

Controversy over Age of Consent

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In the recent debate over amendments to the law on rape, the age of consent for women attracted attention, for almost all the wrong reasons. What was overlooked was that the law has not helped in interventions at the community level to curb child marriages arranged by natal families. There is a need for community-level sensitisation, greater security for girls in public spaces, and better resources for education of girls in poverty-stricken villages and urban slums. The campaign for stringent laws alone has merely strengthened patriarchal power and weakened the negotiating power of young girls contracting marriages of choice.

While the debate around the amendment to the rape law raised a wide range of concerns, an issue which became the focus of controversy at the last stage was the age of consent. The media fanned the controversy by framing it as “whether the age should be retained at 18 or reduced to 16”, which was a wrong way of putting it. The issue split activist groups, government ministries and parliamentarians down the middle. Strangely, it pitted women’s groups against child rights groups, the Ministry of Women and Child Development against the Ministry of Law, and the ruling party against the opposition. Cloaked in confusion, the debate lacked clarity.

Paradoxically, the Bharatiya Janata Party (BJP) expressed its opposition in terms of “preserving” our culture and tradition. Najma Heptulla, the BJP spokesperson, speaking on a news channel, exposed her ignorance when she declared, “India is not ready for it”, thereby implying that a low age of consent is a “western tradition”, oblivious of the reality that a low age of consent and child marriage have been the bane of social reformers in India since the 19th century.

No one seemed to remember that the minimum age of consent for sexual intercourse was raised from 16 to 18 years only in November 2012, when the Prevention of Sexual Offences Act came into force. However, there was no clarity even then. When this bill was first introduced in the Lok Sabha, the age of consent was stated to be 16, but due to protests from certain campaign groups, it was changed to 18 at the time of introducing it in the Rajya Sabha. There were hardly any cases registered under it when the issue of the rape law amendment hit the headlines in January 2013.

During the debate, the minister for women and child development argued

that lowering the age of consent will encourage child marriage, totally disregarding the sociological trend that the age of marriage for females increases only when the standard of living is raised, and when public spaces are safe for them to pursue their education. In rural Karnataka in January 2013, a young girl on her way back from school on a bicycle was gang-raped and thrown into a well. She was saved by passers-by who noticed her struggling for life. Thereafter, the entire village has stopped sending girls to schools outside the village.¹ These girls will soon be married off, despite a law in place that stipulates the minimum age for marriage is 18. According to news reports perturbed over recurrent instances of sexual harassment of teenage girls, the panchayats of six villages in Haryana decided not to send their girls to school. Around 400 girls were affected by this decision. One can condemn these decisions, but this will not help change social reality at the ground level.² Later reports said that parents had allowed the girls to attend school under police protection.

Child rights groups concerned with the global trafficking of minors opposed the provision of 16 years for consensual sex on the ground that it would encourage child traffickers. But we cannot collapse two different concerns – the issue of trafficking of minors and consensual sexual activity between young adults. The new bill has stringent provisions on trafficking and there is no intention on the part of the government to skirt this issue. So this argument lacks validity. This position also has the sanction of the moral brigade that views sex and marriage as synonymous.

The two main concerns for those resisting the increase in the age of consent are increasing parental control over young adolescents and criminalising a normal sexual activity. Perhaps a brief discussion of Monica’s (name changed) case may help to shed some light. Monica approached a public hospital with pregnancy-related problems.³ When her age was recorded as 14, despite her

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protests the police was called and her mother was compelled to sign the first information report (FIR) under the threat that treatment would otherwise not be provided to her daughter. The boyfriend, a 20-year old Muslim, who worked as a garage mechanic, was arrested. Monica was distraught. Several bail applications made on his behalf were dismissed despite Monica herself pleading for his release. This incident occurred before the Protection of Children from Sexual Offences Act, 2012, with its provision of mandatory reporting of all sexual offences came into force.

A month later, Monica delivered a daughter. Her only concern was to meet the father of her child. Every time he was brought to court, she went along with her infant all dressed in a hijab. Her fault was not realising in time that she was pregnant so she could undergo an abortion, and her mother truthfully admitting that she was not married and that they were too poor to afford a private maternity home. Obviously, she turned hostile during the trial, but it is anyone's guess whether the youth, once acquitted, will marry her after the ordeal of incarceration for several months, for which she was not even responsible. In Monica's case, the blame lay squarely on state agencies. Monica is lucky that she has a supportive mother but other young girls are not so lucky.

