

## Age vis-à-vis Consent for Sexual Act in India

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### Abstract

The term “Age of Consent” is a term not found in many state statutes, but rather reflects an absence of prohibition. In Indian context, the age of marriage, age for consent to sexual activity and age for procuring a girl for prostitution are different and time and again has lead to peculiar situation posing question not easy to answer. The age of consent for sexual act for girls is different in different circumstances. It is 15 years for a married girl, 16 years for all others and the legal of marriage is 18 years. Observing this peculiar situation, recently the apex court of the country i.e. Supreme Court of India has refereed this matter to Govt. of India to deliberate on the issue and come with suitable amendments in the relevant laws. The Union Government at the centre has constituted a group of ministers (GOM) under the chairmanship of Sh. Arjun Singh Union Minister of Human Resource Development to solve this enigma and suggest necessary amendments. Considering the complexities of the situation, this matter is discussed in the paper.

**Key Words:** Age, medico-legal, consent, sex, marriage, juvenile.

### Introduction

Age of a person is one of the key criterions in deciding number of penal issues such as criminal responsibility, judicial punishment, crime against the body, sexual crimes, marriage etc. World over, considering the social scenario, physical and mental maturity, customs and rituals, different age limits have been prescribed in the laws of different countries. Generally, statutory rape laws define the age below which an individual

#### Current Legal Status of Age in Relation to Sexual Activity

1. Child Marriage (Restraint) Act, 1929: a child is a person, who if a male, has not completed 21 years of age, not if a female, has not completed 18 years.
2. The Hindu Marriage Act, 1955: a female has to be 18 years before she can legally marry.
3. The Immoral Traffic (Prevention) Act, 1986: a child means a person who has completed the age of 16 years and not completed 18 years.
4. The Indian Majority Act: a person is a major if he/she has completed 18 years of age.

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5. Section 375 Indian Penal Code, 1860: excepts a person from the charge of rape if he has forcible sexual intercourse with wife who is above 15 years of age. For the State of Manipur the age in question is 14 years.
6. Section 366A Indian penal Code, 1860: procurement of minor girls- whoever, by any means whatsoever, induces any minor girl under the age of 18 years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to 10 years, and shall also be liable to fine.

### **Legal age for sexual act**

The need to protect minors from sexual exploitation has been felt from the ancient time. However, when these laws originated in the 13<sup>th</sup> century, the primary intent was to protect the chastity of young women. What should be the legal age for sexual act is a matter of debate since then, and therefore world over different ages has been prescribed for different sexual acts for both genders. But, the basic question is should the sexuality be governed by law. According to some, the sexuality is ones basic human right as long as it is for done forcibly. Hence, there should not be any age restrictions, provided the person is mature both physically and mentally to understand the nature and consequences of the sexual act. While on the other hand, all over the world minimum age has been prescribed in the laws to regulate sexual act e.g. the acts mentioned in introduction.

### **Arguments against Legal age for sexual act**

Americans for a Society Free from Age Restrictions (ASFAR), an advocacy group that promotes the removal of all age-based restrictions and protections including age-for-consent laws. This organization contends that people mature differently and that individual should be treated on case-to-case basis, similar to what courts do when determining if an individual is in possession of all his faculties and able to give informed consent<sup>1</sup>. Some pro-pedophile activists argue that at least some pre-pubescent children are able to give actual consent to sexual act, and that adult-child sex does not necessarily involve child sexual abuse. They defend the abolition of age of consent laws, or their progressive reduction until ages below puberty<sup>2</sup>. The party for Charity, Freedom and Diversity (PNVD) was founded in Netherlands on May 31, 2006 presented a platform for eventual abolition of age of consent laws. The PNVD agrees that cases involving violent rape or coercion should be punished by law.

### **Arguments for Lowering the Age-for-consent for Sexual Act**

Since early 1970s, a number of actions took place in Britain for lowering the age-for-consent, either on the grounds of claims for children's rights, gay liberation, or, more recently, "as a means to avoid unwanted pregnancies, sexually transmitted infection and 'bad sex' via education and health promotion"<sup>3</sup>. John Holt, an American teacher and author of *Escape from Childhood- The Needs and Rights of Children*, believes that, "all people, including young people, should have the right to control their own private sex lives and acts". He considers that, "it is not proper business of the state or government to pry into such matters"<sup>2</sup>. British journalist Miranda Sawyer maintains that the age of consent should be lowered to 12 years in the U.K., arguing that the criminalization of all sexual activity for ages under 16 years is "laughably unrealistic"<sup>4</sup>. In an interesting phone poll conducted

by Channel 4, UK, after broadcasting a programme; “Sex Before 16: Why Law is Failing”, of the 3366 respondents to the 4 options;

1. Thirty-four percent thought the age of consent should be reduced to 14 years.
2. Thirty-five percent thought it should stay at 16 years
3. Thirteen percent thought it should be raised to 18 years
4. Eighteen percent thought it should be abolished<sup>5</sup>.

