



The Age of Consent in India (Historical and Contemporary Dimensions of Female Agency)

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Abstract

At its core, the question of the age of consent is tied to questions of responsibility. It revolves around determining who the law recognizes as a responsible legal actor, and at what age can someone meaningfully act upon their agency in decisions concerning their sexuality. Analyzing the conception of female agency in arguments for and against a higher age of consent is, therefore, essential as it is linked to a broader societal understanding of gender roles and rights. It illustrates the balance that legal frameworkers intend to strike to protect women from exploitation and harm, while also respecting their sexual autonomy. This article aims to examine how both proponents and opponents of the age of consent controversy in India, both in the late nineteenth century and in contemporary debates, conceive female agency. To do so, it relies on secondary data, such as books, research articles, government documents and reports.

Keywords: *Age of Consent; Female Agency; Sexuality*

Introduction

The Nineteenth-Century Debate over the Age of Consent

During the late nineteenth-century, the practice of consummation of marriage at an early age was deeply entrenched in Indian society. Under colonial rule, a growing number of Indians began to view the tradition with concern, with some recognizing it as one of the 'evils' plaguing Hindu society (Engels, 1983). This spurred calls for social reform, which finally culminated in the Age of Consent Law of 1891. This section aims to analyze the arguments by both the proponents and opponents of raising the age of consent to examine how they conceptualized female agency during that time.

The Age of Consent Law was passed on 19 March 1891. It amended the Indian Penal Code and the Code of Criminal Procedure to raise the age of consent of girls from 10 to 12 years. Sexual intercourse with both unmarried and married girls before 12 years became classified as rape and was punishable by ten years imprisonment or transportation for life (Engels, 1983: 107-131). By this time, the movement for reforming the age of consent had spread across all parts of the subcontinent and even to Britain, despite its origins in the Bombay presidency. By the late 1880s, the reformist movement had unfolded as a varied development of events, as a result of active participation spanning various regions. Two pivotal factors that influenced this discourse include the writings published by Behramji Malabari and the legal cases of Rukhmabai and Phulmony.

The movement for social reform began with the publication of 'Notes' on 'Infant Marriage' and 'Enforced Widowhood' in 1884 by Behramji Malabari¹, a journalist and reformer from Bombay (Kosambi, 1991). In this publication, Malabari argued that early marriage was one of the primary causes of high rates of widowhood. He raised alarm about the effects of child marriage on Indian society by contending that child marriage led to 'too early consummation of nuptial troth, the breakdown of constitutions, and the ushering in of disease.' This was accompanied by 'the giving up of studies on the part of the boy-husband, the birth of sickly children, the necessity of feeding too many mouths, poverty and dependence; a disorganized household leading perhaps to sin' (Malabari, 1887). His arguments for the prevention of child marriage were, hence, economic in nature, revolving around concerns of overpopulation, poverty and disease. Huge swathes of Indian male reformers rallied around this argument.

Malabari's writings elicited at least 200 formal replies, ranging from remarks to short treatises, by virtually every social reformer in the country as well as supporters of the orthodoxy (Heimsath, 1962). New societies were formed for the purpose of supporting Malabari, such as those by Dayaram Gidumal², an Assistant Judge at Ahmedabad, who also published a substantial biography of Malabari by 1888. The contributions by Behramji Malabari to the discourse surrounding the age of consent were so significant that they came to represent some of the major arguments used in the reformist movement at that time. This was followed by the reasoning provided by M. G. Ranade³, another influential reformer, who believed that child marriage led to the reproduction of a weak race due to premature consummation and the diverted attention of youth from their education. He contended that early marriage would, hence, lead to the economic ruin of India (Ranade, 1885: 92). Both arguments, however, indicate the absence of a gendered critique for raising the age of consent in nineteenth-century India. Such liberal discourse was dominant in social spheres consisting of majorly Indian male and educated reformers, and therefore, reflects the lack of any conceptualization of women's agency as an argument against child marriage within these social circles.

