IPC cannot be availed of by those persons, who claim to be "husband" of "child brides" pursuant to a marriage which is illegal and void.

47. This leads to an anomalous situation. In Karnataka, if a husband has sexual intercourse with his "wife" aged below 18 years, since such marriage would be *void ab initio*, the wife cannot be treated to be a legal wife and, therefore, the husband cannot get the benefit of Exception 2 to Section 375 IPC whereas in rest of the country he would be entitled to the benefit of such exception and be immune from prosecution.

THE DEFENCE OF SOCIAL REALITY

48. The main defence raised on behalf of the Union of India is that though the practice of child marriage may be reprehensible, though it may have been made illegal, the harsh reality is that 20% to 30% of female children below the age of 18 years are got married in total violation of the PCMA. According to the Union of India, keeping in view this stark reality and also keeping in view the sanctity which is attached to a union like marriage, the Parliament, in its wisdom, thought

it fit to retain the age of fifteen in Exception 2 to Section 375 IPC. It has also been urged that when Parliament enacts any law which falls within its jurisdiction, then this Court should not normally interfere with that Act. When any law is passed, the Court must presume that the Parliament has gone into all aspects of the matter. Though it was faintly urged before us by learned counsel for the petitioner that the Parliament did not go into certain aspects, this Court is clearly of the view that such ignorance cannot be imputed to Parliament. In our constitutional framework, where there is division of powers, each repository of power must respect the other and this Court must extend to the Parliament the respect it deserves. One cannot and should not impute ignorance to the legislature.

49. The stand of the Union of India may be summarised as follows:-

> (i) "Economic and educational development in the country is still uneven and child marriages are still taking place. It has been, therefore, decided to retain the age of 15 years under Exception 2 of Section 375 of IPC so as to give protection to husband and wife against criminalizing the sexual activity between them.
>
> (ii) As per National Family Health Survey-III, 46% of women between the ages 18-29 years in India were married before the age of 18. It is also estimated that there are 23 million child brides in the country. Hence, criminalizing the consummation of a marriage union with a serious offence such as rape would not be appropriate and practical.
>
> (iii) Providing punishment for child marriage with consent does not appear to be appropriate in view of socio-economic conditions of the country. Thus, the age prescribed in Exception 2 of Section 375 of IPC has been retained considering the basic facts of the still evolving social norms and issues.
>
> (iv) The Law Commission also recommended for raising the age from 15 years to 16 years and it was incorporated in the Criminal Law (Amendment) Ordinance, 2013. However, after wide ranging

consultations with various stakeholders it was further decided to retain the age at 15 years.

(v) Exception 2 of Section 375 of IPC envisages that if the marriage is solemnized at the age of 15 years due to traditions, it should not be a reason to book the husband in the case of offence of rape under the IPC.

(vi) It is also necessary that the provisions of law should be in such a manner that it cannot affect a particular class of society. Retaining the age of 15 years in Exception 2 of Section 375 of IPC has been provided considering the social realities of the nation."

50. Certain other facts may be noted which, though not strictly necessary for deciding the legal issues, are necessary to decide the background in which amendment to Section 375 IPC and other criminal laws were carried out. These facts clearly show that Parliament knowingly took a decision not to criminalize sexual activity between husband and wife. In the 84th Report of the Law Commission, it was recommended that the age of consent under clause Sixthly of Section 375 IPC, should be increased to 18 years and Exception 2 should be deleted. In the 172nd Report of the Law Commission, it was recommended that the age of consent under clause Sixthly should be retained at 16 years, but the Law Commission specifically opined that there should be no distinction on account of marriage of the girl child and the age in Exception 2 be raised from 15 to 16 years. The Justice Verma Committee did not make any recommendation to change the age of consent under clause Sixthly. However Parliament, while amending the IPC in the year 2014, in the wake of the "Nirbhaya" incident, decided to increase the

age of consent to 18 years under clause Sixthly, but did not make any change in Exception 2 of Section 375 IPC.

