

Complicated terms of engagement: on child sexual abuse

On October 17, the Supreme Court read down the [marital rape exception for married girls between the ages of 15 and 18](#). The judgment is prospective in nature. Essentially, the court held that since sexual assault in marriage is already a crime under the Protection of Children from Sexual Offences Act, 2012 (POCSO), it is discriminatory and arbitrary to suspend the protection of the rape law for these underage married girls. The Supreme Court set aside the state's argument that marriage presumes consent; that compulsory sex in child marriage is protected by customary or personal law; that husbands of child brides must have impunity from the rape law; or that poverty and lack of development means compulsory sex in child marriage must be decriminalised.

The Supreme Court decision makes it clear that sexual consent can only be given by an adult woman of 18 years. In other words, consent to sex in underage marriage cannot be assumed by the husband nor can parents give such consent on behalf of the underage minor.

POCSO privileges age to define to a child, wherein consent of a child is not a defence to sexual assault. Sexual consent is defined as an adult category. Hence, the argument that marriage presumes consent is not tenable in the law on sexual assault of children.

The child's right to dignity

The [Prohibition of Child Marriage Act, 2006](#) prohibits the solemnisation of child marriages wherein a child means a person who if male has not yet completed 21 years, and if female not yet 18 years. Further, every child marriage, whether solemnised before or after the Act came into effect, can be made void by either the man or the woman within two years of attaining majority. Karnataka has passed a law making all child marriages void.

Child marriage has historically cast a shadow over rape law reform in India. Child marriage is a specific form of customary practice arranged by parents or male community elders. These may be community marriages dictated by religious calendars or by caste customs. These are a distinct form of early marriages in which the consent of the patriarch of the family or elder determines the matrimonial fate of the child. The second species of marriage is found in different customary and personal laws wherein the age at which a girl can be married is lower than the legal age of marriage. The impetus for early marriages, across customary or personal laws, is to prevent young girls from falling in love and experimenting with illicit sex, which is seen to bring dishonour to male defined communities.

This is a field of legal pluralism, where pre-marital sex rather than rape of young girls by their husbands is seen as a social problem. Of course, pre-marital sex is considered a social problem only when women or young girls experiment with sexuality before marriage — it is not a social problem for boys to engage in consensual sex at any age.

POCSO defines a child, (irrespective of gender) as a person under the age of 18 years, which prevents the "inducement or coercion of a child to engage in any unlawful sexual activity". It mandates the Central and State governments to take all measures to ensure publicity to the provisions of the Act and obliges government officials to be trained in how to implement the Act. In other words, the brief of any government is to act to secure the best interests of the child. This includes child-wives hitherto protected by custom, since the Indian state acceded in 1992 to the UN General Assembly's Convention on the Rights of the Child.

The Supreme Court judgment rightly reversed the position that the jurisdiction of sexual impunity

preventing husbands from being prosecuted for rape of child wives must lie with customary or personal law through the marital rape law exception.

This sexual exceptionalism in state law has been defended by traditionalists who make an argument for de-criminalisation of compulsory sex within child marriage arranged by elders and dictated by custom, while approving the criminalisation of sex for unmarried girls up to 18 years to prevent pre-marital sex between young adults. They also find common cause with families who criminalise love affairs, by using state law against daughters.

Feminists have critiqued the custodial violence of the family and the state towards women who marry of choice. And they have protested against familial and state violence towards transgressive daughters who often are imprisoned at home or in state institutions, if they consented to sex or marriage, against the wishes of their parents.

At the same time, feminists have also insisted on bringing to the law a recognition of sexual assault of children, irrespective of gender. They have also gendered the notion of childhood. Feminists have also elaborated how adolescence is gendered.

There are two broad responses to the age of consent. The first perspective that evokes the political economy of custom and law argues for a lowering of age of consent to 16. This, however, creates a conflict with the definition of the child under POCSO, unnecessarily pitting women's rights against child rights. The second stance recommends a proximity in age clause in the age of consent provision to prevent the criminalisation of young people who are sexually active between 16 to 18 years, thereby suggesting a limited form of legal exceptionalism in the best interest of the child.

Both these perspectives are guided by a recognition of the vulnerabilities of young adults to pressure at home to marry early and against their wishes. Sometimes, the home is a space of sexual and physical abuse or poverty and neglect from which marriage seems the only escape. However, if marriage is the only escape for scores of young girls, it is because the state almost never endeavours to realise education and social security for girls and women. And the burden of compulsory sex falls unduly on the young girl, now married, with or without her consent.

The question of sexual consent is clearly one that must lie with the individual woman. Parents, elders, political parties, priests or vigilante groups should not be permitted to force women, adult or minor, into marriage or compulsory heterosexuality. This also means that young adults should not be forced into heterosexuality per se, if they are not sexually attracted to the opposite sex.

The Supreme Court rightly holds that the 'the girl child must not be deprived of her right of choice'. The right to choose, which is free and unfettered, includes freedom from parental pressure to marry early, freedom from forced marriages, freedom of choice of sexual orientation, and freedom to find self-fulfilment through study, work, profession, vocation or talent.

Although the law offers a specific grammar of rights, forcing young persons into compulsory heterosexuality is not seen as a social evil. How then will equality be a lived reality, by and for women, sexual minorities and children?

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