BLOGS

# Is Child Marriage Legal in India? – Independent Thought vs. Union of India.

Indrasish Majumder · 05 Dec 2022

**The following article analyses the landmark case of Independent Thought vs. Union of India.**

### Bench – Justice Madan B. Lokur and Justice Deepak Gupta

- Child marriage is not only a violation of human rights but is also recognized as an obstacle to the development of young people.
- Their development gets comprised due to being deprived of freedom, the 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 freedom.

In this judgment, the Supreme Court considered the question of whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age would amount to rape.

Although Exception 2 to Section 375 of the Indian Penal Code, 1860 (IPC) provided otherwise, the Supreme Court narrowed the scope of the exception and resolved the incongruity between the Indian Penal Code, 1860 (IPC) and Protection of Children from Sexual Offences Act, 2012 (POSCO Act).

### Facts of the case

1. In 2013, by the Criminal Law Amendment Act, the age of consent to sexual intercourse was increased from 16 to 18 mentioned under Section 375 of the Indian Penal Code. But there was an exception clause to this Section i.e. under Exception 2, a husband can have non-consensual sex with a girl child (i.e., below 18 years) if she is above 15 years.

2. In 2012, the POCSO Act was passed which also set the minimum age for the consensual sex as 18 years. Exception 2 was contradictory to the Section 3 of the POCSO act which has criminalized penetrative sexual assault.
3. The petitioner is a society registered on 6th August, 2009 and has since been working in the area of child rights.
4. 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.
5. 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.
6. 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.
7. 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.
8. 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 Section.

### Issues

- Whether sexual intercourse between a man and his wife who is a girl of age 15-18 years is a rape?
- Whether Exception 2 to Section 375 of IPC is arbitrary?
- Whether Exception 2 to Section 375 of IPC is discriminatory?

### Appellant’s Arguments

- The learned counsel for petitioner claimed that since Section 375 of IPC states that a consensual sexual intercourse with a girl who is below 18 years will constitute rape and it will be irrelevant and inconsequential that the girl is his wife or not.
- So, it should not be considered in Exception 2 to Section 375 of IPC that that man will get the immunity of rape merely because she is his wife and he has the bodily right over her.
- The learned counsel further stated that Exception 2 to Section 375 of IPC is not only arbitrary but discriminatory to Article 15(3). The Parliament should make special provisions for women and children but instead of uplifting them and making the provisions, the girl child is placed at a great disadvantage which is contrary to the vision and beneficiaries offered in Article 15(3).
- Counsel added that merely because a girl child is married doesn't mean that she has consented mentally or physically for having sexual intercourse with her husband or indulging in any other sexual activity or in conjugal relations with her.
- They also contended that just because something is going on from past as traditional practice doesn't mean that it will be applicable in the current scenario and per se will be considered illegal and a criminal offence.
- There is clear cut bias when a married girl between 15 to 18 years of age is having sexual intercourse with or without her consent does not constitute rape, whereas a girl below the age of 18 years having sexual intercourse with or without her consent can be constituted as rape.

### Respondent's Arguments

- Union of India stated that educational and economic development of our country in detrimental and is not improving. Therefore, they decided to retain the age of 15 years so as to protect the rights of husband and wife in criminalizing sexual activities between them.
- According to 3rd report of National Health Survey, 46% of women who are between the age group of 18-29 years are below the age of 18 years. So, it will be totally inappropriate and impractical to criminalize the consummation of marriage linking with the serious and heinous offense as rape.
- While considering the socio-economic conditions of India, providing punishment for child marriage would be considered inappropriate as prescribed under Exception 2 to Section 375 of IPC so as to retain the age of 15 years as it is being practiced for many years as basic facts and social norms as well as traditional practice.

