

The Changing Social Context of "Age of consent" in 19th, 20th and 21st Centuries

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I. The Genesis of the Struggle

The genesis of the age of consent can be traced in 19th century wherein the Hindu marriages aspired towards the unification of two souls', Mere temporal happiness and the begetting of children are very minor and subordinate considerations in Hindu marriage¹. The revivalist-nationalist segment of the vernacular press, polemical tracts and manuals translated the notions of marriage of souls as mutual love lasting practically from cradle to funeral pyre, it only anchored the woman's absolute and lifelong chastity². Hindu males were allowed to be polygamous, whereas women had their rights framed within the prescriptive texts, allowing only monogamy. To redeem this inequality, in Hindu marriage wave of polemical literature valorized male monogamy yet in the absence of a *shastric* or custom based injunctions against polygamy, and given the reluctance among Hindu revivalist-nationalists to invite reformist legislation, male chastity was fated to remain normative rather than obligatory.

A powerful eugenics based argument against infant marriage produce weak progeny was countered. The penal code had earlier laid down ten as the minimum age of consent. It was also considered more than a little dishonest to place such importance on the woman's consent. Indissolubility of marriage was considered looking at the physical and economic weaknesses of women.

The Rukma Bai episode of 1887 ruptured the narrative of love to underline and recuperate the basic fact of non-consensuality. In Hindu marriage there is no selection, no self-choice, no consent on the part of the bride and could be gifted even like a cow or any other chattel³. Rukma Bai's action violently foregrounded the sexual double standards and made a mockery of the notion of the loving heart of Hindu conjugality under the rule of brahmanical patriarchy. Was Hinduism a heterogeneous, self-divided, self-contradictory formation or was it a unified monolithic one? The revivalist-nationalist answer was unambiguous. It tried to delineate caste and gender and could not base its hegemonic claims on its leadership.

The second incident can be cited of Phulmonee in 1890, a girl of ten or eleven, was raped to death by her husband Hari Maiti, a man of thirty five under existing penal code provisions, within the statutory age limit of ten. It added enormous weight and urgency to Malabari's campaign for raising the age of consent from ten to twelve. Forty-four women doctors brought out long lists of cases where child wives had been maimed or killed because of marital rape⁴. The debate shifted from the possible effects of child marriage on health to the life and safety of Hindu wives. The custom allowed the husband to establish sexual relation with impunity with a young girl.

While both scriptural and customary 'injunctions strongly favoured early marriage to allow a raising of the age of marriage for girls, certain parts of the *shastras* did prescribe against pre-pubertal cohabitation among married couples.

The Age of consent Bill could have reasonably been faulted on many grounds in courts. Reporting and verification of violations were generally impossible in familial situation. Firstly if the girl's family was willing to depose against the husband, second, it was fairly impossible to verify the age of the girl, third, medical examination was often inconclusive. Fourth, even the British judges, fearful of offending custom, rarely took a firm stand. In 1891, the mother of a young girl had pressed for legal action. Unnerved by the massive anti-bill agitations, the government hastened to undermine the scope of the act. Five days after its enactment, Lord Lansdowne sent circulars instructing that enquiries should be held by 'native Magistrates' alone and in any case of doubt prosecution should be postponed. The nationalist press referred to these problems but as auxilliary arguments and not as central argument. Political criticism too found strong resonance. There was strong

opposition on the grounds that an unreformed and unrepresentative legislature should not legislate on such controversial matters⁵.

Reformers, however, replied that the new bill was not an unprecedented revision of custom, since the penal code had already banned cohabitation for girls before the age of ten.

II. Role of Cornelia Sorabji

It was the language of resistance and repudiation by Cornelia Sorabji. (1866-1954) the one who dealt with the Age of Consent and who has been projected as India's first woman barrister. Cornelia played a pioneering role in trying to open the legal profession to woman much before they were formally allowed to plead before the courts of law. Cornelia's strong sense of individualism and conservation which went against much of the received knowledge about the role of women pioneers as contributors to the cause of broader emancipatory politics. Not unnaturally, while searching for an analytical framework to accommodate the multiple layers of Cornelia's identity as a Christian, a woman lawyer under the Raj, and a conservative driven by the culture of individualism. The ambivalence of Cornelia's colonial subjectivity to race, gender, ethnicity and religion comes forth, Cornelia's⁶ multiple subjectively and her hybridized identity in a colonial context left her with very little neutral space to articulate her protest⁷, and consequently in her negotiations with structures of power and authority, she recreated them even while revisiting them. Cornelia made very conscious choices that shaped her life and gave it a particular character.

