

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) No. _____ of 2013

[UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA]

IN THE MATTER OF:-
Independent Thought

...PETITIONER

VERSUS

Union of India

...RESPONDENT

PAPER - BOOK
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ADVOCATE FOR THE PETITIONER: GAURAV AGRAWAL

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S Y N O P S I S

The Petitioner, which is a registered society and a voluntarily organization involved in issues relating to child rights, has approached this Hon'ble Court by way of the present Writ Petition under Article 32 of the Constitution seeking a writ of declaration that Exception 2 to Section 375 of the Indian Penal Code, 1860 [as amended by Criminal Law (Amendment) Act, 2013] is violative of Articles 14, 15 and 21 of the Constitution to the extent that it permits intrusive sexual intercourse with a girl child aged between 15 to 18 years only on the ground that she has been married. The Petitioner is aggrieved by the prescription of age of 15 years in the said Exception and it is the Petitioner's case that the age should be 18 years as a person below 18 years is a child under Indian law. It is the Petitioner's respectful submission that the law should not encourage sexual relationship with a girl child less than 18 years under any circumstance and simply because the girl is married, she cannot be subjected to such a violation.

Relevant part of Section 375 IPC, as amended by Criminal Law (Amendment) Act, 2013 is extracted herein below for ready reference:-

"375. 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, nor 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,

under the circumstances falling under any of the following seven descriptions:-

First.- Against her will.

Secondly.- Without her consent.

Thirdly.- Without her consent, when her consent has been obtained by putting her to any person in whom she is interested, in fear of death or of hurt.

Fourthly.- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.- With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.- With or without her consent, when she is under eighteen years of age.

Seventhly.- When she is unable to communicate consent.

Explanation 1.- For the purposes of this section, "vagina" shall also include *labia majora*.

Explanation 2.- Consent means as unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.- A medical procedure or intervention shall not constitute rape.

Exception 2.- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

A perusal of the aforesaid provision would show that Parliament has increased the age of consent for a girl child to 18 years. Reference is craved to *Sixthly* of Section 375 IPC. Earlier, right from 1940, the age of consent was 16 years. Therefore, now sexual intercourse with a girl less than 18 years is an offence of rape, irrespective of the fact that she may have consented to the same. The increase in the age of consent to 18 years by way of Criminal Law (Amendment) Act, 2013 is consistent with the legislative policy being followed in India atleast from the year 2000, which shows a female, below the age of 18 years, is treated as a child by law and consequently is deemed to be neither in the mental or physical condition to give consent to sexual intercourse. Infact, there is medical literature to indicate that sexual intercourse with a girl less than 18 years can have adverse consequences on her mental and physical health in case it results in pregnancy/child birth. The Juvenile Justice (Care and Protection of Children) Act, 2000, Protection of Children from Sexual Offences Act, 2012 and Prohibition of Child Marriage Act, 2006 reflect the legislative policy that the girl child less than 18 years should not be subjected to any kind of sexual assault or infringement of her body/mind. Consent in such circumstances is irrelevant.

However, while making such progressive change in Section 375 IPC by the Criminal Law (Amendment) Act, 2013, Parliament

has incorrectly continued the age of 15 years in Exception 2 to Section 375 IPC, whereby a girl aged between 15 to 18 years can be compelled to have sexual intercourse simply because she has been married or by her parents/guardians. It is humbly submitted that this provision is discriminatory and violates Article 14 of the Constitution. The said provision fails to protect the rights of the girl child between ages 15 to 18 years and thereby offends Articles 15 and 21 of the Constitution. Parliament has failed in its duty to protect the rights of the girl child between the ages 15 to 18 years by placing undue reliance on the decision of her parents/guardians to get her married. Simply because the girl child has been married by her parents, law could not permit intrusive sexual relationship with a girl child, when she is otherwise not competent under law to give consent to the sexual relationship, as she is still a child.

