

Public Interest Litigation

Independent Thought vs. Union of India (W.P. Civil 382 of 2013)

(Honorable Supreme Court Issued notices to Centre on 10 July 2013)

Independent Thought¹ (www.ithought.in) has approached the Hon'ble Court Supreme Court of India by way of Writ Petition under Article 32 of the Constitution seeking a declaration that Exception 2 to Section 375 of the Indian Penal Code, [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.

Background

As per the Section 375 IPC, as amended by Criminal Law (Amendment) Act, 2013 which defines "Rape"; a man is said to commit "rape" if he with or without the consent a girl under eighteen years of age, does any of the following;

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

There are few exceptions to the above *Age of Consent of 18 years*, one being Exception 2 which mentions that Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape." *Whereby making it conducive for child Marriages and allowing husbands of illegal child marriages to force themselves on their wife if she is 15 years and above.*

The PIL challenges the above situation in light of the larger State Policy, Juvenile Justice Act, 2000 and Protection of Children from Sexual Offences Act, 2012 demanding to declare the exception under Section 375 as unconstitutional and uniformity as to the Minimum age of consent for Sexual Intercourse.

Historically the minimum age of consent and minimum age prescribed for marriage has consistently increased;

Minimum Age of Consent		Minimum Age for Marriage (Girls)	
Section 375, Indian Penal Code		Child Marriage Restraint Act, 1929	
1860	10 years		
1891	12 years		
1925	14 years	1929	14 Years
1940	16 years	1940	15 Years
2013	18 years	1978	18 Years

¹ *Independent Thought* is a National Human Rights organization working towards equity, justice and mutual respect. Based in Delhi NCR, iThought provides technical and handholding support to non government, government and multilateral Funding, Policy, Research and Grassroots organizations in several states of India.

In another PIL, Independent Thought has approached the Hon'ble Delhi High Court seeking a writ of declaration that **exclusion of schools established, owned or controlled by the appropriate Government** or the local authority under Section 18(1) of the Right of Children to Free and Compulsory Education Act, 2009 (RTE Act) to obtain a certificate of recognition as required under the RTE Act is violative of Articles 14 and 21A of the Constitution, so should be declared as Unconstitutional, as it defeats the aims and objectives of the RTE Act of providing quality education to all children.

PIL seeks clarity on age of consent

New Delhi: The Supreme Court on Wednesday issued notice to the Centre on a PIL seeking a direction for fixing the age of consent of a wife at 18 years for having sexual relations with her husband instead of 15.

Agreeing to hear the PIL, a bench headed by Justice K S Radhakrishnan sought response from the Centre on the issue.

The court passed the order on a petition filed by an NGO, iThought seeking its direction for amendment of section 375 (rape) of the Indian Penal Code which makes an exception on age of consent of the wife for sexual relations with her husband.

The exception in section 375, which was recently amended by the Criminal Law Amendment Act of 2013, states that "sexual in-

tercourse by a man with his wife, who not being under 15 years of age, is not rape."

Advocate Vikram Srivastav, appearing for the NGO, submitted that if the age of adulthood has been fixed at 18 years, the same should ap-

ply in the case of age of consent of a woman for sexual intercourse. ¶¶

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The Larger State Policy, since 2000 has recognized any person below the age of 18 years as children.

- Juvenile Justice (Care and Protection of Children) Act, 2000, defines a child anyone less than 18 years
- 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.
- Protection of Children from Sexual Offences Act, 2012 defines child as any person below age of 18 years.
- The 84th Law Commission report in 1980 had suggested increase in the threshold age to 18 years irrespective of the fact whether the girl is married or not.
- 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.
- National Policy for Children mentions defines child as any person below age of 18 years.

Grounds

Some of the important grounds on which the PIL has been framed :

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 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.
4. 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.
5. For that Parliament has failed to take notice the recommendation of the Law Commission made in 84th Report and 172nd Report; mentioned above.
6. While POCSO, 2012 protects and secured girls between ages of 15-18, the Exception Clause of Section 375 of Criminal Law (Amendment) legalizes penetrative sexual assault; a clear contradiction in law.
7. 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.
8. 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.

Prayers

The Petitioner has prayed for following in Hon'ble Court:

- 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