REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 382 OF 2013

Independent Thought .....Petitioner

versus

Union of India and Anr. ....Respondents

J U D G M E N T

Madan B. Lokur, J.

1. The issue before us is limited but one of considerable public importance – whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape? Exception 2 to Section 375 of the Indian Penal Code, 1860 (the IPC) answers this in the negative, but in our opinion sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The exception carved out in the IPC creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and

discriminatory and is definitely not in the best interest of the girl child. The artificial distinction is contrary to the philosophy and ethos of Article 15(3) of the Constitution as well as contrary to Article 21 of the Constitution and our commitments in international conventions. It is also contrary to the philosophy behind some statutes, the bodily integrity of the girl child and her reproductive choice. What is equally dreadful, the artificial distinction turns a blind eye to trafficking of the girl child and surely each one of us must discourage trafficking which is such a horrible social evil.

2. We make it clear that we have refrained from making any observation with regard to the marital rape of a woman who is 18 years of age and above since that issue is not before us at all. Therefore we should not be understood to advert to that issue even collaterally.

The writ petition

3. The petitioner is a society registered on 6th August, 2009 and has since been working in the area of child rights. The society provides technical and hand-holding support to non-governmental organizations as also to government and multilateral bodies in several States in India. It has also been involved in legal intervention, research and training on issues concerning children and their rights. The society has filed a petition under Article 32 of the Constitution in public interest with a view to draw attention

to the violation of the rights of girls who are married between the ages of 15 and 18 years.

4. According to the petitioner, Section 375 of the IPC prescribes the age of consent for sexual intercourse as 18 years meaning thereby that any person having sexual intercourse with a girl child below 18 years of age would be statutorily guilty of rape even if the sexual activity was with her consent. Almost every statute in India recognizes that a girl below 18 years of age is a child and it is for this reason that the law penalizes sexual intercourse with a girl who is below 18 years of age. Unfortunately, by virtue of Exception 2 to Section 375 of the IPC, if a girl child between 15 and 18 years of age is married, her husband can have non-consensual sexual intercourse with her, without being penalized under the IPC, only because she is married to him and for no other reason. The right of such a girl child to bodily integrity and to decline to have sexual intercourse with her husband has been statutorily taken away and non-consensual sexual intercourse with her husband is not an offence under the IPC.

5. Learned counsel for the petitioner submitted that absolutely nothing is achieved by entitling the husband of a girl child between 15 and 18 years of age to have non-consensual sexual intercourse with her. It was also submitted that whatever be the (unclear) objective sought to be achieved by

this, the marital status of the girl child between 15 and 18 years of age has no rational nexus with that unclear object. Moreover, merely because a girl child between 15 and 18 years of age is married does not result in her ceasing to be a child or being mentally or physically capable of having sexual intercourse or indulging in any other sexual activity and conjugal relations. It was submitted that to this extent Exception 2 to Section 375 of the IPC is not only arbitrary but is also discriminatory and contrary to the beneficial intent of Article 15(3) of the Constitution which enables Parliament to make special provision for women and children. In fact, by enacting Exception 2 to Section 375 of the IPC in the statute book, the girl child is placed at a great disadvantage, contrary to the visionary and beneficent philosophy propounded by Article 15(3) of the Constitution.

Law Commission of India – 84th Report

6. Learned counsel for the petitioner drew our attention to the 84th report of the Law Commission of India (LCI) presented on 25th April, 1980 dealing with the rape of a girl child below the prescribed minimum age. The report considered the anomalies in the law relating to rape, particularly in the context of the age of consent for sexual intercourse with a girl child. The view expressed by the LCI is quite explicit and is to be found in paragraph 2.18, 2.19 and 2.20 of the report. The view is that since the Child Marriage

Restraint Act, 1929 prohibits the marriage of a girl below 18 years of age, sexual intercourse with a girl child below 18 years of age should also be prohibited and the IPC should reflect that position thereby making sexual intercourse with a girl child below 18 years of age an offence. These paragraphs read as follows:

> **2.18. Section 375, fifth clause.** – The discussion in the few preceding paragraphs was concerned with rape constituted by sexual intercourse without consent. The fifth clause of section 375 may now be considered. It is concerned with sexual intercourse with a woman under 16 years of age. Such sexual intercourse is an offence irrespective of the consent of the woman.
>
> **2.19. History. –** The age of consent has been subjected to increase more than once in India. The historical development may, for convenience, be indicated in the form of a chart as follows:-

Year	**Age of consent under sec. 375, 5th clause, I.P.C.**	**Age mentioned in the Exception to sec. 375, I.P.C**	**Minimum age of marriage under the Child Marriage Restraint Act, 1929**
1860……	10 years	10 years	__
1891 (Act 10 of 1891) (after the amendment of I.P.C.	12 years	12 years	__
1925 (after the amendment of I.P.C.)	14 years	13 years	__
1929 (after the passing of the Child Marriage Act)	14 years	13 years	14 years
1940 (after the amendment of the Penal Code and the Child Marriage Act)	16 years	15 years	15 years
1978……	16 years	15 years	18 years
[as of 2017]* *The bracketed portion	[Age of consent under	[15 years]	[Minimum age of marriage under the

in this row has been inserted by us.	Sec. 375, Sixthly of the IPC - 18 years]		PCMA, 2006 – 18(F)/21(M) years]

> **2.20. Increase in minimum age. –** The question to be considered is whether the age should be increased to 18 years. The minimum age of marriage now laid down by law (after 1978) is 18 years in the case of females and the relevant clause of Section 375 should reflect this changed attitude. **Since marriage with a girl below 18 years is prohibited (though it is not void as a matter of personal law), sexual intercourse with a girl below 18 years should also be prohibited.** (Emphasis supplied by us).

Law Commission of India – 172nd Report

7. The issue was re-considered by the LCI in its 172nd report presented on 25th March, 2000. In that report, it is recommended that an exception be added to Section 375 of the IPC to the effect that sexual intercourse by a man with his own wife, the wife not being under 16 years of age, is not sexual assault. In other words, the earlier recommendation made by the LCI was not approved.

8. Apparently at the stage of discussions, the recommendation of the LCI (still at the stage of proposal) did not find favour with an NGO called Sakshi who suggested deletion of the exception. According to the NGO, "where a husband causes some physical injury to his wife, he is punishable under the appropriate offence and the fact that he is the husband of the victim is not an extenuating circumstance recognized by law." Therefore, there is no reason

why a concession should be made in the matter of an offence of rape/sexual assault only because the wife happens to be above 15/16 years of age. The LCI did not agree with the NGO and the reason given is that if the exception that is recommended is deleted, it "may amount to excessive interference with the marital relationship." In other words, according to the LCI the husband of a girl child who is not below 16 years of age can sexually assault and even rape his wife and the assault or rape would not be punishable - and if it is made punishable, then it would amount to excessive interference with the marital relationship. (It may be mentioned that Exception 2 to Section 375 of the IPC has not increased the age to 16 years from 15 years as recommended by the LCI but has retained it at 15 years. According to the counter affidavit filed on behalf of the Union of India, the age of 15 years has been kept to give protection to the husband and the wife against criminalizing the sexual activity between them).

Counter affidavit of the Union of India

9. Since we have adverted to the counter affidavit filed by the Union of India opposing the writ petition, we propose to make a very brief reference to it. A somewhat more detailed reference is made to the counter affidavit of the Union of India at a later stage.

10. For the present, the counter affidavit of the Union of India refers to the National Family Health Survey - 3 (of 2005) in which it is stated that 46% of women in India between the ages of 18 and 29 years were married before the age of 18 years. It is also estimated, interestingly but disturbingly, that there are about 23 million child brides in the country. As far as any remedy available to a child bride is concerned, the counter affidavit draws attention to Section 3 of the Prohibition of Child Marriage Act, 2006 (the PCMA). Under Section 3(1) of the PCMA a child marriage is voidable at the option of any contracting party who was a child at the time of the marriage. The marriage can be declared a nullity in terms of the proviso to Section 3(1) of the PCMA through an appropriate petition filed by the child within two years of attaining majority and by approaching an appropriate court of law. It is also stated that in terms of Section 13(2)(iv) of the Hindu Marriage Act, 1955 a child bride can petition for a 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 the marriage after attaining that age but before attaining 18 years of age. In other words a child marriage is sought to be somehow 'legitimized' by the Union of India and the onus for having it declared voidable or a nullity is placed on the child bride or the child groom.

Documentary material

11. Apart from but in addition to the legal issue, learned counsel for the petitioner and learned counsel for the intervener (The Child Rights Trust) relied on a large amount of documentary material to highlight several adverse challenges that a girl child might face on her physical and mental health and some of them could even have an inter-generational impact if a girl child is married below 18 years of age. The girl child could also face adverse social consequences that might impact her for the rest of her life.

(a) Reference was made to a report "**Delaying Marriage for Girls in India: A Formative Research to Design Interventions for Changing Norms**". This report was prepared in March 2011 under the supervision of UNICEF India.

