

CHILD MARRIAGE LAWS IN INDIA AND ITS MAJOR LOOPHOLES

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INTRODUCTION

“I am one of those unfortunate Hindu women whose hard lot is to suffer the unnameable miseries entailed by the custom of early marriage. This wicked practice of child marriage has destroyed the happiness of my life. It comes between me and the things which I prize above all others – study and mental cultivation. Without the least fault of mine, I am doomed to seclusion; every aspiration of mine to rise above my ignorant sisters is looked down upon with suspicion and is interpreted in the most uncharitable manner...”¹

This excerpt is a tale of the misery of one of the victims of Child Marriage Named Rukhmabai, in 1885. This is not just a tale of Rukhmabai but of millions of Rukhmabai who were the victims of this social evil that prevailed and is prevailing across the Globe. Child Marriage can be defined as the marriage between a female child and an adult male or between a female child and a male child. There are various pieces of legislation enacted to overcome this social evil, like the Child Marriage Restrain Act, 2006 (hereinafter called PCM, Act), Section 18(a) of the Hindu Marriage Act, 1955 (hereinafter called HMA Act) and so on. But how much they are effective in combating child marriage? Are there any loopholes in the provisions contained in Child Marriage Prohibition laws? In this blog, we are going to answer these questions.

HISTORY OF CHILD MARRIAGE IN INDIA

We divide the history of child marriage into - Ancient, Medieval and Modern

ANCIENT HISTORY: As we all know, the Hindu religion was Predominant in the Ancient Indian Population. Vedas are the major source of laws that were prevalent in ancient history. According to the Vedas Philosophy, child marriage is Prohibited and the minimum age for females was 18 years and that of males was 25 years². There were eight types of marriage regarded as legal marriage in the eyes of law in ancient India but none of them were responsible

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¹ Chaitra Arjunpuri, 'Akshaya Tritiya : Hotbed of child marriages' (Aljazeera, 4 May 2012) <<https://www.aljazeera.com/features/2012/5/4/akshaya-tritiya-hotbed-of-child-marriages>> accessed 20 Jan 2024

² 'history of child marriage in India' (Terres d'aise) <<https://terredasie.com/english/english-articles/history-of-child-marriage-in-india/>> accessed 21 Jan 2024.

for promoting child marriage. The Gandharva marriage which is also one of the marriages of eight marriages in ancient India, is the marriage between loved couples who secretly marry without the knowledge of their parents. In this form of marriage also, child marriage is not promoted rather it gives a choice to the individual to marry.³

MEDIEVAL HISTORY: This was the time when child marriage started to grow. This period can be regarded as the period of wars. Child marriage becomes a tool to protect female children from the atrocities of attackers. They used to marry their daughter at an early age in order to protect them. After that period, child marriage became a custom and the daughters were called *parayadhan* (wealth of others). The parents considered their daughter as a responsibility or burden that they wanted to dispense with, So they married their daughter as early as possible.⁴

In this period, a girl in a child marriage has less time to go to school, parents think that education would undermine their ability to become a good wife or mother. The other reason was virginity. parents don't want their daughters to indulge in pre-marital affairs so they marry their daughters early.

A tradition of child marriage became popular in some of present-day Rajasthan which is called *Atta satta*. In this tradition, there were exchange of daughters takes place as a form of marriage between two families in order to solidify the Relationship Bond. Marriage was fixed in childhood and one family married their girl child to the son (who was also a child) of the other family. The latter family also marries their girl child to the son of the former family. The child bride lived in their nuptial home till the age of puberty after that she was farewelled to their marital home.⁵

MODERN HISTORY: Modern history begins with the advent of the British Raj. They first appeared in the 17th century while the roots of child marriage were spread across the Indian Sub-continent. The practice of child marriage first came under the limelight during this period. The European powers used this practice to justify their role as civilizers of "barbaric practices". They didn't intervene at first due to the resentment of Public leaders. In 1891 for the first time with the help of Indian Political mobilisation, a law was enacted restricting child marriage. This change was not effective after child marriage became an inseparable part of nationalist movements. Finally, in 1927 Rai Sahib Harbilas Sarda introduced a bill in the legislature setting

³ ibid

⁴ Karuna Madan, 'Child marriage: curse of Indian society, medieval and modern' *Gulf News* (2 June, 2012)

⁵ Jigyasa Mishra, 'Aata Saata Brides for barter in Rajasthan' *India Spend* (2 march 2023)

a minimum age of 14 years for girls and 18 years for boys. He argued that legislating the age of consent did not address child marriage, stating that his bill, if passed and enforced, would end the problem of child widows and give female children an opportunity to develop physically and mentally.⁶