Elopement and Rape Cases

There are several instances where the parents file cases of rape against the boys with whom their teenage daughters have eloped. Anyone who has even cursorily examined lower court judgments cannot fail to notice the sizeable number of cases termed "statutory rape" or "technical rape". These are cases where the girl elopes with her boyfriend and her parents file a case of rape to exert pressure on her to return, only to get her married to a boy of their choice against her wishes. This tactic could be used only if the girl was around 16 years of age, but now it can be used even in cases where the girl is over 18, since proof of age is a contentious issue in litigation and ossification tests have a margin of

two years, either way. And in a dispute over age between the parents and the child, the law tends to lean in favour of the parents.

A discussion on "elopement" marriages brings to the fore the ways in which multiple social subordinations – caste, region, religion – intersect with patriarchy to contain the sexual choices of defiant young women within established social mores. The situation becomes precarious when an upper-caste girl elopes with a lower-caste boy, or when a Hindu girl falls in love with a Muslim boy, transgressing the boundaries of Hindu upper-caste dictates on "purity". In a strictly stratified society, ridden with prejudices against the lower castes and minorities, a young couple that dares to cross boundaries is severely punished. At times, the price for choosing a partner is public humiliation or gruesome murder. The notion of women as the sexual property of their communities is deeply ingrained.

Child Marriage Discourse

The social movement against child marriage and the demand for state intervention to curb this malaise was first articulated in the 19th century and the engagement with this issue continues in the 21st century (Agnes 2011: 66-78). Despite this being one of the earliest legal campaigns, there are hardly any incisive analyses on why legal reform has failed to address the problem. While child marriage continues to be a problem rooted within socio-economic structures, a solution to it is sought within the domain of the law.

The contemporary discourse needs to be located within continuous structural shifts in the economic, cultural and social frameworks. The 19th century reformers raised this issue within the newly introduced colonial legal order, which was designed to usher in modernity and state control. It posed a challenge to brahminical patriarchy, within which a high premium was placed on the virginity of child brides. The demand was to fix a statutory age of 10 years, below which intercourse was prohibited, both in prostitution and in marriage. This was opposed by revivalists who

challenged the authority of the colonial state to interfere in local customs, practices and religious beliefs. But the age of consent was fixed at 10 in the Indian Penal Code of 1860. Later, following the death of a young bride, Phulmonee, due to violent sexual intercourse by her husband, the age was raised to 12 in 1890 after a great deal of controversy. The British courts had ruled that since the girl was above the age of consent, her death could not be viewed as murder as the husband had a legal right to have sex with her (Sarkar 1993).

During the early 20th century, when women's organisations entered the political arena, the focus shifted to women's health, protection from early pregnancies, and concern over women's education. The age for marriage of girls under the Child Marriage Restraint Act, 1929 (CMRA) was raised from 12 to 14, when biologically the body of the female would be more receptive to sexual intercourse and pregnancy. In 1949, the age of consent under the rape law was raised to 15 years. This became the basis while enacting the Hindu Marriage Act in 1955, which laid down a minimum age of 15 for girls and 18 for boys. But the enactment did not render under-age marriages void. This was due to the ideology of Hindu marriages being sacramental (despite the codification) and due to the grave social implications such a move would have on children born of such unions. In this context, the CMRA came to be viewed more as rhetoric or an aspiration than a moral code or a legal mandate. Socially sanctioned community norms and customs prevailed over the legal dictate.

So, despite the prolonged and highly visible campaign before the enactment, the Act was a non-starter, with scholars in the late 1960s commenting that there had hardly been a hundred-odd prosecutions under it in 40 years, while millions of child marriages took place in the country. It was also noted that where parties had been prosecuted, the motivations came from family feuds and factional fights rather than from a diligent application of the legal provision by the state (Sampath 1969). Thus even the few prosecutions under the Act

were confined within patriarchal paradigms and community controls over the female body, rather than acting as a safeguard against them. Several social factors such as urbanisation increased opportunities for education of girls, a loosening of the grip of conservative religious leaderships over communities, and westernisation among the urban middle class have contributed to a gradual increase in the mean age of marriage. In the 1970s, the minimum age for marriage was raised to 18 for girls (and 21 for boys) as per the recommendations of the Committee on the Status of Women.

Contemporary Concerns

While child marriages still prevail in India, the concern raised by the 19th century reformist movement is no longer valid. Rather than dictates of brahminical patriarchy, the contemporary concern over child marriage needs to be located within socio-economic factors such as extreme poverty among the urban and rural poor, lack of access to education for girls, and fear of rape and sexual abuse. Much more than the elite and middle classes, it is the backward castes, the dalits and Muslims who are burdened with these concerns. Ironically, these communities were not the focus of attention at the time the debate was initiated. Among many lower castes, adult marriages of women were the norm.