The Petitioner begs to submit that while the age for consent for a girl has been increased from 16 to 18 years, Parliament was required to increase the age provided for in the Exception to Section 375 IPC to 18 years, so that it does not encourage sexual relationship with the girl child only because she is married. Child marriage is a social evil. It has been penalized by the Parliament. In such circumstances, Parliament has wrongly not penalized sexual intercourse with a girl between 15 to 18 years, only on the ground that she is married.

LIST OF DATES

- 1860 Indian Penal Code, 1860 was enacted whereby sexual intercourse with a girl less than 10 years was penalized irrespective of the fact whether she had consented or not. Even if the child was married and she was less than 10 years, it was an offence to have sexual intercourse with such a child by her husband. Hence, there was a parity in so far as the age of consent is concerned, and the fact that the child was married, did not make a difference.
- 1891 By an amendment in 1891, the Penal Code was amended and the age of consent was uniformly raised to 12 years, irrespective of the fact whether the child was married or unmarried. Sexual offence with a girl less than 12 years was penalized.
- 1925 In the year 1925, the age for consent was increased to 14 years. However, for the first time there was a distinction in the age of consent by dent of marriage in as much as if the child was 13 years and more and she was married, then sexual intercourse by her husband would not amount to an offence. It may be mentioned that the gap between the age of consent, for a married or unmarried girl, was only 1 year.

- 1940 Again by an amendment made in 1940, the age for consent was increased to 16 years. Simultaneously, the age under the Exception to Section 375 was increased to 15 years. Therefore, the gap in the age for consent in case of married and an unmarried girl child was only 1 year.
- 1980 The Law Commission in its 84th Report in 1980 recommended that age of consent should be increased to 18 years irrespective of the fact of marriage.
- 2000 The Juvenile Justice (Care and Protection of Children) Act, 2000 was passed in year 2000 whereby a person less than 18 years was treated as a juvenile. This was progressively raised from the previous legislation the Juvenile Justice Act, 1986 where the definition of Juvenile meant a girl below the age of 16 years. Relevant Sec 2 (h) 'Juvenile' means a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years
- 2006 The Prohibition of Child Marriage Act, 2006 was passed in year 2006 whereby it was a criminal offence to solemnize the marriage of a girl who was less than 18 years, though the marriage

itself was voidable at the instance of the child and not void.

2012 The Protection of Children from Sexual Offences Act, 2012 was passed in the year 2012, which again defines child as a person less than 18 years of age. Thus, the consistent legislative policy is to treat a person less than 18 years of age as a child.

Feb., 2013 The President promulgated the Criminal Law (Amendment) Ordinance, 2013 on 03.02.2013 by which the age of consent for sexual intercourse was increased to 18 years. However, if the girl was married and more than 16 years, then sexual intercourse by her husband was not an offence. Therefore, the difference in the age of consent was 2 years, i.e. 18 years for an unmarried girl and 16 years for a married girl.

02.04.2013 On 02.04.2013, the Criminal Law (Amendment) Act, 2013 was notified in the Gazette of India. Exception 2 to Section 375 IPC now provides that the age of consent for a girl child, if she is married, is only 15 years. Instead of increasing the age of consent to 18 years for all girls, Parliament has in fact reduced the age of consent to 15 years (from 16 years as provided in ordinance) if the girl child is married. Thus,

the disparity between the age of consent is 3 years, i.e. the age of consent is 18 years for a girl who is not married, while the age of consent is 15 years for a girl who is married.

11.06.2013 Hence, the present Writ Petition has been filed.

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. _____ OF 2013

[UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA]

IN THE MATTER OF:

Independent Thought
Having its registered office at
1/7726, Gali No. 2,
East Gorakhpark,
Shahdara, Delhi – 110032
and presently having its office at
N-257, Sector 25
NOIDA-201301 (U.P.)
Through its Secretary
Ms. Ranjana Srivastava

...Petitioner

VERSUS

Union of India
Through the Secretary
Ministry of Law & Justice
Department of Legislative Affairs,
Shastri Bhawan,
New Delhi

...Respondent

TO

THE HON'BLE CHIEF JUSTICE OF
INDIA AND HIS HON'BLE COMPANION
JUSTICES OF THE HON'BLE
SUPREME COURT OF INDIA.