LAWS PROHIBITING CHILD MARRIAGE

THE PROHIBITION OF CHILD MARRIAGE ACT, 2006 -

1. **Section 2(a)** defines a child as in the case of a male, who has not attained the age of 21 years of age and in the case of females, who has not attained the age of 18 years.
2. **Section 3** states that the solemnization of Child Marriage shall be voidable at the option of the Contracting party who was the child at the time of marriage. It further provides that the child may file a petition of nullity of marriage before completion of two years of attaining majority
3. **Section 9** prescribes a punishment of two years of rigorous imprisonment or with fine for any male adult above the age of 18 years who solemnizes marriage with a child.
4. **Section 10** prescribes a punishment of two years of rigorous imprisonment or with fine for any person who performs, conducts, directs, or abets child marriage.
5. **Section 11** - Where a child contracts a child marriage, any person having charge of the child, whether as parent or guardian or any other person or in any other capacity, lawful or unlawful, including any member of an organisation or association of persons who does any act to promote the marriage or permits it to be solemnised or negligently fails to prevent it from being solemnised, including attending or participating in child marriage, shall be punishable with rigorous imprisonment which may extend to two years and shall also be liable to fine which may extend up to one lakh rupees:
6. **Section 12** - This section prescribes for the minor child marriage to be void in certain circumstances. Those circumstances are -
 - when the marriage of a minor is solemnized by enticing out of the keeping of lawful

⁶ American Jewish World Service, Early and Child Marriage in India (Page 23)

Guardian.

- when the marriage is solemnized by force, compulsion or by any deceitful means to go from any place.
- the minor is sold for the purpose of marriage and made to go through a form of marriage
- the minor is married after which the minor is sold, trafficked, or used for immoral purposes.

HINDU MARRIAGE ACT,1955

1. **Section 5(iii)** - This clause imposes a condition for valid marriage between two Hindus that the Bridegroom must complete the age of 21 years and the Bride must complete the age of 18 years.
2. **Section 18** - It prescribes punishment for rigorous imprisonment for two years or with a fine for any person who procures a marriage for himself or herself to be solemnized under this act in contravention of section 5 (iii) of HMA,1956

MUSLIM PERSONAL LAW

The Muslim law of marriage is not codified just like the Hindu Marriage Act. Muslim marriage law is governed by the Quran, the Hadith of Prophet Muhammad, The Ijma, The Qiyas, and Istehsan.⁷ In Muslim Law marriage between a male and female can be contracted after they attain the age of puberty. Specifically, the age of puberty was decided as 15 years. so the age of marriage between a Muslim male and a Muslim female is 15 years. The marriage of the child can be contracted by the lawful guardian, below the age of 15 years. The marriage would be considered valid but the female has the option to repudiate the marriage before attaining the age of 18 years provided that the marriage was not consummated.⁸

⁷ Kirti Parmar, 'Sources of Muslim Law' (legal service India) <<https://www.legalserviceindia.com/legal/article-1876-sources-of-muslim-law.html>> accessed 20 Jan 2024

⁸ Guest Post, 'Critical Analysing the age of marriage in Muslim law with special reference to Quran and Sunnah, (Ipleaders) <<https://blog.iplayers.in/critically-analysing-age-marriage-muslim-law-special-reference-quran-sunnah/>>

MAJOR LOOPHOLES IN CHILD MARRIAGE LAWS

The PCM, Act 2006 was enacted by the legislature to replace the Child Marriage Restraint Act which was also called the Sarda Act, was a British-era Act that did not completely prohibit Child marriage and prescribed lesser punishment for the culprits. The act failed to effectuate and combat the social evil of child marriage. The present act was enacted to give effect to the large uproar that had been evolved by organisations and women's commissions⁹ to amend the previous law. As a result, the legislature enacted the new law and made child marriage void and voidable and prescribed punishment for 2 years with a fine upto 1 lakh¹⁰ Even after the enactment of this new law and brought major changes in the same, the law has certain loopholes which made it less effective.

1. The Indian Majority Act, 1875 prescribes eighteen years of age for attaining majority. The non-obstante clause excludes this age of majority in those cases pertaining to marriage, divorce, dower and adoption from the operation of this act.¹¹ This means that the age of majority in these cases is governed by the personal laws to which he is subject. This provision silently approves child marriage which would be done according to the personal laws and customs. Although this legislation is pre-constitutional, the post-constitutional legislation is not away from this infirmity. The Dowry Prohibition Act, 1961 which is a post-constitutional legislation contains a provision that silently approves child marriage. In section 6(1)(c), the phrase "when the woman was minor" is mentioned which unveils the fact that the legislature is accepting child marriage impliedly. Similarly, CrPC¹² is also in the line of this acquiescent perception.
2. Section 3 of the PCM Act, made the child marriage voidable and not void (only in certain circumstances it can be made void which is mentioned in S.12 of the PCM Act). According to section 3, A child within the child marriage can move to the court to present the petition for a decree of nullity of marriage before two years of her/his attaining majority. Thus child marriage is not void ab initio but can be made void if the child desires to do so. If during