(b) Reference was also made to a report "**Reducing Child Marriage in India: A Model to Scale up Results**". This report was prepared in January 2016 and also under the supervision and guidance of UNICEF India. The report contains statistics of widowed, separated and divorced girls who were married between 10 and 18 years of age based on Census 2011.

(c) Reference was also made to a useful study "**Economic Impacts of Child Marriage: Global Synthesis Report**" released in June 2017. This report is a collaborative effort by the International Centre for Research on Women and the World Bank and it deals with the impact of child marriages on (i) fertility and population growth; (ii) health, nutrition, and intimate partner violence; (iii) educational attainment; (iv) labour force participation, earnings and welfare, and (v) women's decision-making and other impacts. The economic cost of child marriages and implications has also been discussed in detail in the report. A child marriage is defined as a marriage or union taking place before the age of 18 years and this definition has been arrived at by relying on a number of conventions, treaties and international agreements as well as resolutions of the UN Human Rights Council and the UN General Assembly.

(d) Another extremely useful report referred to is "**A Statistical Analysis of Child Marriage in India based on Census 2011**". This report is prepared by a collaborative organization called Young Lives and the National Commission for the Protection of Child Rights and was released quite recently in June 2017.

12. This refers to the consequences of child marriage in Chapter 5.

Broadly, it is stated :

> "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 key consequences of child marriage of girls** may include early pregnancy; maternal and neonatal mortality; child health problems; educational setbacks; lower employment/livelihood prospects; exposure to violence and abuse, including a range of controlling and inequitable behaviours, leading to inevitable negative physical and psychological consequences; and limited agency of girls to influence decisions about their lives.
>
> 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 marginalization. The impact of early marriage on girls - and to a lesser extent on boys - is wide-ranging, opines the Innocenti Digest on child marriage. Child brides often experience overlapping vulnerabilities - they are young, often poor and undereducated. This affects the resources and assets they can bring into their marital household, thus reducing their decision-making ability. Child marriage places a girl under the control of her husband and often

> in-laws, limiting her ability to voice her opinions and form and pursue her own plans and aspirations. While child marriage is bound to have a detrimental effect on boys who would need to shoulder the responsibility of a wife and in most cases, have to also discontinue their education, there is very little research evidence to capture the long term economic and psychological effect on boys who are married early. The Lancet 2015 acknowledges that adolescent boys are not important and neglected part of the equation. The assumption that girls need more attention than boys is now being challenged.
>
> Looking at the impact of early marriage from rights perspective, it can be said that the key concerns are denial of childhood and adolescence, curtailment of personal freedom, deprivation of opportunities to develop a full sense of selfhood and denial of psychosocial and emotional well-being reproductive health and educational opportunity along with consequences described earlier." (Emphasis supplied by us).

13. There is a specific discussion in the Statistical Analysis on the impact of early child birth on health in which it is stated that "girls aged 15 to 19 [years] are twice more likely than older women to die from childbirth and pregnancy, making pregnancy the leading cause of death in poor countries for these age groups. Girls from the Scheduled Castes and Scheduled Tribes were on an average 10 per cent more likely (after accounting for other variables) to give birth earlier than girls from the other castes." It has been found that girls most likely to have had a child by 19 years (as compared with all other married and unmarried girls) were from the poorest groups; were more likely to live in rural areas; had the least educated mothers; had earlier experiences of menarche; had lower education aspirations; and were

less likely to be enrolled in school between the age of 12 and 15 years. Being young and immature mothers, they have little say in decision-making about the number of children they want, nutrition, health-care etc. Lack of self-esteem or of a sense of ownership of her own body exposes a woman to repeated unwanted pregnancies.

14. There is also a useful discussion on violence, neglect and abandonment; psychosocial disadvantage; low self-esteem; low education and limited employability; human trafficking and under-nutrition, all of which are of considerable importance for the well-being of a girl child.

We are not dealing with these reports in any detail but draw attention to them since they support the view canvassed by learned counsel. All that we need say is that a reading of these reports gives a good idea of the variety and magnitude of problems that a girl child who is married between 15 and 18 years of age could ordinarily encounter, including those caused by having sexual intercourse and child-bearing at an early age.

In-depth Study on all forms of violence against women

15. On 6th July, 2006 the Secretary-General of the United Nations submitted a report to the General Assembly called the "**In-depth Study on all forms of violence against women**". In the chapter relating to violence against women within the family and harmful traditional practices, early

marriage was one of the commonly identified forms of violence.[1] Similarly, early marriage was considered a harmful traditional practice[2] - a thought echoed a year later in the **Study on Child Abuse: India 2007** (referred to later) by the Government of India.

16. An early marriage is explained as involving the marriage of a child, that is, a person below the age of 18 years. It is stated that "Minor girls have not achieved full maturity and capacity to act and lack ability to control their sexuality. When they marry and have children, their health can be adversely affected, their education impeded and economic autonomy restricted. Early marriage also increases the risk of HIV infection." Among the under-documented forms of violence against women are included traditional harmful practices, prenatal sex selection, early marriage, acid throwing and dowry or "honour" related violence etc.[3]

17. On the concern of appropriate legislation to deal with issues of violence against women, the right of a woman to bodily integrity and legislations that allow early marriages, the Secretary General had this to say:

> "**The treaty bodies have expressed concerns about the scope and coverage of existing legislation**, in particular in regard to:

1 Paragraph 111

2 Paragraph 118

3 Paragraph 222

> definitions of rape that require use of force and violence rather than lack of consent; **definitions of domestic violence that are limited to physical violence**; treatment of sexual violence against women as crimes against the honour of the family or crimes against decency rather than violations of **women's right to bodily integrity**; use of the defence of "honour" in cases of violence against women and the related mitigation of sentences; provisions allowing mitigation of sentences in rape cases where the perpetrator marries the victim; inadequacy of protective measures for trafficked women, as well as their treatment as criminals rather than victims; termination of criminal proceedings upon withdrawal of a case by the victim; penalization of abortion in rape cases; **laws that allow early or forced marriage**; inadequate penalties for acts of violence against women; and discriminatory penal laws."[4] (Emphasis supplied by us)

National Policy and National Plan

18. What has been the response of the Government of India to studies carried out from time to time and views expressed? The National Charter for Children, 2003 was notified on 9th February, 2004. While it failed to define a child, we assume that it was framed keeping in mind the generally accepted definition of a child as being someone below 18 years of age. Proceeding on this basis, for the present purposes, Clause 11 of the National Charter is of relevance in the context of child marriages. It recognized that child marriage is a crime and an atrocity committed against the girl child. It also provided for taking "serious measures" to speedily abolish the practice of child marriage. Clause 11 reads:

4 Paragraph 277

> "11. a. The State and community shall ensure that crimes and atrocities committed against the girl child, including child marriage, discriminatory practices, forcing girls into prostitution and trafficking are speedily eradicated.
>
> b. The State shall in partnership with the community undertake measures, including social, educational and legal, to ensure that there is greater respect for the girl child in the family and society.
>
> c. The State shall take serious measures to ensure that the practice of child marriage is speedily abolished."

19. As a first step in this direction, child marriages were criminalized by enacting the PCMA in 2006 but no corresponding amendment was made in Section 375 of the IPC, as it existed in 2006, to decriminalize marital rape of a girl child.

20. The National Charter was followed by the **National Policy for Children** notified on 26th April, 2013. The National Policy explicitly recognized in Clause 2.1 that every person below the age of 18 years is a child. Among the Guiding Principles for the National Policy was the recognition that every child has universal, inalienable and indivisible human rights; every child has the right to life, survival, development, education, protection and participation; the best interest of a child is the primary concern in all decisions and actions affecting the child, whether taken by legislative bodies, courts of law, administrative authorities, public, private, social, religious or cultural institutions.

21. The large 'to do list' in the National Policy led to the **National Plan**

of Action for Children, 2016: Safe Children – Happy Childhood. The National Plan appears to have been made available on 24th January, 2017. While dealing with child marriage, it is stated as follows:

> "In India, between NFHS-3 (2005-06) to RSOC (2013-14), there has been a considerable decline in the percentage of women, between the ages 20-24, who were married before the age of 18 (from 47.4% to 30.3%). The incidence is higher among SC (34.9%) and ST (31%) and in families with lowest wealth index (44.1%). Child marriage violates children's basic rights to health, education, development, and protection and is also used as a means of trafficking of young girls.
>
> Child marriage leads to pregnancy during adolescence, posing life-threatening risks to both mother and child. It is indicated by the Age-specific Marital Fertility Rate (ASMFR) which is measured as a number of births per year in a given age group to the total number of married women in that age group. SRS 2013 reveals that in the age group of 15-19 years; there has been an upward trend during the period 2001-2013. ASMFR is higher in the age group 15-19 years in comparison to 25-29 years."

22. The National Plan of Action for Children recognizes that the early marriage of girls is one of the factors for neo-natal deaths; early marriage poses various risks for the survival, health and development of young girls and to children born to them and most unfortunately it is also used as a means of trafficking.

23. A reading of the National Policy and the National Plan of Action for Children reveals, quite astonishingly, that even though the Government of India realizes the dangers of early marriages, it is merely dishing out

platitudes and has not taken any concrete steps to protect the girl child from marital rape, except enacting the Protection of Children from Sexual Offences Act, 2012.

