Intersections: Gender and Sexuality in Asia and the Pacific
Issue 43, July 2019

How 'Consent', 'Agency' and 'Age' Play out across the Complex Terrain of Family Laws in India:
A Socio-Legal Exploration

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Introduction

1. The central theme of this paper is an exploration of terms such as 'age', 'consent' and 'agency' and the manner in which they play out in judicial discourse across different time zones, and the implications for women from the Hindu and Muslim religious communities in India, who are governed by their respective personal laws. The area explored is matrimonial law, which is approached methodologically through comparative analyses of rulings of the higher judiciary and grounding them within their socio-political locations.

2. Part one contextualises the theme of the paper. Part two then describes the political context of religion-based personal laws in India. The following two parts explore the adverse implications for Hindu women of viewing Hindu marriage as sacramental; and the advantages to Muslim women of viewing Muslim marriage as a civil contract. When we examine reported judgements, Muslim personal law appears to be far more progressive and seems to grant a greater space for the negotiation of rights than the Hindu law. This contradicts the popular perception that Muslim law is regressive and denies Muslim women agency.

3. Continuing further, the fifth part of the paper offers a detailed exploration of the various strands of the historical Rukhmabai case. The case deals with the issue of a decree of restitution of conjugal rights sought by the husband, in the case of a girl who was married when she was a minor. The following section examines the implications of religious conversions for Hindu and Muslim women. Here too, Muslim law appears to provide women with greater scope for exercising an active agency in matters of sexual desire.

4. While the above discussions deal with the colonial period, the next two parts turn to the post-independence period. Even after the codification of Hindu law which rendered Hindu marriages contractual, various court judgements on the realm of restitution of conjugal rights continued to stress the sacramental aspect of a Hindu marriage, to the disadvantage of women. The final part considers the issue of elopement marriages of minor Hindu girls where there is a rupture between age and consent. The challenges this poses to contemporary feminist discourse in India are examined in detail.

The context

5. Interrogating competing legal frames for the adjudication of marriage—sacrament versus contract—the paper locates the trope of women's rights within the politics of religion-based personal laws in colonial and post-colonial India. The comparative arc of the paper takes the focus away from the

typical bifurcation of rights versus culture, and introduces important questions about Hindu-majority and Muslim-minority political discourses which impact on discussions about women's rights across time. The trend of confusing modernity with uniformity overshadows the post-colonial agenda of the nation-state, and this affects the ways in which women's rights are projected in a linear mode as though modernity and uniformity will bring in women's emancipation and everything ancient or classical is anti-women. This paper problematises the politics and discourses which influence the manner in which women's rights are placed within a populist public domain.

6. While tracing the legal development of Hindu and Muslim marriage laws during the colonial period, the paper examines how the notion of the contractual marriage came to be firmly established as integral to Islamic law or *Sharia. Sharia* law invested Muslim women with an agency to negotiate their rights, both within marriage and for its dissolution, against the then prevailing European notion of a 'sacramental, status marriage'. However, as the Christian notion of the sacramental marriage reverberated with the ancient Hindu law or the Brahminical Smriti law, it served to deprive upper caste Hindu women of their rights of negotiation. The colonial legal order failed to recognise the plurality of Hindu law and elements of agency within it, even while the English marriage laws were recast within the framework of a dissoluble 'contract' in the latter half of nineteenth century. The attempt made by Hindu social reformers to 'reform' Hindu marriage, basing it within the context of the developments in the English laws, introduced the notion of 'age' to denote 'consent', an essential ingredient of the 'contract', which failed to invest Hindu women with an 'agency' to negotiate their rights within marriage. On the contrary, the new legal order introduced by the British, served to strengthen local patriarchies by criminalising the acts of Hindu women who strayed away from the Hindu fold, while at the same time recognising the autonomy of Muslim women to contract marriages of choice. Ironically, the contractual marriage under Muslim law, which invested Muslim women with autonomy, came to be devalued in the post-colonial period, with the assumption that Hindu law was more progressive, and that it was now Muslim women who needed protection. This set of associations serves to unsettle what we have come to expect about both the 'modernity' of Hindu law as well as tropes of cultural backwardness and gender inequality within Muslim communities.

7. The distinctions between the two personal laws are further layered with another set of complications around the perceptions of female desire when it poses a challenge to the normative code of sexual expressions. While tracing the shifting ideologies around how Hindu and Islamic concepts of marriage came to be socially perceived, the paper implicates not only the state and community, but enters into a disconcerting zone by problematising the hazards of feminist interventions. It foregrounds how in contemporary times, debates about age and consent to marriage are located not merely within state and community controls but have also impacted on questions of female desire and subjectivities for feminists in the context of the marriages of choice of minors. It is within this backdrop, that the paper examines how legal terms such as 'age', 'consent' and 'agency' are rendered fluid and lend credence to prevailing social mores. It thereby urges for a more nuanced framework of rights.

Contextualising the 'personal law' regime in India

8. The development of the personal law regime in India is intrinsically linked to the history of colonialism on the Indian subcontinent. In the early nineteenth century community-based laws, which operated with some flexibility, were transformed into state-regulated 'personal laws'. In order to apply 'their' personal laws, the diverse and pluralistic communities had to be categorised along the religious binaries of 'Hindu' and 'Muslim'. A judicial system evolved on the model of English courts and English legal principles refashioned customary practices into linear and parallel systems

of Hindu and Muslim personal law through a process of trial and error. The extent of legal interference in local practices depended on a variety of factors; political and economic. When the administration shifted from the East India Company to the British Crown, the Hindu and Muslim family laws went through great transformations during the latter part of colonial rule. The British interpretations of the ancient texts became binding legal principles and made the law certain, rigid and uniform. The impact of the emerging judge-made law and its precedent-focused methodology as stare decisis, was characterised by unprecedented rigidity.[1] The separate personal laws served to feed into the British policy of divide and rule by rendering Hindus and Muslims as separate and mutually hostile political constituencies. Ultimately, this resulted in the partition of the country into two mutually antagonistic nations—India and Pakistan—at the time of independence.

9. The political impediment of the nation-building scheme necessitated reform of Hindu laws in order to bring the vast population of Hindus, divided into castes, sects and tribes, under a uniform and state-regulated code that would inscribe upon them the authority of a secular state with the power to legislate over family matters and interpret the Hindu sacred religious texts.[2] This political scheme, however, was mounted on the plank of women's rights, while the sub-text of the reforms was nation building.[3] Laws governing minority communities such as Muslims, Christians and Parsis were not reformed at this juncture, and they continue to be governed by their separate state-enacted personal laws. Under these laws women already had two most important rights—the right of divorce and the right of property inheritance, which Hindu women lacked.