Though there has been a consistent demand from urban, middle-class legal scholars and social activists to declare child marriages void, there is a legislative reluctance to give in to this even after the Prohibition of Child Marriage Act, 2006. This has been so in view of the plurality of cultures and socio-economic backgrounds in our population. Some rural-based social activists have highlighted the class and caste biases of the contemporary campaign against child marriage in the context of Rajasthan (Singh et al 1994: 1377-79).

Agency and Individual Freedoms

The argument of some scholars that “the institution of patriarchy operates in the name of culture for justifying

child marriage of young girls” becomes problematic when we examine elopement cases (Sagade 2005). As against the socio-economic constraints of child marriage due to poverty, these cases concern marriages of choice by young girls. Here the legal provision becomes a weapon to control the expression of sexuality, and curb voluntary marriages, and is used to augment patriarchal parental power. Even though the criminal provisions of kidnapping and statutory rape appear to be protecting the minor girl, these provisions are concerned primarily with securing the rights of the parent or guardian over the minor girl against her lover or husband. The young couple who exercises the choice gets trapped in family feuds, or caste and community hostilities. There are no exceptions in the laws on abduction and kidnapping that allow a minor to opt out of guardianship or to leave her parental home on grounds of domestic abuse and neglect (Baxi 2009). The use (and abuse) of police power at the instance of parents in marriages of choice is in direct opposition to women’s autonomy, agency and free will.

In a society ridden with prejudices against the lower castes and communal conflicts, a young couple who dares to disobey community dictates is severely punished. At times, the price for choosing a partner is death or public humiliation (Chowdhry 2004; Welchman and Hossain 2005). The notion that women are the sexual property of their communities is deeply internalised, leading to violence not merely by the girls’ families but also the community.

There are several instances where the provision of minority is used against the girl and her lover on the ground that she is a minor and lacks agency to consent. At times, girls who have attained majority are falsely projected as minors who are devoid of the legal authority to give their consent to marriage or sexual intercourse. Despite being aware that it is a marriage of choice and voluntary elopement, the police collude with the fathers to protect patriarchal interests and community honour. Only if a girl is able to provide clear and unequivocal proof of her majority is she

allowed to accompany her husband and cohabit with him. Or else the father’s word regarding her age will be accepted and she will be sent back to his custody, and criminal charges will be pressed against the boy. In rare cases where girls vehemently refuse to return to the custody of their fathers, they are sent to state-run shelter homes. These girls are not automatically released on attaining majority. The husbands concerned would have to initiate legal proceedings for their release.

Judicial Responses

Several judges have commented that many of the habeas corpus petitions filed for production of a girl in court are really cases to do with elopement. This is a serious concern for the courts as the judgments discussed below indicate.

In *Kokkula Suresh vs State of Andhra Pradesh*, the Andhra Pradesh High Court affirmed that the marriage of a minor girl is not a nullity.⁴ The court further held that the husband is the natural guardian of a married minor’s person and property and he is entitled to her custody, thus restraining the father from claiming legal custody of his daughter.

In *Ashok Kumar vs State*, the Punjab and Haryana High Court commented that couples marrying out of love are chased by the police and relatives, accompanied by musclemen.⁵ Often cases of rape and abduction are registered against the boy. At times, the couple faces the threat of being killed and such killings are termed “honour killings”. Often the state is a mute spectator.

In *Payal Sharma alias Kamla Sharma vs Superintendent, Nari Niketan, Agra*, the Allahabad High Court rejected the father’s contention that the girl was a minor and instead accepted her contention that she was a major.⁶ Further, the court declared that as a major she had a right to go anywhere and live with anyone. “In our opinion a man and a woman, even without getting married can live together, if they wish. This can be regarded as immoral by society but it is not illegal. There is a difference between law and morality”, the court commented. Since the girl had stated

that her life was in danger, the court also ordered police protection to ensure her security.

In *Jiten Bouri vs State of West Bengal*, the Calcutta High Court, while permitting a minor girl to join her husband, declared as follows,⁷

Although the girl has not attained majority yet she has reached age of discretion to understand her own welfare which is a paramount consideration for grant of her custody. She may not have attained marriageable age as per the provisions of the Hindu Marriage Act but marriage in contravention of age can neither be void nor voidable... The girl has insisted that she wants to join her husband and does not wish to return to her father's place.