The opposition against child marriage was brought into the consciousness of the masses by the legal cases of Rukhmabai and Phulmony, both of which exposed different concerns with early marriage (Goswami, 2010). The first of these was the Rukhmabai-Dadaji episode from 1884 to 1888. Rukhmabai was married to 19-year-old Dadaji Bhikaji when she was 11 years old. However, Rukhmabai refused to reside with her husband due to socio-economic and personal incompatibility. In 1884, Dadaji Bhikaji initiated legal proceedings in the Bombay High Court seeking the restoration of conjugal rights. During the proceedings, the court threatened Rukhmabai with imprisonment if she refused to fulfill her wifely duties, to which she responded by saying she chose imprisonment rather than living with her husband (Dadaji Bhikaji vs Rukhmabai, 1885). The case finally ended in an out-of-court settlement in 1888, in which Dadaji Bhikaji relinquished his marital claims over Rukhmabai.

Rukhmabai's accounts of her predicament as a child-wife to a man she did not want to be married to during the case provided a vocal opposition to the notion that a Hindu woman is obligated to comply with marital relations with her husband even if it goes against her desire. In doing so, the case introduced a confrontation between the traditional perception of marriage in orthodox society and Western values of

choice and compatibility in adult marriage (Kosambi, 1988). Between June and September of 1885, Rakhmabai, under the pseudonym 'The Hindu Lady', authored a series of letters in the Times of India discussing infant marriage and enforced widowhood (Anagol-McGinn, 1992).

The second case, referred to colloquially as the 'Calcutta child-wife murder case', brought into light the dire physical harms of early consummation. In 1889, 10-year-old Phulmony was married to Hari Mohan Maitree, who was over 30 years of age. However, Phulmony died on her wedding night due to premature consummation. Her husband was charged with murder (Kosambi, 1991). Phulmony's mother Radhamonee narrated her account of finding her daughter lying in her blood and succumbing to the injuries of forced consummation. The Phulmony case raised questions on whether families or communities should be able to inflict pain on women in the name of tradition (in this case, referring to the mandatory sexual intercourse between a marital couple immediately after a child-wife attained puberty).

The public reaction elicited by both these cases paved the way for the Age of Consent Law of 1891. In a memorandum addressed to Sir Andrew Scoble, who introduced the bill in the Legislative Council, Viceroy Lord Lansdowne wrote, 'The age question has been brought to the front by the death of this poor child, and I should not be at all sorry to have my hand forced' (Pande, 2012). This was seen as an attempt to preempt any orthodox backlash due to state interference with Hindu marriage. It is essential to note that much of the support received for raising the age of consent during this time was situated within Britain. Many in India, from their observations of the Hindu family system, argued that consummation ordinarily did not take place this early and that both legal cases were examples of exceptions. However, the British press told a different story (Heimsath, 1962). In one year between 1888 and 1889, The Times published tens of long articles, painting a picture of young girls between the ages of 1 and 11 being married off and mistreated by their husbands and mother-in-laws. Social reformers seized on this increasing public sympathy for raising the Indian age of consent in Britain, targeting their advocacy during this time to the British government and the British people. This was accompanied by a change in their arguments against child marriage. The reactionary environment created in the aftermath of the Rukhmabai and Phulmony case meant that many reformers switched their focus to the evils of early consummation. Social reformers now wrote and spoke about the plight of 'India's 40,000,000 widows,' highlighting the dangers faced by child widows and the harsh consequences endured by pregnant widows (Forbes, 1979).

The argument for raising the age of consent evolved, and with it, so did the framing of female agency at the time. Many in the general public and the reformist movement grew concerned that child marriage and early consummation brought terrible harm to the lives of child wives, whose bodies were seen to be unprepared for such harm. At the same time, members of the Hindu orthodoxy argued that, as per the religious norm of *garbhadhan*, marriages needed to be consummated immediately after a girl started menstruating (Sagade, 2003). Justice Sir Ramesh Chandra Mitta further criticized any attempts to raise the age of consent with the contribution that due to India's hot climate, girls were likely to reach menarche before the age of twelve. Raising the age of consent would, therefore, force married couples across India to delay consummation, and by extension, violate their religious duties.

When ultimately the Age of Consent Law of 1891 was passed, it was due to extensive testimonies by medical experts that concluded that the female body was only prepared for consummation at the age of 12, indicating that the debate for raising the age of consent had come to be linked almost entirely to notions of the physical maturity of the wife. This was further emphasized when the orthodox movement, in return, consulted 34 doctors to argue that premature consummation was uncommon in Indian society, and never led to fatalities. Such a discourse reduced the concerns for a child-wife's agency to her corporeal body, limiting our understanding of female agency at the time (Pande, 2012). As noted in the Age of Consent Law by Tanika Sarkar: 'The protected person was nothing more than a protected body. Personhood for her did not extend to anything beyond her sheer physical existence' (Sarkar, 2000).

