JUDICIAL PATERNALISM: A CASE COMMENT ON *AVINASH* V. *STATE OF KARNATAKA & OTHERS*

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I. INTRODUCTION

This article aims to analyze *Avinash* v. *State of Karnataka and Others*[1], a judgment delivered by the Karnataka High Court that mandated parental consent for girls marrying below the age of 21. The rationale for the judgment was that, girls less than 21 years of age, are hormonally imbalanced and thus, not fit to decide who they choose to marry. The judgment stated that:

> "*Girls below the age of 21 years are not capable of forming a rational judgment as to the suitability of the boy, who is love [sic]. It is relevant to mention that those girls, who are suffering from hormonal imbalance! [sic] easily fall prey to boys and fall in love, marry and repent at leisure.*"[2]

The author tries to unpack the judgment to understand the patriarchal mindset that is still a part of our judicial attitudes. This judgment raises issues apart from established statutory rules including the issue of right to choose. The article argues that while we decide upon cases we need to look beyond just the facts of case summarily and analyze the real reasons for the existence of such a judgment. The article concludes that the judiciary is ingrained in patriarchal and archaic ideology, a far cry from the current social reality, that judgments end up being dictatorial and take away many rights essential to individual dignity. Thus defeating the very purpose of people approaching the courts for enforcement of their rights.

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1 Avinash Kumar v State of Karnataka, 2011 (4) KarLJ 560 ¶12.

2 *Id.* ¶12.

3 INDIAN PENAL. CODE, 1860 § 342.

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II. AVINASH KUMAR v. STATE OF KARNATAKA

A. FACTS OF THE CASE

In this case, the petitioner, Avinash, a resident of Bangalore and the girl Sanghavi were in love however, both sets of parents did not consent to their marriage. They eloped on March 2, 2011, and got married in a temple at Tamil Nadu. The girl's parents lodged a missing persons report with a police station in Bangalore. On such knowledge the petitioner gave custody of the girl to the father and maternal uncle who were the respondents in this case. They had in turn agreed to allow Avinash to speak to the girl twice a day.. However this promise was not fulfilled. On 18 April 2011, the petitioner and his friend went to the house of the maternal uncle of the girl and enquired about her whereabouts. The uncle abused and threatened the petitioner with dire consequences. Consequently on April 20, 2011, the petitioner lodged a complaint in the police station against the father and the maternal uncle. The police registered a case for offences under sections 342[3], 504[4], 506[5] read with section 149[6] of the Indian Penal Code.

Additionally the petitioner moved the High Court under Article 226 of the Constitution of India to grant the writ of *habeas corpus* and produce the girl, Sanghavi. His contention was that she was his legally wedded wife and he apprehended danger to her life. Sanghavi was produced before the court by her brother. The respondents contended that Avinash had not only kidnapped the minor girl, but also was himself below the age of 21 years which made the alleged marriage invalid.[7] It was further alleged that he had kidnapped her and in turn caused hardships and misery to her and her parents. The girl when presented before the court submitted that she was kidnapped by the petitioner who was a friend of her brother on her

4 PEN. CODE, §504.
5 PEN. CODE §506.
6 PEN. CODE §149.
7 Avinash v State of Karnataka, supra note, 1 ¶7.

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way to college. She also said that she did not marry the petitioner and that she was happily living with her parents at that moment.[8]

B. The Right To Choose

The right to marry is a multi-dimensional right with broader implications than merely the right to enter into a marriage.[9] In international law the right to marry has been defined as to include the "the right to choose freely when, if and whom to marry".[10] The question regarding the right to choose whom to marry is not the first of its kind before the Courts.[11] The point of controversy in this case was whether the girl really married him or was kidnapped. It is not difficult to imagine a situation where a girl who is living in her parent's custody would adhere to what her parents' demand of her. Historian Uma Chakravarthi argues that there is a natural bias towards the parents stemming from the belief that they would never mean to harm the girl and hence such statements are never questioned. However, if the same girl would say the opposite that is, admit to the marriage then there have been instances of her choice not being respected by the judiciary.[12]

Adult heterosexual women who choose to get married in contravention to the wishes of their families are brought under the

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8 Avinash v State of Karnataka, supra note, 1 ¶6

9 Hossain Sara, *The Right to Choose, If, When and Whom, to Marry: A Conceptual Framework*, *Against the Forces, National Consultation on Women's Right to Choose, If, When and Whom to marry: Report and Recommendations*, AALI in Collaboration with IWRAW Asia Pacific and INTERRIGHTS, March 2003.