10. Tensions between the Hindu majority and Muslim minority continued to reverberate within the political sphere in the post-independence period. While Hindu marriages were rendered monogamous through the process of codification during the first decade after independence, the continuation of the uncodified Muslim Personal Law, which permitted polygamy and arbitrary *talaq,* along with the reluctance of successive Congress-led governments to enforce a Uniform Civil Code, came to be viewed by the Hindu majority as concrete evidence of the 'Muslim appeasement' theory in both public perception, and judicial discourse.[4] The 1985 Shahbano ruling[5] which, in the context of the maintenance rights of a Muslim wife, while urging the government to enforce the Uniform Civil Code (UCC), made certain adverse comments against the Prophet and Islam which resulted in a Muslim backlash. In the post-independence political climate, the demand for the UCC acquired a political edge which fed into a popular imagination of 'minority appeasement' by the ruling Congress party. The rise of Hindu nationalism sustained itself drawing on this popular sentiment. During this period, a territorial dispute over the question of the location of a historical mosque on what was believed to be the birth place of Hindu God Lord Ram was brewing in Ayodhya (Uttar Pradesh). In 1992, the demolition of the 450-year-old mosque in question, the Babri Masjid, by Hindu right-wing communal mobs, despite an assurance to the court to the contrary, and the country-wide riots that followed, caused a further rupture in Hindu–Muslim relationships. It irrevocably changed discourses on Hindu–Muslim relations and brought religious identity to the forefront of political rhetoric. A decade later, in 2002, the communal carnage in the State of Gujarat which was symbolised by gruesome sexual violence against Muslim women, subsequently came to be marked as a moment of national shame causing a serious setback to the secular fabric of the country. Within this political climate, increasingly, support for the UCC came to be construed as a betrayal of the cause of identity politics within minority communities and secular human rights groups.

11. It is against this backdrop of communal disharmony and public perceptions of 'minority appeasement' that I embark upon this journey of exploring the relationship between religious personal law, women's rights within marriage, and the shifting meanings and uses of 'consent' within the Hindu and Muslim marriage laws at different historical junctions.

The difference between the notion of 'consent' within Hindu and Muslim marriage codes

12. The ancient Hindu law (or *Smriti* law, or the Brahminical law) of India viewed marriage as an essential sanskara (religious obligation). Marriage was mandatory to discharge the debt to one's ancestors—the debt of begetting offspring. It was also essential for the performance of religious and spiritual duties. The sacrosanct marital bond was considered indissoluble and eternal. Consent of the parties was not an essential ingredient for the solemnisation of marriage. As per the Brahminical traditions, a bedecked virgin bride was 'gifted' to the bridegroom's family. This act of gifting a bedecked bride to the groom automatically relegates the bride giver to a lower social status than the bride taker. Women were governed by a strict code of sexual purity based on the notions of Brahmincal patriarchy. Virginity and chastity were valued possessions and in order to ensure the 'purity' of the girl, child marriages were the norm.[6]

13. Under Muslim law, marriage was viewed as a civil contract. Consent was pivotal, as reflected in the terms *ijab* (proposal) and *qabul* (acceptance) which were essential characteristics of a Muslim marriage. The *nikahnama* (the contract of marriage) provided clear proof of a valid marriage having been performed. Minors were permitted to enter into these contracts with the consent of their guardians (*wali*), who had the authority to contract on their behalf. Conditions could be stipulated in the *nikahnama* as well as the pre-nuptial contract, *kabin-nama,* to secure women's rights.[7]

14. The next part illustrates how the premise of a contractual marriage among Muslims enlarged the scope for protecting women's rights, in contrast to the notion of *sanskara* under the Hindu law or even the feudal European/Christian notion of an indissoluble sacramental marriage.[8]

Legal precedents emphasising the contractual nature of Muslim marriages

15. Some landmark rulings of the Privy Council and the various High Courts during the colonial period from 1860 to the 1940s help us to better comprehend the positive impact of the contractual nature of Muslim marriage and its divergences from the sacramental understanding of a Hindu marriage. These cases deal with a wide range of rights based on women's active agency such as the validity of a pre-nuptial agreement, the option of puberty, the right to matrimonial residence, rights over separate property, the enforceability of contractual obligations entered into for the benefit of a minor wife, the validity of the delegated right of divorce, etc. These rulings not only safeguarded the rights of Muslim women, but also served to expand the boundaries of matrimonial law in general.

16. The Moonshee Buzloor Ruheem v Shumsoonisa Begum[9] case of 1867, was one of the earliest Indian disputes decided by the Privy Council.[10] The case highlights the superior position of a Muslim wife over her property. The wife had filed a suit to recover the properties misused by her husband. In retaliation, the husband filed for restitution of conjugal rights. The husband's suit was dismissed and the wife's suit regarding her claim to her property was decreed in her favour by the Calcutta High Court. Against this ruling, the husband appealed to the Privy Council. In 1867, while upholding the wife's claim, the Privy Council commented:

> Distinction must be drawn between the rights of a Mohammedan and a Hindu woman. In all that concerns her power over her property, the former is, by law, far more independent, in fact even more independent than an English woman. There is no doubt that a Mussulman woman, when married, retains her dominion over her own property and is free from the control of her husband in its disposition. The Mohammedan law is more favourable than the Hindu law to women and their rights, and does not insist on their dependence upon and subjugation to the stronger sex.[11]

17. In Badarannissa Bibi's case, decided by the Calcutta High Court in 1871,[12] the husband had entered into a *kabin-nama* with his wife, authorising her to divorce him if he remarried without her consent. After a few years when the husband did remarry, the wife approached the court for redress. The trial court dismissed the wife's plea on the grounds that Mohammedan law does not permit a wife to divorce herself upon a private agreement. At this juncture, an Islamic jurist, Moulvi Mahamat Hossein, represented the wife and pointed out the relevant sections from legal texts that specified the delegated power of the wife to divorce herself, and pleaded that such a provision is not repugnant to Mohammedan law. The court concurred with this view, reversed the lower court's ruling and upheld the woman's right to divorce herself.

18. A later case in 1938 from the Calcutta High Court, *Joygun Nessa Bibi v Mahammad Ali Biswas,*[13] emphasises the importance of consent under Muslim law and deals with other avenues available to a Muslim wife to dissolve her marriage, such as the Islamic principle of 'option of puberty'.[14] In this case, the wife filed for a declaration that her marriage was null and void and did not confer on her husband the right to a conjugal relationship. She pleaded that in the alternative, even if the marriage was not declared void ab initio, the nuptial tie was dissolved by her exercising the delegated right of *talaq* bestowed upon her by the *kabin-nama*.[15] She pleaded that she was barely 10 or 11 years old at the time of marriage and had not attained the age of puberty, though in the marriage register her age was falsely recorded as 15 years. The husband had violated the terms of the *kabin-nama* and hence she had exercised the right of divorce as per the stipulated terms. The husband denied the *kabin-nama,* and pleaded further, that even if it could be proved, the terms of the *kabin-nama* were illegal and opposed to public policy, and hence not binding on the parties. The trial court ruled in the wife's favour, but the court of first appeal reversed the ruling and held that Joygun Nessa Bibi had attained the age of discretion, though not the age of puberty since she was above seven years of age, and that her father's consent to the marriage rendered it valid. Ironically the court also upheld the husband's contention that the terms of the *kabin-nama,* which permitted the wife to divorce herself, were against public policy.