While fighting gender discrimination⁸, both during her student life and professional career, she failed to be a part of the broader women's movement in India. She was one of the leading female legal practitioners in India who had developed a considerable reputation as the legal adviser to orthodox Hindu women the *purdanashin* (veiled seclusion)⁹. Cornelia's main interest in the women's question was in social service, embodied in her scheme for an institute for social service in India.

Cornelia wanted to intervene in the lives of the high caste Hindu women, who had already become some sort of the most contested figures in colonial India, both in British and Indian elite discourses during the second half of the nineteenth century. The British Indian experience, as Ashish Nandy pointed out, juxtaposed the 'masculine' virtue of controlled self-discipline against 'feminine', qualities of self indulgence, emotionality and irrationally and the like¹⁰. Britain saw itself as a male power¹¹, ordering and controlling a feminist orient. To rescue India's degraded women, the Raj enacted a series of social legislation to abolish Sati in 1829, legalize the remarriage of Hindu widows in 1856, and the age of consent for marriage in 1891. The British were also struck by the way Hinduism venerated female deities like kali. The stereotypical image of upper-caste women helped the sustenance of this hierarchy. To quote a perceptive comment the 'higher' morality of the imperial masters could be effectively established by highlighting the low status of women among the subject population, as it was an issue by which the moral "inferiority" of the subject population could simultaneously be demonstrated¹². The zenana and the veil came to represent the moral degeneration of the Hindu social order¹³. In British perception, Hindu women were degraded owing to their sexuality and vulnerability to priestly influence.

In post 1857 years¹⁴ the persistence of the image of a regressive Hindu society and the degraded status of Hindu women became a convenient rationale for the continuance of the British rule, as a protecting and uplifting influence. The 1857 Revolt exploded the myth of British invincibility. Once the rebellion was suppressed, the British reframed its India policy to cope with the new reality. The reorganised Raj now came to rest upon the support to transform India on the British model which was to be replaced by an attempt to preserve the traditional indigenous social order.

As has been aptly said the conservative imperialist, kept holding on to political power in India as it had a stake in the construction of Indian women as oppressed, both by the society and her husband thereby depicting them as benefiting from the British rule despite their double subjugation¹⁵. It was thus not unnatural that all the reform acts on the position of women, enacted by the colonial regime, related to upper-caste Hindu women. To contest such depictions of high caste Hindu women, the male members of the Indian elite were also engaged in a debate over the definition of a high-caste Hindu woman. In this new construction, the Hindu woman was viewed as 'liberated and self-reliant', but essentially remaining submissive to patriarchal authority in her household. Cornelia's intrusion into the lives of these women added a new dimension to this process of development of the zenana, as a contested area in India. She had to define her relationship with the (zenana) women in the context of early twentieth century colonial and nationalist discourses on upper-caste Hindu women.

Her formative years show the major influences that shaped Cornelia's personality and her political and social outlook. Being Parsee Christian converts, the sorabjis' were a minority within a minority. But they were a privileged minority in the colonial context, in terms of their social connection and their exposure to the English language and culture, which in many ways gave them an edge over other Indians of their time. They also developed a deep political loyalty to the British and reposed faith in the Raj for India's social regeneration.

Cornelia's social background and her faith in religion and the empire thus set the parameters within which she made a bid to aspire for social recognition and economic self sufficiency. Driven by a social evangelical urge to help disadvantaged social groups, Cornelia wanted to equip herself intellectually. This meant a violation of the restrictive social role of women inscribed by tradition but Cornelia was careful not to subvert the existing social and political structure instead she preferred to work within it¹⁶. It gave the Age of Consent¹⁷ controversy which had a wide resonance among the Bengali middle class. On the other hand the British admitted that by raising the age of consent they would be interfering with the religion of the Hindus. The contestation of alien reformism and rationalism, and this defence of community custom, represses the pain of women whose protest was drowned to make way for a putative consensus. The protest of Phulmonee and many other battered child-wives who died or nearly died as a result of marital rape. We have a court deposition left by a young girl who was severely wounded and violated by her elderly husband. The husband was discharged by the British magistrate and the girl was restored¹⁸ to him.