51. Interestingly, though the Verma Committee did not recommend that the age of consent should be increased under clause Sixthly from 16 to 18 years, but it did recommend that Exception 2 should be completely deleted. The Parliament took note of the Verma Committee report. It also took note of the recommendations of the Law Commission and a Standing Committee was constituted and Parliament enacted this law pursuant to the recommendations of the Standing Committee. It would also be pertinent to mention that one Member of Parliament, Mr. Saugata Roy moved a Private Member's Bill to fix the age at 18 years in Exception 2 of Section 375 IPC, but that amendment was not carried. Interestingly, the amendment to Section 375 IPC and other sections relating to offences against women and the POCSO were incorporated by one Amending Act i.e., The Criminal Law (Amendment) Act, 2013. After the "Nirbhaya" case, the Juvenile Justice (Care and Protection of Children) Act, 2015 was also amended in 2016 and a child in conflict with law over the age of 16 years, if charged with a heinous offence, can be tried in a court of law if the Juvenile Justice Board feels that he was mature enough to commit a crime.

POWER OF THE COURT TO INTERFERE

52. It is a well settled principle of law that when the constitutional validity of the law enacted by the legislature is under challenge and there is no challenge to the legislative competence, the Court will always raise a presumption of the constitutionality of the legislation. The courts are reluctant to strike down laws as unconstitutional unless it is shown that the law clearly violates the constitutional provisions or the fundamental rights of the citizens. The Courts must show due deference to the legislative process.

53. There can be no dispute with the proposition that Courts must draw a presumption of constitutionality in favour of laws enacted by the legislature. In ***Sub-Divisional Magistrate*** *v.* ***Ram Kali***[46], this Court observed as follows:

> ".....The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, and its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds."

54. Thereafter, in ***Pathumma & Ors.*** *v.* ***State of Kerala & Ors.***[47], this Court held that the Court would interfere only when the statute clearly violates the rights of the citizens provided under Part III of the Constitution or where the Act is beyond

46 (1968) 1 SCR 205

47 (1978) 2 SCC 1

the legislative competence or such similar grounds. The relevant observations are as follows:

> "**6**. It is obvious that the Legislature is in the best position to understand and appreciate the needs of the people as enjoined by the Constitution to bring about social reforms for the upliftment of the backward and the weaker sections of the society and for the improvement of the lot of poor people. The Court will, therefore, interfere in this process only when the statute is clearly violative of the right conferred on the citizen under Part III of the Constitution or when the Act is beyond the legislative competence of the legislature or such other grounds. It is for this reason that the Courts have recognised that there is always a presumption in favour of the constitutionality of a statute and the onus to prove its invalidity lies on the party which assails the same..."

55. In ***Government of A.P. v. P. Laxmi Devi***[48], this Court held thus:

> "**66**. As observed by the Privy Council in Shell Co. of Australia v. Federal Commr. of Taxation [1931 AC 275:1930 All ER Rep 671 (PC)] (All ER p. 680 G-H)
>
> "...unless it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will..."
>
> **67**. Hence if two views are possible, one making the provision in the statute constitutional, and the other making it unconstitutional, the former should be preferred vide Kedar Nath Singh v. State of Bihar [AIR 1962 SC 955]. Also, if it is necessary to uphold the constitutionality of a statute to construe its general words narrowly or widely, the court should do so vide G.P. Singh's Principles of Statutory Interpretation, 9th Edn., 2004, p. 497....."

56. In ***Subramanian Swamy v. Director, CBI***[49], a Constitution Bench of this Court laid down the following principle:

48 (2008) 4 SCC 720

49 (2014) 8 SCC 682

"**Court's approach**

49. Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognised by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognised and these are: (i) discrimination, based on an impermissible or invalid classification, and (ii) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders – if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is."

57. I am conscious of the self imposed limitations laid down by this Court while deciding the issue whether a law is constitutional or not. However, if the law is discriminatory, arbitrary or violative of the fundamental rights or is beyond the legislative competence of the legislature then the Court is duty bound to invalidate such a law.