19. It was held that since the father had given his consent by approving the bridegroom and settling the terms of *kabin-nama,* his consent was implied. The court commented that the father did not act as a guardian to circumvent the provisions of the *Child Marriage Restraint Act, 1929*.[16] However, even while upholding the validity of the marriage and disregarding the delegated right of divorce in the *kabin-nama,* the court held that the woman is entitled to exercise the option of puberty (or repudiation of marriage) under Islamic law, and the marriage could be dissolved on this ground.

20. Under the English law of contract, a person who is not a party to a contract cannot enforce it even when she/he is a beneficiary. However, the Privy Council ruling of 1910 in *Khwaja Mohammed v Husseini Begum*[17] laid down a new principle for enforcing contracts, which was a departure from the established norms of English law, and took into consideration the cultural reality of India. The Privy Council laid down a new precedent by upholding a minor girl's right to enforce a contract against her father-in-law, even though she was not a party to it. The facts of the case make for interesting reading. In 1877, on the occasion of the marriage of his son, the father-in-law executed an agreement that he would pay the daughter-in-law Rs.500/- per month as *kharch-i-pandan* (an allowance for personal expenses) in perpetuity. Thirteen years later when the couple separated, the wife sued her father-in-law for arrears. The trial court refused to enforce the agreement and held that '[i]t is unreasonable to suppose that the wife can enforce her contract against her father-in-law, even when she refuses to live with her husband. To hold so would be repulsive to conscience and common sense.'[18] Moreover, the Court also cast aspersions on the woman's character. On appeal, the Allahabad High Court decreed in the wife's favour and held that no condition had been attached to the payment of the annuity and the chastity of the wife was not an issue under the agreement.

21. While upholding this ruling, the Privy Council commented:

> *Kharch-i-pandan,* which literally means "betel box expenses," is a personal allowance to the wife, customary among Mohammedan families of rank, fixed either before or after the marriage. When they are minors, as is frequently the case, the arrangement is made between the respective parents or guardians on behalf of minors. Hence serious injustice will be caused if the common law doctrine is applied to agreements entered into in connection with such contracts.

22. *Noor Bibi v Pir Bux*[19] occurred at an important juncture of the political history of India. The *Sharia* had been established as the law of Indian Muslims through the Application of the *Sharia Act of 1937*.[20] The right of a Muslim wife to dissolve her marriage was codified and she had obtained a statutory right to divorce through the enactment of the *Dissolution of Muslim Marriages Act of 1939*. Hindu law was yet to be codified, however, and the debate over codification was raging among the nationalist Congress leaders. The significance of this case also lies in the fact that it was decided by an Indian judge, the renowned Islamic jurist and the great moderniser, Justice Tyabji, who was Chief Justice of the High Court of Sindh in 1950, in post-independent India, rather than during the Victorian era when colonial officers were struggling to come to terms with the principles of Islamic Family Law.

23. Distinguishing the Islamic Family Law from the Hindu tradition of sacramental marriage, the court held:

> The Muslim marriage differs from the Hindu marriage in that it is not a sacrament. A Muslim marriage is a covenant by which the parties enter the state of marriage. The parties are permitted to stipulate the conditions upon which they will do so, provided the conditions are not illegal according to Muslim law. The subsistence of the marriage confers certain essential rights and imposes certain duties upon the parties. When a husband and a wife have been living apart, and the wife is not being maintained by the husband, a dissolution is permitted not as a punishment for the husband who had failed to fulfill one of the obligations of marriage, or allowed, as a means of enforcing the wife's rights to maintenance. In the Muslim law of dissolution, the failure to maintain, when it continues for a prolonged period, is regarded as an instance where a cessation has occurred. It will be seen therefore that the wife's disobedience or refusal to live with her husband does not affect the principle on which the dissolution is allowed.[21]

24. These judgments highlight the fact that under Muslim law, the 'consent' and 'agency' of the woman while contracting the marriage and negotiating her rights appear to have been of great significance. The legal framework of contract enabled Muslim women to include several economic rights in the marriage contract.

Introducing 'age' as an embodiment of 'consent' under the Hindu Law of Marriage

25. If 'consent' was being contested and redrawn in legal battles under Muslim law, a similar set of challenges to Hindu family law was unleashed by Hindu social reformers of the nineteenth century who invoked 'age' as an embodiment of a modernist and liberal theory of marriage.

26. The restraint upon child marriage emerged as the symbolic space through which the notion of 'consent' could be introduced into Hindu marriage using the premise of Western liberalism. Hence one of the earliest reforms introduced after the power of administration was transferred from the Company to the Crown in 1858 was the *Age of Consent Act of 1860,* which stipulated a minimum age of 10 years for sexual intercourse in order to prevent infant marriages. Sexual intercourse with a girl below this age could be construed as rape.

27. The inadequacy of this legislation was highlighted in the Phulmonee case, *Queen Empress v Huree Mohan Mythee,*[22] where a child of 11 years died due to the injuries caused to her during

forcible sexual intercourse by her husband. But the husband could not be convicted for rape since he had a legal right to sexual intercourse with his wife, who was above the age of 10. This incident became the focal point for galvanising public opinion to demand the raising of the age of consent to sexual intercourse from 10 to 12 years. The conservative factions opposed this demand on the ground that it would violate the religious dictate of pre-puberty marriage, through which the virginity of the bride could be ensured. However, the public uproar against the verdict finally led to the enactment of the *Age of Consent Act of 1891*, which increased the age of consent from 10 to 12 years.