Recently in a survey conducted by Federation of Obstetrics and Gynecologists of India on city girls shows that the sexual maturity among girls in rural India has dropped to 11 years from 13 years <sup>(6)</sup>.

Arguments in Favor in Legal age:

1. Objective criteria for ascertaining physical and mental maturity.
2. Avoiding early motherhood.
3. Population control (to some extent).
4. Prohibiting sexual exploitation/abuse of children and adolescents.

## **Courts & Age of Consent for Sexual Act**

Court rulings/ orders/judgments-

1. “There is nothing wrong in a girl eloping to get married according to her choice if she has attained 18 years- the legal age of marriage”, Supreme Court of India<sup>7</sup>.
2. “ The marriage of a girl above the age of 15 is legally valid, provided she does so of her own free will”, Delhi High Court.
3. “It is illogical that a legal system in which an age of 18 is used for other purposes- like the Indian Majority Act, the Contract Act, the Juvenile Justice Act, the Child Marriage Restraint Act and the Representation of People Act- has a different approach in the case of sexual consent. Kerala High Court.
4. “Virtually all sexual activity by people under age 16 be prohibited and health care professionals and educators must report such behavior to state authorities”, A Federal Trial Court, Kansas, US <sup>8</sup>.

## **Discussion**

The Law Commission of India has recommended as reported in the leading news paper <sup>9</sup> that minimum age of consent for sexual act in case of girls be raised from 15 years to 16 years even if she is married by deleting the relevant portion of the law i.e. Section 375 IPC, further the commission

has also recommended a uniform minimum age of marriage both for boys and girls i.e. 18 years. These recommendations take care of the discrepancy regarding 15 years and 16 years age of consent for sexual act among married and unmarried girls respectively meaning in other word a uniform age of consent for sexual activity irrespective of the marital status of the girl. The point that also needs to ponder is that if we want to control teen age sex, both girls and boys in this age should be discouraged for this. It is unfair on part of the society to put legal barriers only for girls and totally sparing boys, who are equal partners in the sexual act. Why not to restrict them by making a law prohibiting even consensual sexual act under the age of 16 years. This becomes more pertinent considering a recent survey, where 15-30% men admitted of pre-marital sex, majority of them are teen-agers<sup>10</sup>. A waste majority of countries world wide has legal age restrictions regarding both genders, such as: a) Georgia, Alaska, Connecticut, Indiana, Maine, New Jersey, Pennsylvania, Washington, USA- it is 16 years for male to female, male to male and even female to female sex; b) Colorado, Illinois, New York, USA- it is 17 years for all above sexual activities; and c) California, North Dakota, Wisconsin, USA- it is 18 years for all above activities. In large number of states male/male and female/female sexual activity laws are either invalidated or repealed. Whereas the in some other states the age of consent is not uniform rather it depends upon the age difference between the sexual partners i.e. the age of the victim and the age of the defendant. Thus, the states can be divided into 5 categories for age of consent law as follows:

1. Category A- a single age of consent for both male and female, irrespective of age of victim and defendant that is usually taken as 18 years.
2. Category B- Sexual act with an individual under 16 years of age is illegal if the other party is four or more years older, thus a sexual relation between a 15-year-old and an 18-year-old would be legal, while the same relation between 15-year-old and a 21-year-old would be illegal.
3. Category C- includes states that define the minimum age of victim only for sexual legality. It is illegal to engage in any sexual activities with some one less than 13 years of age under all circumstances. Here the age consent may be 16 years, but under certain circumstances- that is, if the defendant is not more than four years older and less than 19 years, can legally engage in sexual activity.
4. Category D- includes states that define the age below which an individual cannot be prosecuted for having sex with a minor e.g. sexual activity with some one below the age of consent is only illegal if the defendant is at least 18 years of age.
5. Category E- includes states such as India, which have age restrictions only for female sex, i.e. a girl below the age of 16 (if unmarried) and 15 (if married) can not give consent for female to male sexual act. Whereas, in case of male, there is no age limit.

The recommendations of law commission as stated above have still not touched this differential treatment to male and female sex. So, if we desire to prevent pre-mature sexual act of male and female, as other male to male and female to female sexual act are not permitted in Indian laws, we should consider a uniform age of consent to sexual act for both genders. Considering the legal provision existing in our country and the social set-up and need, it will be appropriate to fix the minimum age of consent for sexual act at 18 years both for male and female individuals. However, a consensual sex between minors i.e. below 18 years should not be treated as rape; rather it merits a differential treatment by posing minor penalties by creation of a separate law. This can take care of all the issues raised by and in different courts of the country.

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