

CONTROL & FREEDOM: WOMEN & THE AGE OF SEXUAL DECISIONS

An analysis of the legal ambiguity around the age of consent *vis-à-vis* sexuality and impact of the same on women's right to choice and sexual autonomy

Geeta Ramaseshan

AALI

April, 2012

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By:

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FOREWORD

AALI, while providing legal and other help to women facing harassment and violence for exercising their right to choose a sexual partner, either with or without the intention of marriage, has frequently tackled the issues of "age," "consent," and "sexual autonomy." Situations become complicated when a girl is of age to give consent for sexual relationships but may not be of age to live or go away with someone of her own volition. Usually, the party opposing the relationship claims that the girl is below the "age of consent" and initiates criminal proceedings, which leads not only to a long, drawn-out procedure to determine age, but also requires ensuring that she is not placed into a situation where she fears for her life and liberty. Often, when the girl is below the age of consent, a delicate balance has to be maintained between the girl not wanting to return to her family and "protective custody."

In this context, AALI felt it imperative to study this legal ambiguity and was fortunate that Geeta Ramaseshan, an advocate of the Madras High Court and a highly reputed human rights activist, agreed to undertake this paper to contribute to a greater understanding of the issue. Through secondary research, this paper examines and reviews the constitutional and legislative provisions and the judicial pronouncements on the age of consent vis-à-vis sexuality. The paper brings forth interesting patterns, such as biased treatment by state agencies of girls below the age of consent, when they themselves choose their sexual partners and when their parents get them married. The paper also points out the ways in which the issues of "age of consent" and "sexual autonomy" are manipulated by the parties in the context of the criminal justice system in a way that leads to serious human rights violations.

This paper does not advocate any legislative amendments, but by highlighting the human rights violations that occur due to the prevailing ambiguity, it hopes to initiate a discussion surrounding women's rights, child rights, and human rights activists on the age of consent vis-à-vis sexuality. This discussion becomes even more pertinent with the passing of the law against child offences, which has raised the age of consent vis-à-vis sexuality to 18 years. There has been opposition to

this increase of the age of consent from various quarters, ranging from the higher and lower judiciary to women's rights and human rights activists. This paper sets the context for furthering this discussion.

AALI is thankful to Geeta Ramaseshan for bringing forth the contradictions and predicaments in ambiguity around age of consent and sexuality in such a concise and simple manner. We also thank the Ford Foundation for supporting this research.

And last but not the least, we are also grateful to Tulika Srivastava and Niti Saxena for suggesting a review of laws around the age of consent and sexuality.

AALI Team

About the organisation:

AALI (Association for Advocacy and Legal Initiatives) is a feminist legal advocacy and resource organization based in Lucknow, Uttar Pradesh. AALI has been working since 1998 with the vision of an egalitarian social system that recognizes women, particularly those from marginalized and minority communities, as complete individuals and equal human beings. Since its inception, AALI has been working at various levels toward enabling a holistic response to the issue of violations faced by women on account of exercising their right to enter, remain or exit from a sexual relationship. Over the past 13 years, the organization has undertaken direct response to violations of women's human rights, as well as advocacy and research, with a view toward establishing and protecting women's human rights.

About the author:

Geeta Ramaseshan is a senior lawyer practicing in the Madras High Court in the area of criminal law, constitutional law, and family law, with specific emphasis on human rights and women's human rights. She has also specialized in international human rights law and has conducted workshops on international human rights for the Asian Forum For Human Rights and Development, Bangkok and the International Women's Rights Action Watch - Asia Pacific.

List of Abbreviations

1. Pg..... Page
2. SC Supreme Court
3. IPC Indian Penal Code
4. SLP Special Leave Petition
5. S.C.C Supreme Court Cases
6. A.I.R. All India Reporter
7. Vs Versus
8. Ibid The same
9. & And
10. Etc. Etcetera
11. i.e. That is
12. C.M.O Chief Medical Officer
13. IDRC International Development and Research
..... Centre
14. CRDI Centre de recherches pour le
..... développement international (Research
..... Centre for International Development)

Table of Contents

◆ Introduction	1
◆ The Constitution of India and the rights of young persons	4
◆ The Constitutional guarantee to the right to life and the writ of habeas corpus: No person shall be deprived of his life and liberty except by procedure established by law (Article 21)	5
◆ Age of consent and marriage	9
— The Prohibition of Child Marriage Act, 2006	9
— The Hindu Marriage Act, 1955	11
— Islamic Law	12
— The Indian Christian Marriage Act of 1872	12
— The Special Marriage Act of 1954	13
— Indian Majority Act of 1875	14
— Valid marriages and kidnapping from lawful guardianship	16
— Determination of age	16
— The concept of “protective custody”	19
◆ The interplay of evidence under the criminal justice system in issues of choice, the misuse of law, and state-supported violence	20
◆ The capacity of a woman to make a sexual choice, and the question of her physical custody	25
◆ Age of consent and rape	30
◆ Conclusion	32

Aali

Introduction

The age of consent for choice and decision-making in sexual relationships is extremely problematic at the *de jure* level in India. A host of legislations has addressed this issue and prescribed differing ages of majority, as a result of which complex legal problems that conflict with constitutional guarantees regarding the right to life arise. This is often compounded by the judgments of the higher courts, which interpret these issues with a heavy focus on social norms.

At the *de facto* level, many forms of control are exercised on a young person by other members of the family or the community, who often take advantage of these lacunas in the law. Some of these include illegally detaining young people, forcibly marrying them against their will, inflicting violence upon them, and in particular restricting their freedom and right to choice.

This paper examines the various legislations that have an impact on consent and choice in sexual relationships through the basis of age. It reviews constitutional and legal provisions, in addition to some judgments of the high courts and Supreme Court on age, consent and sexual autonomy, to indicate judicial reasoning that reflects social norms or addresses the right to autonomy. The paper considers the *de jure* (existing laws) and *de facto* (ground reality) positions on the issue of right to choice. It analyses how laws are often used to criminalise the right to choice in marriage and relationships by families who use the argument of age. It also examines the issue of evidentiary requirements, which have become crucial in determining age. In doing so, it takes into account the intersection of gender, caste, class and religion. It examines the interconnections between critical issues such as choice, child protection and the rights of young persons. It analyses complexities in the areas of age, consent and women's agency and the impact of those complexities on women's rights to choice and sexual autonomy in relationships.

This study recognises the importance of addressing consent in the context of same-sex relationships. But as the language of the law and judgments are all concerned with marriage and heterosexual relationships, the study focuses only on these issues. In the context of same-sex relationships, the Delhi High Court has decriminalised

the provision of the Indian Penal Code that treated homosexual acts as an offence among consenting adults by holding the provision to be unconstitutional. The matter is now pending in the Supreme Court.¹

The writer is conscious of many instances of adults being denied their right to choice. While these also result in violence, the issue of age in such cases has little relevance as pertains to what is then done to the adult in violation of their fundamental rights. This paper does not address such situations, as the focus of the research is on legal ambiguity relating to the age of consent.

But in the context of situations where age is a concern, the role of the state is to "protect" the child/minor. While this role is important in cases where a child/minor is in need of care and protection, the concept of "protection" often serves as an instrument of harassment and is used to deny choice, with protectionist arguments being used in the courts to take a position. What actually happens to the young person is that violence is perpetrated against him/her or that there is a denial of various rights. In that process, the young person gets caught in the vortex of the criminal justice system. Both entry into marriage and exit from one are very problematic in the context of age. It is this complexity that the paper seeks to unravel and in doing so it is hoped that the findings of this paper will contribute to understanding around the right to choice and sexual autonomy from a legal framework.