28. This was a significant victory that disrupted the sacrosanct space of Hindu marriage by symbolically equating 'age' with 'consent' as a means of ensuring a limited measure of equality between the spouses.[23] However, as Tanika Sarkar has argued, the definition of Hindu marriage as a sacrament allowed Hindu conjugality to remain a 'family affair'.[24]

29. The Rukhmabai case, which was decided by the Bombay High Court in 1885, brought Hindu conjugality (and the attendant contestations around 'consent') into the public domain. Questioning what was assumed to be natural, Rukhmabai offered a subversive model of assertion, as a desiring individual, in a terrain dominated by family, community and imperial notions of justice and governance.[25] By refusing to acknowledge a husband's uncontested 'conjugal right', she foregrounded questions of individual agency and desire. While increasingly, 'age' was used as a substitute for the slippery question of female desire and 'consent', through a convergence of Hindu and English legal principles, Rukhmabai was denied the options which a Muslim woman could avail herselfe of, such as the 'option of puberty' within the notion of a contractual marriage of the Anglo-Muhammedan law.[26]

30. The Rukhmabai case, discussed above, was a 1885 case for the restitution of conjugal rights filed by her husband. Justice Pinhey of the Bombay High Court had declined to pass a decree in his favour, declaring that since conjugality had not been instituted, the question of granting the relief of 'restoring conjugality' did not arise.[27] The ruling met with opposition from the traditionalist lobby among the Hindu nationalists known as revivalists, who viewed the judgment as an interference in the sacrosanct arena of Hindu conjugality and as a breach of the assurance of non-interference given in the Queen's Proclamation. For the modernist segment known as reformers, the intervention of the English courts and the importation of western notions of liberalism was an armour in their campaign against archaic Brahminical traditions and a step towards modernising Hindu family relations by foregrounding 'age' as a symbol of 'contract' and 'consent'.

31. The litigation, the judgement and the controversy that followed, were each laden with ironies. The husband's case was trumpeted by the traditionalists and it is with their support that he had approached the English courts, rather than the traditional non-state adjudication fora such as the caste panchayat for the remedy of restoring his *Hindu* conjugality. Within both the traditional *Smriti* law governing the upper castes as well as the pluralistic customary law governing the lower castes, relief for the restoration of conjugality was non-existent and the husband could not obtain any relief in this sphere. In addition, the parties in the Rukhmabai case belonged to the lower caste (carpenter caste) which recognised the right of the wife to dissolve her marriage; a right denied upper-caste women. Most importantly, Justice Pinhey had declined relief on the grounds that it was an outdated medieval Christian remedy under the English law and argued that the Hindu law did not recognise such a barbaric custom!

32. However, in the highly politicised climate, these subtle legal points were rendered invisible. Succumbing to political pressure, in the following year the Appellate Bench, presided over by Chief Justice Sir Charles Sergeant, ruled in favour of the husband and rejected the argument that there was no authority for a decree for 'institution' of conjugal rights under Hindu law, commenting:

> The gist of the action for restitution of conjugal rights is that married persons are bound to live together. Whether the withdrawal is before or after consummation, there has been a violation of conjugal duty which entitles the injured party to the relief prayed.[28]

The verdict served to subvert the element of consent and agency, which Rukhmabai had attempted to introduce into the domain of Hindu sacramental conjugality.

33. Raising the age from 10 to 12 years through the *Age of Consent Act of 1891* did not resolve the issue of child marriage and the debate continued well into the twentieth century. Women's organisations that were formed around this time, with a focus on women's health and education, supported the demand raised by social reformers for a law restraining child marriage. Finally the *Child Marriage Restraint Act* (CMRA) was enacted in 1929, raising the minimum age of marriage of girls to 14 years. The Act imposed a punishment on parents and husbands for arranging, contracting, performing, celebrating and participating in child marriages, but did not invalidate child marriages performed without consent of the parties. The status of Hindu conjugality as a sacrament did not permit young girls, who were married while they were minors, to repudiate their marriage upon attainment of puberty.[29] While the CMRA attempted to raise the age of marriage, it did not attempt to introduce an element of consent within the sacramental notion of a Hindu marriage. Hence while age became synonymous with sexual maturity, it did not foreground the active sexual agency of women within marriage. The concern was only to protect a young girl from the physical harm caused by sexual intercourse and pregnancy at an early age, not to alter the character of Hindu marriage from sacrament to consensual contract. This formulation viewed women as passive sexual partners. Hence, despite the reforms, the question of women's agency with regard to Hindu marriages remained unaddressed and unresolved. In the next part I will discuss how conversion was used by Hindu women to exercise a religio–legal strategy to escape from the rigidity of status marriages and to contract marriages of choice.

Conversions to Islam: An illusory escape route

34. Apart from the grounds for divorce discussed earlier, Muslim women could also use apostasy as a ground to dissolve their marriages. A change of religion automatically dissolved their previous marriage, hence when they married men from the new religion they could not be convicted for bigamy. Hindu women used this strategy based on a mistaken assumption that conversion to Islam provided them an escape route to rid themselves of an unhappy marriage. Since the Islamic law of marriage was based on the notion of consent, it appeared possible for women converting to Islam to also avail themselves of this option. They believed that apostasy ipso facto dissolved their previous marriages as was the case with Muslim women. The case law however, renders their expectations a fallacy. Colonial state power seemed to collude with native patriarchal value systems to deny women their autonomy. The women became liable for criminal prosecution under the newly enacted *Indian Penal Code of 1860* on the basis of complaints filed by their husbands from the previous marriage, and they were convicted.

35. In 1895, in the case of *Ram Kumari,* [30] the Calcutta High Court upheld the conviction of a Hindu woman married according to Hindu rites who had converted to Islam and married a Muslim man. The court explained that the proper course for the woman was to file a declaratory suit under the Mohammedan law, which was her personal law after conversion, give notice to her former husband, and obtain a declaratory decree from the court that her earlier marriage was dissolved upon conversion and that she was now competent to remarry. Since she had failed to adopt this course, her original marriage performed under Hindu law remained valid and she became liable for prosecution under the provision of bigamy. In a subsequent case decided by the Madras High

Court, the court went further and declared that the children of such unions were illegitimate.[31]

36. In 1919, the Lahore High Court in *Emperor v t. Ruri,*[32] a Christian wife had renounced Christianity, embraced Islam, and married a Muslim. The session's court at first instance acquitted the woman on charges of bigamy on the ground that on conversion, the first marriage was automatically dissolved. However on Appeal, the High Court invoked the principle upheld in *Ram Kumari* and convicted the woman on the ground that conversion did not dissolve the first marriage solemnised as per the Christian law, and held the subsequent marriage to be bigamous. The sacramental status of her previous marriage continued even after conversion, and the woman was not free to contract another marriage of her choice as per Islamic principles.

37. In the 1947 case of the Bombay High Court, *Rabasa Khanum v Khodadad Bomanji Irani,*[33] the same principle was applied to a Parsi woman who had converted to Islam. While the principles of the English law of marriage could not be applied to a Parsi marriage, the Bombay High Court invoked principles of English common law—justice, equity and good conscience—in convicting the woman for bigamy. Thus it appears that conversion could not provide an escape route for women from status marriages.

38. These complex and multiple contests over marriage and conversion draw our attention to the consistent efforts made by women to dissolve their status marriages through agentive action. However, these could effectively be countered by husbands aided by the newly enacted penal provisions of the criminal law. One can clearly see a convergence between indigenous and colonial law and the reworking of a new and modern patriarchy that endorsed and even perpetuated inequality in gender relations. For the women, conversions were a way of exercising consent in matrimonial relations, albeit in a convoluted manner. But the courts continued to view all marriages, other than Muslim marriages, as sacramental status marriages, and did not concede to women the agency to exercise the choice of conversion to dissolve their marriages.