Human Rights Council

24. The Report of the Working Group on the Universal Periodic Review for India (issued on 17th July, 2017 without formal editing) for the 36th Session of the Human Rights Council refers to recommendations made by several countries to remove the exception relating to marital rape from the definition of rape in Section 375 of the I.P.C. In other words, the issue raised by the petitioner has attracted considerable international attention and discussion and ought to be taken very seriously by the Union of India.

25. In our opinion, it is not necessary to detail the contents of every report or study placed before us except to say that there is a strong established link between early marriage and sexual intercourse with a married girl child between 15 and 18 years of age. There is a plethora of material to clearly indicate that sexual intercourse with a girl child below the age of 18 years (even within marriage) is not at all advisable for her for a variety of reasons, including her physical and mental well-being and her social standing – all of which should ordinarily be of paramount importance to everybody, particularly the State.

26. The social cost of a child marriage (and therefore of sexual intercourse with a girl child) is itself quite enormous and in the long run might not even be worth it. This is in addition to the economic cost to the country which would be obliged to take care of infants who might be malnourished and sickly; the young mother of the infant might also require medical assistance in most cases. All these costs eventually add up and apparently only for supporting a pernicious practice.

27. We can only express the hope that the Government of India and the State Governments intensively study and analyze these and other reports and take an informed decision on the effective implementation of the PCMA and actively prohibit child marriages which 'encourages' sexual intercourse with a girl child. Welfare schemes and catchy slogans are excellent for awareness campaigns but they must be backed up by focused implementation programmes, other positive and remedial action so that the pendulum swings in favour of the girl child who can then look forward to a better future.

Provisions of the Indian Penal Code (IPC)

28. Section 375 of the IPC defines 'rape'. This section was inserted in the IPC in its present form by an amendment carried out on 3rd February, 2013 and it provides that a man is said to commit rape if, broadly speaking, he has sexual intercourse with a woman under circumstances falling under any of

the seven descriptions mentioned in the section. (A woman is defined under Section 10 of the IPC as a female human being of any age). Among the seven descriptions is sexual intercourse against the will or without the consent of the woman; clause 'Sixthly' of Section 375 makes it clear that if the woman is under 18 years of age, then sexual intercourse with her - with or without her consent - is rape. This is commonly referred to as 'statutory rape' in which the willingness or consent of a woman below the age of 18 years for having sexual intercourse is rendered irrelevant and inconsequential.

29. However, Exception 2 to Section 375 of the IPC provides that it is not rape if a man has sexual intercourse with a girl above 15 years of age and if that girl is his wife. In other words, a husband can have sexual intercourse with his wife provided she is not below 15 years of age and this is not rape under the IPC regardless of her willingness or her consent.

30. However, sexual intercourse with a girl under 15 years of age is rape, whether it is with or without her consent, against her will or not, whether it is by her husband or anybody else. This is clear from a reading of Section 375 of the IPC including Exception 2.

31. Therefore, Section 375 of the IPC provides for three circumstances relating to 'rape'. **Firstly** sexual intercourse with a girl below 18 years of

age is rape (statutory rape). **Secondly** and by way of an exception, if a woman is between 15 and 18 years of age then sexual intercourse with her is not rape if the person having sexual intercourse with her is her husband. Her willingness or consent is irrelevant under this circumstance. **Thirdly** sexual intercourse with a woman above 18 years of age is rape if it is under any of the seven descriptions given in Section 375 of the IPC (non-consensual sexual intercourse).

32. The result of the above three situations is that the husband of a girl child between 15 and 18 years of age has blanket liberty and freedom to have non-consensual sexual intercourse with his wife and he would not be punishable for rape under the IPC since such non-consensual sexual intercourse is not rape for the purposes of Section 375 of the IPC. Very strangely, and as pointed out by Sakshi before the LCI, the husband of a girl child does not have the liberty and freedom under the IPC to commit a lesser 'sexual' act with his wife, as for example, if the husband of a girl child assaults her with the intention of outraging her modesty, he would be punishable under the provisions of Section 354 of the IPC. In other words, the IPC permits a man to have non-consensual sexual intercourse with his wife if she is between 15 and 18 years of age but not to molest her. This view is surprisingly endorsed by the LCI in its 172nd report adverted to

above.

Protection of Human Rights Act, 1993

33. The Protection of Human Rights Act, 1993 defines "human rights" in Section 2(d) as meaning the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in international covenants and enforceable by courts in India. There can be no doubt that if a girl child is forced by her husband into sexual intercourse against her will or without her consent, it would amount to a violation of her human right to liberty or her dignity guaranteed by the Constitution or at least embodied in international conventions accepted by India such as the Convention on the Rights of the Child (the CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW).

Protection of Women from Domestic Violence Act, 2005 (DV Act)

34. Section 3 of the Protection of Women from Domestic Violence Act, 2005 (for short 'the DV Act') provides that if the husband of a girl child harms or injures or endangers the health, safety, life, limb or well being, whether mental or physical, of his wife including by causing physical abuse and sexual abuse, he would be liable to have a protection order issued against him and pay compensation to his wife. Explanation I (ii) of Section

3 defines ‘sexual abuse’ as including any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of a woman.

Prohibition of Child Marriage Act, 2006 (PCMA)

35. One of the more important legislations on the subject of protective rights of children is the Prohibition of Child Marriage Act, 2006 (for short ‘the PCMA’). For the purposes of the PCMA, a ‘child’ is a male who has not completed 21 years of age and a female who has not completed 18 years of age and a ‘child marriage’ means a marriage to which either contracting party is a child.

36. Section 3 of the PCMA provides that a child marriage is voidable at the option of any one of the parties to the child marriage – a child marriage is not void, but only voidable. Interestingly, and notwithstanding the fact that a child marriage is only voidable, Parliament has made a child marriage an offence and has provided punishments for contracting a child marriage. For instance, Section 9 of the PCMA provides that any male adult above 18 years of age marrying a child shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both. Therefore regardless of his age, a male is penalized under this section if he marries a girl child. Section 10 of the PCMA provides that whoever performs, conducts, directs or abets any child

marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees; Section 11 of the PCMA provides punishment for promoting or permitting solemnization of a child marriage; and finally Section 13 of the PCMA provides that the jurisdictional judicial officer may injunct the performance of a child marriage while Section 14 of the PCMA provides that any child marriage solemnized in violation of an injunction under Section 13 shall be void.

37. It is quite clear from the above that Parliament is not in favour of child marriages *per se* but is somewhat ambivalent about it. However, Parliament recognizes that although a child marriage is a criminal activity, the reality of life in India is that traditional child marriages do take place and as the studies (referred to above) reveal, it is a harmful practice. Strangely, while prohibiting a child marriage and criminalizing it, a child marriage has not been declared void and what is worse, sexual intercourse within a child marriage is not rape under the IPC even though it is a punishable offence under the Protection of Children from Sexual Offences Act, 2012.

Protection of Children from Sexual Offences Act, 2012 (POCSO)

38. The Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act') is an important statute for the purposes of our discussion.

The Statement of Objects and Reasons necessitating the enactment of the POCSO Act makes a reference to data collected by the National Crime Records Bureau (NCRB) which indicated an increase in sexual offences against children. The data collected by the NCRB was corroborated by the **Study on Child Abuse: India 2007** conducted by the Ministry of Women and Child Development of the Government of India.

39. While the above Study focuses on child abuse, it does refer to the harmful traditional practice of child marriage and in this context adverts to child marriage as being a subtle form of violence against children. The Study notes that there is a realization that if issues of child marriage are not addressed, it would affect the overall progress of the country.

40. The above Study draws attention to the **Convention on the Elimination of All Forms of Discrimination Against Women** (CEDAW) to which India is a signatory. Article 16.2 thereof provides "The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for

marriage and to make the registration of marriages in an official registry compulsory." [5]

41. The above Study also makes a reference to gender equity to the effect that discrimination against girls results in child marriages and such an imbalance needs to be addressed by bringing about attitudinal changes in people regarding the value of the girl child.

42. The Preamble to the POCSO Act states that it was enacted with reference to Article 15(3) of the Constitution. The Preamble recognizes that the best interest of a child should be secured, a child being defined under Section 2(d) as any person below the age of 18 years. In fact, securing the best interest of the child is an obligation cast upon the Government of India having acceded to the **Convention on the Rights of the Child** (the CRC). The Preamble to the POCSO Act also recognizes that it is imperative that the law should operate "in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy, physical, emotional, intellectual and social development

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

of the child". Finally, the Preamble also provides that "sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed". This is directly in conflict with Exception 2 to Section 375 of the IPC which effectively provides that the sexual exploitation or sexual abuse of a girl child is not even a crime, let alone a heinous crime – on the contrary, it is a perfectly legitimate activity if the sexual exploitation or sexual abuse of the girl child is by her husband.