The paper begins with an overview of the rights guaranteed under the Indian Constitution that prohibit discrimination and provide for affirmative action. It analyses current trends in the area of cases relating to the constitutional remedy of Habeas Corpus, where interference by private actors such as family, community and religious groups are involved. This is followed by providing an overview of the issue of age in the context of consent and the interplay between family law and criminal law. It further examines this factor in situations where a woman makes a choice relating to marriage. It also looks into the issue of the evidentiary requirement of age in cases of rape and age of consent, besides addressing some concerns under the Juvenile Justice (Care and Protection) Act.

1. Section 377 IPC Naz Foundation Vs. Govt. Of NCT and others 160(2009) DLT277

Cases cited in this paper are analysed in detail to provide an understanding of the slew of legal issues that confront a person who is viewed as defying community norms.

The paper, by reviewing existing laws and judgments on consent and women's agency, has highlighted the critical concerns emerging in the area. The paper is restricted to addressing issues through a legal framework, while being conscious that law has its limitations and that there are other concerns (such as education and health) that are interlinked with sexuality and choice. However, there is frequent use of the law and the legal system to address these issues and it is such complexity that the paper seeks to capture. It is hoped that the legal analysis provided here will provide a better understanding of the nuanced complexities and further discussion and advocacy around the issue.

The research methodology for the report is the secondary research method. These include an analysis of legislations, judgments, policy papers and various reports of NGOS that have worked in this critical area.



The Constitution of India and the rights of young persons

The Constitution of India recognizes the right of all individuals to life, liberty, equality, and equal protection before the law. While discrimination is prohibited, the state can make special provisions for women and children, and such provisions cannot be challenged as discriminatory.² A fair trial process is also guaranteed under the Constitution that applies to all processes, including proceedings under a statute such as the Juvenile Justice (Care and Protection of Children) Act of 2006, which has departed from the traditional justice system in cases relating to children.³

A fair trial process implies that a person charged with an offence is assured of certain rights both at the pre-trial and the trial stages to ensure that she/he gets a fair hearing. This includes the right not to be compelled to give evidence against oneself and the production of the person arrested before a court within 24 hours. Guidelines have been formulated by the Supreme Court in cases of arrests that require the police to take certain steps, including immediately intimating family members of the same and informing the arrested person as to the reasons for arrest.⁴ The right to legal aid and a speedy trial is a constitutional right.⁵ The Supreme Court has, in a series of judgments, introduced the concept of payment of compensation for cases of illegal detention, death in custody, and torture.⁶

The Supreme Court has also, in a series of judgments, read into domestic law the provisions of international human rights treaties to which India is party.



2. Article 15 and 16

3. Article 20 and 22

4. DK Basu Vs. State of West Bengal, AIR 1997 SC 610

5. HussainaraKhatoon Vs. State of Bihar, AIR 1979 SC 1369, 1377, Khatri Vs. State of Bihar, AIR 1981 SC 928, Hoskot Vs. State of Maharashtra, AIR 1978 SC 1548 for speedy trial, Common Cause Laws Vs. Union of India AIR 1996 SC 1619

6. For a detailed analysis on the principle of state liability, Nilabati Vs. State of Orissa, 1993 2 SCC pg 746

The Constitutional guarantee to the right to life and the writ of habeas corpus: No person shall be deprived of his life and liberty except by procedure established by law (Article 21)

The right to life and liberty guaranteed under this article is available to even non-citizens.⁷ Freedom of choice is guaranteed under the Constitution in various areas of life. Choosing a partner, or living outside the institution of marriage, is not prohibited under law in the case of adults. In the area of family law, legislations permit the right to marry a spouse according to one's choice on the attainment of majority, irrespective of religion, though different personal laws would apply to the marriage depending on the form of marriage or the choice of religion of the parties. While the right to life has been interpreted widely by the Supreme Court in a series of judgments relating to public interest litigation,⁸ for the purposes of the right to choice, a violation of this right by private actors such as the family gives rise to a cause of action, as such a violation is seen as a restriction of one's constitutional right.

At the *de jure* level, if a woman is detained or ill-treated by her family and wants to exercise her right to choice in a relationship, a next friend can move the high court by a writ of habeas corpus, bringing this violation to the notice of the court and seeking the production of the woman before the judges so that her wishes may be ascertained.⁹ However, the writ is often used by natal families seeking the production of their daughter, who they claim is a minor and has eloped with a man. Habeas corpus is also invoked by husbands seeking the release of their wives when they are detained by their biological families. At other times, both spouses seek the protection of the court when they are harassed and threatened by their families.

7. Chairman Railways Board Vs. Chandrima Das AIR 2000 SC 988

8. For a detailed analysis of Public Interest Litigation see Sangeeta Ahuja, *People, Law and Justice* casebook on Public Interest Litigation, Orient Longman, 1997

9. Article 226 of the Constitution of India

While courts do intervene and ascertain the woman's wishes, there is reluctance in actually passing an order based on the same, as individual bias and prejudices of the judges often come into play when determining an issue. The following examples indicate the court's approach to right to choice even when the women involved are adults:

In *Avinash Vs. State of Karnataka*,¹⁰ the petitioner filed a writ of habeas corpus stating that his adult wife was kept under confinement by her parents, as she had married him against their will. When the woman was produced in court, she informed the judges that she was kidnapped by him. Though the facts of the case indicated that this was related to kidnapping, the court made highly disapproving statements regarding the right to choice.

Statutory law does not make any distinction in age in relation to arranged marriages and marriage by choice or with expressions of sexual autonomy, and adults above the age of consent have the right to enter, and exit relationships and marriages. Nonetheless, the court elaborately discussed conditions of a valid Hindu marriage (discussed in detail subsequently). Under Section 5 of the Hindu Marriage Act (governing marriages between two Hindus), a marriage may be solemnized under certain conditions, one of which requires a male to be 21 years and a female to be 18 years. Highly critical of the right to choice guaranteed under the statute, the court made generalisations in this regard and observed that Parliament had not taken into account "love" marriages when the law was formulated, regretting that the term "solemnized" could not be construed or interpreted as "to be performed by the parents" and thereby making it necessary to obtain their consent. By analysing "solemnized" in this fashion, the court seems to have expressed its disapproval of the right that the statute gives over Hindu Shastriac law, which requires the parents to perform the marriage of their children.

Consider the observation of the court: "In our opinion, girls below the age of 21 are not capable of forming a rational judgment as to suitability of the boy, who is in love. It is relevant to mention that those girls who are suffering from hormonal imbalance easily fall prey to the boys, fall in love and repent in leisure. The parents of the girl are interested in selecting a suitable boy and see that the girl leads a happy married life. Since the Hindu Marriage Act does not deal with love

10. Divorce and Matrimonial Cases volume III 2011 page 720

marriages, in our view, it is high time that Parliament shall take note of the sufferings and turmoil of such girls and their parents and amend the law suitably...Hence we suggest that in the case of love marriage of a girl, who is below the age of 21 years, there shall be a condition that the parents of the girl should approve the marriage, otherwise such marriages shall be declared void or voidable." The court clearly indicated its bias toward arranged marriages, while being critical of "love marriages" and viewing sexuality only as an issue of hormonal imbalance.

The observations of the high court are quoted to indicate that even when statutory law permits marriage of choice among adults above the age of 18 in the case of females and 21 in the case of males, an inherent bias is encountered in the structure and culture of the law regarding matters of choice. Although the above case was related to kidnapping, the court made generalised observations about marriages of choice (using the terminology "love marriage" in opposition to "arranged" marriages). By such reasoning, the court was seeking to read into the understanding of the term "solemnized" by putting a rider in the context of marriages of choice. Furthermore, it was recommending a complete restriction of the right to choice by suggesting the age of 21 as the cut-off date for such cases.