THE HUMBLE PETITION OF THE
PETITIONER ABOVE NAMED.

MOST RESPECTFULLY SHOWETH:

1. The Petitioner is preferring the present Writ Petition under Article 32 of the Constitution of India challenging the Constitutional validity of Exception 2 to Section 375 of the IPC by which the minimum age of consent for sexual intercourse has been provided as not less than 15 years for

a married girl child, while the age of consent is otherwise 18 years, as provided in Section 375 *Sixthly* of IPC.

2. The Petitioner submits that Exception 2 to Section 375 of IPC which provides the considerably lower age for consent, only on the basis that the girl is married, is discriminatory and, therefore, liable to be struck down since it violates Article 14 of the Constitution. The Petitioner submits that the said provision fails to protect the rights of the girl child as also the health of the girl child and forces the girl child into sexual relations without regard to adverse consequences of the same and, therefore, violates Articles 15 and 21 of the Constitution. Since, this issues has national significance, the Petitioner has been advised to approach this Hon'ble Court by way of the present Writ Petition under Article 32 of the Constitution.
3. The Petitioner had not approached any other authority or court with same or similar relief against the Respondent as prayed for in this petition.
4. The Petitioner "Independent Thought" is a registered society which was registered on 06.08.2009, Registration No.S/6651/2009. Copy of registration certificate of the Petitioner is annexed with the vakalatnama. The Petitioner authorized its Secretary Ms Ranjana Srivastava to tile the W.P., her affidavit and Vakalatnama filed with this W.P.
5. The Petitioner has been working in the area of child rights for last 5-6 years and provides technical and handholding support to non-government, government and multilateral

funding, policy, research and grassroots organizations in several states in India. The Petitioner has worked in various States like Andhra Pradesh, Bihar, Chhattisgarh, Jharkhand, Delhi, Goa, Haryana, Jammu & Kashmir, Karnataka, M.P., Maharashtra, Orissa, Rajasthan, U.P. and West Bengal. The Petitioner has been involved in legal intervention, research and training, advocacy programme implementation, monitoring and evaluation, campaign and advocacy with Organizations like UNICEF, Save the Children, Plan India, CRY, Ms. Ranjana Srivastava and Vikram Srivastava, who have done a lot of work on issue of Child Rights and are the Secretary and Founder of the Petitioner Society. Vikram Srivastava has previously been a member, Child Welfare Committee (CWC), New Delhi and Central Districts constituted as Board of Magistrates and having final authority for Children in Need of Care and Protection; under the Juvenile Justice (Care and Protection of Children) Act, 2000 and Delhi Rules, 2009. The Petitioner would crave leave to refer to the achievements/work of the Petitioner organization in detail, if so required.

6. The petition has been filed purely in public interest with a view to draw attention of this Hon'ble Court to the violation of rights of child aged between 15 years and 18 years.
7. The Petitioner respectfully begs leave of this Hon'ble Court to draw attention to the fact that girl child between aged 15 and 18, are being forced to marriage because the law itself legalizes sexual relations of such girl children if they are

married, while the age of consent otherwise is 18 years. In fact, a girl below the age of 18 years is a Child under Indian Law. The law should discourage any sexual activity with a girl who is less than 18 years. Unfortunately, by virtue of Exception 2 to Section 375 of the IPC, a girl aged between 15 years and 18 years can be subjected to forced sexual intercourse or any other sexual activity by her husband and the said act is not penalized by law.