43. Under Article 34 of the CRC, the Government of India is bound to "undertake all appropriate national, bilateral and multi-lateral measures to prevent the coercion of a child to engage in any unlawful sexual activity". The key words are 'unlawful sexual activity' but the IPC declares that a girl child having sexual intercourse with her husband is not 'unlawful sexual activity' within the provisions of the IPC, regardless of any coercion. However, for the purposes of the POCSO Act, any sexual activity engaged in by any person (husband or otherwise) with a girl child is unlawful and a punishable offence. This dichotomy is certainly not in the spirit of Article 34 of the CRC.

44. Further, in terms of our international obligations under Article 1 and Article 34 of the CRC, the Government of India must undertake all appropriate measures to prevent the sexual exploitation or sexual abuse of

any person below 18 years of age since such sexual exploitation or sexual abuse is a heinous crime. What has the Government of India done? It has persuaded Parliament to convert what is otherwise universally accepted as a heinous crime into a legitimate activity for the purposes of Section 375 of the IPC if the exploiter or abuser is the husband of the girl child. But, contrarily the rape of a married girl child (called 'aggravated penetrative sexual assault' in the POCSO Act) is made an offence for the purposes of the POCSO Act.

45. Section 3 of the POCSO Act defines "penetrative sexual assault". Clause (n) of Section 5 provides that if a person commits penetrative sexual assault with a child, then that person actually commits aggravated penetrative sexual assault if that person is related to the child, *inter alia,* through marriage. Therefore, if the husband of a girl child commits penetrative sexual assault on his wife, he actually commits aggravated penetrative sexual assault as defined in Section 5(n) of the POCSO Act which is punishable under Section 6 of the POCSO Act by a term of rigorous imprisonment of not less than ten years and which may extend to imprisonment for life and fine.

46. The duality therefore is that having sexual intercourse with a girl child between 15 and 18 years of age, the husband of the girl child is said to have

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

47. There is no real or material difference between the definition of rape in the terms of Section 375 of the IPC and penetrative sexual assault in the terms of Section 3 of the POCSO Act.[6] The only difference is that the definition of rape is somewhat more elaborate and has two exceptions but the sum and substance of the two definitions is more or less the same and the punishment (under Section 376(1) of the IPC) for being found guilty of committing the offence of rape is the same as for penetrative sexual assault (under Section 4 of the POCSO Act). Similarly, the punishment for

---

6 **3. Penetrative sexual assault**.—A person is said to commit "penetrative sexual assault" if—

(*a*) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(*b*) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(*c*) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(*d*) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person…….

375. Rape.—A man is said to commit "rape" if he—

(*a*) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(*b*) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(*c*) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(*d*) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

'aggravated' rape under Section 376(2) of the IPC is the same as for aggravated penetrative sexual assault under Section 6 of the POCSO Act. Consequently, it is immaterial if a person is guilty of the same sexual activity under the provisions of the POCSO Act or the provisions of the IPC – the end result is the same and only the forum of trial changes. In a violation of the provisions of the POCSO Act, a Special Court constituted under Section 28 of the said Act would be the Trial Court but the ordinary criminal court would be the Trial Court for an offence under the IPC.

48. At this stage it is necessary to refer to Section 42-A inserted in the POCSO Act by an amendment made on 3rd February, 2013. This section reads:

> **42-A. 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.

The consequence of this amendment is that the provisions of the POCSO Act will override the provisions of any other law (including the IPC) to the extent of any inconsistency.

49. One of the questions that arises for our consideration is whether there is any incongruity between Exception 2 to Section 375 of the IPC and

Section 5(n) of the POCSO Act and which provision overrides the other. To decide this, it would be necessary to keep Section 42-A of the POCSO Act in mind as well as Sections 5 and 41 of the IPC which read:

> **5. Certain laws not to be affected by this Act.**—Nothing in this Act shall affect the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of the Government of India or the provisions of any special or local law.
>
> **41. "Special law".**—A "special law" is a law applicable to a particular subject.

50. These two provisions are of considerable importance in resolving the controversy and conflict presented before us.

Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act)

51. The Juvenile Justice (Care and Protection of Children) Act, 2015 (the JJ Act) is also relatable to Article 15(3) of the Constitution. Section 2(12) of the JJ Act defines a child as a person who has not completed 18 years of age. A child in need of care and protection is defined in Section 2(14) of the JJ Act, *inter alia*, as a child "who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnization of such marriage". Clearly a girl child below 18 years of age and who is sought to be married is a child in need of care and protection. She is therefore, required to be produced before a Child Welfare Committee constituted under Section 27

of the JJ Act so that she could be cared for, protected and appropriately rehabilitated or restored to society.

Brief summary of the existing legislations

52. It is obvious from a brief survey of the various statutes referred to above that a child is a person below 18 years of age who is entitled to the protection of her human rights including the right to live with dignity; if she is unfortunately married while a child, she is protected from domestic violence, both physical and mental, as well as from physical and sexual abuse; if she is unfortunately married while a child, her marriage is in violation of the law and therefore an offence and such a marriage is voidable at her instance and the person marrying her is committing a punishable offence; the husband of the girl child would be committing aggravated penetrative sexual assault when he has sexual intercourse with her and is thereby committing a punishable offence under the POCSO Act. The only jarring note in this scheme of the pro-child legislations is to be found in Exception 2 to Section 375 of the IPC which provides that sexual intercourse with a girl child between 15 and 18 years of age is not rape if the sexual intercourse is between the girl child and her husband. Therefore, the question of punishing the husband simply does not arise. A girl child placed in such circumstances is a child in need of care and protection and needs to

be cared for, protected and appropriately rehabilitated or restored to society. All these 'child-friendly statutes' are essential for the well-being of the girl child (whether married or not) and are protected by Article 15(3) of the Constitution. These child-friendly statutes also link child marriages and sexual intercourse with a girl child and draw attention to the adverse consequences of both.

Article 15(3) of the Constitution

53. Article 15(3) of the Constitution enables and empowers the State to make special provision for the benefit of women and children. The Constituent Assembly debated this provision [then Article 9(2) of the draft Constitution] on 29th November, 1948. Prof. K.T. Shah suggested an amendment to the said Article ("Nothing in this article shall prevent the State from making any special provision for women and children") so that it would read: "Nothing in this article shall prevent the State from making any special provision for women and children or for Scheduled Castes or backward tribes, for their advantage, safeguard or betterment." The view expressed was:

> "Sir, it must be distinguished from the preceding article. I read it, at any rate, that this is a provision for discrimination in favour of women and children, to which I have added the Scheduled Castes or backward tribes. This discrimination is in favour of particular classes of our society which, owing to an unfortunate legacy of the past,

> suffer from disabilities or handicaps. Those, I think, may require special treatment; and if they do require it, they should be permitted special facilities for some time so that real equality of citizens be established.
>
> The rage for equality which has led to provide equal citizenship and equal rights for women has sometimes found exception in regard to special provisions that, in the long range, in the interest of the country or of the race, exclude women from certain dangerous occupations, certain types of work. That, I take it, is not intended in any way to diminish their civic equality or status as citizens. It is only intended to safeguard, protect or lead to their betterment in general; so that the long-range interests of the country may not suffer."

The amendment was negatived by Dr. Ambedkar in the following manner:

> "With regard to amendment No. 323 moved by Professor K.T. Shah, the object of which is to add "Scheduled Castes" and "Scheduled Tribes" along with women and children, I am afraid it may have just the opposite effect.
>
> The object which all of us have in mind is that the Scheduled Castes and Scheduled Tribes should not be segregated from the general public.
>
> For instance, none of us, I think, would like that a separate school should be established for the Scheduled Castes when there is a general school in the village open to the children of the entire community. If these words are added, it will probably give a handle for a State to say, 'Well, we are making special provision for the Scheduled Castes'. To my mind they can safely say so by taking shelter under the article if it is amended in the manner the Professor wants it. I therefore think that it is not a desirable amendment."

The response given by Dr. Ambedkar suggests that he certainly favoured special provisions for women and children with a view to integrate them into

society and to take them out of patriarchal control. But a similar integration could not be achieved by making special provisions for Scheduled Castes and Scheduled Tribes – it would have the opposite effect and further segregate them from the general public.

54. What clearly emerges from this discussion is that Article 9(2) of the draft Constitution [now Article 15(3)] was intended to discriminate in favour of women and children – a form of affirmative action to their advantage. This intention has been recognized by decisions of this Court and of some High Courts. The earliest such decision is of the Calcutta High Court in ***Sri Mahadeb Jiew v. Dr. B.B. Sen***[7] in which it was said that: "The special provision for women in Article 15(3) cannot be construed as authorizing a discrimination against women, and the word "for" in the context means "in favour of"."