Budha Ram Meena Vs. State of Rajasthan¹¹ and others

In this case, the court tried to strike a balance between cases where young persons have made a responsible choice and where the marriages gave rise to suspicion as to the nature of relationship. The petitioner, who was 34 years of age, filed a writ of habeas corpus for the production of his wife, who was above 18 years. The petitioner and the woman had undergone a Hindu form of marriage under the Arya Samaj. This form of marriage was propagated by a Hindu reform movement that began in the nineteenth century. Historically, the Arya Samaj has recognised marriages between Hindus belonging to different castes, though such marriages were traditionally illegal under customary Hindu law. It has also converted non-Hindus to Hinduism, and is a form of marriage chosen by many young persons facing parental opposition. The Hindu Marriage Act applies to marriages under the Arya Samaj.¹²

11. D.B Habeas Corpus Petition, 151/2011 dated 21.10.11

12. Section 2 (1) (a) of the Hindu Marriage Act

The rules of the Arya Samaj have required a notice to be given to the parents if the woman is below 21 years, and parents could give their objections in this regard. They have also provided that parental objections could be overruled if they were made on the basis of caste or poverty, but could be considered if there was a huge age difference or some "character flaw" in the party. The judgment does not provide much detail regarding the facts of the case or whether the wishes of the woman were considered, but in this case the court found that the rules were not being followed by the Arya Samaj in as much as the woman was found to be above 18 but below 21 years of age, and her parents were not notified to state their objections.

Though substantive law such as the Hindu Marriage Act does not make notification of the woman's parents a requirement, as in the earlier case here too there was reluctance in addressing marriages of choice when an 18 year-old decided to marry a 34 year-old man. It is not to say that such choices are essentially informed or intelligent. There are situations where young women are often enticed or coerced into relationships where they may be victims of trafficking.¹³ However, the concern here is the approach of courts to take away the rights granted under substantive law, simply because in a given case the choice made by the woman is not per the liking of the judges. How else can one explain the approach in this case where issues of facts such as age, consent, violation of rules, and notice to a third party (in this case, the Arya Samaj) were all determined in habeas corpus?

The court did, however, address situations where young people facing harassment from their caste and community and have chosen Arya Samaj temples to marry. The court has directed all police stations in whose jurisdiction the temples are situated to offer protection to those who marry under parental opposition, and reiterated the judgment of the Supreme Court in Lata Singh's case, which will be discussed later in this paper.



13. For a detailed discussion on this issue see *Trafficking of Women and Children in India*, commissioned by the National Human Rights Commission, Orient Longmans, 2005

Age of consent and marriage

There is interplay between family law and criminal law, and this chapter and the subsequent one examine this factor in situations where a woman makes a choice in favour of marriage or sexual autonomy. The *de facto* position of the application of law is heavily in favour of marriages arranged by families, while in cases where a woman asserts her sexual autonomy, the law is often manipulated to deny her the right to exercise her liberty.

The following legislations indicate the age of marriage in family or personal laws:

The Prohibition of Child Marriage Act, 2006

This Act addresses the issue of child marriages (marriages below the age of 18 in the case of females and 21 in the case of males), and since such marriages are prevalent among persons of all religious communities, it applies to all. The Act defines a child as one who has not completed the age of 21 in the case of males and 18 in the case of females. Marriages performed below the age defined under the Act can be voidable at the option of the underage minor.¹⁴ While the practice of child marriages has to be curbed, the way in which the statute approaches the same is problematic. It addresses the issue through the prism of a crime and penalises the bridegroom if above 18 years, as well as parents and others who perform the marriage, with a heavy fine that may extend to one lakh rupees or with imprisonment that may extend to two years.¹⁵ Thus, if a 17 year-old girl marries an 18 year-old boy out of choice, he can be sentenced to undergo imprisonment or be heavily fined. An option is given to the child on the attainment of adulthood to move the court to declare the marriage as a nullity, and this must be done within two years of the marriage. If the child is a minor, the Act permits only a guardian or a next friend, along with a child marriage officer, to file such proceedings, which have to be initiated before the child completes two years after attaining majority.¹⁶ Courts can issue an injunction order to prevent a child

14. Section 3

15. Sections 9 and 10

16. Section 3

marriage, and such complaints can be made by the child marriage prohibition officer or an NGO.¹⁷

Marriages of minors by force, enticement, or deceit and marriages for the purpose of sale or where the minor is made to go through a form of marriage, after which she is sold or trafficked or used for immoral purposes, are absolutely null and void.¹⁸

The Act is commendable in its approach, as it tries to balance the validity of marriage with that of the right to choice, whereby a woman married below the age of consent (18 years) can get her marriage repudiated before she attains the age of 20 years. In reality, however, very few women who are forced into such marriages as children by their natal families are in a position to seek legal recourse to repudiate their marriage within two years of their attaining majority. The Act does not offer a scheme or provide for measures, such as shelter homes, that would offer protection to such women if they decide to exit such marriages. The role of the child marriage prohibition officers is restricted to prevent such marriages, collect evidence for prosecution, and generate awareness about the practice.¹⁹

Since marriages under the Act can be voidable at the option of the child, the statute considers all marriages valid unless one party challenges the same.²⁰ While marriages arranged by families of children have the sanction of the community and satisfy social norms, difficulties arise in those cases where a woman below 18 years opts to marry a person of her choice. In such situations, family members of the woman who are against her decision can, under the scheme of the legislation, move the court and get a restraining order against her marriage. They can also penalise her husband and his family, so long as they are adults.

One of the crucial requirements in such situations is proof of age. If the woman is unable to prove her age, but indicates that she married of her own will, there could be difficulties encountered as she could be sent into "protective custody." The gendered concept of "protective custody" is based on a protectionist approach that empowers courts to send young women to remand homes for their own safety. The

17. Section 13

18. Section 12

19. Section 16

20. Section 3

women may be survivors of sexual assault or other crimes, or may have exercised their choice or sexual autonomy below the statutory age.

The law also poses an anomaly in the case of males, as if he marries before the age of 21, his marriage is considered a child marriage. At the same time, if he is above 18 and below 21, he can be punished with imprisonment or a fine for marrying a girl below 18 years, despite the fact that he is a minor under the Act.²¹ Theoretically, if the male is below 21, his marriage should be annulled within two years after turning 21. However, the reading of the Act indicates that such a petition should be filed when he completes two years of majority, which under the Indian Majority Act for the purposes of marriage is 18. With such a confused interpretation, it could be argued that the common age of men and women for the purpose of marriage could be 18 years!

The Prohibition of Child Marriage Act gives a choice to the parties, albeit a weak one, in terms of exercising their right to exit from a marriage if the bride and bridegroom are below 18 and 21, respectively. However, it is not easy for a woman to do so at the *de facto* level due to community pressure, lack of opportunity, lack of access to services, and lack of resources and options. Additionally, the threat and actuality of violence deters most young people from making any choice in this regard.

The Hindu Marriage Act, 1955

This law applies if both parties are Hindus. One of the conditions for a valid marriage is that the bridegroom should be 21 years of age and the bride should be 18 years of age.²² However, a marriage below the stipulated age is legal, unless the wife was married before she attained the age of 15 years and wants to repudiate it after reaching the age of 15 years but before 18 years.²³ As indicated earlier, this poses a serious problem, as a girl child married below the statutory age can seek dissolution only if she is above 15 years but below 18 years of age, and is thus forced to enter a marriage with no option to exit. Not many women married as children are able to independently exercise the exit option before attaining the age of 18.