8. It is the Petitioner's case that Exception 2 to Section 375 of IPC amounts to hostile discrimination as it permits sexual intercourse by the husband with a girl who is between 15 and 18 years, when as Parliament itself has laid down that the age of 18 years is the minimum age for the girl to be mature enough to consent to sexual intercourse. The rationale for this discrimination i.e. the marriage of the girl, has absolutely no rationale nexus with the object. If the object of the law is to prevent sexual relation with a child i.e. girl less than 18 years, then simply because the girl is married, it does not mean that she ceases to be a child and is a fit, mentally and physical, for sexual relations. Thus, the discrimination has not logical nexus with the object.
9. It is the Petitioner's respectful submission that Exception 2 to Section 375 IPC is arbitrary. There is no reason why a girl between 15 years and 18 years should not be regarded as child, if she enters into a marriage, when otherwise it is only after attaining the age of 18 years that she is not considered as a child. Parliament has arbitrarily fixed the

age of 15 years for the purposes of permissible sexual activity simply because the girl is married. There is no rationale forthcoming for his lower age.

10. It is the Petitioner's contention that the Parliament has failed to suitably protect the interests of girl child between 15 to 18 years while enacting the Criminal Law (Amendment) Act, 2013, and thereby the Exception 2 of Section 375 IPC violates Articles 15 and 21 of the Constitution and is therefore unconstitutional and is liable to be struck down.

11. The Petitioner respectfully submits that over a period of time, the minimum age for consent by a girl for sexual relations has been consistently increased by amendments made to IPC. The chart shows the increase in age of consent under Section 375 IPC:-

1860	10 years
1891	12 years
1925	14 years
1940	16 years
2013	18 years

12. The Petitioner humbly submits that the age for consent has been increased by Parliament in recognition of the fact that the physical and mental maturity can be obtained only after age of 18 years. Infact, the Law Commission, way back in the year 1980, had recommended that the age for consent should be increased to 18 years. The 84th Law Commission Report dated 25.04.1980 is annexed herewith and marked as Annexure P1.jpg

13. The realization that the physical and mental maturity is attained at the age of 18 years was very clear when the Child Marriage Restraint Act, 1929 was amended in the year 1978 to provide that the minimum age of a girl for marriage should be 18 years. The following chart shows the increase in the minimum age prescribed under Child Marriage Restraint Act, 1929:-

1929	14 years
1940	15 years
1978	18 years

14. The Prohibition of Child Marriage Act, 2006, which repeals the Child Marriage Restraint Act, 1929, also provides the minimum age of 18 years for marriage for a girl.

15. The fact that the age of 18 years has been considered in India as to the minimum age for mental and physical maturity is also recognized by Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000. It defines a child less than 18 years, is a juvenile:-

(k) "juvenile" or "child" means a person who has not completed eighteenth year of age;

16. Most recently, Parliament had enacted the Protection of Children from Sexual Offences Act, 2012 [No.32 of 2012]. Section 2(1)(d) of the said Act defines child as follows:-

"(d) "child" means any person below the age of eighteen years;"

17. The minimum age for consent was fixed at 16 years by amendment of IPC in year 1940. There were repeated demand for increase of the minimum age requirement for consent under Section 375 IPC. Finally, Parliament by way of Criminal Law (Amendment) Act, 2013 has made substantial amendments in Section 375 of IPC and increased the minimum age for consent to 18 years. Section 375 *sixthly* now reads as under:-

"375 *Sixthly*.- With or without her consent, when she is under eighteen years of age.

18. Therefore, the age of consent, which is an indication of mental and physical maturity to give consent, has been increased to 18 years under Section 375 IPC in the year 2013.

19. However, Parliament has retained Exception 2 to Section 375 whereby the age for consent of a married girl child has been retained as 15 years. The Petitioner respectfully submits that the minimum age even under the exception to Section 375 IPC has been increased as indicated by the following chart:-

1816	10 years
1891	12 years
1925	13 years
1940	15 years

20. As the provision stood upto the year 2012, a girl above 16 years was in a position to give consent for the purposes of Section 375 of IPC. A lower age of 15 years was laid down

if the girl was in a matrimonial relationship. This age was fixed in 1940, when the instances of girls getting married at the age of 15 years were very high. Since 1978, Parliament has laid down that the minimum age for marriage by a girl should be 18 years. Thus, it is the legislature policy to increase the age of consent to 18 years.