58. Justice H.R. Khanna in the case of ***State of Punjab v. Khan Chand***[50] held that when Courts strike down laws they are only doing their duty and no element

50 (1974) 1 SCC 549

of judicial arrogance should be attributed to the Courts when they do their duty under the Constitution and determine whether the law made by the legislature is in conformity with the provisions of the Constitution or not. The relevant observations are as follows:

> "**12**. It would be wrong to assume that there is an element of judicial arrogance in the act of the Courts in striking down an enactment. The Constitution has assigned to the Courts the function of determining as to whether the laws made by the Legislature are in conformity with the provisions of the Constitution. In adjudicating the constitutional validity of statutes, the Courts discharge an obligation which has been imposed upon them by the Constitution. The Courts would be shirking their responsibility if they hesitate to declare the provisions of a statute to be unconstitutional, even though those provisions are found to be violative of the Articles of the Constitution. Articles 32 and 226 are an integral part of the Constitution and provide remedies for enforcement of fundamental rights and other rights conferred by the Constitution. Hesitation or refusal on the part of the Courts to declare the provisions of an enactment to be unconstitutional, even though they are found to infringe the Constitution because of any notion of judicial humility would in a large number of cases have the effect of taking away or in any case eroding the remedy provided to the aggrieved parties by the Constitution. Abnegation in matters affecting one's own interest may sometimes be commendable but abnegation in a matter where power is conferred to protect the interest of others against measures which are violative of the Constitution is fraught with serious consequences. It is as much the duty of the Courts to declare a provision of an enactment to be unconstitutional if it contravenes any Article of the Constitution as it is theirs to uphold its validity in case it is found to suffer from no such infirmity."

59. Therefore, the principle is that normally the Courts should raise a presumption in favour of the impugned law; however, if the law under challenge violates the fundamental rights of the citizens, the law is arbitrary, or is discriminatory, the Courts can either hold the law to be totally unconstitutional and strike down the law or the Court may read down the law in such a manner that the

law when read down does not violate the Constitution. While the Courts must show restraint while dealing with such issues, the Court cannot shut its eyes to the violations of the fundamental rights of the citizens. Therefore, if the legislature enacts a law which is violative of the fundamental rights of the citizens, is arbitrary and discriminatory, then the Court would be failing in its duty if it does not either strike down the law or read down the law in such a manner that it falls within the four corners of the Constitution.

60. It is not the job of the Court to decide whether a law is good or bad. Policy matters fall within the realm of legislature and not of the Courts. The Court, however, is empowered and has the jurisdiction to decide whether a law is unconstitutional or not.

61. "The law is an ass" said Mr. Bumble[51]. That may be so. The law, however, cannot be arbitrary or discriminatory. Merely because a law is asinine, it cannot be set aside. However, if the law is arbitrary, discriminatory and violates the fundamental rights guaranteed to the citizens of the country, then the law can either be struck down or can be read down to make it in consonance with the Constitution of India.

51 Oliver Twist: Author Charles Dickens

WHETHER EXCEPTION 2 TO SECTION 375 IPC IS ARBITRARY?

62. Before dealing with this issue, it would be necessary to point out that earlier there was divergence of opinion as to whether a law could be struck down only on the ground that it was arbitrary. In ***Indira Nehru Gandhi*** v. ***Raj Narain***[52] the Court struck down clauses 4 and 5 of Article 329A of the Constitution on the ground of arbitrariness. Reliance was placed on the celebrated judgment of this Court passed in the case of ***Keshavananda Bharati*** v. ***State of Kerala***[53]. In Para 681 of ***Raj Narain*** (supra), Chandrachud J., held as follows:

> "**681**. It follows that clauses (4) and (5) of Article 329A are arbitrary and are calculated to damage or destroy the rule of law. Imperfections of language hinder a precise definition of the rule of law as of the definition of 'law' itself. And the Constitutional Law of 1975 has undergone many changes since A.V. Dicey, the great expounder of the rule of law, delivered his lectures as Vinerian Professor of English Law at Oxford, which were published in 1885 under the title, "*Introduction to the Study of the Law of the Constitution*". But so much, I suppose, can be said with reasonable certainty that the rule of law means that the exercise of powers of government shall be conditioned by law and that subject to the exceptions to the doctrine of equality, no one shall be exposed to the arbitrary will of the Government. Dicey gave three meanings to rule of law: Absence of arbitrary power, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by ordinary law courts and that the Constitution is not the source but the consequence of the rights of individuals, as defined and enforced by the courts……."

52 1975 (Supp.) SCC 1

53 (1973) 4 SCC 225.