The Age of Consent¹⁹ Bill could only succeed in doing away with this age old traditional orthodox practice. Such ill-practices continued to have cast a shadow on the unequal position of women and also perpetuated an evil practice of sexual assault. Therefore, in the changing circumstances after a lapse of 130 years when once again a legal recourse was taken by presenting a petition in the court to lower the age of consent.

III. Consent and the Age Factor

India should consider lowering the age of consent. The question of consent becomes crucial in a case of sexual assault in a way in which it does not in an act of non-sexual violence occurs. The victim of a violent assault is never assumed to be an accomplice, but if such an assault can be described as sexual, the victim must establish her lack of consent, which is otherwise assumed. If consent is established, the act is considered legitimate. At the same time, sexual acts not sanctioned by prevailing codes of conduct are illegitimate regardless of whether consent was given as with people who do not have 'adult' status (in terms of age or mental capacity) or between parents and children, or in India, sexual acts 'against the order of nature', which refers to sodomy, with men or women. Conversely, consent of both parties is assumed in sexual acts sanctioned by the social order which are therefore perpetually legitimate, as for example, sex within marriage. 'Marital Rape' does not exist except within the feminist lexicon, unless it is sodomy, in which case both husband and wife are guilty of a criminal act if the wife consented, and the husband alone, if she did not 'consent' therefore is not always legitimate, not lack of consent always illegitimate. A crucial factor that decides the legitimacy of consent is age, in India, the legal age of majority, also the minimum age for marriage is eighteen. However, under section 375 of the IPC, the age of consent for marriage has been accepted as fifteen. 'Sexual intercourse by a man with his wife, the wife not being under fifteen years of age is not rape'. Feminists have pointed out often enough that the marriage of a woman below eighteen is not legal and to recognise such marriages as legal through section 375 is a great anomaly²⁰. This anomaly can also be interpreted in a startlingly different way. In his evidence to the joint committee of Parliament considering the Criminal Law Amendment Bill passed in 1983, a DIG of Police argued that since the legal minimum age of marriage is eighteen years, the law must assume a 'wife' to be eighteen. Once married, a woman must be considered to be eighteen, and therefore, he held that the exception should read 'sexual intercourse by a man with his wife is not rape'.

The 1993 Draft therefore, seeks to correct this anomaly by 'fixing the minimum age of consent to sex as eighteen for the purposes of the Bill. However, from the note accompanying the Bill it is clear that this decision was arrived at after considerable debate. Some members were concerned that if age was as high as eighteen then even consensual sex between adolescents in the sixteen-eighteen age group should be an offence. This position could be constructed as highly puritanical and moralist. The decision was finally taken on the consideration that the age of majority for voting is eighteen. At the same time, in order to deal with the sexual assault of minors while not unduly penalising the possibility of consensual sex between adolescents, greater punishment below twelve than in the age group twelve to eighteen. Thus the state of mind labelled 'consent', which is constituted in a complex way, as feminists would be the first to acknowledge, must be pegged rigidly to a linear notion of physical growth if it is to make sense within legal discourse Nivedita Menon has quoted Tanika Sarkar on the Age of consent debate in India in the nineteenth century. She demonstrates how all strands of opinion, whether colonial, revivalist-nationalist or medical reformist, defined consent in terms of a purely biological category, that is, the stage when the female body was ready to accept sexual penetration without serious harm. They only differed, she points out, in assessing when this stage was reached²¹.

With the development of forensic medicine it is possible to codify 'the body' more and more rigorously, and ossification tests to determine age are routinely ordered when there are no documents to attest to the age of the raped woman, which is very often the case. Whether greater weight is to be given to medical evidence or to birth and school certificates.

These multiple interpretations, far from demonstrating the elasticity of the law, point to precisely the opposite— the inevitable movement with legal discourse to codify, fix and regulate meaning. Whether the woman was above or below the Age of Consent. Below this age a woman cannot be deemed to have acted on her own volition in matters of sex, that is, she can be understood only as a victim or Dupe. Above this age, even if it is by a few months, she is radically transformed from victim to accomplice.