'Consent' and 'agency' under the codified Hindu Law

39. The *Hindu Marriage Act* (HMA) enacted in 1955 was the culmination of a sustained struggle: its major outcome was that upper caste Hindu women acquired an equal right of divorce on the same footing as their husbands. Though the Act retained the sacramental aspects and (recognised ritual) solemnisation of Hindu marriage, it rendered Hindu marriages contractual and dissoluble unions between two consenting adults, following developments under the English law. It provided for the dissolution of marriage under certain stipulated conditions through a judicial decree. Interestingly, the codification also gave legal sanctity to the essential ceremonies of marriage. A marriage in contravention to these stipulations could be declared void. It clearly reconfirmed the Brahminical Hindu marriage practices.

40. Moreover, the *Hindu Marriage Act* could not rid itself of the premise of male patriarchal privileges as the courts continued to embed the 'Lord and Master' theory within contractual Hindu law, undermining a woman's right to determine the choice of her marital home, or even retain a job against her husband's wishes. The courts validated the husband's rights to conjugality by introducing feudal concepts of obedience into the modernised and codified Hindu law. If the woman was employed at a place away from the matrimonial home, the husband could claim restitution of conjugal rights against the wife. For decades after its enactment, in a series of decisions, the courts held that Hindu marriage was a sacrament and it was the sacred duty of the wife to follow her husband and reside with him wherever he chose to reside, even when the wife was gainfully employed at a place away from the matrimonial residence, and contributing to the family income. Husbands often used the legal ploy of 'restoring conjugality' in order to spite the women.[34]

41. The 1977 Full Bench ruling of the Punjab and Haryana High Court in *Kailash Wati v Ayodhia Parkash,*[35] which followed several other similar rulings of the sixties and seventies exemplifies this trend. The wife was employed prior to the marriage but after seven years of marriage, the husband asked the wife to resign her job. Upon her refusal to do so, he filed for restitution of conjugal rights. The wife pleaded that while prepared to honour her matrimonial obligations, she was not prepared to resign her job. Granting the decree in the husband's favour, the High Court held that:li>

> According to Hindu Law, marriage is a holy union for the performance of marital duties with her husband wherever he may choose to reside and to fulfill her duties in her husband's home. The wife's refusal to resign her job amounts to withdrawal from the husband's society.[36]

42. In a subsequent case, where the wife had challenged the decree of restitution granted to the husband that it violates the wife's fundamental right under Article 21 of the Constitution (right to life which includes right to a life with dignity), and Article 14 (right to equality), the Delhi High Court upheld the constitutional validity of the provision and held:

> Introduction of constitutional law within the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution. In the privacy of the home neither Article 21 (Right to Life) nor Article 14 (Right to Equality) have any place. In a sensitive sphere which is most intimate and delicate, the introduction of the cold principles of constitutional law will have the effect of weakening the marriage bond.[37]

43. Through this ruling the court deprived Hindu women of the right to equality and dignity, by denying them the agency to withhold their consent to forced sexual intercourse within marriage.

44. During the debate over reforms in Hindu family laws, opposition to reforms from conservative forces was effectively countered by foregrounding the urgency of granting rights to Hindu women who lacked basic rights to divorce and property, as compared to women from other minority communities. At this juncture, Muslim law, which granted women these rights, was perceived as comparatively more modern, progressive and pro-women and the movement for Hindu law reforms was mounted on this premise. The entire endeavour was to reform Hindu laws and render them contractual and give women the right of divorce and inheritance rights. The contractual nature of Muslim law characterised by the notion of consent became the defining feature of post-colonial Hindu law reforms. Ironically, during the later decades, due to the Hindu right-wing's onslaught against Muslims, the Muslim personal law came to be projected as pre-modern, obscurantist and anti-women.[38] It is against this recent background of stereotyping Muslim women as legally disempowered that one must examine the contemporary contest between concepts of 'age' and 'consent' within the codified *Hindu Marriage Act*.

45. Despite consent now being integral to both Hindu and Muslim marriage laws, the common practice followed by both communities in India continues to be arranged marriages[39] within the confines of caste, class and religion.[40] The consent of the contracting individuals is more implied than explicit.

46. While child marriages continue to prevail, the concerns raised during the nineteenth-century reformist movement are no longer valid. A shift in perspectives must take place and the contemporary concern over child marriage ought to be wider, and located within socio-economic factors such as extreme poverty among the urban and rural poor, lack of resources and access to education for girl children, the fear of rape and sexual abuse of young unmarried girls in urban slums, etc. rather than merely as a dictate of Brahminical patriarchy.

47. The denial of agency becomes even more evident while examining the issue of marriages of

minors. Though the prescribed age of marriage under HMA in 1955 was 15 for girls and 18 for boys, at that time, being a minor did not provide a defence against a suit for restitution of conjugal rights. Neither could a marriage solemnised against the wishes of the girl while she was a minor be dissolved upon her attaining majority. This discrepancy within the law denied women the agency to contest the validity of the marriage contracted when they were minors. This was evident in the 1965 case of *Premi v Daya Ram*[41] where the husband filed a suit for restitution of conjugal rights in the lower court which was decreed in his favour. Against this, the wife filed an appeal in the Himachal Pradesh High Court which declined to set aside the decree of the lower court on the ground that since essential ceremonies of marriage had been performed, the marriage is valid and the husband is entitled to a decree of restitution of conjugal rights.[42] Even when the husband was much older than the girl, as in *Naumi v Narotam,*[43] the courts have declined to invalidate the marriage on the ground that if essential ceremonies stipulated under the *Hindu Marriage Act* had been performed, the marriage is valid and the husband is entitled to a decree of restitution of conjugal rights. These cases confirm that even after codification, Hindu law could not rid itself of the association of marriage as a sacrament, thus denying women essential features of a modern marriage—contract, consent and agency.

48. It is only after the amendment to the *Hindu Marriage Act in 1978* that we can discern 'consent' being incorporated into Hindu law through adoption of the Islamic concept of 'option of puberty' according to which a girl who was married while she was a minor under 15 could repudiate her marriage upon majority. The remedy of a divorce by mutual consent was also introduced at this juncture and grounds of obtaining divorce were liberalised to include cruelty and desertion. Since age was perceived to be synonymous with consent, the age of marriage was increased from 15 to 18 for girls and from 18 to 21 for boys, and the *Child Marriage Restraint Act* was accordingly amended.

49. While superficially this may appear to be beneficial to women, the flipside of this amendment was to criminalise an even larger number of marriages by bringing them within the ambit of child marriage, resulting in a skewed statistical profile. Thus the premise that 'age' is synonymous with 'consent' needs to be problematised, since raising the age of consent ironically resulted in criminalising a large number of marriages of choice and in exerting greater family, community, and state control over young women, a point to which I will return later.