63. The aforesaid case was one of the first cases in which a law was set aside on the ground of being arbitrary. In ***E.P. Royappa*** v. ***State of Tamil Nadu*** [54] the doctrine of arbitrariness was further expanded. Bhagwati, J., eruditely explained the principle in the following terms.

> "**85**.....From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16."

64. The doctrine developed in ***Royappa's*** case (supra) was further advanced in the case of ***Maneka Gandhi*** v. ***Union of India***[55]. In this case, the test of reasonableness was introduced and it was held that a law which is not "right, just and fair" is arbitrary. The following observations are apposite:-

> "**7**.....The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness

54 (1974) 4 SCC 3

55 (1978) 1 SCC 248

> pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied."

65. This principle was followed in the cases of ***A.L. Kalra*** v. ***Project and Equipment Corpn.***[56], ***Babita Prasad*** v. ***State of Bihar***[57], ***Ajay Hasia*** v. ***Khalid Mujib Sehravardi***[58] and ***Dr. K.R. Lakshmanan*** v. ***State of Tamil Nadu***[59]. In the case of ***Ajay Hasia*** *(*supra), a Constitution Bench of this Court held as follows:

> "**16**.....Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an 'authority' under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."

66. In ***State of A.P.*** v. ***McDowell & Co.***[60], a three-Judge Bench of this Court struck a discordant note and rejected the plea of the Amending Act being arbitrary. The Court held that an enactment could be struck down if it is being challenged as violative of Article 14 only if it is found that it is violative of equality clause, equal protection clause or violative of fundamental rights. The Court went on to hold

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56 (1984) 3 SCC 316,

57 1993 Supp (3) SCC 268

58 (1981) 1 SCC 722

59 (1996) 2 SCC 226

60 (1996) 3 SCC 709

that an enactment cannot be stuck down only on the ground that the Court thinks that it is unjustified. This judgment need not detain us for long because in ***Shayara Bano*** v. ***Union of India & Ors.***[61] popularly known as the "Triple Talaq case", this Court held that this judgment did not take note of binding judgments of this Court passed by a Constitution Bench, in the case of ***Ajay Hasia*** (supra) and a three-Judge Bench in the case of ***Dr.K.R. Lakshmanan*** (supra). After discussing the entire law on the subject, Nariman, J., in his judgment held as follows:

> "It is, therefore, clear from a reading of even the aforesaid two Constitution Bench judgments that Article 14 has been referred to in the context of the constitutional invalidity of statutory law to show that such statutory law will be struck down if it is found to be "arbitrary".
>
> xxx xxx xxx
>
> xxx xxx xxx
>
> "**55**.....The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

Therefore, there can be no dispute that a law can be struck down if the Court find it is arbitrary and falls foul of Article 14 and other fundamental rights.

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61 WP(C) No.118/2016 and connected matters [(2017) Vol. 8 SCALE 178]

67. In this case, we are concerned mainly with Article 14 and 21 of the Constitution of India. The legislative history given above clearly indicates that a child has universally been defined as a person below 18 years of age in all the enactments. This has been done for the reason that it is perceived that a person below the age of 18 years is not fully developed and does not know the consequences of his/her actions. Not only is a person below the age of 18 years treated to be a child, but is also not even entitled to deal with his property, enter into a contract or even vote.

68. The fact that child marriage is an abhorrent practice and is violative of human rights of the child is not seriously disputed by the Union of India. The only justification given is that since a large number of child marriages are taking place, it would not be proper to criminalize the consummation of such child marriages. It is urged that, keeping in view age old traditions and evolving social norms, the practice of child marriage cannot be wished away and, therefore, legislature in its wisdom has thought it fit not to criminalize the consummation of such child marriages.

69. I am not impressed with the arguments raised by the Union of India. Merely because something is going on for a long time is no ground to legitimise and legalise an activity which is *per se* illegal and a criminal offence. No doubt, it is totally within the realm of Parliament to decide what should be the age of consent

under clause Sixthly of Section 375 IPC. It is also within the domain of the Parliament to decide what should be the minimum age of marriage. The Parliament has decided in both the enactments that a girl below 18 years is not capable of giving consent to have sex and legally she cannot marry. Parliament has also, in no uncertain terms, prohibited child marriage and come to the conclusion that child marriage is an activity which must come to an end. If that be so, can the practice of child marriage which is admittedly "an evil", and is also a criminal offence be set up as an exception in a case of a girl child, who is subjected to sexual intercourse by her so called husband. Shockingly, even if this sexual intercourse is forcible and without the consent of the girl child, then also the husband is not liable for any offence. This law is definitely not right, just and fair and is, therefore, arbitrary.