21. Section 2 (a)

22. Section 5

23. Section 13 (2) v

At the *de facto* level, such stipulations also need evidentiary requirements with reference to age, which will not be easily accessible to a girl child of 15 years. This relief is only applicable in the case of a girl child, and to some extent the statute discriminates against the boy child, as no rationale exists for not giving such an option of exit to a boy married below 15 years of age.

Islamic Law

Islamic law permits marriage below the statutory age (as defined under the Prohibition of Child Marriage Act, 2006) with the consent of a guardian. Thus, child marriages are legal. Under the Dissolution of Marriages Act, 1939, a girl child married before the age of 15 years can repudiate her marriage before she attains the age of 18 years, provided the marriage was not consummated.²⁴ Here too, as in Hindu law, the chances of a young girl who is under the control of her family to opt out of marriage are very rare. In the case of the boy child, there is no statute governing the same, and the child will be governed by customary Islamic law. In such situations, the marriage can be repudiated by the male under certain conditions on the attainment of puberty, such as if the father or guardian has acted carelessly or negligently in choosing a bride, if the guardian has married the child to a mentally ill person, or if the marriage is to the manifest disadvantage of the child.

The Indian Christian Marriage Act of 1872

The Indian Christian Marriage Act of 1872 governs marriages between two Christians and between those of whom one is a Christian and the other spouse opts to marry under the Act. In the first category, marriages can be solemnised by ministers who are licensed under the Act. The person marrying the couple issues a notice, which is kept on the church notice board with the name, address, and church or private dwelling where the marriage is to be solemnised.²⁵ The statute requires the father (if living) or the guardian of the minor to give permission for the marriage if the marriage is of a minor.²⁶ This also clearly indicates that marriages between minors are not void.

24. Section 2 (vii)

25. Section 12

26. Section 19

This position is reaffirmed in another provision of the statute, which further permits a person to lodge a protest against the issue of a marriage certificate in writing. Once such protest is entered into the register, no marriage certificate can be issued.²⁷ After the marriage is solemnised, it is compulsory that it be registered and entries are made in the marriage register of the concerned church following the marriage.²⁸

Every marriage can be certified without a preliminary notice, except in cases where the age of the man intending to marry is below 21 years and that of the woman is below 18 years.²⁹ The statute thus permits marriages between minors upon consent of a guardian. In case minors exercise their choice without their guardian's consent, the parent or guardian may lodge a protest and prevent the marriage.

In this case, the legislation makes it incumbent on the part of the parties to get the consent of the guardian.

The Special Marriage Act of 1954

The Special Marriage Act of 1954 is a secular legislation that permits marriages between members of different communities and religions and does not require the parties to change their religion, unlike Hindu or Islamic law, which requires both parties to follow the particular religious denomination. It makes it a precondition of the man to have completed 21 years and the woman 18 years.³⁰ Under the Act, marriage below the age of 18 if female and 21 if male would be void.³¹ Such marriages are registered before the Registrar of Marriage or the marriage officer, who is a statutory authority.

The Act requires the parties to give a notice of 30 days (subject to a maximum of 90 days) of their intention to marry.³² However, noncompliance with this provision has been held as only an irregularity and not fatal, and hence if a certificate without notice is issued, the marriage is not a nullity.³³ This notice, which is affixed

27. Section 44

28. *Seema Vs. Ashwini Kumar* 2008 (1) SCC 180

29. Section 60

30. Section 4 (c) of the Special Marriage Act

31. Section 24

32. Section 5

33. *Nirmal Dass Bose Vs. Mamta Gulati* AIR 1997 Allahabad 401

to the board of the office or kept in the register, is a public document that is open to all for inspection.³⁴ The notice generally contains the names, age, addresses, photos, etc. of the parties. The purpose of the notice is to invite objections as per any contraventions of the Act.³⁵ Objections can be raised on the ground that a party already has a living spouse, cannot give consent on account of unsoundness of mind or a mental disorder, has been subject to recurring attacks of insanity, has not completed the age of 21 (if male) or 18 (if female), or is within the bounds of a prohibited relationship.³⁶

Actually, what this indicates is that objections are required to see that no one violates conditions of nullity. However, the openness of records in inter-religious marriages has often resulted in religious fundamentalist groups, armed with all details, harassing young persons and their family members who marry this way. This often results in a lot of violence. It is pertinent to point out that such harassment occurs even in cases where other family members have given their consent. An important issue that also needs to be considered is how public a private act of marriage should be.

The government has been considering amendments to the Act to prevent such harassment, and one of the recommendations in a proposed bill that is pending in Parliament is to delete the requirement of the notice period so that such harassment can be prevented.

Indian Majority Act, 1875

The Indian Majority Act lays down the age of majority as 21 years for all transactions, but exempts matters of marriage, dowry, divorce and adoption from its purview.

The right to choice in marriage poses peculiar problems. Under Hindu, Muslim, and Christian laws, marriages below the statutory age are valid. Under Muslim and Christian marriage laws, the marriage is valid if consent of a guardian is given. Such marriages are void only under the Special Marriage Act. All marriages under Hindu and Muslim law are presumed to be valid unless declared to be null and

34. Section 6

35. Section 7

36. Section 7

void. It is important to understand the differences between valid, voidable, and void marriages. A valid marriage gives rise to different set of rights and can be dissolved on divorce.

In the context of a voidable marriage, the law presumes that the marriage is valid unless one party approaches the court to argue that their marriage should be declared void.³⁷ A void marriage, on the other hand, is one where the law presumes that due to a violation, the marriage does not exist at all. Some examples of void marriages include: where a second spouse is living (this would amount to bigamy for communities other than Muslims), or the parties are within prohibited relationships according to personal law. Technically, in all cases of void and voidable marriages, a court order is required under the respective law to terminate the relationship and to specify the nature of termination.

Marriages below the statutory age of 21 and 18 in the case of boys and girls, respectively, are not a grounds for nullity. Under the current legislative framework of personal law, marriages of even very young children are not void under Hindu, Christian, and Muslim law. Once married, the husband is the guardian of the wife if she is a minor.

As indicated earlier, while all marriages of the various communities below the statutory age of consent are valid, the Prohibition of Child Marriage Act makes such marriages voidable at the option of the girl, so long as she is able to do so within two years of attaining majority. In view of the fact that this law is secular, it would imply that the current provisions of the Hindu Marriage Act and Islamic law that make such marriages valid would become voidable. However, the Prohibition of Child Marriage Act does not specifically say this. The only departure with this legalisation is that in cases of child marriages, the marriages are presumed to be valid unless the woman or her guardian moves the court to declare her marriage as null and void by exercising her right as in a voidable marriage. In cases of marriages under the Special Marriage Act, such marriages would be void. Thus, there is no uniformity in this regard on the issue of nullity, valid, and voidable marriages.

37. Section 5 of the Hindu Marriage Act and personal law applicable to Muslims

Valid marriages and kidnapping from lawful guardianship

Despite statutory provisions in Hindu and Muslim law that legalise marriage of those below the statutory age as indicated, problems arise according to criminal law in cases where a woman marries by exercising her own choice. Under the Penal Code, the taking or enticing of a minor (in the case of a male the age is 16 years and in the case of a female 18 years) out of the custody of a lawful guardian without the consent of that guardian amounts to an offence of kidnapping from lawful guardianship.³⁸

For example, if a woman of seventeen years exercises her choice and marries against the wishes of her natal family, her husband and all others who have helped in her marriage can be charged for the offence of having kidnapped a minor from lawful guardianship, which is an offence under the Indian Penal Code. A person convicted for this offence can be sentenced to imprisonment that may extend to seven years.³⁹ This will happen despite the marriage being valid under family law!