- In 172nd report of Law Commission of India, it was suggested by LCI that the age 15 years should be increased to 16 years but after detailed consultations with various stakeholders it was decided to retain the age of 15 years.
- If the marriage is constituted at the age of 15 years, then it should not be the reason to hold the husband guilty of rape merely it was a traditional practice.
- By considering the social and old traditions and norms, it is the duty that the provisions of the law should be made according to the norms which did not affect the particular class or society, so 15 years should be retained in Exception 2 to Section 375 of IPC.

### Supreme Court's Observation

1. The Supreme Court observed that the Exception 2 of IPC creates an artificial distinction between a married girl child and an unmarried girl child without any reasonable nexus.
2. The artificial distinction is contrary to both Article 15(3) and Article 21 of the Constitution. No other provision in penal laws gives any immunity to the husband.
3. It also violates the bodily integrity and reproductive choice of the girl child and has no measures for trafficking of a girl child. Therefore, it is being arbitrary and discriminatory hindering the best interest of the girl child.
4. The Apex Court further observed that the Exception 2 of IPC creates an artificial distinction between a married girl child and an unmarried girl child without any reasonable nexus. The artificial distinction is contrary to both Article 15(3) and Article 21 of the Constitution.
5. No other provision in penal laws gives any immunity to the husband. It also violates the bodily integrity and reproductive choice of the girl child and has no measures for trafficking of a girl child. Therefore, it is being arbitrary and discriminatory hindering the best interest of the girl child.

### Judgement

The Court delivered a detailed judgment in the form of two concurring opinions, considering the constitutionality of Exception 2 to Section 375, IPC, 1860.

### Justice Madan B Lokur

1. Article 21 of the Constitution: Under Article 21 of the Constitution, a girl child has a right to live with dignity which is violated by Exception 2 by destroying her bodily integrity and reproductive choice.
2. Article 14 of the Constitution (Right to equality): A child is a child whether married or unmarried or divorced or separated or widowed. The rationale of classification between a married and unmarried child in Exception 2 has become non-existent, therefore, making exception arbitrary, unreasonable and violative of the doctrine of equality.
3. Article 15 of the Constitution: Under Article 15(3), Parliament has powers to make legislation for the welfare of child and women. POCSO was such a prerogative of Article 15(3) by the legislature. POCSO provisions have overriding effect over any other law. There is an artificial distinction between rape of a married girl child and aggravated penetrative Sexual Assault which is completely arbitrary and discriminatory.
4. To harmonise the system of law, Exception 2 to Section 375 of IPC will now be read as stating that sexual intercourse with a wife who is not below 18 years is not a rape.

### Justice Deepak Gupta

1. Fundamental Rights: It is the duty of the court to either strike down or read down the law making it consistent with the constitution if any law violates the Fundamental Rights of the citizens.
2. Article 14 of the Constitution: Exception 2 decriminalises the forceful sexual relation by a husband with his wife between of 15-18 years, who is a girl child unable to look for herself, therefore, it is arbitrary.Moreover, it is discriminatory as it is discriminating between an educated girl child who is protected even if she has sexual intercourse whereas, it doesn't help a married girl between 15-18 years even if she is subjected to have forceful sexual intercourse by her husband. Therefore, Exception 2 being discriminatory and arbitrary is violative of Article 14 of the Constitution.
3. Article 21 of the Constitution: Right to life also includes right to live with human dignity. A girl's right to life also includes the right to develop physically, mentally and economically as an independent self-sufficient female adult.
4. Article 15 of the Constitution: Due to the paucity of funds State should not form a law negatively affecting its citizens that too a minor girl child. Relying on Vishaka State of Rajasthan, it was said as follows: A forceful sexual intercourse with a 15- or 16-years old girl

child leads her to trauma which is injurious to her body as well as her mind. Exception 2 is violative of Article 14, 15 and 21 of the Constitution as it puts a girl's both physical and mental health in serious jeopardy.

5. As Court has not dealt with the wider issue of "marital rape", it should be read down as that a husband having sexual intercourse or sexual activity with her wife is not commencing the offence of rape.