55. In ***Government of A.P. v. P.B. Vijayakumar***[8] affirmative action for women (and children) was recognized in paragraphs 7 and 8 of the Report in the following words:

> "The insertion of clause (3) of Article 15 in relation to women is a recognition of the fact that for centuries, women of this country have

7 AIR 1951 Cal 563

8 (1995) 4 SCC 520

> been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. **It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15(3) is placed in Article 15. Its object is to strengthen and improve the status of women**……
>
> What then is meant by "any special provision for women" in Article 15(3)? **This "special provision"**, which the State may make to improve women's participation in all activities under the supervision and control of the State **can be in the form of either affirmative action or reservation**." ….(Emphasis supplied by us)

56. ***Yusuf Abdul Aziz v. State of Bombay***[9] is a Constitution Bench decision of this Court in which the constitutional validity of Section 497 of the IPC was challenged on the ground that it unreasonably 'exempts' a wife from being punishable for an offence of adultery and therefore should be interpreted restrictively. Rejecting the contention that Article 15(3) of the Constitution places any restriction on the legislative power of Parliament, it was said:

> "It was argued that clause (3) [of Article 15 of the Constitution] should be confined to provisions which are beneficial to women and cannot be used to give them a licence to commit and abet crimes. We are unable to read any such restriction into the clause; nor are we able to agree that a provision which prohibits punishment is tantamount to a licence to commit the offence of which punishment has been prohibited."

57. The view that Article 15(3) is intended to benefit women has also

9 1954 SCR 930

been accepted in ***Cyril Britto v. Union of India***[10] wherein it was held that prohibition from arrest or detention of women in execution of a money decree under Section 56 of the Civil Procedure Code is a special provision calculated to ensure that a woman judgment-debtor is not put to the ignominy or arrest and detention in civil prison in execution of a money decree and that this provision is referable to Article 15(3) of the Constitution. A similar view was taken in respect of the same provision in the Civil Procedure Code in ***Shrikrishna Eknath Godbole v. Union of India***.[11]

58. It is quite clear therefore that Article 15(3) of the Constitution cannot and ought not to be interpreted restrictively but must be given its full play. Viewed from this perspective, it seems to us that legislation intended for affirmative action in respect of a girl child must not only be liberally construed and interpreted but must override any other legislation that seeks to restrict the benefit made available to a girl child. This would only emphasize the spirit of Article 15(3) of the Constitution.

Right to bodily integrity and reproductive choice

10 AIR 2003 Ker 259

11 PIL No. 166/2016 decided on 21st October, 2016

59. The right to bodily integrity and the reproductive choice of any woman has been the subject of discussion in quite a few decisions of this Court. The discussion has been wide-ranging and several facets of these concepts have been considered from time to time. The right to bodily integrity was initially recognized in the context of privacy in ***State of Maharashtra v. Madhukar Narayan Mardikar***[12] wherein it was observed that no one has any right to violate the person of anyone else, including of an 'unchaste' woman. It was said:

> "The High Court observes that since Banubi is an unchaste woman it would be extremely unsafe to allow the fortune and career of a government official to be put in jeopardy upon the uncorroborated version of such a woman who makes no secret of her illicit intimacy with another person. She was honest enough to admit the dark side of her life. **Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish.** She is equally entitled to the protection of law." (Emphasis supplied by us)

60. In ***Suchita Srivastava v. Chandigarh Administration***[13] the right to make a reproductive choice was equated with personal liberty under Article 21 of the Constitution, privacy, dignity and bodily integrity. It includes the right to abstain from procreating. In paragraph 22 of the Report it was held:

---

12 (1991) 1 SCC 57

13 (2009) 9 SCC 1

> "There is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. **It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods**. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a "compelling State interest" in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices." (Emphasis supplied by us)

61. In issues of criminal law, investigations and recording of statements, the bodily integrity of a witness has been accepted by this Court in ***Selvi v. State of Karnataka***[14] wherein it was held in paragraph 103 of the Report:

> "The concerns about the "voluntariness" of statements allow a more comprehensive account of this right. If involuntary statements were readily given weightage during trial, the investigators would have a strong incentive to compel such statements—often through methods involving coercion, threats, inducement or deception. Even if such involuntary statements are proved to be true, **the law should not incentivise the use of interrogation tactics that violate the dignity and bodily integrity of the person being examined**." (Emphasis supplied by us)

14 (2010) 7 SCC 263

62. ***Ritesh Sinha v. State of Uttar Pradesh***[15] was a case relating to the collection of a voice sample during the course of investigation by the police. Relying of ***Selvi*** it was held that: "In a country governed by the rule of law, police actions which are likely to affect the bodily integrity of a person or likely to affect his personal dignity must have legal sanction."

63. Finally, in ***Devika Biswas v. Union of India***[16] it was observed that "Over time, there has been recognition of the need to respect and protect the reproductive rights and reproductive health of a person." This is all the more so in the case of a girl child who has little or no say in reproduction after an early marriage. As observed in ***Suchita Srivastava*** "…. the "best interests" test requires the Court to ascertain the course of action which would serve the best interests of the person in question."

64. The discussion on the bodily integrity of a girl child and the reproductive choices available to her is important only to highlight that she cannot be treated as a commodity having no say over her body or someone who has no right to deny sexual intercourse to her husband. The human rights of a girl child are very much alive and kicking whether she is married or not and deserve recognition and acceptance.

---

15 (2013) 2 SCC 357

16 (2016) 10 SCC 726

Rape or penetrative sexual assault

65. Whether sexual intercourse that a husband has with his wife who is between 15 and 18 years of age is described as rape (not an offence under Exception 2 to Section 375 of the IPC) or aggravated penetrative sexual assault (an offence under Section 5(n) of the POCSO Act and punishable under Section 6 of the POCSO Act) the fact is that it is rape as conventionally understood, though Parliament in its wisdom has chosen to not recognize it as rape for the purposes of the IPC. That it is a heinous crime which also violates the bodily integrity of a girl child, causes trauma and sometimes destroys her freedom of reproductive choice is a composite issue that needs serious consideration and deliberation.

66. There have been several decisions rendered by this Court highlighting the horrors of rape. In ***State of Karnataka v Krishnappa***[17] an 8 year girl was raped and it was held in paragraph 15 of the Report:

> "Sexual violence apart from being a dehumanising act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity - **it degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience**." (Emphasis supplied by us)

17 (2000) 4 SCC 75

67. In ***Bodhisattwa Gautam v. Subhra Chakraborty***[18] it was observed by this Court that rape is a crime not only against a woman but against society. It was held in paragraph 10 of the Report that:

> "Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society. **It destroys the entire psychology of a woman and pushes her into deep emotional crisis.** It is only by her sheer will-power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21. To many feminists and psychiatrists, rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women. The rape laws do not, unfortunately, take care of the social aspect of the matter and are inept in many respects." (Emphasis supplied by us)

68. About a month later, it was pithily stated in ***State of Punjab v. Gurmit Singh***[19]

> "We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably **causes serious psychological as well as physical harm in the process**. Rape is not merely a physical assault — it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female." (Emphasis supplied by us)

69. There are several decisions in which similar observations have been made by this Court and it is not necessary to multiply the cases. However,

18 (1996) 1 SCC 490

19 (1996) 2 SCC 384

reference may be made to a fairly recent decision in ***State of Haryana v. Janak Singh***[20] wherein reference was made to ***Bodhisattwa Gautam*** and it was observed in paragraph 7 of the Report:

> "Rape is one of the most heinous crimes committed against a woman. It insults womanhood. It violates the dignity of a woman and erodes her honour. **It dwarfs her personality and reduces her confidence level.** It violates her right to life guaranteed under Article 21 of the Constitution of India." (Emphasis supplied by us)

70. If such is the traumatic impact that rape could and does have on an adult victim, we can only guess what impact it could have on a girl child – and yet it is not a criminal offence in the terms of Exception 2 to Section 375 of the IPC but is an offence under the POCSO Act only. An anomalous state of affairs exists on a combined reading of the IPC and the POCSO Act. An unmarried girl below 18 years of age could be a victim of rape under the IPC and a victim of penetrative sexual assault under the POCSO Act. Such a victim might have the solace (if we may say so) of prosecuting the rapist. A married girl between 15 and 18 years of age could be a victim of aggravated penetrative sexual assault under the POCSO Act, but she cannot be a victim of rape under the IPC if the rapist is her husband since the IPC does not recognize such penetrative sexual assault as rape. Therefore such a girl child has no recourse to law under the provisions of the IPC notwithstanding that

20 (2013) 9 SCC 431

the marital rape could degrade and humiliate her, destroy her entire psychology pushing her into a deep emotional crisis and dwarf and destroy her whole personality and degrade her very soul. However, such a victim could prosecute the rapist under the POCSO Act. We see no rationale for such an artificial distinction.

71. While we are not concerned with the general question of marital rape of an adult woman but only with marital rape of a girl child between 15 and 18 years of age in the context of Exception 2 to Section 375 of the IPC, it is worth noting the view expressed by the **Committee on Amendments to Criminal Law** chaired by Justice J.S. Verma (Retired). In paragraphs 72, 73 and 74 of the Report it was stated that the out-dated notion that a wife is no more than a subservient chattel of her husband has since been given up in the United Kingdom. Reference was also made to a decision of the European Commission of Human Rights which endorsed the conclusion that "a rapist remains a rapist regardless of his relationship with the victim." The relevant paragraphs of the Report read as follows:

> "72. The exemption for marital rape stems from a long out-dated notion of marriage which regarded wives as no more than the property of their husbands. According to the common law of coverture, a wife was deemed to have consented at the time of the marriage to have intercourse with her husband at his whim. Moreover, this consent could not be revoked. As far back as 1736, Sir Matthew Hale declared: '*The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual*

matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract'.