The 1993 Draft is marked by a deep discomfort with the fixing of one specific physical landmark as the point at which consent changes its meaning. As a result much ambiguity remains. The definition of 'Minor' for example, is a view as a person who is eighteen years of age or under²². The attempt to fix 'minority' at a higher level in terms of age and simultaneously to leave the boundaries of 'minor' status permeable, results in opening up the possibility of more people being classified as minor, so that more cases of rape can be classified as Aggravated sexual Assault, deserving of greater punishment. This must be seen in the context of the increasing number of sexual attacks on children, and the growing awareness of sexual abuse of women and children within families. The Committee makes it clear that it feels that the danger of sexual abuse of minors going unpunished is greater than the possibility for consensual²³ Sex.

We cannot be blind to the implications of constructing 'sexuality' for young women entirely in terms of victimhood. And yet, perhaps the very logic of legal discourse leaves us with very little room to deal in complexity. We are forced into the language of patriarchy despite ourselves. For instance, the Committee while discussing the possibility that defining 'minority' so broadly could criminalise consensual sex between adolescents, came to the conclusion that there would be very few cases in which a family would make a false charge of sexual assault because such a charge would implicate their 'family honour and dignity'²⁴. This leaves the issue of the Age of Consent in an ever evolving stage where amendments in law are made continuously and consistently to deal with the changing social values and times. An issue that had been taken up as far as 1891.

A proponent of social orthodoxy, Tilak believed that social change should come gradually, and with people's consent, rather than being imposed by the British rulers, who were not only alien and irresponsible', but also came from a fundamentally different religious and social background whether in the Rukmabai case (1886) where the husband pleaded for restitution of conjugal rights while the wife maintained that since she was married without her consent she could not be forced to live with her husband thus raising the controversy on the Age of Consent Bill (1890) to raise the marriageable age of girls to fifteen. Tilak came out openly in support of Hindu conservative opinion. On the other hand the reformers were willing to disseminate the idea of reforming Hindu society even with official support—a trend of thinking that was already evident from the middle of the nineteenth century and the debate is still going as reiterating that changed social circumstances subscribe the law and society to go for change adaptable to their times.

IV. India should consider lowering the age of Consent in the Changing Circumstances

Recently, the Madras High Court acquitted a boy accused of aggravated penetrative assault under the Prevention of Children From Sexual Assault (Pocso) Act and kidnapping under the Indian Penal Code (IPC). While dealing with the same case, the court also asked the competent authorities to reconsider the definition of child and reduce the age of consent from eighteen years to sixteen. The seventeen-year-old girl had allegedly eloped with the accused, her male schoolfriend, and both were traced after six months, living together. During the trial, the girl turned hostile, leading to the acquittal of the boy, whose age is not mentioned in the judgment.

The court observed that it was possibly a case of mutual consent and teenage attraction, not an uncommon occurrence at such an age, and, therefore, the age of consent should be reduced from eighteen years to sixteen, so that the boy accused of the crime does not have to undergo punishment under the Pocso Act.

The court's suggestion to lower the age of consent is a welcome step; the government should consider it seriously. The fact remains that many of the cases of sexual assault reported to the police (under the Pocso Act and other laws) dealing with the 16-18 years-old children are consensual in nature and are generally reported at the behest of girl's parents who disapprove of the teenagers' conduct. Therefore, the most relevant question to be addressed is whether a teenage girl or boy of this age has the capability to give "free consent". Records show that in most cases in this age group, girls turn hostile because the sexual act was not against their will and they were not allured or induced into indulging in the act. It has also been observed that due to a change in the socio-cultural environment in recent decades, teenagers are sensible enough to understand the implications of their conduct.

A few other provisions of the law are also relevant to the situation. First, our laws do not consider any action by a child under the age of seven an offence. Second, even if the child is between the ages of seven and twelve, but has not attained sufficient maturity to judge the nature and consequences of his conduct, his act would not be considered an offence. The grey area of the age category 7-12 years aside, it is implied that a child above twelve years of age develops sufficient understanding of the implications of an offence. As a corollary, this assumption of attaining maturity, with an additional margin of four years — as is being considered now — may also be applied in cases of granting "free consent"? One may also note that the Child Labour (Prohibition

and Regulation) Act defines a child as a person under the age of fourteen, and, therefore, those above fourteen can legally be employed in otherwise prohibited occupations and processes.

Many countries have sixteen years or below as the age of consent. Most of the American states, Europe, Japan, Canada, Australia, China and Russia fall into this category. Therefore, the rights of the child (up to eighteen years of age) might be protected in accordance with the UN Convention on the Rights of the Child, but the age of consent can safely be reduced from 18 to 16.