21. However, when Criminal Law (Amendment Act, 2013 was passed, the gap between consensual sexual relation and matrimonial sexual relation has increased to 3 years, which is violative of the fundamental rights of the children between ages 15 to 18 years and also strikes at the desired legislature policy to discourage child marriage.

22. Infact, the Law Commission way back in the year 1980, in its Eighty Fourth Report had opined as under:-

"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."

23. Therefore, the Law Commission had suggested increase in the threshold age to 18 years irrespective of the fact whether the girl is married or not.

24. The Law Commission in its 172nd report had suggested parity in so far as age of consent is concerned and had suggested increase of the minimum age requirement to 16

years, even if the girl was married. Copy of the 172nd report of Law Commission of India dated 25.03.2000 is annexed as Annexure P2. [pg.

25. Prior to passing of Criminal Law (Amendment) Act, 2013, the President of India had promulgated Criminal Law (Amendment) Ordinance, 2013. In the said Ordinance, the age mentioned in Exception 2 to Section 375 IPC was 16 years. Copy of Criminal Law (Amendment) Ordinance, 2013 dated 03.02.2013 is annexed as Annexure P3. [pg.

26. The Justice Verma Committee on Amendments to Criminal Law had suggested that the minimum age of a girl child for consensual sexual intercourse should be 16 years and marriage was not to be treated as an exception. The Petitioner would crave leave to refer to and rely upon the report of the Committee on Amendments to Criminal law.

27. In this back ground, the present Criminal Law (Amendment) Acts, 2013 which permits sexual intercourse with a girl who is less than 18 years on the ground that she is married is a totally arbitrary and discriminatory. Parliament has failed to protect the rights of the girl child. It is a matter of common knowledge that the girls in this age are married as a result of the decision of their parents/guardian. The right to decide of parents cannot be absolute and decision of the parents/guardian cannot be made the basis to legalize sexual relationship between the age of 16 to 18 years of a girl child, as it is more often than not in the best interests of

the child and take away the right of the child to decide for herself after attaining the age of 18 years. There have been large number of instances of traffics/exploitation of children in guise of marriage. It is also not uncommon that girls between 15 to 18 years are married for economic purposes and in name of traditional values of the patriarchal setup. The Petitioner believes and respectfully submits that such kind of illegal acts, which is detrimental to the girl child, can be taken care of if the age for consent is increased to 18 years irrespective of the fact whether the girl is married or not. Copy of the relevant part of Criminal Law (Amendment) Act, 2013 dated 02.04.2013 is annexed herewith as Annexure P4. [pg.

28. The girl child who is aged between 15 to 18 years is not in a position to decide for herself. In such circumstances, it is the obligation of the State i.e. Parliament, Government and the Court to protect her from being subjected to sexual intercourse under the guise of marriage, when physically and mentally, she is not competent to consent to the sexual intercourse.
29. There is also medical literature to indicate that child birth at the age of less than 18 years is not only harmful to the health of the girl, but also harmful to the health of foetus. If sexual intercourse is permitted between the age of 15 to 18 years, in a matrimonial relation, more often than not, then girl child would become pregnant at the age of less than 18 years [again without having any independence to decide

what is her best interest]. Such pregnancy or child birth can be life threatening for the mother as well as the child. Copy of UNICEF Report 2011 on Child Marriage and Health dated nil is annexed as Annexure P5. [pg.

30. Infact, the National Family Health Survey shows that an alarming 16% of girls in the age group 15-19 years were a mother or pregnant at the time of survey. Extract from the Report of National Family Health Survey dated nil is annexed as Annexure P-6. [pg.