10 Convention on the Elimination of Discrimination Against Women Committee, General Recommendation No. 21, 1994.

11 There have been articles studying such case like Pratiksha Baxi, *Habeas corpus: Judicial Narratives of Sexual Governance*, (CSLG Working Paper Series CSLG/WP/09/02) *available at,* www.jnu.ac.in/cslg/workingPaper/CSLG%20WP%2009-02%20Pratiksha%20Baxi.pdf

12 Uma Chakravarti, *From Fathers to Husbands: Of Love, Death and Marriage in North India, in* 'Honour' Crimes, Paradigms, and Violence against Women, at pg 311 (Lynn Welchman and Sara Hossain eds., 2005).

13 *Id.* at 311.

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fold of criminal and constitutional law.[13] Pratiksha Baxi in her article argues against the law as it exists, since the law permits an adult woman to make a choice in marriage yet the law is unsuccessful in preventing the criminalizing of the couple who exercise their choice. In her article Baxi has studied the use of the writ of *habeas corpus* in cases of runaway marriages to control the sexuality of an adult heterosexual woman. She shows in her paper that a criminal complaint registered against the partner of the daughter charging him with abduction and/or kidnapping is the popular and common method to 'recover' a daughter who enters into an alliance that the parents of the girl do not approve of.[14] Such a complaint was made by parents of the girl in this case. In other cases this is accompanied with a *habeas corpus* petition that claims that the daughter is held in private detention. This is then followed by the police hunting the couple down.[15] There are instances where a case of rape is lodged in the police station by the minor girl's parents against the man with whom the girl has eloped.[16]

Baxi's paper looks at this through the analysis of various judgments which have used the *habeas corpus* writ to criminalize a marriage of one's choice. In such situations a girl is forced to choose between her parents or her future husband, which places her in a moral and legal conundrum. This is despite the law which very specifically states that a right to choose one's partner exists for all adult women.[17] It is not the intention of this paper to delve into the use of *habeas corpus* or state intervention. Such cases are not new in

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[14] Pratiksha Baxi, *Supra* note 11 at 3.

[15] Pratiksha Baxi, *Supra* note 11 at 3.

[16] Rose Sequeira, *Being in Love is No Offence: Bombay High Court*, THE TIMES OF INDIA, (Feb. 7, 2012), http://articles.timesofindia.indiatimes.com/2012-02-07/mumbai/31033814_1_minor-couple-minor-girl-ankit (One such case was reported in a national daily of case of minor who consented to have physical relationship with her cousin and she was forced to lodge a complaint. Reportedly, when the case came up before the High Court of Bombay, the parents did not want to proceed and promised to get the boy and the girl married when she becomes a major. The Judge reportedly, stated that "Love is not offence").

[17] *See* The Hindu Marriage Act, 1955, §5.

[18] The Prohibition of Child Marriage Act 2006, § 3.

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the Indian scenario and it is important to keep this fact in mind while analyzing this judgment.

C. Analysis of the Judgment

Since neither the boy nor the girl had attained majority when they were married and the girl had denied the marriage, the court could have easily dismissed the marriage as *prima facie* invalid. The court however did not do that. The Hon'ble judges after profound deliberation in effect decided against the law as it now stands.

At this point it would be important to refer to the Prohibition of Child Marriage Act, 2006 (*hereinafter*, '2006 Act'), that provides an option to the contracting party (the child bride/ bridegroom) to continue with or annul the marriage within two years of attaining majority.[18] The 2006 Act does not hold a child marriage void, but voidable.[19] A child marriage therefore remains legal despite the refusal of a marriage registration office to register it. One could make the argument that in this case, since the girl herself had denied the fact of marriage, the child marriage laws do not apply. And if the judges had restricted the judgment to only this point then there would not be a need to discuss this particular judgment. But considering the course that this judgment took and it's implication on many marriages it is imperative to analyze the judgment in depth.