50. At another level, in cases where a young wife is abandoned and approaches the courts for maintenance, the plea of 'minority' is advanced by husbands to invalidate marriages and to escape the liability of paying women maintenance. Here the courts have been firm and have ruled that being a minor does not invalidate the marriage.[44]

Interrogating 'consent' and 'agency' within juridical and feminist discourses over 'elopement marriages'

51. In this part, I examine how 'age' is pitted against 'agency' in the context of elopement marriages, within the political climate of religious and caste hostilities, in a complete turn-about from the manner in which child marriage was first articulated by nineteenth-century reformers.

52. The term 'elopement marriages' is used for marriages contracted without the consent of the respective parents. At times, the girls are below the permissible age of marriage, and at other times, they are projected as minors by their parents in order to invoke state power by using the provisions of the CMRA. The discussion on elopement marriages brings to the fore ways in which multiple social subordinations—caste, region, religion—intersect with patriarchy in order to reign in the sexual choices of defiant young women within established social mores. It appears that choice,

or desire, as expressed by a woman is somehow intrinsically illicit when it is against parental wishes and caste or community norms, and therefore needs to be contained and controlled.[45]

53. From conversion marriages to elopement marriages, women who exercise active agency to defy convention pose a threat to the established social order and hence need to be confined by reframing consent itself. In this discourse, 'consent' assumes a different dimension and gets embedded in assumptions about rational choice and parental authority, rather than choices made by women themselves. While this is problematic, even more problematic is the way in which feminist discourse engages with notions of age, agency and consent when there is a rupture between these terms.

54. The situation becomes precarious when an upper-caste girl elopes with a lower-caste boy or when a Hindu girl falls in love with a Muslim boy, transgressing the boundaries of Hindu upper-caste dictates of purity and pollution. In a strictly stratified society, riddled with prejudices against lower castes and minorities, a young couple who dares to cross the boundaries is severely punished. At times the price for choosing a partner would be public humiliation or a gruesome murder. The notion of women as the sexual property of their communities continues to be deeply ingrained.[46]

55. The *Rizwanur-Priyanka* case of Kolkata in 2007, where the police played an active role in separating a legally married upper-class Hindu girl from a Muslim boy belonging to the lower social strata, is one such glaring instance. Priyanka's rich and influential family were able to draw the police into an active alliance. Rizwanur's subsequent death is officially a suicide, but believed by many to be a murder carried out in collusion with Priyanka's father and the police. The then Police Commissioner of the city justified the involvement of the police in separating the couple as a normal and routine affair! A complex network of connections among the state, political parties, public institutions, business and the underworld were implicated in this regulative mechanism. Thus, marriage as a means of crossing community boundaries—by conversion or interfaith marriages—remains a volatile political issue.[47]

56. One way of regulating such defiant behaviour by young women is to invoke the provisions of the seemingly progressive statute, the CMRA. Its provisions are invoked more often to prevent voluntary marriages and augment patriarchal power than to pose a challenge to it. Hence, when child marriages are performed by families and communities, the provisions of this statute are seldom invoked. The patriarchal bastions are too strong and well-fortified for a modernist feminist discourse to enter and change social mores through legal dictates. The only sphere in which these provisions come into play is when 'elopement' marriages, contracted against the wishes of the respective family members and defying norms of endogamy and exogamy, bring into sharp focus the vagaries of the term, 'consent'. For the authorities, lack of age becomes synonymous with lack of agency to express sexual desire and bodily pleasure. This raises some new and challenging questions for a feminist discourse. First, in cases of elopement marriages of adolescent girls, when there is an active agency expressed by the girls, is it possible to place consent on a superior plane, when there is disjuncture between age and consent, as the courts have done? Second, is the response of a seemingly conservative institution such as the judiciary more nuanced and pro-women than that of feminists towards elopement marriages? And third, will invoking the Islamic notion of the 'age of discretion' rather than the 'age of majority' aid defiant young women who challenge patriarchal authority, while exercising unconventional sexual choices?[48] I will attempt to explore these questions in the following part.

57. Usually, an eloped couple is tracked and taken into custody by the police under parental pressure. The provisions of the CMRA are invoked to exert pressure on the girl and a criminal case of rape and kidnap is foisted upon the boy since sexual intercourse, even with the consent of a minor girl under the age of 16 constitutes statutory rape. In order to criminalise the choice, even major girls

are projected as minors, lacking the agency to consent to marriage or the sexual act. Despite being aware of the fact that it is a marriage of choice and voluntary elopement, the police collude with the fathers to protect patriarchal interests and community 'honour'. Only if the girl is able to provide clear and unequivocal proof of her majority is she allowed to accompany her husband and cohabit with him. Or else, the father's word regarding her age is accepted and she is reverted to his custody. In cases where the girls vehemently refuse to return to their parental home, they are placed in government run 'protection' homes until they are majors. Even thereafter the girls are not automatically released and the husbands are compelled to initiate costly and protracted litigation to release them from state custody. The state authorities decline to examine the element of 'consent' and merely adhere to the prescription of 'age' while determining the legal status of these marriages.

58. These cases come to the notice of the higher judiciary when the remedy of habeas corpus, meant to curb abuse of state (police) power against innocent citizens, is invoked by husbands for the production of their wives who have been retained illegally by parents. Sensitive judges have viewed these petitions as symptomatic of a changing social order, and have advised the parties to avail themselves of counselling to resolve the dispute rather than applying the stringent provisions of criminal law.[49] In some cases, upholding the wishes of the minor, the courts have permitted the girl to accompany her husband, even against parental wishes, as the following cases reveal.

59. In *Manish Singh v State (NCT Delhi),*[50] in a habeas corpus writ petition filed by the husband of a minor girl, the Delhi High Court held that marriages solemnised in contravention of the age restriction are not void. The court commented that the legislature was conscious of the fact that if such marriages are rendered void, it could lead to serious consequences and exploitation of women. The girl had deposed that she had married out of her own will and was desirous of living with her husband. The court ruled that once a girl or a boy attains the age of discretion and chooses a life partner, the marriage cannot be nullified on the ground of minority and that it is not an offence if a minor girl elopes and gets married against the wishes of her parents.

60. In *Sunil Kumar v State (NCT Delhi),*[51] wherein the father had confined the girl illegally, it was held:

> If a girl of around 17 years runs away from her parents' house to save herself from their onslaught and joins her lover or runs away with him, it is no offence either on the part of the girl or on the part of the boy.

The girl was not willing to return to her parents, who were not amenable to any reconciliation and wished to sever all relationship with her.