At the same time, for much of the reformist discourse, the conceptualization of female agency was dominated by a male understanding of it. Women's thoughts and desires were disregarded in the advocacy for raising the age of consent. The British government, while calling for comments from Indian judges and leading reformers, did not ask any woman, however prominent, for her views. There existed emerging signs of women's consciousness during this time, as noted by Padma Anagol-McGinn in her work, where she states: 'The age of consent debates gave them [women] the opportunity to bring into public prominence their frustration in translating social reform ideals into the private, domestic sphere. It was precisely their attempt to change their role and position in the domestic realm which enabled them to create a gendered critique of child marriage' (Anagol-McGinn, 1992). However, such women's consciousness was limited in its extent. Women's groups during this time were often not well-organized, possessing no clear-cut ideology or managerial skills. Only a small number of women were literate, and therefore, public writings and mobilization by a small group of educated Indian women were not representative of the desires of middle-class women in India. Additionally, much of this women's consciousness was regionalized in nature, as most of the women's activism was situated in Maharashtra, and was quite limited in Bengal (Heimsath, 1964: 86-7). Due to this lack of women's participation and input, the Age of Consent Law of 1891 was limited in protecting women's agency as it failed to reflect women's diverse experiences and needs as articulated by them.

The Opposition from the Orthodoxy

Parallely, the orthodox movement was also developing a response to raising the age of consent. The introduction of the Age of Consent Bill in the Viceroy's Legislative Council was met with discussions and agitations of an unprecedented scale, especially in Bengal. This brought forth an alternative conception of female agency. Members of the Hindu orthodoxy argued that marriage practices at that time did not pose a problem. They were instead necessitated by ancient sacred texts and suited the social conditions (Kosambi, 1991). This perspective originated from concerns about women's innate sexual desires, which were believed to lead to impurity. Early consummation and marriage were seen as a method of directing and regulating these perceived urges. Raising the age of consent would, thus, threaten the Hindu marriage institution itself. To support this view, pandits stressed the necessity of the *garbhadhan* ceremony, insisting that disregarding it would pollute the lives of any son or daughter born. In the lead-up to the law, two Bengali newspapers, the *Bangabasi* and the *Dainik-o-Samachar*, furiously argued that social stability was based on the Hindu family system, which needed to be defended against reformers who only supported principles of the West (Engels, 1983). Bal Gangadhar Tilak, citing passages from the Manusmriti, even argued that there was no space for the free will of women due to her nature, and women must thus always be obedient to their father, husband or son (Rao, 2008).

Ironically, this subjugation of female agency was often portrayed by the orthodox movement as desired by women themselves under the guise that it enabled them to fulfill their religious responsibilities. Child marriage was one such essential duty of women, and one that they allegedly took joy in fulfilling, as indicated by the description of a child bride as 'a delightful little doll, full of fun and frolic, bringing pleasure to all' (Sarkar, 2000). This loving surrender of Indian women to their religion and family was contrasted to the forced and brutal subjugation of Indians caused by the colonial state.

The preservation of Hindu religious ideas was hence seen as a defense against British domination. In particular, Tilak weaponized the question of raising the age of consent as a tool for the extremist opposition to imperial rule in India. Through his work in *Kesari* and *Mahratta* in Poona, Tilak elicited an outraged response from the orthodoxy to British rule, stoking fears of increasing power in the hands of the British (Jaswal, 2007). This is illustrated through his editorial on February 15, 1891, where he said: "We have often pointed out that we are not against the particular reform advocated. Individually, we would be prepared to go even further than what the Government proposes to do so, but we are certainly not prepared to force our views upon the large mass of orthodox people" (Heimsath, 1962). As a result of his

advocacy, supporting the need for reform became equivalent to making India's advancement dependent upon the British (Engels, 1983).

