Her right to choose

On October 11, the Supreme Court read down Exception 2 to Section 375 of the Indian Penal Code, with prospective effect, to hold that "sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is rape". The court reviewed the amended law on rape, which raised the age of consent from 16 to 18 years. Exception 2, however, did not allow underage wives, above the age of 15 years, to prosecute their husbands of rape, although the Protection of Children from Sexual Offences Act (POCSO) criminalised sexual assault of underage wives up to the age of 18.

The state affidavit pointed out that although the Law Commission had recommended raising the age to 16 years and this was incorporated in the Criminal Law (Amendment) Ordinance, 2013, after wide-ranging consultations, the age of consent for underage wives was not increased to 16. These "consultations" ostensibly did not include conversations with women's rights groups which had recommended the insertion of a "proximity in age" exception to prevent the criminalisation of consensual adolescent sex between 16-18 years.

For example, in Florida, "close in age exemptions" exist, which allow 16 or 17 years old to engage in consensual sex with a partner no older than 23. However, this recommendation was not taken seriously given that the increased age of consent was seen as a way of preventing pre-marital consensual sex, while forced sex in child marriage was seen as a way of preserving the institution of marriage.

The burden of preserving marriage inevitably falls on women. Hence, the state affidavit did not explain why the 2013 ordinance on sexual assault which was gender-neutral had retained a gender specific exception. The 2013 ordinance held that "sexual intercourse or sexual acts by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault". This meant that a husband could accuse his wife of sexual assault but a wife, above 16 years, could not prosecute her husband of sexual assault. This historic injustice against wives was redressed by the retrospective application of the amended rape law in 2013.

The state did not explain why the exception excluded aggravated marital rape against child wives, that is, rape accompanied with physical violence, resulting in disability or serious risk to health and even murder. The protests after 10-year-old Phulmonee Dasi was raped to death by her 35-year-old husband in 1889, which led to increase in the age of consent from 10 to 12 years, haunt our legislature today.

The state did not also explain why the exception distinguished between married and unmarried children since the 1920s. After all, eminent barrister and the first vice chancellor of Delhi University, Hari Singh Gour, introduced a bill to increase the age of consent from 12 to 14 years, irrespective of the marital status of girl children, in 1924. In 1925 and then 1929, the age of consent for unmarried girls was 14 and for child wives was reduced to 13; and in 1940, the age of consent was fixed for unmarried girls at 16 and for child wives at 15 years. Any defence of the classification would then have to refer to the archives of the 1920s and 1940s.

Instead, the government argued that child marriages take place since the economic and educational development in the country is still uneven, and, hence, it was imperative to reduce the age of consent "to give protection to husband and wife against criminalising the sexual activity between them". This elided the fact that the exception prescribes an age of consent for wives, and not husbands; and that child wives are denied education when forced into early marriages. Surely, patriarchal visions of development and systemic exclusion of women from education entrench child marriage.

Further, the state argued that it would not be "practical" or "appropriate" to criminalise sex with a wife between 15 to 18 years. The prevalence of child marriage is not seen as a failure of paternalistic or patriarchal governance. Child marriage is mystified as a tradition which cannot be tackled through practical and appropriate forms of constitutional governance.

For, impunity to rapists who punish government employees for preventing child marriage is afforded by a state apparatus who would much rather protect the tradition of child marriage. It is therefore convenient to cite the Vishakha judgment without recalling that it arose after a sathin was gangraped for preventing child marriage in Rajasthan.

The court rightly dismissed these arguments as "explanations". Since no arguments were offered on the precise legal question of harmonising the age of consent with the laws on child marriage, child sexual abuse and juvenile justice, the court held that overlooking "these facts and statutes confirms that the distinction is artificial and makes Exception 2 to Section 375 of the IPC all the more arbitrary and discriminatory".

The ruling should be welcomed since the Supreme Court rightly held that the "unnecessary and artificial distinction between a married girl child and an unmarried girl child" is discriminatory and against the best interests of the girl child. The exception was illegible since POCSO criminalises sexual assault by husbands of child wives. It is crucial to emphasise that a new offence is not created since it already exists in POCSO. And the court, reviewing both custom and personal laws, rejected the view that legal pluralism demands toleration of rape in child marriage.

The juridical unconscious addressed the Rukhmabai case (1887) when it read down the exception to ensure the right of a girl child to "study further", "earn independently" and "live as a self-sufficient independent woman". Historian Sudhir Chandra reminds us that Rukhmabai described child marriage as a "wicked practice" that destroyed "the happiness" of her life; as that terrible reality which stole the thing she prized the most "above all others - study and mental cultivation". When her husband, Dadaji, brought a restitution of conjugal rights suit against Rukhmabai, she told the court that the marriage could not be binding on her since she had not consented to it at the age of 11.

Unlike Rukhmabai, the Supreme Court does not classify child marriage as a form of forced marriage. If, as the Supreme Court holds, "the girl child must not be deprived of her right of choice", then child marriage must be seen as forced marriage. The right of women to consent to marriage, if, when and whom they marry, continues to be negotiated under the cover of tradition. If the rape law is seen as a site for regulating sexuality and marriage, rather than guaranteeing sexual autonomy, precedents of injustice will proliferate.

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