70. There can be no dispute that every citizen of this country has the right to get good healthcare. Every citizen can expect that the State shall make best endeavours for ensuring that the health of the citizen is not adversely affected. By now it is well settled by a catena of judgments of this Court that the "right to life" envisaged in Article 21 of the Constitution of India is not merely a right to live an animal existence. This Court has repeatedly held that right to life means a right to live with human dignity. Life should be meaningful and worth living. Life has many shades. Good health is the *raison d'etre* of a good life. Without good health

there cannot be a good life. In the case of a minor girl child good health would mean her right to develop as a healthy woman. This not only requires good physical health but also good mental health. The girl child must be encouraged to bloom into a healthy woman. The girl child must not be deprived of her right of choice. The girl child must not be deprived of her right to study further. When the girl child is deprived of her right to study further, she is actually deprived of her right to develop into a mature woman, who can earn independently and live as a self sufficient independent woman. In the modern age, when we talk of gender equality, the girl child must be given equal opportunity to develop like a male child. In fact, in my view, because of the patriarchal nature of our society, some extra benefit must be showered upon the girl child to ensure that she is not deprived of her right to life, which would include her right to grow and develop physically, mentally and economically as an independent self sufficient female adult.

71. It is true that at times the State, because of paucity of funds, or other reasons beyond its control, cannot live up to the expectations of the people. At the same time, it is not expected that the State should frame a law, which adversely affects the health of a citizen, that too a minor girl child. The State, under Article 15 of the Constitution, is in fact, empowered to make laws favouring women. Reservation for women is envisaged under Article 15 of the Constitution. In

Vishakha v. State of Rajasthan[62], this Court held that sexual harassment of working women amounts to violation of the rights guaranteed by Articles 14, 15 and 23 of the Constitution.

72. When a girl is compelled to marry before she attains the age of 18 years, her health is put in serious jeopardy. As is evident from various reports referred to above, girls who were married before the age of 19 years are likely to suffer medical and psychological problems. A 15 or 16 year old girl, when forcibly subjected to sexual intercourse by her "husband", undergoes a trauma, which her body and mind is not ready to face. The girl child is also twice as more likely to die in child birth than a grown up woman. The least, that one would expect in such a situation, is that the State would not take the defence of tradition and sanctity of marriage in respect of girl child, which would be totally violative of Article 14, 15 and 21 of the Constitution. Therefore, this Court is of the view that Exception 2 to Section 375 IPC is arbitrary since it is violative of the principles enshrined in Article 14, 15 and 21 of the Constitution of India.

73. Approaching this aspect from another angle. As is evident from various reports filed in this case, child marriages are not restricted to girls aged above 15 years. Even as per the National Plan of Action for Children, 2016 prepared by the Ministry of Women and Child Development, Government of India, 30.3%

62 (1997) 6 SCC 241

marriages i.e. almost 1 in every 3 marriage takes place in violation of the PCMA. Many of these relate to child brides aged less than 15 years. A girl may be married when she is 3-4 years or may be 10-11 years old. She may be sent to her matrimonial home on attaining the age of puberty, which may be well before she attains the age of 15 years. In such an eventuality, what is the reason for fixing the magic figure of 15 years. This figure had relevance when under the criminal law and the marriage laws the age was similar. In the year 1940, the age of consent was 16 years, the age of marriage was 15 years and the age under the exception was also 15 years; in 1975, the age of consent was 16 years, the age of marriage was 18 years, but the age under the exception remained 15 years. That may have been there because there was no change in the age of consent under Clause Sixthly. Now when the age of consent is changed to 18 years, the minimum age of marriage is also 18 years and, therefore, fixing a lower age under Exception 2 is totally irrational. It strikes against the concept of equality. It violates the right of fair treatment of the girl child, who is unable to look after herself. The magic figure of 15 years is not based on any scientific evaluation, but is based on the mere fact that it has been existing for a long time. The age of 15 years in Exception 2 was fixed in the year 1940 when the minimum age for marriage was also 15 and the age of consent under clause Sixthly was 16. In the present context when the age for marriage has been fixed at 18 years and when the age of consent

is also fixed at 18 years, keeping the age under Exception 2 at 15 years, cannot be said to be right, just and fair. In fact, it is arbitrary and oppressive to the girl child.