31. Exception 2 to Section 375 of the IPC is also inconsistent with Article I the Convention on the Elimination of all forms of Discrimination against Women [CEDAW] which has been ratified by India. Article I of the Convention Provides that for the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment of exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

32. The Petitioner respectfully submits that when the age of consent under Section 375 IPC has been increased from 16 to 18 years, Parliament should have also increased the age mentioned in Exception to Section 375 from 15 to 18 years. Infact, when Criminal Law (Amendment) Ordinance 2013,

had provided age of 16 years in Exception 2 to Section 375 IPC, there was no reason to go back to the age of 15 years when the Amendment Act was passed. Retention of the age of 15 years in Exception 2 is violative of the rights of the girl child. Once it is accepted by Parliament that the girl should be normally 18 years for purposes of marriage and for purposes of consent, there is no reason why Parliament should not have penalized sexual relation with a girl who is less than 18 years.

33. Retention of the age of 15 years in Exception 2 to Section 375 is a retrograde step. The charts given herein above show that the age of consent has been increased over a period of time from 10 years in 1860 to 18 years in 2013, but the age for married girl for consent has remained as 15 years since 1940. The law, by flux of time has become unconstitutional. This Hon'ble Court in a number of judgments has held that even if the law was constitutional when passed, it may become unconstitutional by efflux of time. The Petitioner respectfully submits that the provision of Exception 2 to Section 375 IPC which has not changed despite the fact that the age of consent has been increased from 16 years to 18 years in 2013, is unconstitutional and liable to be so declared by this Hon'ble Court.
34. The present Writ Petition is being filed by the petitioners on following among other grounds:-

G R O U N D S

- 1) For that Exception 2 to Section 375 of IPC, as amended by Criminal Law (Amendment) Act, 2013, is violative of Articles 14, 15 and 21 of the Constitution.
- 2) For that the said provision discriminates between a girl child aged between 15 to 18 years and those above 18 years on the ground of marriage which has no rationale nexus to the purpose sought to be achieved.
- 3) For that once it is recognized by Parliament that a girl child less than 18 years is not in a physical or mental condition for a sexual relationship, making an exception for married girl children between 15 to 18 years, only because they are married, amounts to hostile discrimination as the fact that the girl child is married has absolutely no relationship with the age for grant of consent. Hence, the said provision is violative of Article 14 of the Constitution.
- 4) For that the age for grant of consent for sexual relationship has increased over a period of time from 10 years in 1860 to 16 years in 1940 and now the same has been increased to 18 years by way of Criminal Law (Amendment) Act, 2013. There is no justification whatsoever to maintain the age at 15 years only because the girl child is married. Thus, the provision is arbitrary and violates Article 14 of the Constitution.
- 5) For that by virtue of provisions of Juvenile Justice (Care and Protection of Children) Act, 2000 and provisions of Protection of Children from Sexual Offences Act, 2012,

Parliament has recognized that a girl less than 18 years is a child and therefore, not in a physical and mental condition to take an informed decision as to sexual relationship. In such circumstances, there is no reason for Parliament to retain the age of 15 years in Exception 2 of Section 375 of IPC. Hence, the said provision is arbitrary and violates Article 14 of the Constitution liable to be struck down.

- 6) For that by permitting sexual intercourse with a girl, who is a child, only because she has been married off by her father/guardian, Parliament has failed to protect the rights of the girl child. The provision impinges upon of a girl child to grow in an inviolate and trouble free environment till she attain majority. It is humbly submitted that the girl child aged 15 to 18 years is also vulnerable and is in no position to make an informed choice as to her marriage or sexual relationship. Parliament has not taken steps to protect the rights of said girl child till he attains the age of majority. Hence, the lower age of 15 years in Exception 2 to Section 375 IPC is violative of Articles 15 and 21 of the Constitution. The right to life has been given a very expensive interpretation by this Hon'ble Court and the forced sexual relation of a girl child between 15 to 18 years under the pretext of marriage violates her right to live.
- 7) For that the Criminal law (Amendment) Act, 2013 and the provision of Penal Code i.e. Exception 2 to Section 375 IPC is also unconstitutional, as by flux of time, law has recognized that the age of consent should be 18 years. Infact, for a girl child who is not married, the age of consent

if 18 years. The age of consent has been increased progressively from 1860 onwards. The huge disparity between the age of consent of a married girl and unmarried girl post 2013 amendment makes provision of the Exception 2 to Section 375 IPC unconstitutional.