73. This immunity has now been withdrawn in most major jurisdictions. In England and Wales, the House of Lords held in 1991 that the status of married women had changed beyond all recognition since Hale set out his proposition. Most importantly, Lord Keith, speaking for the Court, declared, '*marriage is in modern times regarded as a partnership of equals,* and no longer one in which the wife must be the subservient chattel of the husband.'

74. Our view is supported by the judgment of the European Commission of Human Rights in ***C.R. v UK*** [C.R. v UK Publ. ECHR, Ser.A, No. 335-C] which endorsed the conclusion that **a rapist remains a rapist regardless of his relationship with the victim**. Importantly, it acknowledged that this change in the common law was in accordance with the fundamental objectives of the Convention on Human Rights, the very essence of which is respect for human rights, dignity and freedom. This was given statutory recognition in the Criminal Justice and Public Order Act 1994." (Emphasis supplied by us)

72. In ***Eisenstadt v. Baird***[21] the US Supreme Court observed that a "marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."

73. On a combined reading of ***C.R. v. UK*** and ***Eisenstadt v. Baird*** it is quite clear that a rapist remains a rapist and marriage with the victim does not convert him into a non-rapist. Similarly, a rape is a rape whether it is described as such or is described as penetrative sexual assault or aggravated

21 405 US 438, 31 L Ed 2d 349, 92 S Ct 1092

penetrative sexual assault. A rape that actually occurs cannot legislatively be simply wished away or legislatively denied as non-existent.

Harmonizing the IPC, the POCSO Act, the JJ Act and the PCMA

74. There is an apparent conflict or incongruity between the provisions of the IPC and the POCSO Act. The rape of a married girl child (a girl child between 15 and 18 years of age) is not rape under the IPC and therefore not an offence in view of Exception 2 to Section 375 thereof but it is an offence of aggravated penetrative sexual assault under Section 5(n) of the POCSO Act and punishable under Section 6 of that Act. This conflict or incongruity needs to be resolved in the best interest of the girl child and the provisions of various complementary statutes need to be harmonized and read purposively to present an articulate whole.

75. The most obvious and appropriate resolution of the conflict has been provided by the State of Karnataka – the State Legislature has inserted sub-Section (1A) in Section 3 of the PCMA (on obtaining the assent of the President on 20th April, 2017) declaring that henceforth every child marriage that is solemnized is void *ab initio*. Therefore, the husband of a girl child would be liable for punishment for a child marriage under the PCMA, for penetrative sexual assault or aggravated penetrative sexual assault under the POCSO Act and if the husband and the girl child are living together in the

same or shared household for rape under the IPC. The relevant extract of the Karnataka amendment reads as follows:

> "(1A) Notwithstanding anything contained in sub-section (1) [of Section of the PCMA] 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".

76. It would be wise for all the State Legislatures to adopt the route taken by Karnataka to void child marriages and thereby ensure that sexual intercourse between a girl child and her husband is a punishable offence under the POCSO Act and the IPC. Assuming all other State Legislatures do not take the Karnataka route, what is the correct position in law?

77. There is no doubt that pro-child statutes are intended to and do consider the best interest of the child. These statutes have been enacted in the recent past though not effectively implemented. Given this situation, we are of opinion that a few facts need to be acknowledged and accepted. **Firstly**, a child is and remains a child regardless of the description or nomenclature given to the child. It is universally accepted in almost all relevant statutes in our country that a child is a person below 18 years of age. Therefore, a child remains a child whether she is described as a street child or a surrendered child or an abandoned child or an adopted child. Similarly, a child remains a child whether she is a married child or an

unmarried child or a divorced child or a separated child or a widowed child. At this stage we are reminded of Shakespeare's eternal view that a rose by any other name would smell as sweet - so also with the status of a child, despite any prefix. **Secondly**, the age of consent for sexual intercourse is definitively 18 years and there is no dispute about this. Therefore, under no circumstance can a child below 18 years of age give consent, express or implied, for sexual intercourse. The age of consent has not been specifically reduced by any statute and unless there is such a specific reduction, we must proceed on the basis that the age of consent and willingness to sexual intercourse remains at 18 years of age. **Thirdly**, Exception 2 to Section 375 of the IPC creates an artificial distinction between a married girl child and an unmarried girl child with no real rationale and thereby does away with consent for sexual intercourse by a husband with his wife who is a girl child between 15 and 18 years of age. Such an unnecessary and artificial distinction if accepted can again be introduced for other occasions for divorced children or separated children or widowed children.

78. What is sought to be achieved by this artificial distinction is not at all clear except perhaps to acknowledge that child marriages are taking place in the country. Such child marriages certainly cannot be in the best interest of the girl child. That the solemnization of a child marriage violates the

provisions of the PCMA is well-known. Therefore, it is for the State to effectively implement and enforce the law rather than dilute it by creating artificial distinctions. Can it not be said, in a sense, that through the artificial distinction, Exception 2 to Section 375 of the IPC encourages violation of the PCMA? Perhaps 'yes' and looked at from another point of view, perhaps 'no' for it cannot reasonably be argued that one statute (the IPC) condones an offence under another statute (the PCMA). Therefore the basic question remains - what exactly is the artificial distinction intended to achieve?

Justification given by the Union of India

79. The only justification for this artificial distinction has been culled out by learned counsel for the petitioner from the counter affidavit filed by Union of India. This is given in the written submissions filed by learned counsel for the petitioner and the justification (not verbatim) reads 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.

80. The above justifications given by the Union of India are really explanations for inserting Exception 2 in Section 375 of the IPC. Besides, they completely side track the issue and overlook the provisions of the PCMA, the provisions of the JJ Act as well as the provisions of the POCSO Act. Surely, the Union of India cannot be oblivious to the existence of the trauma faced by a girl child who is married between 15 and 18 years of age or to the three pro-child statutes and other human rights obligations. That these facts and statutes have been overlooked confirms that the distinction is artificial and makes Exception 2 to Section 375 of the IPC all the more arbitrary and discriminatory.

81. During the course of oral submissions, three further but more substantive justifications were given by learned counsel for the Union of India for making this distinction. The **first** justification is that by virtue of getting married, the girl child has consented to sexual intercourse with her husband either expressly or by necessary implication. The **second** justification is that traditionally child marriages have been performed in different parts of the country and therefore such traditions must be respected and not destroyed. The **third** justification is that paragraph 5.9.1 of the 167th report of the Parliamentary Standing Committee of the Rajya Sabha (presented in March 2013) records that several Members felt that marital rape has the potential of destroying the institution of marriage.

82. In law, it is difficult to accept any one of these justifications. There is no question of a girl child giving express or implied consent for sexual intercourse. The age of consent is statutorily and definitively fixed at 18 years and there is no law that provides for any specific deviation from this. Therefore unless Parliament gives any specific indication (and it has not given any such indication) that the age of consent could be deviated from for any rational reason, we cannot assume that a girl child who is otherwise incapable of giving consent for sexual intercourse has nevertheless given such consent by implication, necessary or otherwise only by virtue of being

married. It would be reading too much into the mind of the girl child and assuming a state of affairs for which there is neither any specific indication nor any warrant. It must be remembered that those days are long gone when a married woman or a married girl child could be treated as subordinate to her husband or at his beck and call or as his property. Constitutionally a female has equal rights as a male and no statute should be interpreted or understood to derogate from this position. If there is some theory that propounds such an unconstitutional myth, then that theory deserves to be completely demolished.

83. Merely because child marriages have been performed in different parts of the country as a part of a tradition or custom does not necessarily mean that the tradition is an acceptable one nor should it be sanctified as such. Times change and what was acceptable the few decades ago may not necessarily be acceptable today. This was noted by a Constitution Bench of this Court (though in a different context) in ***State of Madhya Pradesh v. Bhopal Sugar Industries Ltd.***[22] that:

> "But, by the passage of time, considerations of necessity and expediency would be obliterated, and the grounds which justified classification of geographical regions for historical reasons may cease to be valid."