61. In *Kokkula Suresh v State of Andhra Pradesh,*[52] the Andhra Pradesh High Court reaffirmed that the marriage of a minor girl below 18 years is not a nullity and the father cannot claim her custody. In *Ashok Kumar v State,*[53] the Punjab and Haryana High Court commented that couples performing love marriage are chased by police and the relatives, often accompanied by musclemen and cases of rape and abduction are registered against the boy. At times the couple faces the threat of being killed and such killings are termed 'honour killings'.

62. These judgements, which restrain the police from performing arbitrary actions such as forcing women into the protective custody of the state, serve as a benchmark for a liberal interpretation of constitutional safeguards of personal liberty and individual freedom. For instance, in *Payal Sharma alias Kamla Sharma v Superintendent, Nari Niketan, Agra,*[54] the Allahabad High Court rejected the father's contention that the girl was a minor and instead accepted the woman's own contention that she was a major, declaring that she has a right to go anywhere and live with anyone. The court commented:

> In our opinion a man and a woman, even without getting married can live together, if they wish. This can be regarded as immoral by society but it is not illegal. There is a difference between law and morality.'[55]

63. These judicial pronouncements have been criticised by some women's organisations on the ground that such a lax attitude towards child marriage on the part of the judiciary would be instrumental in increasing the incidents of child marriage in the country. This led to a renewed campaign to render child marriages void and for compulsory registration of marriages to curb the concern about child marriage. In response to these demands, the CMRA was amended in 2006, but once again, the state in its wisdom, declined to render such marriages 'void' but merely voidable at the option of a contracting party. Challenging this, Writ Petitions were filed by statutory bodies such as the National Commission for Women for declaration of a uniform age of marriage (which is 18) and sexual intercourse (which is 16) and for declaring all under-age marriages as void.[56]

64. The feminist argument that 'the institution of patriarchy operates in the name of culture for justifying child marriage of young girls' gets problematised when we examine the agency which a young girl expresses in an elopement marriage.[57] Here the legal provision becomes a weapon to control sexuality and curb marriages of choice. Even though the criminal provisions regarding kidnapping and statutory rape appear to be protecting minor girls, these provisions are used in a manner which augments the patriarchal parental power over the minor girl. There are no exceptions in the laws on abduction and kidnapping that allow a minor to opt out of guardianship, or to leave her parental home on grounds of domestic abuse and neglect.[58] The use and abuse of police power, at the instance of parents with regard to marriages of choice, works in direct contrast to women's autonomy, agency and free will.

65. These developments raise complex legal questions—since the girls were minors, were they juridical persons invested with the agency to exercise free choice and would the consent given by them to the marriage, be deemed legally valid? At times, judges, with a concern for social justice, have resolved the issue by resorting to basic principles of human rights in order to save minor girls from the wrath of their parents and from institutionalisation in state-run protective homes. The only way they could do so was by upholding the validity of the marriages by bestowing on the minor girls an agency and by distancing the notion of 'age' from 'consent'.

66. We need to examine these judgements, which declared the marriages of minor girls as valid, and acknowledged their agency to contract marriages of choice, through the prism of women's rights. Can these judicial interventions in aid of minor girls be termed as regressive and the demand by women's groups to declare these marriages as null and void be termed progressive? Alternatively, can we term the curbing of the freedom of these minor girls to express their sexual choices by their natal families, with the aid of the mighty power of the state, within a sexually repressive society, be termed a progressive intervention in support of the movement against child marriages?

67. It is important that contemporary feminist discourse becomes far more nuanced than what one can discern through the recent campaign against child marriages. Rather than blindly advocating a universally accepted position framed by a first-world feminist discourse, women's rights groups need to advance a position which is rooted within third-world realities, contextualised within the urban–rural divide, and responsive to other social realities such as caste prejudices and communal conflicts. In conclusion, I urge that feminist voices lend credence to the claims of the weak against the institutional authorities which hold the might of the status quo. The agency exercised by a young teenage girl and her voice of protest against the dictates of patriarchy needs articulation and support. The claims of an Indian feminist jurisprudence lie within this complex tapestry.

Conclusion

68. Age and consent within marriage laws appear to be fluid concepts when we examine them across different time zones—from the historical to the contemporary. They act out in myriad of different ways within the realm of personal laws of Hindus and Muslims. Historically they have denied Hindu women agency to negotiate their rights and sexual choices, while the Muslim law grants women, greater scope to negotiate their rights. This paper has focused elaborately on this issue. During the contemporary period, in cases of elopement marriages, where girls defy parental authority and contract marriages of choice, age is viewed as synonymous with consent. The paper explores the disadvantages it poses to minor girls who challenge patriarchal power and express sexual desire through their active agency. In this discourse, the role of the judiciary seems to be more progressive than the feminist voice which is seeking to declare such marriages void.

69. The paper urges that a nuanced approach is to be adopted while addressing the concerns of women who wish to enter into marriage or seek its dissolution. Rather than adopting a universalist position, it is important to keep in view whether the feminist voice lends credence to the weaker against the might of patriarchal power that seeks to throttle their voices.

Notes

All URLs in these references were operational when the paper was first published.

[1] Lucy Carroll has argued the linear mould into which fluid customary practices were recast as per the Brahminical norm resulted in loss of rights of lower caste widows to property inheritance after remarriage. See Lucy Carroll, 'Law, custom, and statutory social reform: The Hindu Widows' Remarriage Act of 1856,' *The Indian Economic & Social History Review* 20(4) (December 1983): 363–88, DOI: 10.1177/001946468302000401.

[2] D.J.M. Derrett, *Religion, Law and the State in India,* New Delhi: Oxford University Press, 1999.

[3] Archana Parashar, *Women and Family Law Reform in India,* New Delhi: Sage Publications, 1992.

[4] This phrase is commonly used by right wing Hindu fundamentalist against the Congress government which provided certain protection to the poverty stricken Muslim population.

[5] *Mohd Ahmed Khan v Shahbano Begam (1985),* All India Reporter Supreme Court 945.

[6] The lower castes, who did not follow the Brahminical law were not governed by this dictates and hence marriages among them were more egalitarian as the communities did not practice child marriage and the custom of dowry. They followed the tradition of 'bride price' and women had the right to divorce and remarriage.

[7] A.A.A. Fyzee, *Outlines of Muslim Law,* New Delhi: Oxford University Press 1974, 4th edn, p. 125.

[8] Flavia Agnes, 'Women, marriage, and the subordination of rights', in *Community, Gender and Violence, Subaltern Studies Volume XI,* edited by Partha Chatterjee and Pradeep Jeganathan, New Delhi: Permanent Black, 2000, pp. 106–37.

[9] *Moonshee Buzloor Ruheem v Shumsoonisa Begum (1867),* 11 Moore's Indian Appeals 551.

[10] After the new legal order was introduced in 1860 (when the power to administer India was placed under the direct rule of the British Parliament and Privy Council) it became the final authority of adjudication with its decisions binding on the High Courts in India.