Several judgments have held the marriage between two minors, especially the runaway marriages voidable and provided the two parties with the option of invalidating the marriage after they attain majority.[20] The Punjab and Haryana High Court in 2011 issued guidelines to the police to on dealing with cases of runaway marriages and providing protection to the couple.[21] Two important guidelines for the purpose of

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19 *Id.*

20 Sivakumar v Inspector of Police & Others, A.I.R. 2012 Mad. 62; Jitendar Kumar Sharma v. State, 2010 Ind. Law Del. 1904.

21 Kuldeep Kaur & another v State of Punjab & others, High Court of Punjab & Haryana, Crl Misc. No. M-3694 of 2011, decided on 16 March, 2012 at 2.

22 *Id.* at 2.

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this essay include a direction to curb the tendency to threaten the couple with separation and violence[22] and deferring of arrests until absolutely necessary.[23] This was done by giving recognition to the threat that such runaway couples face from their parents. However it is interesting to note how the Hon'ble judges carve an exception for the exercise of liberty for "*virtues like morality, law, justice, common good*"[24] thereby giving an option to revoke this right in the interest of morality. One wonders whose morality would drive this decision. Needless to say, the law is quite clear on this and grants a right.[25]

The Madras High Court[26] adhering to the letter of the law held the marriage voidable at the option of both the parties. The question before the judges was simple. In the Madras High Court case, the girl married against the wishes of her father. The father filed for granting of the writ of *habeas corpus* and alleged that she was kidnapped. The girl admitted her marriage and stated that she was not kidnapped and that she had married the boy out of her own will and hadn't been forced. This was denied by her father and the father stated that he had the best interest of the girl at heart who was a minor at the time. Till the case was decided she was kept in the Government Children's Home. The court examined the 2006 Act and the Hindu Marriage Act, 1955 (*hereinafter*, 'HMA') and held that a combined reading of the two would mean that the marriage between two minors, especially the marriages subsequent to eloping are voidable at the option of the two parties after they attain majority.

The former case was before *Avinash* v. *State of Karnataka* was pronounced and the latter one was after *Avinash*. What distinguishes the particular judgment discussed in this paper is the additional deliberation of the High court regarding consent and types of marriages. Even though, the judgment is only obiter and

23 *Id.* at 3.
24 *Id.* at 2.
25 *See* The Hindu Marriage Act, 1955, §5
26 Sivakumar, *supra* note 20.

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recommendatory, but even as a recommendation by the High Court, it should be unpacked and understood. The discussion on marriages and choice of a woman below 21 years of age to determine who she marries provides a unique insight into the psyche of the judiciary while deciding such cases.

III. Consent for marriages: Who has the right?

While discussing marriages and consent for marriage the Hon'ble judges referred to section 5[27] of HMA that deals with solemnization of marriage between two Hindus. The Judges then proceeded to examine the Section and interpret the same as:

> "*The word solemnized used in Section 5 of the Hindu Marriage Act indicates that marriage may be performed subject to conditions. It does not say who are the persons to perform marriage and whether consent of parents of boy and girl is required or not? In our opinion, it appears to us that the Parliament had not taken into account love marriages when the Bill was introduced. Should we interpret the word solemnized to the effect that marriage may be performed by the respective parents of the bridegroom and the bride and thus their consent is necessary*?"[28]

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[27] A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:—
(i) neither party has a spouse living at the time of the marriage;
(ii) at the time of the marriage, neither party—
(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
(c) has been subject to recurrent attacks of insanity
(iii) the bridegroom has completed the age of [twenty-one years] and the bride, the age of [eighteen years] at the time of the marriage;
(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;
(v) the parties are not *sapindas* of each other, unless the custom or usage governing each of them permits of a marriage between the two.

[28] Avinash Kumar, *supra* note 1 ¶9.

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Two important points emerge from the above statement, firstly, that the courts are making a troubling distinction between the so called "arranged marriages" and "love marriages". The presumption is that arranged marriages are the historically preferred way of making an alliance. And that love marriages where the persons choose whom they want to marry is necessarily an import into the Hindu (read as Indian) society. "*Love marriages present a clear threat to the intricate web of social, material and cultural factors requiring specific marriage structures. Once 'love', or 'choice' is conceded, reining in the choice to suitable partners from within an acceptable circle becomes difficult*".[29] Hence the threat of love marriages stems from a certain social structure and way of life rooted in patriarchy and an ideology that has always suppressed the right of choice of women. This would then necessarily raise the question whether individuals themselves have no right to choose who they live with? Secondly, there exists a presumption that parents' consent is necessary for marriages to be performed. A simplistic and immediate problem to this would be the fact that, this would necessarily exclude all those persons who have neither parents living unless they convert to another religion which allows for "love marriages". However, a more relevant question is why is their consent required?