22 [1964] 6 SCR 846

84. Similarly, in ***Rattan Arya v. State of Tamil Nadu***[23] it was observed that judicial notice could be taken of a change in circumstances. It was held:

> "It certainly cannot be pretended that the provision is intended to benefit the weaker sections of the people only. We must also observe here that whatever justification there may have been in 1973 when Section 30(*ii*) [of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960] was amended by imposing a ceiling of Rs 400 on rent payable by tenants of residential buildings to entitle them to seek the protection of the Act, the passage of time has made the ceiling utterly unreal. **We are entitled to take judicial notice of the enormous multifold increase of rents throughout the country, particularly in urban areas. It is common knowledge today that the accommodation which one could have possibly got for Rs 400 per month in 1973 will today cost at least five times more**. In these days of universal, day to day escalation of rentals any ceiling such as that imposed by Section 30(*ii*) in 1973 can only be considered to be totally artificial and irrelevant today. As held by this court in *Motor General Traders* v. *State of A.P.*[24] a provision which was perfectly valid at the commencement of the Act could be challenged later on the ground of unconstitutionality and struck down on that basis. What was once a perfectly valid legislation, may in course of time, become discriminatory and liable to challenge on the ground of its being violative of Article 14." (Emphasis supplied by us)

85. In ***Anuj Garg v. Hotel Association of India***[25] this Court was concerned with the constitutional validity of Section 30 of the Punjab Excise Act, 1914 which prohibited employment of "any man under the age of 25 years" or "any woman" in any part of such premises in which liquor or an intoxicating drug is consumed by the public. While upholding the view of

---

23 (1986) 3 SCC 385

24 (1984) 1 SCC 222

25 (2008) 3 SCC 1

the Delhi High Court striking down the provision as unconstitutional, this Court held in paragraphs 46 and 47 of the Report:

> "It is to be borne in mind that legislations with pronounced "protective discrimination" aims, such as this one, potentially serve as double-edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. **The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means**.
>
> No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency until and unless there is a *compelling State purpose*. Heightened level of scrutiny is the normative threshold for judicial review in such cases." (Emphasis supplied by us)

86. Similarly, it was observed by this Court in ***Satyawati Sharma v. Union of India***[26] in paragraph 32 of the Report that legislation which might be reasonable at the time of its enactment could become unreasonable with the passage of time. It was observed as follows:

> "It is trite to say that **legislation which may be quite reasonable and rational at the time of its enactment may with the lapse of time and/or due to change of circumstances become arbitrary, unreasonable and violative of the doctrine of equality** and even if the validity of such legislation may have been upheld at a given point of time, the Court may, in subsequent litigation, strike down the same if it is found that the rationale of classification has become non-existent." (Emphasis supplied by us)

---

26 (2008) 5 SCC 287

There is therefore no doubt that the impact and effect of Exception 2 to Section 375 of the IPC has to be considered not with the blinkered vision of the days gone by but with the social realities of today. Traditions that might have been acceptable at some historical point of time are not cast in stone. If times and situations change, so must views, traditions and conventions.

87. We have adverted to the wealth of documentary material which goes to show that an early marriage and sexual intercourse at an early age could have detrimental effects on the girl child not only in terms of her physical and mental health but also in terms of her nutrition, her education, her employability and her general well-being. To make matters worse, the detrimental impact could pass on to the children of the girl child who may be malnourished and may be required to live in an impoverished state due to a variety of factors. An early marriage therefore could have an inter-generational adverse impact. In effect therefore the practice of early marriage or child marriage even if sanctified by tradition and custom may yet be an undesirable practice today with increasing awareness and knowledge of its detrimental effects and the detrimental effects of an early pregnancy. Should this traditional practice still continue? We do not think so and the sooner it is given up, it would be in the best interest of the girl child and for society as a whole.

88. We must not and cannot forget the existence of Article 21 of the Constitution which gives a fundamental right to a girl child to live a life of dignity. The documentary material placed before us clearly suggests that an early marriage takes away the self esteem and confidence of a girl child and subjects her, in a sense, to sexual abuse. Under no circumstances can it be said that such a girl child lives a life of dignity. The right of a girl child to maintain her bodily integrity is effectively destroyed by a traditional practice sanctified by the IPC. Her husband, for the purposes of Section 375 of the IPC, effectively has full control over her body and can subject her to sexual intercourse without her consent or without her willingness since such an activity would not be rape. Anomalously, although her husband can rape her but he cannot molest her for if he does so he could be punished under the provisions of the IPC. This was recognized by the LCI in its 172nd report but was not commented upon. It appears therefore that different and irrational standards have been laid down for the treatment of the girl child by her husband and it is necessary to harmonize the provisions of various statutes and also harmonize different provisions of the IPC inter-se.

89. We have also adverted to the issue of reproductive choices that are severely curtailed as far as a married girl child is concerned. There is every possibility that being subjected to sexual intercourse, the girl child might

become pregnant and would have to deliver a baby even though her body is not quite ready for procreation. The documentary material shown to us indicates that there are greater chances of a girl child dying during childbirth and there are greater chances of neonatal deaths. The results adverted to in the material also suggest that children born out of early marriages are more likely to be malnourished. In the face of this material, would it be wise to continue with a practice, traditional though it might be, that puts the life of a girl child in danger and also puts the life of the baby of a girl child born from an early marriage at stake? Apart from constitutional and statutory provisions, constitutional morality forbids us from giving an interpretation to Exception 2 to Section 375 of the IPC that sanctifies a tradition or custom that is no longer sustainable.

90. The view that marital rape of a girl child has the potential of destroying the institution of marriage cannot be accepted. Marriage is not institutional but personal – nothing can destroy the 'institution' of marriage except a statute that makes marriage illegal and punishable. A divorce may destroy a marriage but does it have the potential of destroying the 'institution' of marriage? A judicial separation may dent a marital relationship but does it have the potential of destroying the 'institution' of marriage or even the marriage? Can it be said that no divorce should be

permitted or that judicial separation should be prohibited? The answer is quite obvious.

91. Looked at from another perspective, the PCMA actually makes child marriages voidable and makes the parties to a child marriage (other than the girl child) punishable for an offence under the said Act. For someone who supports the institution of marriage, nothing could be more destructive of the institution of marriage than the PCMA which makes a child marriage voidable and punishable on the one hand and on the other, it otherwise collaterally legitimizes the pernicious practice of child marriages. It is doubtful if the Parliamentary Standing Committee intended such a situation along with its attendant adverse and detrimental impacts and so we leave it at that.

92. Assuming some objective is sought to be achieved by the artificial distinction, the further question is: what is the rational nexus between decriminalizing sexual intercourse under the IPC with a married girl child and an unclear and uncertain statutory objective? There is no intelligible answer to this question particularly since sexual intercourse with a married girl child is a criminal offence of aggravated penetrative sexual assault under the POCSO Act. Therefore, while the husband of a married girl child might not have committed rape for the purposes of the IPC but he would

nevertheless have committed aggravated penetrative sexual assault for the purposes of the POCSO Act. The punishment for rape (assuming it is committed) and the punishment for penetrative sexual assault is the same, namely imprisonment for a minimum period of 7 years which may extend to imprisonment for life. Similarly, for an 'aggravated' form of rape the punishment is for a minimum period of 10 years imprisonment which may extend to imprisonment for life (under the IPC) and the punishment for aggravated penetrative sexual assault (which is what is applicable in the case of a married girl child) is the same (under the POCSO Act). In other words, the artificial distinction merely takes the husband of the girl child out of the clutches of the IPC while retaining him within the clutches of the POCSO Act. We are unable to understand why this is so and no valid justification or explanation is forthcoming from the Union of India.

Application of special laws

93. Whatever be the explanation, given the context and purpose of their enactment, primacy must be given to pro-child statutes over the IPC as provided for in Sections 5 and 41 of the IPC. There are several reasons for this including the absence of any rationale in creating an artificial distinction, in relation to sexual offences, between a married girl child and an unmarried girl child. Statutes concerning the rights of children are special

laws concerning a special subject of legislation and therefore the provisions of such subject-specific legislations must prevail and take precedence over the provisions of a general law such as the IPC. It must also be remembered that the provisions of the JJ Act as well as the provisions of the POCSO Act are traceable to Article 15(3) of the Constitution which enables Parliament to make special provisions for the benefit of children. We have already adverted to some decisions relating to the interpretation of Article 15(3) of the Constitution in a manner that is affirmative, in favour of children and for children and we have also adverted to the discussion in the Constituent Assembly in this regard. There can therefore be no other opinion regarding the pro-child slant of the JJ Act as well as the POCSO Act.

94. A rather lengthy but useful discussion on this subject of special laws is to be found in ***Life Insurance Corporation of India v. D.J. Bahadur***[27] in paragraphs 52 and 53 of the Report. Briefly, it was held that the subject-matter and the perspective of the statute are determinative of the question whether a statute is a general law or a special law. Therefore, for certain purposes a statute might be a special law but for other purposes, as compared to another statute, it might be a general law. In respect of a dispute between the Life Insurance Corporation and its workmen qua workmen, the

27 (1981) 1 SCC 315

Industrial Disputes Act, 1947 would be a special law vis-à-vis the Life Insurance Corporation Act, 1956; but, "when compensation on nationalisation is the question, the LIC Act is the special statute". It was held as follows:

> "In determining whether a statute is a special or a general one, the focus must be on the principal subject-matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law. In law, we have a cosmos of relativity, not absolutes — so too in life. The ID Act is a special statute devoted wholly to investigation and settlement of industrial disputes which provides definitionally for the nature of industrial disputes coming within its ambit. It creates an infrastructure for investigation into, solution of and adjudication upon industrial disputes. It also provides the necessary machinery for enforcement of awards and settlements. From alpha to omega the ID Act has one special mission — the resolution of industrial disputes through specialised agencies according to specialised procedures and with special reference to the weaker categories of employees coming within the definition of workmen. Therefore, with reference to industrial disputes between employers and workmen, the ID Act is a special statute, and the LIC Act does not speak at all with specific reference to workmen. On the other hand, its powers relate to the general aspects of nationalisation, of management when private businesses are nationalised and a plurality of problems which, incidentally, involve transfer of service of existing employees of insurers. The workmen qua workmen and industrial disputes between workmen and the employer as such, are beyond the orbit of and have no specific or special place in the scheme of the LIC Act. And whenever there was a dispute between workmen and management the ID Act mechanism was resorted to.
>
> What are we confronted with in the present case, so that I may determine as between the two enactments which is the special? The only subject which has led to this litigation and which is the bone of contention between the parties is *an industrial dispute between the Corporation and its workmen qua workmen*. If we refuse to be obfuscated by legal abracadabra and see plainly what is so obvious,

> the conclusion that flows, in the wake of the study I have made, is that vis-a-vis "industrial disputes" at the termination of the settlement as between the workmen and the Corporation, the ID Act is a special legislation and the LIC Act a general legislation. Likewise, when compensation on nationalisation is the question, the LIC Act is the special statute. An application of the generalia maxim as expounded by English textbooks and decisions leaves us in no doubt that the ID Act being special law, prevails over the LIC Act which is but general law."

