

## # 10: Marriage and Consent

*The tenth of the ten part essay series has been adapted from a session led by Alice Miller and Sonia Correa and includes contributions of all the participants at the Global Dialogue on Decriminalisation, Choice and Consent.*

In the name of promoting consent, there is a contemporary move to utilise criminal law to prevent child and forced marriage.

Historicising how international human rights law has addressed issues of marriage and consent enables us to begin to problematise this move. The first essay based on Carole Vance's talk draws out how the modern state in the West inherited the power to regulate forms of sex through criminal law. Concomitant to the criminalisation of "unnatural" sex was the state's instantiation of marriage as a legal status, in part because marriage was linked to all kinds of other legal implications, like inheritance.

Within human rights law, from the League of Nations era onwards, the structure of marriage was implicated in intergovernmental conversations thinking about the development of nations. In particular, in the context of decolonisation, women's status in marriage was framed as an indicator revealing the modernity of states. Reflecting this, women's status became a means to assess a country's developmental status. Attempting to define what marriage ought to look like everywhere in the world, the 1948 Universal Declaration of Human Rights was a part of this project. Over the late 1940s and early 1950s, various conventions exemplified the centrality of marriage to conversations around rights and modernity. In other words, there was a focus on developing legal protections in order to separate individual women from what were understood to be "non-modern" cultures.

Fundamentally shaped by this history, contemporary human rights law addressing marriage primarily stresses two things. First, as stated in the Universal Declaration, "free and full consent" is elaborated as the terms upon which men and women enter into marriage. Second, there is an emphasis on equality between men and women in the terms of entry, the conditions of practice, and the terms of dissolution of marriage.

International law aims to work against the local practices and laws that limit these rights across caste, religion, and race. Within the frame of international rights law, differences in caste, religion, and race are seen as irrelevant to the right to marry. Thus, even though kinship systems have historically determined how marital structures look, under international law, marriage is treated as an institution related to, but separate from, the institution of the family. At the same time, the documents that frame the right to marriage are largely heteronormative. Marriage involves a man and a woman, and there is furthermore no interrogation of what these gender categories might mean.

In its focus on a man and a woman entering into marriage with "full and free consent," the human rights approach to marriage is highly individuated. The only attributes of the imagined rights-bearer that are relevant to the right to marry are age and sex-gender. Paradoxically, "full and free consent" is protected through the threat of criminal law. Forced and child marriage, understood to violate this right, thus face criminal charges. Especially given that these protections of marriage are

decontextualised from structures of kinship – which differ over space and time – and the history of the social construction of childhood, what does it mean to use criminal law around forced and child marriage?

There seems to be a great deal of human rights campaigning around regulating who “gets in” to marriage; on the one hand, there are efforts to legalise same-sex marriage and on the other, there are campaigns to ban child marriage. But there doesn’t seem to be much emphasis on how to “get out” of marriage. Are current efforts to protect the right to marry, in other words, normatively consolidating marriage as a requirement of adulthood?

*Alice Miller, JD, a scholar and advocate on the faculty of Yale University's School of Public Health and Jackson Institute for Global, and a spring Adjunct at Yale Law School.*

*Sonia Corrêa has a degree in Architecture and a post-graduate in Anthropology. From the 1970's on she has been involved in research and advocacy activities related to gender equality, health and sexuality.*