Both these views of the courts are troubling considering the numerous cases where young girls and boys are brutally murdered under the garb of family honour.[30] The Supreme Court of India has recently passed a judgment condemning the same[31]. Whether successful or not, violence generally accompanies such love marriages. The breakdown of law and order is used as an excuse by the police to retrieve the girl and bring her back into the custody of her family.[32] When the families do not think twice about killing their children who

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[29] *See* Chakravarti, *supra* note 12, at 312.

[30] For details and some cases regarding the victims of such crime please visit http://memini.co/memini/ a website dedicated for the victims of honour crimes worldwide including India.

[31] Bhagwan Das v State (NCT) of Delhi, Cri. Appeal No. 1117 of 2011 at Special Leave Petition (Cri.) No. 1208 of 2011.

[32] *See* Chakravarti, *supra* note 12 at 315.

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have exercised their right to choice of a spouse, it seems imprudent for the Hon'ble judges to give parent's authority to validate or invalidate a marriage. It also leads one to question as to who then has the right to decide matters about marriage. It is not the point of this article to discuss the institution of marriage and what it should or should not be. But it is a very troublesome matter when the judiciary deems it fit to decide and even question a marriage between adults because the consent of parents is not provided.

A. Consent under Different Types of Marriages

As we read the judgment, a consistent pattern that emerges is a distinction in the mind of between the so called "love marriages" and "arranged marriages". It appears to be this distinction that indicates the rationale for the observation by the judges. The statement by the judges before referring to section 5 of the HMA throws light upon the real rationale for this judgment.

> "*We have seen many cases of runaway love marriages and untold misery and hardship of the parents of the girls. All love marriages are not successful. In the event of failure of love marriages of the girl, it is the girl and her parents have to suffer for their life long. The girls, later on, realise their mistake that they were hasty in love marriages and repent at leisure.*"[33]

We can again see the difference the judges draw between the two different types of marriages, wherever marriage has been mentioned it has been prefixed with the word "love". However while we are reading the same, we need to remember that all marriages are not successful and not just "all love marriages". At the same time it is interesting to note that the judges explicitly mention it is only the girl and her parents who suffer if the marriage fails. And for the rest of their lives! The language of the judgment leaves no room for the girl to move on with her life either single or by being married again. The judgment goes back to the patriarchal ideology of marriage being the

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[33] Avinash Kumar, *supra* note 1 ¶11

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sole reason for a girl's birth and failed marriages leading to a ruined life resulting in social ostracisation of not only the girl but her parents as well.

"Repenting at leisure" also seems to indicate that once the wedding has taken place, the purpose of the girl life's is thus complete, and on failure of marriage, they have to spend their time "repenting". The parents of the girls suffer untold misery and hardship and suffer along with the girl when the very essence of the girl's being, her marriage, fails. This reinforces the concept of girls being a responsibility and a burden on their family and ensures that her failed marriage is a cause for an untold misery. A good woman and in this particular case a good Hindu woman, should marry a suitable boy chosen by her family and live through that marriage so that she does not cause untoward hardship to her maternal home. The normative woman would not choose her own life partner and then leave him at her leisure to spend the rest of her life "repenting", to be a burden on her parents.

B. Parent's Consent and the Hindu Marriage Act

The judges finally decided upon this issue by stating the following,

> "*The parents of the girl are interested in selecting a suitable boy and see that the girl leads a happy married life. Since the Hindu Marriage Act does not deal with love marriages, in our view, it is high time that the Parliament shall take note of sufferings and turmoil of such girls and their parents and amend the law suitably.*"[34]

The judges then referred to the episode of famous Telugu Cine actor Sri Chiraneevi's daughter's love marriage [sic].[35]Here it was

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[34] Avinash Kumar, *supra* note 1 ¶9.

[35] Sushil Rao, *How the Love Story of Chiranjeevi's Daughter went Awry?*, The Times of India, (Mar. 16, 2011), *available at* http://articles.timesofindia.indiatimes.com/2011-03-16/hyderabad/28698745_1_sirish-bharadwaj-srija-and-sirish-chiranjeevi (Chiranjeevi's daughter eloped and there was trouble in the marriage and she came back to her father's house after she filed dowry harassment claim against her husband).