- 8) For that Parliament has failed to take notice the recommendation of the Law Commission made in 84th Report and 172nd Report. The earlier 84th Law Commission Report had recommended that the age of consent for all girl children, irrespective of marriage, should be increased to 18 years. The 172nd Law Commission Report, though suggesting that the age of consent should be 16 years, had clearly opined that there should be no distinction between the age of consent on the ground that the girl was married.
- 9) For that Parliament has failed to note that various medical studies and data show that pregnancy in a girl, less than 18 years, is detrimental not only to the health of the girl, but also to the child in the womb, Parliament by permitting lawful sexual intercourse with a girl aged 16 to 18 years who is, in a matrimonial relation, has put the lives of lacs of such girls at risk [and also the lives of children in their womb at considerable risk].
- 10) For that Parliament has failed to take note of provisions of other acts like Child Marriage Act, 2006 Protection of Juvenile Justice (Care and Protection of Children) Act, 2000 and the most recent which specifically bars all consensual sexual activities below the age of 18 years leave alone the

gravest form of penetrative sexual assault, the Protection of Children from Sexual Offences Act, 2012. Infact, in the Criminal Law (Amendment) Order, 2013, the age provided in Exception 2 to Section 375 IPC was 16 years. The huger gap between the age for consent under Section 375 and the age for consent for a married girl child is unfair, unjust, arbitrary and violative of the Constitutional provisions. Hence, is liable to be struck down.

- 11) For that the impugned provisions of the Indian Penal Code are consistent with Article I of Convention on the Elimination of all forms of Discrimination against Women [CEDAW] which has been ratified by the Government of India.
- 12) For that any individual below 18 years has been considered as Child and minor as per the *Justice Juvenile (Care and Protection of Children) Act, 2000* and marriage of any girl child below age of 18 is also an offence as per The Prohibition of the Child Marriage, 2006. The girl between the ages of 16-18 years are Child and minor and their marriage is prohibited as per the laws stated above they have to legally face penetrative sexual assault due to the Exception Clause of the Section 375 of The Criminal Law (Amendment) Ordinance, 2013. This is clear fact that through some laws girls between ages of 15-18 are protected and secured while the Exception Clause of the Section 375 of The Criminal Law (Amendment) is legalizing penetrative sexual assault. This is clear contradiction in law.

- 13) As per UNICEF girls who are married below the age of 18 has to face many health problems because of pregnancy and the child born are also not healthy and there are more instances of Infant Mortality as per evidence of UNICEF (Annexure). According to UNICEF, Girls age 15-19 are more likely (66.6%) to experience delivery complications compared to 30-34 year-old women (59.7%)² and neonatal, infant and child mortality rates are much higher for younger girls (Annexure A). Risks of HIV/AIDS infection are higher among young girls as their negotiation skills and experience to ensure a healthy sexual life are less developed. This is clearly evident that Exception to the Section 375 of The Criminal Law (Amendment) Act, 2013 which legalizes penetrative sexual assault on the girls between the ages of 15-18 raises major health issue of the girl Child as well as of child born.
- 14) For that legalizing penetrative sexual assault on the minor girls who is being forcibly subjected to marriage and the consequent cruelty. The girls between the ages of 15-18 years are being forced and illegally married as per *Section 3 and 9* of The Prohibition of the Child Marriage, 2006 and as per *Section 5* of the Protection of Children from Sexual Offence Act, 2012, but they are being legally subjected to sexually assault as illegally married minor.
- 15) For that though child marriage had been a social phenomenon, after independence, a number of steps have been taken by Parliament and the Government to ensure

that child marriages come to an end. The Prohibition of Child Marriage Act, 2006 also reiterates the commitment of the Government to stop child marriages. In such circumstances, it was time for Parliament to have sent a clear message that marriage of girls less than 18 years would not be accepted and it was time for Parliament to penalize sexual interaction with a girl child less than 18 years, rather than permitting the same simply because the parents have married the girl.