The orthodox movement in the nineteenth century, therefore, believed that women's rights were not an explicit or inalienable claim, and as such, could and should be disregarded in the face of potential harm to the family, community or nation. In their view, women assented to child marriage and early consummation as it provided them with a channel to fulfil their sacred and social duties. It is essential to note how, in this argument, even the orthodox movement attempted to argue that opting into child marriage was representative of female agency. In nineteenth-century India, both the orthodox and the reformist movements attempted to portray themselves as having a grasp of female agency on paper, even if this portrayal was far from a genuine understanding of female agency.

The Age of Consent Law of 1891 represented a turning point in Indian society's understanding of women's autonomy (Pande, 2013). The arguments provided by both proponents and opponents of the law showed that the discourse regarding child marriage was changing, and needed to accommodate principles of women's autonomy, even if only in its rhetoric. At the same time, even though it was a product of a discourse that limited its understanding of consent to only the physical body or understanding of Indian men, the law was a novel development. Through incorporating principles of consent in its name and its framing, the law signaled that the legal system was supposed to protect the assent of Indian women (Sarkar, 2000). This inclusion of the notion of women's agency aided the development of more radical demands by women in their fight against child marriage in the twentieth century (Pande, 2013).

Contemporary Controversy over the Age of Consent

The realm of debate and discussion surrounding the controversy of the age of consent has evolved significantly in contemporary discourse since the nineteenth century. The Protection of Children from Sexual Offences (POCSO) Act, 2012 criminalizes all sexual relations among/with those who are under 18, regardless of whether the minor consents to it. According to the law, it is presumed that those below 18 cannot legally consent to sexual acts (The Protection of Children from Sexual Offences Act, 2012). However, there have been recent calls to reduce the age of consent from 18 to 16. This section aims to understand how both advocates and critics of reducing the age of consent to 16 conceive female agency following the enactment of the POCSO Act.

A major argument furthered by the advocates of reducing the age of consent is that the current law fails to recognize adolescent sexuality, and instead criminalizes it, both within and outside early marital relations. Repeated legal cases accusing the defendant of sexual assault have been filed under the POCSO Act even when the girl, between 16 and 18 years of age, testifies to consensual sex. In many instances, it is parents who file cases of rape with the police in their attempt to punish the boys with whom their teenage daughters have engaged in sexual acts or eloped (Pitre et al., 2021). As a result, many activists believe that the provisions of the Act drown out the voices of adolescents by adult concerns around sexuality. This argument has received some judicial support. In 2022, the Chief Justice of India, D.Y. Chandrachud, urged the government to review the current age of consent (Adil, 2023). Multiple Indian High Courts have also appealed to the government to reduce the age of consent to 16 years. While acquitting a 25-year-old in the case of a sexual relationship with a 17-year-old, the Bombay High Court stated: "Sexual autonomy encompasses both, the right to engage in wanted sexual activity, and the right to be protected from unwanted sexual aggression. Only when both aspects of an adolescent's rights are recognized, human sexual dignity can be considered to be fully respected" (Deshpande, 2023).

Many activists argue that the current age of consent allows parents to invoke state power to control the sexual choices of their daughters that they do not approve of. These stances of parents cannot be seen detached from the social and cultural realities of India, as social hierarchies based on caste,

region, and religion govern notions of purity, and therefore intersect to restrain the sexual agency of women. The eloping of an upper-caste girl with a lower-caste boy, or a Hindu girl with a Muslim boy, for example, are both cases that especially anger parents and their sociocultural beliefs, and are disproportionately represented in the cases brought in front of the police or the court. Sometimes, the parents or the community take matters into their own hands, physically punishing the girl or the boy involved through honor killings and physical beatings. As a result, similar to the orthodox stance of the nineteenth century, today's age of consent serves to uphold ideals of purity within the Hindu familial structure. In *Vivek Kumar @ Sanju and Anjali @ Afsana vs The State*, a case concerning the elopement of a Muslim girl with a Hindu boy, the Delhi High Court argued that a girl's desire to marry out of her religion should not elicit threats to the life and liberty of minors, and if a minor girl runs away with her lover to save her from 'the onslaught of her father', it is not an offense (*Vivek Kumar @ Sanju and Anjali @ Afsana v. The State*, 2007).