74. Law cannot be hidebound and static. It has to evolve and change with the needs of the society. Recognising these factors, the Parliament increased the minimum age for marriage. The Parliament also increased the minimum age of consent but the inaction in raising the age in Exception 2 is by itself an arbitrary non-exercise of power. When the age was being raised in all other laws, the age under Exception 2 should also have been raised to bring it in line with the evolving laws especially the laws to protect women and the girl child aged below 18 years. Therefore, I have no hesitation in holding that the Exception 2, in so far as it relates to the girl child below eighteen years, is unreasonable, unjust, unfair and violative of the rights of the girl child. To that extent the same is arbitrary and liable to be set aside.

WHETHER EXCEPTION 2 TO SECTION 375 IPC IS DISCRIMINATORY?

75. There can be no dispute that a law can be set aside if it is discriminatory. Some elements of discrimination have already been dealt with while dealing with the issue of arbitrariness. However, there are certain other aspects which make Exception 2 to Section 375 IPC in so far as it deals with the girl child totally discriminatory. The law discriminates between a girl child aged less than 18 years,

who may be educated and has sexual intercourse with her consent and a girl child who may be married even before the age of 15 years, but her marriage has been consummated after 15 years even against her consent. This is invidious discrimination which is writ large. The discrimination is between a consenting girl child, who is almost an adult and non-consenting child bride. To give an example, if a girl aged 15 years is married off by her parents without her consent and the marriage is consummated against her consent, then also this girl child cannot file a criminal case against her husband. The State is talking of the reality of the child marriages. What about the reality of the rights of the girl child? Can this helpless, underprivileged girl be deprived of her rights to say 'yes' or 'no' to marriage? Can she be deprived of her right to say 'yes' or 'no' to having sex with her husband, even if she has consented for the marriage? In my view, there is only one answer to this and the answer must be a resounding "NO". While interpreting such a law the interpretation which must be preferred is the one which protects the human rights of the child, which protects the fundamental rights of the child, the one which ensures the good health of the child and not the one which tries to say that though the practice is "evil" but since it is going on for a long time, such "criminal" acts should be decriminalised.

76. The State is entitled and empowered to fix the age of consent. The State can make reasonable classification but while making any classification it must show

that the classification has been made with the object of achieving a certain end. The classification must have a reasonable nexus with the object sought to be achieved. In this case the justification given by the State is only that it does not want to punish those who consummate their marriage. The stand of the State is that keeping in view the sanctity attached to the institution of marriage, it has decided to make a provision in the nature of Exception 2 to Section 375 IPC. This begs the question as to why in this exception the age has been fixed as 15 years and not 18 years. As pointed out earlier, a girl can legally consent to have sex only after she attains the age of 18 years. She can legally enter into marriage only after attaining the age of 18 years. When a girl gets married below the age of 18 years, the persons who contract such a marriage or abet in contracting such child marriage, commit a criminal offence and are liable for punishment under the PCMA. In view of this position there is no rationale for fixing the age at 15 years. This age has no nexus with the object sought to be achieved viz., maintaining the sanctity of marriage because by law such a marriage is not legal. It may be true that this marriage is voidable and not *void ab initio* (except in the State of Karnataka) but the fact remains that if the girl has got married before the age of 18 years, she has right to get her marriage annulled. Irrespective of the fact that the right of the girl child to get her marriage annulled, it is indisputable that a criminal offence has been committed and other than the girl child, all other persons

including her husband, and those persons who were involved in getting her married are guilty of having committed a criminal act. In my opinion, when the State on the one hand, has, by legislation, laid down that abetting child marriage is a criminal offence, it cannot, on the other hand defend this classification of girls below 18 years on the ground of sanctity of marriage because such classification has no nexus with the object sought to be achieved. Therefore, also Exception 2 in so far as it relates to girls below 18 years is discriminatory and violative of Article 14 of the Constitution.