- 16) For that there have been number of social practices which have been prohibited by Parliament e.g. *bigamy*, *sati* and *Mritu Bhoj* (social practice prevalent in Rajasthan). Hence, it was time for Parliament to have penalized sexual intercourse with a child less than 18 years. Child marriage is a social evil. It put the child in a position where she cannot decide for herself, what is good for her. It also adversely impacts the health of the child. Parliament was duty bound to protect the rights of the girl child by ensuring that she was not forced into marriage at an age earlier than 18 years. Parliament was duty bound to protect the health of the girl child as well.
- 17) For that the Exception 2 to Section 375 IPC places too much importance on the decision of parents/guardian of the girl child as the parents/guardian have the unabridged right to marry the child at the age less than 18 years, as the child of age of 15 to 18 years is not in a position to decide on her future and perhaps is in no position to protest against the decision of her parents/guardian. In such circumstances,

Parliament should have intervened and should have made its policy very clear that a girl child, less than 18 years, should not be married and forced to have sexual relation which has the ill effects not only her mental health, but also on her physical health. Parliament could not have refrained from intervening only on the ground that the parents/guardians have an absolute right to marry the girl child, when she is less than 18 years. More than 65 years after independence, there is no justification whatsoever for permitting marriage of children less than 18 years only on the ground that this is a family matter. The Petitioner respectfully submits that considering the scientific and educational advancement over a period of time and with more data being available as to the ill effects of pregnancy at age less than 18 years, Parliament should not have refrained from penalizing inclusive sexual intercourse with a girl child.

- 18) For that Parliament should have taken note of a number of instances where the parents/guardians have married of their girl child for purposes of sexual exploitation, trafficking, forced labour etc. and also for making some quick money for themselves. These social evils could be prevented if the age of consent for sexual relations is increased to 18 years so that the child is not forced into a marriage by their parents/guardian and the law could protect the rights of such a girl child and thereby give her the freedom to ground physically and mentally and in a position to take a decision for herself.

- 19) For that Parliament could not have upheld the right of the parents to violate the rights of their daughters who are less than 18 years, who have the right, like any other citizen, to grow in the best way possible manner, without being forced into sexual intercourse only on the ground that they have been married of by their parents.
- 20) For that Parliament ought to have taken note of developments of other countries whereby the parents of a child do not have an absolute right to determine the destiny of the child. Unfortunately, by not penalizing sexual intercourse between 15 to 18 years for a girl child on the sole ground that she has been married by her parents/guardian, Parliament has failed to keep pace with the global developments in the law of Right of Children and has thereby condemned girl child in this vulnerable age group of 15 to 18 years to sexual intercourse [at the choice of her parents] and life threatening pregnancy/child birth.

P R A Y E R

In these premises, it is most respectfully prayed that this Hon'ble Court be pleased to -

- a) issue an appropriate writ, order or direction in the nature of certiorari or such other similar writ, in the nature of declaration, declaring that the provisions of Exception 2 to Section 375 of IPC, as amended by Criminal law (Amendment) Act, 2013 is unconstitutional and liable to be struck down;

- b) issue an appropriate writ, order or direction in the nature of certiorari or a writ of declaration that the age of consent for sexual relationship should be treated as 18 years, irrespective of the marital status of the girl child;
- c) Pass such other order or orders and directions as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case as also in the interest of justice,

AND FOR THIS ACT OF KINDNESS THE PETITIONER AS IN DUTY BOUND SHALL EVER PRAY.

FILED BY

(GAURAV AGRAWAL)
ADVOCATE FOR THE PETITIONER

NEW DELHI
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