[11] ibid.

[12] *Badarannissa Bibi v Mafiattala (1871),* 7 Bengal Law Reporter 442.

[13] *Joygun Nessa Bibi v Mahammad Ali Biswas (1938),* All India Reporter Calcutta 71.

[14] This provision was subsequently incorporated into the Hindu law through an amendment in 1976.

[15] The term *kabin-nama* can be roughly translated as a pre-nuptial contract between the parties .

[16] It was enacted on 28 September 1929 in the Imperial Legislative Council of India and came into force on 1 April 1930. The Act fixed age of marriage for girls as 14 and for boys as 18 years. This Act will be discussed later.

[17] *Khwaja Mohammed v Husseini Begum (1910),* 37 Indian Appeals 152.

[18] ibid., pp. 412–13.

[19] *Noor Bibi v Pir Bux (1950),* All India Reporter Sindh 8.

[20] While there is a continuity between this judgment and the principles upheld in the earlier judgments, Justice Tyabji draws a clear distinction between Hindu and Muslim Family Law jurisprudence, placing Muslim law on a higher plank.

[21] ibid, pp. 11–12.

[22] *Queen Empress v Huree Mohan Mythee (1891),* Indian Law Reporter 17 Calcutta 49.

[23] Even as Hindu law was reified as traditional, thereby reducing the flexibility of local custom and modes of adjudication, the act of colonial codification staged a conflict between reformers and revivalists, who responded to the efforts to modernise/codify Hindu law very differently.

124] Tanika Sarkar, 'Rhetoric against age of consent', in *Economic and Political Weekly* xxviii(6) (1993): 1869–78.

[25] Sudhir Chandra, *Enslaved Daughters,* New Delhi: Oxford University Press 1998, p. 1.

[26] See *Joygun Nessa Bibi* discussed in the preceding part.

[27] *Dadaji Bhikaji v Rukmabai (1885),* Indian Law Reporter 9 Bombay 529.

[28] *Dadaji Bhikaji v Rukhmabai (1886),* Indian Law Reporter 10 Bombay 301.

[29] This option was made available to Hindu women only in 1978 through an amendment to the *Hindu Marriage Act of 1955*.

[30] *Ram Kumari,* (1895) Indian Law Reporter 18 Calcutta 264.

[31] *Budansa Rowther v Fatima Bibi (1914),* All India Reporter Madras 192.

[32] *Emperor v t. Ruri (1919),* All India Reporter Lahore 389.

[33] *Rabasa Khanum v Khodadad Bomanji Irani (1947),* All India Reporter Bombay 272.

[34] See Flavia Agnes, *Family Law, Vol. II: Marriage, Divorce and Matrimonial Litigation,* New Delhi: Oxford University Press, 2011, p. 22, DOI: 10.1093/acprof:oso/9780198072201.001.0001.

[35] *Kailash Wati v Ayodhia Parkash (1977),* Indian Law Reporter 1 Punjab & Haryana 642 Full Bench.

[36] ibid., p. 673.

[37] *Harvinder Kaur v Harminder Singh (1984),* All India Reporter Delhi 66.

[38] See comments in the *Shah Bano* ruling in 1985 discussed earlier.

[39] Marriage proposals would be settled by elders of the respective families.

[40] In modern times dowry has become an integral part of marriage negotiations both among Hindus and Muslims. The constant demand for dowry even after marriage and the subsequent murder of suicide by married women has become

a cause of deep concern, leading to introduction of penal provisions to curb this evil practice.

[41] *Premi v Daya Ram (1965),* All India Reporter Himachal Pradesh 15.

[42] The wife contested the validity of her marriage on the grounds that she was under the prescribed age of marriage. But the court rejected her plea on the ground that a marriage contracted when a girl is minor is not void. The court explained that though such marriages are discouraged by society and law, the evil of child marriage was deep-rooted, and declaring such marriages void would result in unfortunate consequences and unnecessary hardship to the parties.

[43] *Naumi v Narotam (1963),* All India Reporter Himachal Pradesh 15. In this case, a 13-year-old girl pleaded that she had been forcibly married to a man of 60.

[44] See *V. Mallikarjunaiah v H.C. Gowramma (1997),* All India Reporter Karnataka 77, in this context.

[45] Uma Chakravarthi, 'From fathers to husbands: Of love, death and marriage in North India', in *Honour Crimes, Paradigms, and Violence Against Women,* edited by Lynn Welchman and Sara Hossain, London: Zed Press (2005) pp. 308–33.

[46] Prem Chowdhry, 'Private lives, state intervention: Cases of runaway marriage in rural North India', *Modern Asian Studies* 38(55) (2004): 55–84, DOI: 10.1017/S0026749X04001027.

[47] S. Sen, 'Crossing communities : Religious conversion, rights in marriage and personal law', in *Negotiating Spaces: Legal Domains, Gender Concerns and Community Constructs,* edited by Flavia Agnes and Shoba Ghosh, Oxford University Press, India, 2012, 77–109.

[48] It needs to be mentioned here that parents have also wielded their power when young women have made the unconventional choice of same sex relationships. I have not dwelt on this, since the issue is not the focus of this paper.

[49] See *Ajit Ranjan v State, II (2007)* Divorce and Matrimonial Cases 136 where the Delhi High Court commented that the changing social scenario in the country was leading to a situation where there were more inter-caste and inter-religious marriages, which meet with societal and familial resistance and advised the state administration to view these cases as a social problem than a criminal offence.

[50] *Manish Singh v State (NCT Delhi) I (2006),* Divorce and Matrimonial Cases 1: All India Reporter 2006 Delhi 37.

[51] *Sunil Kumar v State (NCT Delhi), I (2007),* Divorce and Matrimonial Cases 786.

[52] *Kokkula Suresh v State of Andhra Pradesh, I (2009),* Divorce and Matrimonial Cases 646.

[53] *Ashok Kumar v State, I (2009),* Divorce and Matrimonial Cases 120.

[54] *Payal Sharma alias Kamla Sharma v Superintendent, Nari Niketan, Agra (2001),* All India Reporter Allahabad 254.

[55] ibid., para 1.

[56] Through an amendment to the rape law, the age of consent to sexual intercourse is now 18 years.

[57] J. Sagade, *Child Marriage in India,* New Delhi: Oxford University Press, 2005.

[58] P. Baxi, '"Till honour does us apart": Legislating Women's Right to Marry', New Delhi: Centre for Law and Governance, Jawaharlal Nehru University, 2009, unpublished paper, copy in author's possession.

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Published with the support of Gender and Cultural Studies, School of Culture, History and Language, College of Asia and the Pacific, The Australian National University.

URL: http://intersections.anu.edu.au/issue43/agnes.html

Page constructed by Carolyn Brewer
Last modified: 29 July 2019 1222