According to the Indian Penal Code, a lawful guardian is a person who is entrusted with the care and custody of the minor. This can include relatives with whom the minor resides.

This is one of the frequently used provisions under which cases are filed when a young woman elopes or marries of her own choice, resulting in a nebulous situation where the marriage is valid under personal law but the male spouse and his family are charged with kidnapping the spouse's own wife. Though this is a gender-neutral provision, such cases are often filed against the man's family, as the wife is generally younger than the husband.

Determination of age

The issue of age is not related to minors alone. In actual situations, the determination of age is very problematic. Evidentiary requirements, such as birth certificates and school leaving certificates, are unavailable to many people in India. As age is a crucial factor in determining majority and many women cannot prove their age, in the absence of records, the decision of choice taken by her would often work against her. Even if she has records, when a woman leaves her natal

38. Section 361 IPC

39. Section 363 IPC

home she may not have access to them, as these may be retained by her family members.

Even though age is a critical factor in legitimizing a decision taken by a woman in relation to her choice in marriage or a sexual relationship, minors have been viewed by the courts as stakeholders in decisions related to their custody and guardianship in custody disputes between parents. Personal laws treat the father as the natural guardian,⁴⁰ but by judicial precedent in matters relating to custody, courts stress the welfare and best interests of the minor child. Courts have a well-established practice of consulting minors in deciding such matters, and have held that where the child is intelligent and capable of making a decision and has not been tutored, his/her wishes have to be respected. In fact, the Convention on Rights of the Child, which puts in place the standard of 18 years of age as the determining factor of adulthood, also speaks to the right of minors to participate in decisions relating to themselves.

Article 12 states that:

1. *Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
2. *For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

Despite such approaches and safeguards, age continues to be a factor in controlling sexuality and choice through the misuse of law, as courts are reluctant to ascertain the minor's wishes in such situations. The following case illustrates the complexity in this regard:

40. Section 5 of the Hindu Minority and Guardianship Act and Muslim personal law. The Guardian and Wards Act of 1890 do not determine any hierarchy between the father and the mother. Also see Nil Ratan Kundu vs. Abhijit Kumar Kundu (2008) 9 SCC pg 413, GithaHariharan and another Vs. Reserve Bank of India and another 1999 2 SCC pg 228 On the question of capacity of the child to decide, see Sheila B Das vs. P R Sugasree 2006 (3) SCC pg 62 In this case the Supreme Court interviewed a small child personally and passed an order according to her wishes.

Khushboo Vs. State of U.P. and others⁴¹

The petitioner, who was 19 years of age, had married of her own choice and moved an application before the magistrate stating that she wanted to live with her husband. As proof of her age, she submitted her school certificate, which indicated her age as 19 years (DOB 5.2.1989). Despite the submission, the magistrate directed a medical examination and the chief medical officer opined that she was of the same age as previously stated. Despite two conclusive proofs, the magistrate refused to permit her to re-join her husband, but instead sent her to protective custody. The magistrate declared his judgment based on a different birth certificate produced by the police, which showed her date of birth as almost six years below 19 years, i.e. 13 years (5.2.1995). The police alleged that she was raped and that a case was registered against her husband in this regard on the basis of a complaint given by her family. The progress of this case had also resulted in a charge sheet being filed on the basis of rape against her husband.

It was evident in this case that the school had issued two different age certificates, clearly indicating that one was fraudulent. Khushboo filed a habeas corpus petition and the Allahabad High Court set her at liberty, taking note of the medical report. The court stated that: "We are of the view that the documentary evidence of date of birth of the Petitioner Khushboo is self contradictory, the medical ascertainment of age done by the C.M.O, Gorakhpur, on the basis of X-ray report is more reliable, and according to that ascertainment of age, the Petitioner is apparently major and so she cannot be kept in Rajkiya Paschatyavarti Dekhrehk Sanrakshan, (government shelter home) Varanasi, against her wishes."

In the absence of documentation, courts take note of ossification or a bone density test. For example, the report may reveal that the entire epiphysis of elbow joints and knee joints has fused. In the case of the wrist, the lower ends of ulna and radius may be fused, indicating an older age. But these tests often have a margin of a few months to two years. Medical reports on age determination are not conclusive in nature and not binding in court, but are merely advisory.⁴²

The determination of the age of a woman often depends on the subjective satisfaction of a judge who decides whether she is major or not. As evident in

41. 2009(2)ACR1204

42. Vishnu vs. State of Maharashtra 2006 (1) SCC 283

Khushboo's case, while the magistrate refused to consider her a major, the high court held that she was a major on its subjective satisfaction.

The concept of "protective custody"

When a woman makes a choice and her family disapproves of the same, the natal family often files a case on the charge of kidnapping from lawful guardianship against her husband or partner and his family. Other offences include wrongful restraint, rape, outraging the modesty of a woman, and criminal conspiracy (against friends and family members), all of which are offences under the Indian Penal Code. The entire criminal justice system is then used to trace the woman and her partner/husband and harass him.

The woman is often sent back to her natal family, and if she refuses to go with them, she is sent to "protective custody," where she is detained in a shelter home until she reaches the age of 18. "Protective custody" is a practice where the woman is detained in a state-run or funded home until she reaches the age of 18 years. The concept, which is based on a protectionist model of equality, is applied only to women and is not restricted to the age of 18 in practice. The writer, in her experience, has come across cases where adult survivors of rape, who are often poor migrants in search of livelihood who have no family in the city when the offence was committed against them, are detained until their case is complete for their "protection," while those who perpetuate violence against them obtain bail. Thus the survivor is in "custody," deprived of her freedom and denied her right to eke out a livelihood while the accused moves around freely.



The interplay of evidence under the criminal justice system in issues of choice, the misuse of law, and state-supported violence

The following case illustrates how criminal laws are misused in situations where women exercise choice in their relationships. The case has been discussed in detail as violence, lack of access to legal aid, delayed justice, manipulating concerns of mental health, and social boycott all interplay in the facts of the case and in the approach of various agencies.

Lata Singh Vs. State Of Uttar Pradesh⁴³

Lata Singh, who was living with her brothers in Lucknow, married Brahma Nand Gupta on 2.11.2000 in Delhi. It was an inter caste marriage, with Lata Singh being of the "high caste." On a complaint of kidnapping given by one of her brothers two days after her marriage, Gupta's two sisters, brother-in-law, and cousin were arrested by the police. One of the sisters was sent to prison along with her one month-old child. Lata's three brothers assaulted Gupta's mother, destroyed their household articles, and locked one of his brothers in a room for five days, denying him food and water. They cut up the family's harvest crops, sold the produce, and took forcible possession of their fields and a shop belonging to Gupta. Fearing for her life after the arrest of her husband and his relatives, Lata remained in hiding in Jaipur and approached the State Women's Commission, which recorded her statement in March 2001. The commission wrote a letter to the National Human Rights Commission and to the Government of Uttar Pradesh for intervention in her case.

In the meantime, Gupta's family members were released after having spent five months in jail, whereby the police claimed that no offence was committed by them.

Lata was produced before the magistrate, who recorded her statement. Lata clearly told the judge that she had married of her own free will, resulting in the closing of

43. All India Reporter 2006 S.C. pg 2522

the complaint. Her brothers filed a protest petition against the closure report of the police, claiming that she was mentally ill. Accordingly, she was examined by a panel of doctors in Jaipur, who certified that she was not mentally ill. Despite this, the magistrate passed an order of committal, directing the police to proceed with the case against Gupta's relatives. Warrants were issued once again for their arrest, resulting in Gupta's family filing cases to quash the complaint in 2003. Complaints against Gupta's members were pending in various criminal courts for ten years, including when Lata finally approached the Supreme Court in 2010 for redress against the State of Uttar Pradesh. It is pertinent to note that no action was taken against Lata's brothers for having caused so much violence to her and to Gupta's family, including their distant relatives.