77. One more ground for holding that Exception 2 to Section 375 IPC is discriminatory is that this is the only provision in various penal laws which gives immunity to the husband. The husband is not immune from prosecution as far as other offences are concerned. Therefore, if the husband beats a girl child and has forcible sexual intercourse with her, he may be charged for offences under Sections 323, 324, 325 IPC etc. but he cannot be charged with rape. This leads to an anomalous and astounding situation where the husband can be charged with lesser offences, but not with the more serious offence of rape. As far as sexual crimes against women are concerned, these are covered by Sections 354, 354A, 354B, 354C, 354D of the IPC. These relate to assault or use of criminal force against a woman with intent to outrage her modesty; sexual harassment and punishment for sexual harassment; assault or use of criminal force to woman with

intent to disrobe; voyeurism; and stalking respectively. There is no exception clause giving immunity to the husband for such offences. The Domestic Violence Act will also apply in such cases and the husband does not get immunity. There are many other offences where the husband is either specifically liable or may be one of the accused. The husband is not given the immunity in any other penal provision except in Exception 2 to Section 375 IPC. It does not stand to reason that only for the offence of rape the husband should be granted such an immunity especially where the "victim wife" is aged below 18 years i.e. below the legal age of marriage and is also not legally capable of giving consent to have sexual intercourse. Exception 2 to Section 375 IPC is, therefore, discriminatory and violative of Article 14 of the Constitution of India, on this count also.

78. The discrimination is absolutely patent and, therefore, in my view, Exception 2, in so far as it relates to the girl child between 15 to 18 years is not only arbitrary but also discriminatory, against the girl child.

LAW IN CONFLICT WITH POCSO

79. Another aspect of the matter is that the POSCO was enacted by Parliament in the year 2012 and it came into force on 14th November, 2012. Certain amendments were made by Criminal Law Amendment Act of 2013, whereby Section 42 and Section 42A, which have been enumerated above, were added. It

would be pertinent to note that these amendments in POCSO were brought by the same Amendment Act by which Section 375, Section 376 and other sections of IPC relating to crimes against women were amended. The definition of rape was enlarged and the punishment under Section 375 IPC was made much more severe. Section 42 of POCSO, as mentioned above, makes it clear that where an offence is punishable, both under POCSO and also under IPC, then the offender, if found guilty of such offence, is liable to be punished under that Act, which provides for more severe punishment. This is against the traditional concept of criminal jurisprudence that if two punishments are provided, then the benefit of the lower punishment should be given to the offender. The legislature knowingly introduced Section 42 of POCSO to protect the interests of the child. As the objects and reasons of the POCSO show, this Act was enacted as a special provision for protection of children, with a view to ensure that children of tender age are not abused during their childhood and youth. These children were to be protected from exploitation and given facilities to develop in a healthy manner. When a girl is married at the age of 15 years, it is not only her human right of choice, which is violated. She is also deprived of having an education; she is deprived of leading a youthful life. Early marriage and consummation of child marriage affects the health of the girl child. All these ill effects of early marriage have been recognised by the Government of India in its own documents, referred to hereinabove.

80. Section 42A of POCSO has two parts. The first part of the Section provides that the Act is in addition to and not in derogation of any other law. Therefore, the provisions of POCSO are in addition to and not above any other law. However, the second part of Section 42A provides that in case of any inconsistency between the provisions of POCSO and any other law, then it is the provisions of POCSO, which will have an overriding effect to the extent of inconsistency. POCSO defines a child to be a person below the age of 18 years. Penetrative sexual assault and aggravated penetrative sexual assault have been defined in Section 3 and Section 5 of POCSO. Provisions of Section 3 and 5 are by and large similar to Section 375 and Section 376 of IPC. Section 3 of the POCSO is identical to the opening portion of Section 375 of IPC whereas Section 5 of POCSO is similar to Section 376(2) of the IPC. Exception 2 to Section 375 of IPC, which makes sexual intercourse or acts of consensual sex of a man with his own "wife" not being under 15 years of age, not an offence, is not found in any provision of POCSO. Therefore, this is a major inconsistency between POCSO and IPC. As provided in Section 42A, in case of such an inconsistency, POCSO will prevail. Moreover, POCSO is a special Act, dealing with the children whereas IPC is the general criminal law. Therefore, POCSO will prevail over IPC and Exception 2 in so far as it relates to children, is inconsistent with POCSO.