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suggested that in the case of a love affair involving a girl, who is below the age of 21 years, there should be a condition that the parents of the girl should approve the marriage, otherwise such marriages should be declared void or voidable.[36]

The judges make it amply clear that it is only the parents of the girl who should approve the marriage. It has been taken as a given that the boy has the right to choose whoever he wants as his life partner and even if the marriage fails, a lifetime of desolation is not in store for him. The judgment indicates that since a girl under the age of 21 is hormonally imbalanced she is not capable of determining who her spouse will be especially because after marriage she has to life in her husband's house. It has to be noted that the preference to arranged marriages as opposed to "love marriages" stems from a paranoia that a marriage by choice is always going to fail and cause a lifetime of distress to the girl's family. The cause for the failure of marriages is promptly laid upon the girl who the Hon'ble judges are quite sure is not capable of making her own decisions. The Hon'ble judges arguably deliberately do not mention arranged marriages to a partner of the same community. The judgment further fails to consider that the discourse in forced marriages has always taken to consideration the caste structures. Arranged marriages do not just mean arranged and approved by the family but also with a partner who is from the same caste/community. However in this case the sole motivation for judges is the incompetence of the women to make their own decisions in light of unstable hormones. This is one among very many ruses to control women and their sexuality in society.

Biological reasons for controlling the sexuality and choice of women are not a new phenomenon.[37] The biological differences are used in many instances to explain the "irrationality" or the "incapacity" of a woman. For instance, in the case of *Lata Singh* v. *State of U.P.*[38]

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[36] Avinash Kumar, *supra* note 1 ¶9.

[37] *See* Chakravarti, *supra* note 12, at 321.

[38] Lata Singh v State of Uttar Pradesh, Writ Petition No (Cri.) 208 of 2004 decided on 07/07/2006.

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the brothers of Lata Singh had alleged that she was mentally unfit when they had protested her marriage. However this was held to be untrue when she was examined by doctors. These so called biological differences become especially acute whenever there is the exercise of a right. In this case the right is to get married to whoever and whenever a woman wants. Incapacity and irrationality generally is different from speaking about the capacity to make decisions legally. Mental incapacity is matter of fact. It has to be proven before the court. It cannot be presumed. The law assumes sanity and consequently the capacity to consent.[39] The incapacity has to be proven by the person who is so alleging.[40] So when the courts make sweeping generalizations on the capacity of not just one girl but all women and blame it on their biology, it is a cause of serious concern.

IV. Conclusion

The right to choose whom we marry is rarely about marriage per se. While we are discussing the same we should not loose sight of the reasons why young and dependant individuals decide to get married. Marriage at this stage of social development can be argued as the only legitimate expression of love, emotion and desire. Any other avenue for expression of desire is absent in the Indian context, in terms of physical spaces as well as societal and legal space. When this legitimate expression is denied we look for the judiciary to reinforce our right and validate the right to choose whoever one wants to marry. The matter before the court was that of the validity of the *habeas corpus* writ. Even though the force of the discussions around HMA was only *obiter dicta*, they made their retrogressive observation and recommendations to amend the law very clear and it is this ideology that is troubling. It is only when we look at this through a gendered lens that we understand the mindset of the judiciary. It is this mindset that often defines our laws and precedents. The judges

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[39] The Hindu Marriage Act, 1955 (The Act provides that a girl above 18 has the capacity to consent for marriage. One of the exception being mental incapacity which has to be proven before the court).

[40] *Id.*

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cannot function in isolation completely detached from the realities of the persons who approach them otherwise we would be burdened with pronouncements and judgments that impact the lives of many in an unwarranted manner. These judgments are so intrinsically rooted in a patriarchal and archaic ideology that they end up being dictatorial in a manner that takes away rights which are essential to individual dignity. This judgment is just one among many and would not be as troubling if it did not affect so many young couples especially those couples where the girl is above 18 years of age and gets married out of her free choice, but without parental approval. There is a very real possibility that many forced marriages are validated under the guise of parental consent. The purpose of the court is to prevent the occurrence of such forced marriages and not to provide tools that deny a woman her right to choice.

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