The Supreme Court expressed distress at the "shocking state of affairs" and while quashing all the criminal complaints against Gupta's family, directed the state police to offer them protection. It also observed that inter-caste marriages are in the interest of the nation and that stern action must be taken against those indulging in violence against young people for exercising their right to choice. It even went to the extent of directing the police across the country to protect the lives of young people who marry according to choice. But in so doing, it also condoned "social sanctions" against them. Consider the observation of the Supreme Court that: "If the parents of the boy and the girl do not approve of such inter caste or inter religious marriage, the maximum they can do is that they can cut off social relations with the son or the daughter but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter caste or inter religious marriage."

The observations of the Supreme Court, while protecting the rights of not only Lata but of all persons, indicate the approach of the court in addressing the right to choice. While this is implicit in Article 21 of the Indian Constitution, referencing social practices such as social ostracism and then granting them a seal of approval actually appears to approve violations against persons who are seen as transgressing social norms.

Additionally, the case also raises a number of concerns. The first is with respect to the misuse of criminal law. Gupta's family members, who were in no way connected with the case, were charged under Sections 366 and 368 of the Indian Penal Code (I.P.C.). Section 366 of the I.P.C. deals with kidnapping of a woman

with the intention that she may be compelled to marry a person against her will. Additionally, compelling or forcing a woman to have intercourse is an offence under this provision. In order to prove a charge under this section, it has to be established that the accused induced the complainant to go from any such place deceitfully. In addition, the kidnapping or abduction had to have taken place with intent that the complainant may be seduced to sexual intercourse and that the accused had full knowledge of it.

Under Section 368 of the I.P.C., wrongly concealing or keeping a kidnapped or abducted person in concealment is an offence. While Section 366 of the I.P.C. is gender-specific and the offence can be committed only against a woman, Section 368 of the I.P.C. is not consider how the law was applied by the courts. When Lata indicated to the magistrate that she had married of her choice, the Mental Health Act of 1987 was easily invoked by Lata's family members against her in order to claim that she was not of sound mind and therefore married Gupta against her will. Worst of all, the court proceeded on that basis!

For Gupta's family, there was an absolute denial of the fair trial process, even as a female family member with a months-old child was detained for five months without the right to bail. There seems to have been an absence of legal aid for them at various stages. It was only after the intervention of the women's commission of another state and its interaction with the highest authority of the state that the release of his relatives resulted. The cases against them were pending for nearly 10 years, and if the Supreme Court had not been approached, the process would have continued for longer. Above all, there was no compensation for them, though they were arrested on a false complaint at the instigation of Lata's brothers and had lost substantially.

Lata, who the judgment records as a student pursuing her post-graduation, had to flee from the state where she was living, marry in another state, and then seek refuge in a third state.

The Indian Penal Code and the Mental Health Act were utilised in tandem to permit state-supported violence against the young couple.

Thus, this case demonstrates how the agencies of the criminal justice system (in this case, the police and the magistrate who committed Gupta's family to arrest, despite having recorded Lata's statement) actively work in negating women's

human rights, thereby permitting state sanction of the notion of honour. It is this critical issue of misuse of the law and a matter of great concern.⁴⁴

The following case illustrates how the concept of protective custody can be brazenly misused by insensitive judges. While the issue in this case was not one of choice, it is described here to indicate the approach of the criminal justice system towards female children:

In a case before the Madras High Court, a 13 year-old girl was sexually abused by four boys over a period of time. The girl was six months pregnant when she informed her parents of the abuse, and her parents immediately filed a police complaint. The accused were arrested and later released on bail. The girl was produced before a magistrate, who sent her to a vigilance home established for the "rehabilitation" of adult sex workers, as she came from a socially disadvantaged family. Moreover, the magistrate directed her to a radiologist to conduct an examination of her age, which the doctor refused to do out of fear that it may harm the foetus. Thereafter, the system completely forgot about the girl, even though her father was running from pillar to post to get her released. The girl gave birth to a child while in the vigilance home, and during her trial she attended the court with a two year-old child. Consider the fact that she was illegally detained in protective custody though she wanted to join her parents. Consider also the fact that the court did not think it fit to send her before the Child Welfare Committee under the Juvenile Justice Act, though it was of the opinion that she was a child in need of care and protection and had doubts about her age. Instead, she was sent to a home that housed adult sex workers; in the process, the magistrate treated her as if she were a sex worker, since she was subjected to sexual violence over a period of time and did not inform her parents immediately. Shockingly, after she gave her evidence, she was not sent with her parents but was again sent to the vigilance home on protective custody by the court. Meanwhile, all three accused were acquitted on the benefit of doubt, as one of the aspects of the case was that there was no proof of that she was a minor. The magistrate, who directed her to undergo a medical test to determine her age while she was pregnant, did not consider it fit to send her for the same after the delivery of her child. The

44. Forthcoming paper "Changing the law? Current developments in Honour Crimes, Geeta Ramaseshan from "Honour and Women's rights; South Asian Perspectives, edited by Manisha Gupte, Ramesh Awasthi and Shraddha Chickerur and published by Masum, IDRC and CRDI 2012

superintendent of the vigilance home wrote many letters to the magistrate, reminding him that the young girl and the child should not be in "protective custody," to which the magistrate wrote a letter stating that he did not have the necessary papers and that "he would not entertain further letters on this subject." The minor's parents filed a writ of habeas corpus before the Madras High Court seeking the release of their daughter and her child. But the high court dismissed the petition through a shocking order, observing that "as the detinue is a victim of rape and the learned judicial magistrate has ordered that the victim is to be kept in a home accordingly she is kept in the home since then. Hence it is clear that she is not in illegal detention but it is in pursuant to a valid order of a competent court." Note how the perpetrators of the crime were acquitted and that the survivor was in custody for more than two years, during which time she gave birth to a child. Note also how here was a case where the child wanted to be with her parents but was deliberately kept in custody by a callous order that violated all principles of justice.

Finally, a judge of the high court noticed this case while he was working on the administrative side of the court. He immediately informed the concerned district judge, who then directed the assistant sessions judge in whose jurisdiction the case arose to release her. The minor was united with her parents after nearly three years, but strangely the sessions judge directed that the minor should be produced before him on the first working day of every month!⁴⁵ This kind of appearance is generally required from an accused of a crime. Once a child gets caught in the system, it becomes a long and arduous task for her and her family to get out. But more than that, it highlights the lack of sensitivity on the part of some judges, who see the survivor of a sexual crime as a person who is of "immoral character" and who needs to be reformed, or as only a witness who requires "protection." In the process, the child can become invisible to all, languishing in a home.



45. 2010 (2) CTC journal section

The capacity of a woman to make a sexual choice, and the question of her physical custody

Is a woman below 18 years competent to decide for herself her sexual choice? Or to pose it differently, what is the impact when a minor does make a choice? The cases given below are discussed in detail to indicate the complexities that emerge, depending upon how the court approaches the issue in its subjective fashion:

In the first case, while acquitting a person charged with the offence of kidnapping, the Supreme Court took note of the capacity of the minor and her acts while determining "enticing and taking away," which are the two essential ingredients that constitute the offence. The second and third cases indicate the contradictory position that has been taken by the courts in determining guardianship of a minor woman who makes a choice regarding marriage. The discussion on "custody" also indicates how exit from a marriage may be made difficult for a minor, as what would be of relevance is who has her "custody."