IS THE COURT CREATING A NEW OFFENCE?

81. One of the doubts raised was if this Court strikes down, partially or fully, Exception 2 to Section 375 IPC, is the Court creating a new offence. There can be no cavil of doubt that the Courts cannot create an offence. However, there can be no manner of doubt that by partly striking down Section 375 IPC, no new offence is being created. The offence already exists in the main part of Section 375 IPC as well as in Section 3 and 5 of POCSO. What has been done is only to read down Exception 2 to Section 375 IPC to bring it in consonance with the Constitution and POCSO.

82. In this behalf, reference may be made to some English decisions. In England, there was never any such statutory exception granting immunity to the husband from the offence of marital rape. However, Sir Mathew Hale, who was Chief Justice of England for five years prior to his death in 1676, was credited with having laid down the following principle:

> "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract."

83. The aforesaid principle, commonly known as Hale's principle, was recorded in the History of the Pleas of the Crown[63] and was followed in England for many years. Under Hale's principle a husband could not be held guilty of raping his

63 (1736), Vol. 1, Ch. 58, P. 629

wife. This principle was based on the proposition that the wife gives up her body to her husband at the time of marriage. Women, at that time, were considered to be chattel. It was also presumed that on marriage, a woman had given her irrevocable consent to have sexual intercourse with her husband.

84. The aforesaid principle was followed in England for more than two centuries. For the first time in ***Reg*** v. ***Clarence***[64], some doubts were raised by Justice Wills with regard to this proposition. In ***Rex*** v. ***Clarke***[65], Hale's principle was given the burial it deserved and it was held that the husband's immunity as expounded by Hale, no longer exists. Dealing with the creation of new offence, the House of Lords held as follows:

> "The remaining and no less difficult question is whether, despite that view, this is an area where the court should step aside to leave the matter to the Parliamentary process. This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it."

85. In my view, as far as this case is concerned, this Court is not creating any new offence but only removing what was unconstitutional and offensive.

THE PRIVACY DEBATE

86. Ms. Jayna Kothari, learned counsel for the Intervener, had raised the issue of privacy and made reference to the judgment of this Court in the case of ***Justice***

64 (1888) 22 Q.B.D. 23

65 (1949) 2 All E.R. 448

K.S. Puttaswamy (Retd.) & Anr. v. ***Union of India and Ors.***[66] to urge that the right of privacy of the girl child is also violated by Exception 2 to Section 375 IPC. I have purposely not gone into this aspect of the matter because anything said or urged in this behalf would affect any case being argued on "marital rape" even in relation to "women over 18 years of age". In this case, the issue raised is only with regard to the girl child and, therefore, I do not think it proper to deal with this issue which may have wider ramifications especially when the case of girl child can be decided without dealing with the issue of privacy.

RELIEF

87. Since this Court has not dealt with the wider issue of "marital rape", Exception 2 to Section 375 IPC should be read down to bring it within the four corners of law and make it consistent with the Constitution of India.

88. In view of the above discussion, I am clearly of the opinion that Exception 2 to Section 375 IPC in so far as it relates to a girl child below 18 years is liable to be struck down on the following grounds:–

(i) it is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Article 14, 15 and 21 of the Constitution of India;

(ii) it is discriminatory and violative of Article 14 of the Constitution of India and;

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(iii) it is inconsistent with the provisions of POCSO, which must prevail.

Therefore, Exception 2 to Section 375 IPC is read down as follows:

> *"Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape".*

It is, however, made clear that this judgment will have prospective effect.

89. It is also clarified that Section 198(6) of the Code will apply to cases of rape of "wives" below 18 years, and cognizance can be taken only in accordance with the provisions of Section 198(6) of the Code.

90. At the cost of repetition, it is reiterated that nothing said in this judgement shall be taken to be an observation one way or the other with regard to the issue of "marital rape".

91. Extremely valuable assistance was rendered to this Court by Mr. Gaurav Agarwal, learned counsel appearing for the petitioner and Ms. Jayna Kothari, learned counsel appearing for the intervener and I place on record my appreciation and gratitude for the same.

.....J.
(DEEPAK GUPTA)

New Delhi
October 11, 2017