⁹ Women Commission, 'Review of laws affecting women and legislative measures suggested' <<http://ncw.nic.in/ncw-cells/legal-cell/new-bills-laws-proposed/legal-amendments-proposed/child-marriage-restraint-act-1929>> accessed on 23 Jan 2024

¹⁰ Section 11 of the Prevention of Child Marriage Act, 2006

¹¹ Saving.—Nothing herein contained shall affect: — (a) the capacity of any persons to act in the following matters (namely), —marriage, dower, divorce and adoption; (b) the religion or religious rites and usages of any class of 7 [citizens of India]; or (c) the capacity of any person who before this Act comes into force has attained majority under the law applicable to him.

¹² Criminal Procedure Code, 1973

the time given, the child failed to move the court for decree of nullity of marriage, the marriage will be valid in the eyes of law. In addition to this, the PCM Act made adult male persons criminally liable and may incur punishment for two years and a fine upto two lakh rupees, who contracted marriage with a child under Section 12 of the act. So it can be deduced after reading the above-mentioned provisions that the PCM Act made the person criminally liable without rendering the marriage void. This anomalous situation would be responsible for less registration of criminal cases against the persons who contract child marriage which indirectly encourages like-minded persons who are stuck to this social evil to get more involved in child marriage. This Observation is evident from the data of NCRB which says that on average one thousand cases were registered from 2017 till the present but the rate of child marriage is around 27% according to the latest figures.¹³

3. Although the PCM Act is a secular law, this act failed to provide for the application of various religious and customary laws because most religions and customs validate child marriage. It does not expressly prohibit personal laws to sanction child marriage.
4. When it comes to the HMA, Act, Section 5 (iii) imposes a condition that the age of the bride must not be less than 18 years and that of the bridegroom must not be less than 21 years. According to this section if the age of the bride and bridegroom is less than the prescribed age limit, it would be called a child Marriage but nowhere in the whole of the HMA act renders this child marriage as neither void nor voidable. Although section 18 (a) made the male adult person contracting child marriage, criminally liable and punishment of two years with a fine upto one lakh has been prescribed. Here also, an anomalous situation arises on one hand, the HMA, Act validates the child marriage(it neither renders it void nor voidable), on the other hand, it punishes a person who contracts child marriage.
5. The PCM Act, 2006 is also the result of poor draftsmanship. Section 6 of the act confers legitimacy to the child born out of child marriage which has been annulled under section 3 of the act. However, the legitimacy of the child is not extended to the children born out of child marriage under sections 12 and 14 of the act. The legislature should have deleted the words 'under section 3' in section 6 to widen the scope of the legitimacy of children. Similarly, Section 4 deals with the provision for maintenance and residence to female children under child marriage. This benefit has only extended to the girl child who has been

¹³ Ujwal Jalali, 'Over 1000 child marriage cases in 2022:NCRB' *The Indian Express* (New Delhi, 6 Dec 2023)

a party to annulled voidable marriage under section 3 of the act. This benefit has not been extended to girls who had been party to void marriage under sections 12 and 14 of the act. Section 12 is incomplete in itself. The opening part of section 12 does not make any reference to "marriage" while it deals with its operative part related to marriage. only clause (c) of section 12 mentions "marriage". It should be amended to include the word "child marriage" in the opening part of section 12.

CONCLUSION

There has been a call by the judiciary in various cases¹⁴ highlighting the anomalies of the PCM Act. As we know from the above observation the marriage is made only voidable till it is made void by the child who was a party to the marriage. As India has the vast majority of poor people and child marriage are largely seen in rural areas therefore the provision of voidability of child marriage isn't very fruitful for the girl child. As that girl child who doesn't have much access to education and lacks finance, after attaining majority doesn't have adequate means and support from the family to move the court for nullity of marriage. Also, the probable reason why the legislature made child marriage voidable and not void would be that child marriage once solemnized and consummated makes it very difficult for girls to deny and step out of those marriages. Therefore, it is in keeping with the social reality the legislature has not made child marriage void. Meanwhile, the legislature has made a progressive step by changing the rape law. Previously in section 375 of IPC¹⁵ sexual intercourse with the wife above the age of fifteen years was not constituted as rape within the meaning of the said section. However, the new legislation BNS which replaces the IPC increased the age limit to 18 years. The legislature through Section 375(exception2) of IPC was silently approving child marriage but the change made in rape law by enacting a new code would surely be considered as a progressive step and made in consonance with the PCM, Act 2006.

¹⁴ 2012 (193) DLT 61

¹⁵ Indian Penal Code, 1860