S. Varadarajan Vs. State of Madras⁴⁶

A college student of 17 years was staying at the residence of her father's relatives when she eloped with the accused, who was helped by two of his friends. The two friends and the girl's companion were charged for kidnapping a minor from lawful guardianship and sentenced to imprisonment. The sentence was confirmed by the high court. On appeal, the Supreme Court found that the woman "rang up her lover, met him at the appointed time and went to the office of the Marriage Registrar." Acquitting all the accused, and taking note of the fact that she was educated in a college, the court observed that when a minor leaves her father's protection, knowing and having the capacity to know the full import of what she is doing and voluntarily joins the accused person, the accused cannot be said to have taken her away from the keeping of her lawful guardian. A question was also raised as to whether her relative, with whom she was staying, was her guardian, to which the court held it in the affirmative.

46. AIR 1965 SC p 942

This judgment from the 1960s is quoted as a progressive precedent that decriminalised the right to choice with reference to the offence of kidnapping from lawful guardianship in cases where evidence showed that the woman was able to make a calculated and clear judgement. The court took note of her educational background while addressing her right to make a choice. Note that this does not give her the freedom of choice if she is below 18, but could result in making her act of going away with a man less of an offence while addressing the question of "informed" consent, though not articulated in that way.⁴⁷ The judgment, though given more than 45 years ago, is in keeping with the spirit of Article 12 of the CRC that requires the views of the child be taken in accordance with the age and maturity of the child. The cases given below are discussed in detail to indicate the complexities that emerge depending upon how the court approaches the issue.

N. Babu Vs. Sub Inspector of Police⁴⁸

This case is related to a situation where the minor had married exercising her choice, and a habeas corpus petition was filed by her parents for custody. Her parents had also filed a case under Sections 366A and 363 of the Indian Penal Code against the girl's husband. The court considered the question of her custody as between her husband and parents. It also elaborately discussed the issue of validity of marriage, which in this case was a Hindu marriage.

The observations are quoted below to give an understanding of the complexities involved. According to the court, "The question of marriage and the plea of marriage have no meaning for the simple reason that there is no question of consent of a minor. For all practical purposes the father and mother are the natural guardians of a minor." This observation is in contrast to the positions of Hindu and Muslim law, which consider the husband as the guardian of a minor. The question that was not considered by the court was the guardianship of a minor who had an arranged marriage.

The observations of the court were that there is no question of consent in a case where a minor makes a choice. This would also imply that if she is married forcibly by her parents, she does not have a choice. Invariably, the judicial thinking

47. Ibid 39

48. 2000 (3) Madras Weekly Notes crl 69

seems to be heavily weighed against cases where choice is exercised by minors, while not being so severe in cases where there are arranged marriages below the statutory age, which in any event are only prohibited but still valid under personal laws.

In order to address the issue of a valid marriage, the court observed that "if the girl is allowed to stay with her husband it would be giving him an advantage of his own wrong." Holding that it was not possible to permit a minor to live with a person who was facing criminal charges, the court had put her in the custody of her parents. When her husband's advocate apprehended that she may come to harm, a close monitoring was ordered to be done by the police, and the parents were warned by the court not to treat her in any manner that would prejudice her welfare, including getting her married against her wishes.

Such a protectionist approach puts the woman's life at risk, as the judgment does not indicate whether the woman's wishes were ascertained before she was ordered to live with her parents. In such situations, the court has no mechanism to monitor treatment by her natal family.

Indeed, in a habeas corpus petition, the court cannot really look into the evidentiary requirements of validity and consent in the marriage, which in the case of Hindus (which the parties in this case were) was valid anyway under the Hindu Marriage Act.

Jitendra Kumar Sharma Vs. State and another⁴⁹

This is related to a case of marriage of a minor woman who was of 16 years of age and had exercised her right to choice in marriage. In this case, the court considered the issue of who the natural guardian of a minor Hindu girl is. Keeping the principles of the Guardian and Wards Act of 1890 and the Hindu Minority and Guardianship Act of 1956, the court held that after marriage, the guardian of a minor girl is her husband. It also observed that no guardian of the person of a married minor girl can be appointed unless the court is of the opinion that the husband is unfit to be the guardian of her person (the Guardian and Wards Act makes a distinction in guardianship between the person and property of a minor).

49. 2010 INDLAW Del 1904

By doing so, the court granted custody of the woman to her husband. The court also observed that "the preferences of a minor who is old enough to make an intelligent preference ought to be considered by the court." In doing so, the court ensured autonomy with responsible choice.

Nonetheless, by introducing the concept of custody in the case of a minor who makes a choice, the court approached a paternalistic and protectionist approach. Furthermore, such an approach, while permitting her an entry into marriage, could effectively make her exit difficult if she wants to terminate the same, as her husband would be her custodian under law.

Association for Social Justice and Research Vs. Union of India⁵⁰

In this case, the court has differed from the decision in Jitendra Kumar Sharma's case. Currently, the issue of the right of the husband to have the custody of his minor wife is pending before a full bench of the Delhi Court.

T. Sivakumar Vs. Inspector at the Thiruvallur Police and two others⁵¹

In this case, the charge against the woman's husband was filed under Section 366A of the Indian Penal Code, which makes the procurement of a minor (below 18 years) an offence punishable with a maximum of 10 years' imprisonment. In order to constitute an offence under this provision, the accused must induce the minor to go to another place with the intention that the girl may be or is likely to be forced or seduced into illicit sexual intercourse with another person.

A 17 year-old engineering college student eloped with her companion. Her father filed a complaint under Section 366A of the I.P.C. and also filed a Habeas corpus petition for her production, as he alleged that her companion was keeping her in illegal custody. The woman appeared before the high court and informed the judges that she was in love with her companion; she also stated to them that when her parents learned about the same, they began to arrange her marriage with her maternal uncle (such marriages are legal under customary law in parts of south India). She told the judges that she decided to run away on her own accord and

50. MANU/DE/4335/2010

51. Current Tamil Nadu Cases 2011(5) pg. 689

married her companion, as his family was supportive of her. As she refused to go with her parents, she was sent into "protective custody" but was permitted to attend college with a police escort, who accompanied her every day. She found it very difficult to stay in the government home and was later permitted to stay in a private home, where the conditions were better.⁵²

As her husband was arraigned as a respondent in the case, it was contended on his behalf that the woman was in a position to make an intelligent preference and that, as her husband is now her legal guardian, she should be permitted to go with him. Arguments were advanced on the theory of the welfare of the minor by all parties. It is to be noted that such arguments are generally taken in cases of child custody disputes or in cases that involve the property of a minor.

The court concerned itself on the issue of validity of such marriages and whether "custody" should be given to the husband. By introducing the argument of "custody," the court analysed whether the principles of the Guardian and Wards Act that relate to minors could apply to cases of such nature. However, in view of the Prohibition of Child Marriage Act, which made such marriages voidable in court, it is not a valid marriage in its "stricto sensu." However, it is not "invalid," either.

The cases given above indicate the complexity that emerges in matters where a minor expresses her choice in marriage in relation to her sexuality. It appears that allowing such decisions depends on the subjective satisfaction of the judge. The legal effect is to get over the formal law that makes a husband the guardian of a minor wife in cases where she makes a choice. Under the common law system, judgments of high courts are binding on lower courts and have the force of law. Varied views clearly indicate how courts view issues of choice even when exercised by an adult woman, often giving rise to confusing and conflicting judgments.