The scope and amplitude of the two significant pro-child statutes may now be examined in light of the law laid down by this Court including Sections 5 and 41 of the IPC.

(i) The JJ Act

95. A cursory reading of the JJ Act gives a clear indication that a girl child who is in imminent risk of marriage before attaining the age of 18 years of age is a child in need of care and protection (Section 2 (14) (xii) of the JJ Act). In our opinion, it cannot be said with any degree of rationality that such a girl child loses her status as a child in need of care and protection soon after she gets married. The JJ Act provides that efforts must be made to ensure the care, protection, appropriate rehabilitation or restoration of a girl child who is at imminent risk of marriage and therefore a child in need of care and protection. If this provision is ignored or given a go by, it would put the girl child in a worse off situation because after marriage she could be subjected to aggravated penetrative sexual assault for which she might not

be physically, mentally or psychologically ready. The intention of the JJ Act is to benefit a child rather than place her in difficult circumstances. A contrary view would not only destroy the purpose and spirit of the JJ Act but would also take away the importance of Article 15(3) of the Constitution. Surely, such an interpretation and understanding cannot be given to the provisions of the JJ Act.

(ii) The POCSO Act

96. Similarly, the provisions of the POCSO Act make it quite explicit that the dignity and rights of a child below 18 years of age must be recognized and respected. For this purpose, special provisions have been made in the POCSO Act as for example Section 28 thereof which provides for the establishment of a Special Court to try offences under the Act. Section 29 of the POCSO Act provides that where a person is prosecuted for committing or abetting or attempting to commit an offence under Section 3 (penetrative sexual assault) or under Section 5 (aggravated penetrative sexual assault) then the Special Court shall presume that such a person has committed or abetted or attempted to commit the offence unless the contrary is proved. Similarly, the procedure and powers of a Special Court have been delineated in Section 33 of the POCSO Act and this section provides for not only a child friendly atmosphere in the Special Court but also child friendly

procedures, some of which are given in subsequent sections of the statute. Once again the legislative slant is in favour of a child thereby giving substantive meaning to Article 15(3) of the Constitution.

97. However, of much greater importance and significance is Section 42-A of the POCSO Act. This section provides that the provisions of the POCSO Act are in addition to and not in derogation of the provisions of any other law in force which includes the IPC. Moreover, the section provides that in the event of any inconsistency between the provisions of the POCSO Act and any other law, the provisions of the POCSO Act shall have overriding effect. It follows from this that even though the IPC decriminalizes the marital rape of a girl child, the husband of the girl child would nevertheless be liable for punishment under the provisions of the POCSO Act for aggravated penetrative sexual assault.

98. *Prima facie* it might appear that since rape is an offence under the IPC (subject to Exception 2 to Section 375) while penetrative sexual assault or aggravated penetrative sexual assault is an offence under the POCSO Act and both are distinct and separate statutes, therefore there is no inconsistency between the provisions of the IPC and the provisions of the POCSO Act. However the fact is that there is no real distinction between the definition of rape under the IPC and the definition of penetrative sexual assault under the

POCSO Act. There is also no real distinction between the rape of a married girl child and aggravated penetrative sexual assault punishable under Section 6 of the POCSO Act. Additionally, the punishment for the respective offences is the same, except that the marital rape of a girl child between 15 and 18 years of age is not rape in view of Exception 2 to Section 375 of the IPC. In sum, marital rape of a girl child is effectively nothing but aggravated penetrative sexual assault and there is no reason why it should not be punishable under the provisions of the IPC. Therefore, it does appear that only a notional or linguistic distinction is sought to be made between rape and penetrative sexual assault and rape of a married girl child and aggravated penetrative sexual assault. There is no rationale for this distinction and it is nothing but a completely arbitrary and discriminatory distinction.

Harmonious and purposive interpretation

99. The entire issue of the interpretation of the JJ Act, the POCSO Act, the PCMA and Exception 2 to Section 375 of the IPC can be looked at from yet another perspective, the perspective of purposive and harmonious construction of statutes relating to the same subject matter. Long ago, it was said by Lord Denning that when a defect appears, a judge cannot fold his hands and blame the draftsman but must also consider the social conditions

and give force and life to the intention of the Legislature. It was said in ***Seaford Court Estates Ltd. v. Asher***[28] that:

> "A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature."

100. Similarly, in ***Collector of Customs v. Digvijaya Singhji Spinning & Weaving Mills***[29] it was said that where an alternative construction is open, that alternative should be chosen which is consistent with the smooth working of the system which the statute purports to regulate. It was said that:

> "It is one of the well-established Rules of construction that "if the words of a statute are in themselves precise and unambiguous no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature". It is equally well-settled principle of construction that "Where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system"."

28 [1949] 2 K.B. 481 affirmed in [1950] A.C. 508

29 AIR 1961 SC 1549

101. That a constructive attitude should be adopted in interpreting statutes was endorsed in ***Jugal Kishore v. State of Maharashtra***[30] when it was said that:

> "….. Unless the Acts [Maharashtra Agricultural Land (Ceiling on Holdings) Act, 1961 and the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958], with the intention of implementing various socio-economic plans, are read in such complementary manner, the operation of the different Acts in the same field would create contradiction and would become impossible. It is, therefore, necessary to take a constructive attitude in interpreting provisions of these types and determine the main aim of the particular Act in question for adjudication before the court."

102. Finally, from the purposive and harmonious construction point of view as well as the social context point of view, we may only draw attention to the opinion expressed by the Constitution Bench in ***Abhiram Singh v. C.D. Commachen***[31] by one of us (Lokur, J) to supplement our view. It is not necessary to repeat the observations made and conclusions given therein.

103. Viewed from any perspective, there seems to be no reason to arbitrarily discriminate against a girl child who is married between 15 and 18 years of age. On the contrary, there is every reason to give a harmonious and purposive construction to the pro-child statutes to preserve and protect the human rights of the married girl child.

---

30 1989 Supp (1) SCC 589

31 (2017) 2 SCC 629

Implementation of laws

104. The Preamble to our Constitution brings out our commitment to social justice, but unfortunately, this petition clearly brings out that social justice laws are not implemented in the spirit in which they are enacted by Parliament. Young girls are married in thousands in the country, and as Section 13 of the PCMA indicates, there is an auspicious day – *Akshaya Trutiya* - when mass child marriages are performed. Such young girls are subjected to sexual intercourse regardless of their health, their ability to bear children and other adverse social, economic and psychological consequences. Civil society can do just so much for preventing such child marriages but eventually it is for the Government of India and the State Governments to take proactive steps to prevent child marriages so that young girls in our country can aspire to a better and healthier life. We hope the State realizes and appreciates this.

Conclusion

105. On a complete assessment of the law and the documentary material, it appears that there are really five options before us: (i) To let the incongruity remain as it is – this does not seem a viable option to us, given that the lives of thousands of young girls are at stake; (ii) To strike down as unconstitutional Exception 2 to Section 375 of the IPC – in the present case

this is also not a viable option since this relief was given up and no such issue was raised; (iii) To reduce the age of consent from 18 years to 15 years – this too is not a viable option and would ultimately be for Parliament to decide; (iv) To bring the POCSO Act in consonance with Exception 2 to Section 375 of the IPC – this is also not a viable option since it would require not only a retrograde amendment to the POCSO Act but also to several other pro-child statutes; (v) To read Exception 2 to Section 375 of the IPC in a purposive manner to make it in consonance with the POCSO Act, the spirit of other pro-child legislations and the human rights of a married girl child. Being purposive and harmonious constructionists, we are of opinion that this is the only pragmatic option available. Therefore, we are left with absolutely no other option but to harmonize the system of laws relating to children and require Exception 2 to Section 375 of the IPC to now be meaningfully read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the framers of our Constitution can be preserved and protected and perhaps given impetus.

106. We make it clear that we have not at all dealt with the larger issue of marital rape of adult women since that issue was not raised before us by the petitioner or the intervener.

107. We express our gratitude to Mr. Gaurav Agrawal, Advocate and Ms. Jayna Kothari, Advocate for the effort that they have put in and the able assistance that they have given us for the purpose of deciding this case.

……J

New Delhi; **(Madan B. Lokur)**
October 11, 2017