Such arguments bring forward an evolved conceptualization of autonomy. They support the positive exercise of the agency of adolescent girls to enter sexual acts. As a result, the discourse surrounding the age of consent has moved beyond merely depicting them as victims. Echoing the line of reasoning presented by Rukhmabai in court, such an argument proclaims that women should possess autonomy over their sexual choices, both in and out of early marriage. It situates women's agency within the broader social and cultural realities of India. It argues the power imbalance that exists in her relationships with her parents or her community must also be recognized as an external constraint to a woman's agency.

Conclusion

The debate on the age of consent is far from over. There exists rampant opposition to the reduction of the age of consent in the contemporary period. A primary justification adopted by opponents of reducing the age of consent is that even when consent may be signaled by women under the age of 18, it is illegitimate and should not be recognized as meaningful consent by the law. This is because any age below 18 is too young an age to fully understand the ramifications of engaging in sexual activities. In particular, girls may be motivated to do so, not simply because they desire to, but because of peer pressure or the increasing exposure to sexual activities on the internet that glorify such acts. Such reasoning was supported by the Supreme Court when it stated that: "A minor is incapable of thinking rationally...[she] can be easily lured into giving consent for such an act without understanding the implications thereof." (*Satish Kumar Jayantilal Dabgar v. State of Gujarat*, 2015)

Such an argument raises alarm over the idea that a reduction in the age of consent may, therefore, make it easier to use coercion, threat and influence over minors to force them into doing acts that they are uncomfortable with or are illegal. Women's organizations have argued that a reduced age of consent could increase the incidence of child marriage in India. It could become easier to force minors into sexual activities, or even result in increased child trafficking across the country. In line with the advocacy of Dadaji Bhikaji and other male social reformers, this contemporary argument suggests that a lower age of consent might exacerbate the occurrence of various broader societal issues.

This argument also centres itself around the agency. However, instead of protecting the women's choice to enter sexual acts right now, such reasoning focuses on protecting their future autonomy by removing the possibility of coercion. Viewing minor girls through the lens of vulnerability and protection, it argues that the reduction of the age of consent in India needs to consider the social and legal implications of doing so, beyond just looking at the age at which adolescents might begin to desire sexual acts. It moves beyond simply framing consent to be a legal concept, as it argues that even if consent is

formally acknowledged on paper, it does not count as meaningful assent if it is not accompanied by the emotional and mental ability to adequately provide that assent.

Some opponents also argue that lowering the age of consent would increase adolescent sexuality in the country, which they believe goes against India's traditional values. Indeed, Najma Heptulla, the BJP spokesperson, contended that 'India is not ready' for a lowered age of consent, arguing that a low age of consent is a 'Western tradition' (Petroni, 2019). It is ironic to note how conceptions of the doctrinal stand on the age of consent have evolved - from the support of a low age of consent to now arguing for its delaying. However, similar to the nineteenth-century justification against increasing the age of consent to protect Hindu religious traditions, this claim is borne out of the belief that a woman's innate sexual desires bring harm to the community. Both arguments thus proclaim that women's agency is subordinate to the well-being of the family and the community.

Indeed, the progression of the age of consent controversy over centuries mirrors a growing recognition of women's agency in society. What was once a secondary consideration has now emerged as a primary concern in debates surrounding the age of consent. Discussions that previously primarily revolved around societal perceptions of women's bodies and their roles within the patriarchal structure have matured and moved towards an increasingly nuanced understanding of women's rights and autonomy. They reflect a broader understanding of consent as more than just a biological or legal concept but as a reflection of individual autonomy and well-being.

Endnotes

1. Behramji Malabari (1853-1912) was a Parsi poet and social reformer in India. He advocated for women's rights, particularly those of the Hindu widow. He is also known for his support of women's suffrage in India.
2. Dayaram Gidumal (1857-1927) was an Indian social reformer and an Assistant Judge at Ahmedabad. Famously, he was known as the godfather of the Sindhi Hindus. He founded the Seva Sadan along with Behramji Malabari.
3. Mahadev Govind Ranade (1842-1901) served as a judge in the Bombay High Court in the late nineteenth century. During his seven-year tenure, he championed social reform, particularly in the realm of women's rights, advocating against practices like child marriage and advocating for widow remarriage. Besides his judicial role, Ranade was a prominent historian and actively engaged in social and economic reform movements. He is sometimes hailed as the 'Father of Indian Economics' for his efforts, albeit unsuccessful, to persuade the British authorities to initiate industrialization and welfare programs in India.

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