52. This was done in my personal intervention before the bench.

Age of consent and rape

The definition of rape under the Indian Penal Code is gender-specific and the offence can be committed only against a woman. The age of consent is 16 years and sexual intercourse below that age is considered to be statutory rape⁵³ (There are current moves to raise the age of consent to 18, and The Protection of Children from Sexual Offences Bill of 2011 has been passed by the Parliament but has to get presidential assent; the age of consent would be 18 according to the new bill). Interestingly, it is in the same code that 18 is considered as the age of majority for the offence of kidnapping from lawful guardianship, where a woman makes a choice of going away with her companion or husband.

The contradiction exists in the fact that the Indian Penal Code has adjudged the age for statutory rape to be under 16. This enables a legal inference that a woman above 16 can consent to sexual intercourse, and therefore the defence of consent can be used by an accused in such matters. An expansive reading of this leads to an understanding that a woman below 26 years can be considered to be capable of giving valid consent for a sexual relationship. However, this still does not give her the right to marry if below 18 years.

Unfortunately, the trend among parents of getting girls married at even younger ages continues with impunity. This is further compounded by the legal provision that forced intercourse with one's wife over the age of 15 (and in Manipur, 13)⁵⁴ is not rape. Also, if the wife is between 12 and 15 years, then the punishment is a fine and/or two years of imprisonment, as compared to 10 years for others.

The consequence of this legal positioning is that while her consent to sexual intercourse can be used by the accused as a defence, he still has to face charges of committing the offence of kidnapping from lawful guardianship, unless the girl is over 18. This puts the woman at considerable disadvantage and at the mercy of her guardians (and consequently, her partner), as she has no right to make a

53. Section 375 6th exception of the Penal Code

54. www.vakilno1.com

choice or exercise any control over her freedom of movement and sexuality if she is between 16 and 18 years, even under the Juvenile Justice Act.

Issues of age under the Juvenile Justice (Care and Protection of Children) Act (JJC&P), 2000⁵⁵

This act consolidates two concerns, namely the law relating to children in conflict with the law and children in need of care and protection. Under the statute, a child is one who has not completed 18 years of age, including both male and female.⁵⁶ Complex concerns arise if two persons below the age of consent elope or marry by choice. In such situations, the young persons are considered to be juveniles in conflict with law if the natal families have initiated proceedings on the offence of kidnapping from lawful guardianship. Under the Indian Penal Code, a male can be kidnapped from lawful guardianship if he is below 16 years while a female should be below 18 years.⁵⁷ Thus, a 17 year-old male who elopes with a female of the same age would have committed an offence, while the female would be a victim.

The young men can be detained in a reception centre or observation home under the act until they attain the age of majority. While this statute is a welfare legislation to protect the rights of the child, it is often invoked in cases against a minor when he/she makes a choice in conjunction with other offences of kidnapping, etc. discussed earlier.

The writer has come across cases of this nature where young boys below the age of 18 have been charged with kidnapping from lawful guardianship and are within the juvenile justice system as children in conflict with the law.



55. For a detailed critique of the statute and the juvenile justice system in India see VedKumari, *The juvenile system in India from welfare to rights*, OUP 2004

56. 2 k

57. Section 361

Conclusion

The paper indicates that despite constitutional provisions guaranteeing the right to choice in marriage or relationships and the positive judgments of higher courts that have enhanced this right to counter abuse of criminal law, implementation is often absent at the grassroots level. While family law recognises the right to choice in marriage, what emerges from the study is that despite the rights to marry, not to marry, to remain in a relationship, etc. that flow from Article 21 of the Indian Constitution, there is often the misuse of the criminal justice system in this regard.

There is a strong interplay between family law and criminal law on the issue of sexual autonomy, with the de facto position of application of the laws heavily in favour of marriages arranged by families. In cases where a woman asserts her sexual autonomy, the law is often manipulated to deny her the liberty of making a choice. While marriages arranged by families of children have the sanction of the community and satisfy social norms, difficulties arise in cases where a woman below 18 years opts to marry a person of her choice. In such situations, family members of the woman who are against her decision can, under the scheme of the legislation, move the court and get a restraining order against her marriage. The law also poses an anomaly in the case of a male who marries before completing the age of 21 years, as it is then considered a child marriage, while in the case of a female the age is set at 18.

While all marriages of the various communities below the statutory age of consent are valid, the Prohibition of Child Marriage Act makes such marriages voidable at the option of the child if she/he is able to do so within two years of attaining majority. In view of the fact that this law is secular, it would imply that those current provisions of the Hindu Marriage Act and Islamic law which make such marriages valid would become voidable. But the statute does not say this, once again exposing complexities. The concept of "protective custody" is often misused against women who exercise sexual choice, and this combined with the problematic issue of determination of age results in the denial of choice for females.

There is frequent misuse of the criminal justice system, and criminal laws such as kidnapping from lawful guardianship, rape, wrongful restraint, the Mental Health Act, and the right to choice are often negated by misuse by other non-state actors, including the family, despite the fact that they are guaranteed under the Constitution. Additionally, judgments often reflect inherent social bias, and despite certain judgments that are positive in nature, in securing the right of a woman to make a choice at the de facto level they are often not implemented.

Bias plays a major role in the approach of law enforcement authorities, who often misuse their power to harass young people and fabricate evidence.

Some of these concerns could be addressed by providing access to legal aid. The writ of habeas corpus can be moved only in the high courts, as it is a constitutional remedy.

These courts are often in the capital of the state, and it is not always possible for persons who are on the run from their families to seek recourse without assistance, especially given the fact that law enforcement officials have access to extremely limited resources. Statutory bodies such as the Legal Services Authority must play a more proactive role in intervening in situations where there is an active misuse of the law, including by offering legal aid to women.

In addition, active institutional support is required, including access to safe and shelter homes. The Protection of Women from Domestic Violence Act envisages an elaborate scheme in this regard. Women who face violence from their natal families would be entitled to reliefs under the Act. Unfortunately, it has yet to be fully implemented in most states. In Punjab and Haryana, due to increasing honour killings of young persons who marry against parental and community opposition, the high court has directed the establishment of homes where women may seek protection. Such proactive measures are an urgent requirement.⁵⁸

Nonetheless, all this would still be defeated unless the concerned authorities show a greater sensitivity to such issues by internalising and understanding that a woman has a right to choice. This can be done only through advocacy, media campaigns, training of police and judicial authorities, educational campaigns in the community,

58. Former Chief Justice of the Punjab and Haryana Court Mukul Mudgal in a discussion on judicial activism, April 21, 12 Chennai organized by Times Now

etc. Along with this, there should be a combined application of the law against those who commit violence against young people.

It is important to remember that criminal law cannot fully address complex social relationships. What is required is addressing behaviour among young people in various appropriate ways and breaking the silence around intimacy and sexuality. Otherwise, as indicated in the paper, the law will only be misused and will criminalize the natural process of growing up.

This paper, by reviewing existing laws and judgments on consent and women's agency, has highlighted the critical concerns emerging in this area. The intent is not to advocate for early marriages or even marriages at all, at the instance of the young adults or their guardians. There have been innumerable cases in which women have eloped with lovers, changed their minds, gone back, given statements in courts, and gone back on the same; therefore, one understands that a decision of such nature can be hasty, without informed consent and susceptible to problems in the future. Such decisions are not pathways to all that is bright and beautiful. However, our cultural context forces us to examine sexuality in a framework exclusively of marriage, which has led to a convenient invisibilization of issues related to sexuality for women and especially young adults. The impact on the use of criminal law to deny sexual self-determination leads to the destruction of lives. What is required is an understanding of behaviour among young people vis-à-vis their expression of sexuality, especially with regard to non-coercive and consensual relationships, and a breakage of the silence around intimacy and sexuality.

That is where the paper is situated. It is hoped that the legal analysis provided here will further discussion and advocacy on this issue.



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