The court also suggested the need to define consensual sex as a separate category of crime under a more liberal provision. This may not prove to be a very useful step, as one of the main reasons for acquittals in such cases is victims turning hostile. Therefore, if an act is committed with mutual consent in the 16-18 years of age category, it need not be made punishable at all. However, the issue may require broader deliberations. Taking out such cases from the purview of the penal law will also help the police divert its attention towards more serious and complex cases. Furthermore, the National Crime Records Bureau data reveals that about half of the Pocso Act cases fall in the category of 16-18 years age group. Removing cases of consensual sex under this category can help us get a better picture of sexual assault cases.

V. Conclusion :

The Changing Social Context of Age of Consent in 19th, 20th and 21st Centuries is distinct in its approach. The 19th century witnessed a whole hearted effort to struggle for raise in the Age of Consent to at least fifteen the process has since then continued in earnestness to raise the age by eighteen years so how is the changing social condition compelling people to ask for lowering the age of consent as in today's time in 21st century. As now most sexual assault cases dealing with the age of consent belongs to the age bracket of 16-18 yeas generally reported by offended parents, as the question of 'age of consent' does not necessarily belong to the "marital status" now but has become an issue of "mutual consent" for living together as well.

However, the struggle for 'consent' continues in all its different manifestation as witnessed since the late nineteenth century.

References :-

- [1]. Bangabashi, 9 July 1887 RNP 1887.
- [2]. Chandrakanta Basu, *Hindu Patni and Hindu Vivah Bayar and Uddeshya cited in Hindu Vivah*.
- [3]. The Hindu Patriot, 19 September 1887.
- [4]. Sumit Sarkar, Tanika Sarkar (ed.), 2007, Women and Social Reform in Modern India, Vol. I, Permanent Black, Ranikhet, pp. 395-398.
- [5]. The Bengalee, 21 March 1891.
- [6]. Suparna Gooptu, 2006, Cornelia Sorabji, Oxford India Paperback, Delhi, pp 30-36.
- [7]. Ibid, p. xxiv.
- [8]. Sumit Sarkar, Tanika Sarkar (ed.), 2007, Women and Social Reform in Modern India, Vol. II, Permanent Black, Ranikhet, pp 220, 221.
- [9]. India Calling : The Memoirs of Cornelia Soralji, London, 1934.
- [10]. Ashish Nandy, 1983, The Intimate Enemy : Loss and Recovery of Self under Colonialism, Delhi Intro p 1.
- [11]. Suparna Gooptu, 2006, Cornelia Sorabji, Oxford India Paperback Delhi, p 30-36.
- [12]. Uma Chakrabarti, 1989, Whatever Happened to the Vedic Dasi ? Oreintalism, Nationalism and a Script for the Past in K. Sangari and S. Vaid (eds.) Recasting Women, Essays in Colonial History, pub Zubaan, Delhi.p.10
- [13]. T.R. Metcalf, Ideologies of the Raj (The New Cambridge History of India, III, 4, Cambridge, 1995.
- [14]. T.R. Metcalf, The Aftermath of Revolt and his Ideologies of the Raj and F.H. Hutchins, The Illusion of Permanence : British Imperialism and India (Princeton, New Jersey, 1967.
- [15]. T. Hubel, 1996, Whose India ? The Independence Struggle in British and Indian Fiction and History London, P 111.
- [16]. Cornelia Sorabji, India Calling, p 7.
- [17]. Sumit Sarkar, Tanika Sarkar (ed), 2007, Women and Social Reform in Modern India, Vol. I, Permanent Black, Ranikhet, pp 412-414.
- [18]. Ibid., p 413.
- [19]. The Bengalee, 25 July, 1891.
- [20]. J.P. Array, 1988 Crimes Against Women, Vikash Publishing House, p. 144.
- [21]. Tanika Sarkar, 'Rhetoric Against Age of Consent. Resisting Colonial Reason and Death of a child-Life', Economic and Political Weekly, Vol. 28, No. 36, 4 September, 1993, p. 1875.
- [22]. Nivedita Menon, 2004, Recovering Subversion,Parmanent Black, Ranikhet, p 128.
- [23]. 1993 Draft, p 4 & 13.
- [24]. Ibid., p 4.
- [25]. Hindu, R.K. Vij, 2021.