In *Vivek Kumar @ Sanju and Anjali @ Afsana vs The State*, a case concerning the elopement of a Muslim girl with a Hindu boy, the Delhi High Court commented,⁸

There is no law which prohibits a girl under 18 years from falling in love...Neither falling in love with somebody is an offence under IPC or any other penal law. Desiring to marry her love is also not an offence.... However, this (to wait to marry till she is a major) is possible only when the house of her parents where she is living has congenial atmosphere and she is allowed to live in peace in that house and wait for attaining age of majority...When the daughter confided in her father that she was in love and wanted to marry her lover, the response of the father created a fear in the mind of the girl. Her father slapped her and told her that her action would malign the family and bring danger to the religion. He even threatened to kill her or marry her off to some rich person. When once such a threat is given to a girl around 17 years of age, who is in love, she has a right to protect her person and feelings against such onslaught, even if the onslaught is from her own parents. Right to life and liberty as guaranteed by the Constitution is equally available to minors. A father has no right to forcibly marry off his daughter, against her wishes. Neither has he the right to kill her, because she intends to marry out of her religion. If a girl around 17 years of age runs away from her parents house to save herself from the onslaught of her father and joins her lover, it is no offence either on the part of the girl or on the part of the boy with whom she ran away to get married.

These judgments serve as a benchmark for the liberal interpretation of the constitutional provisions of equality and individual freedom. At times, our

judges, with a concern for social justice, have resolved the issue by resorting to the basic principles of human rights, and saved minor girls from the wrath of their parents and from state-run "protective homes". The only way they could do so was by holding these marriages to be valid and by allowing the girls to cohabit with their partners of choice.

Feminist Jurisprudence and Social Reality

While pondering over these judgments, one needs to address a complex legal question – since the girls were minors, were they juridical persons invested with the power to exercise a free choice, and would the consent given by the girls to the marriage be deemed legally valid? Examining these judgments through the prism of women's rights, could these judicial interventions in aid of minor girls be termed regressive and the demand to declare these marriages null and void be termed progressive? Could the curbing of the freedom of these minor girls to express their sexual choices by their natal families, with the aid of the mighty power of the state, in a sexually repressive society, be termed a progressive intervention?

It is not my aim here to encourage marriages of minors. The point one is trying to advance is simply that the law has not helped in interventions at the community level to curb child marriages arranged by natal families. There is a need for community-level sensitisation, greater security for girls in public spaces, and better resources for education of girls in poverty-stricken villages and urban slums. What is being underlined is that the campaign for stringent laws has only strengthened patriarchal power and weakened the negotiating power of young girls contracting marriages of choice.

It is important that contemporary discourse be far more nuanced than what one observed in the recent controversy. In the final analysis, a progressive voice must lend credence to the claims of the weak against the might of status quo-ist institutional authorities. The agency exercised by a young teenage girl and her voice of protest against the

dictates of patriarchy need articulation and support. It is within this complex tapestry that the claims of feminist jurisprudence must essentially lie.

NOTES

- 1 This was narrated by a senior officer of the Karnataka Police Training Academy at a workshop held at the Lal Bahadur Shastri National Academy of Administration, Mussoorie, in March 2013 to the author.
- 2 Newline, Mumbai, 12 May 2013, "6 Haryana Villages Not to Send Girls to School to Avoid Harassment".
- 3 A Majlis team of social workers and lawyers guided her through the legal process as part of Rahat, a survivor support programme.
- 4 I (2009) DMC 646 AP.
- 5 I (2009) DMC 120 P&H.
- 6 AIR 2001 All 254.
- 7 II (2003) DMC 774.
- 8 CrI M C No 3073-74/2006, decided on 23 February 2007.

REFERENCES

- Agnes, Flavia (2011): *Family Law Vol II: Marriage, Divorce, and Matrimonial Litigation* (New Delhi: Oxford University Press).
- Baxi, P (2009): *Till Honour Does Us Apart: Legislating Women's Right to Marry* (New Delhi: Centre for Law and Governance, Jawaharlal Nehru University).
- Chowdhry, P (2004): "Private Lives, State Intervention: Cases of Runaway Marriage in Rural North India", *Modern Asian Studies*, Vol 38, No 1, pp 55-84.
- Sagade, J (2005): *Child Marriage in India* (New Delhi: Oxford University Press).
- Sampath, B N (1969): "Marriageable Age, Consent and Soundness of Mind in Indian Matrimonial Law: A Plea for Rationalisation", *Benares Law Journal*, Vol 5.
- Sarkar, T (1993): "Rhetoric against Age of Consent", *Economic & Political Weekly*, Vol 28, No 36, pp 1869-78.
- Singh, S, Nikhil Dey and Aruna Roy (1994): "Child Marriage, Government and NGOs", *Economic & Political Weekly*, Vol 29, No 23, pp 1377-79.
- Welchman, L and Sara Hossain (2005): *'Honour' Crimes, Paradigms, and Violence against Women* (London and New York: Zed Press).

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