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# ISSUES ON LAWS RELATING TO CHILD MARRIAGE IN INDIA

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## ABSTRACT

In simple terms ,Marriage between minors below the age of 18 for girls and below age of 21 for boys is Child marriage ,the contracting parties can either both be a minor or one minor and another adult . Recently due to outbreak of COVID the child marriage has drastically increased. As the tradition and custom forces young children on the trap of child marriage, which is continuing till date , however it cause exploitation of childhood and leads mental stress and various other problems , the longest constitution of India doesn't able to give solution for this problem where the basic human rights and fundamental rights of child are affected in the name of child marriage .However the current law states child marriage is voidable on the option of contracting parties on the other hand criminalise and punish those , as similarly by the way of promoting gives custody and maintenance to the children who became victim to child marriage ,legal validity provide an assurance to the parents and guardians that the legal rights of the married minors are secured ,that on other hand defeats the legislative intention to curb the social evil of Child Marriage, this does not make sense untill finalising the validity of child marriages. Karnataka government's move in 2017 whereby it passed the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016, declaring child marriage as void ab initio is appreciable but need execution on non registered case and same must to applied all over India to curb child marriage . The harmonisation of Prohibition of child marriage act , POCSO , IPC and personal laws are needed to curb the issue but ultimately the view on uniform civil code is only discussed by the judiciary it doesn't came into play , if it passed it's solve the biggest social stigma on child marriage by overriding the personal laws.

Key words : Tradition , exploitation, voidable , void ab initio , harmonisation.

## Who is a child ?

- The one major problem is still in lacuna that who is child since various acts prescribe differently for example The definition of “child” as per Section 2(d) of POCSO act includes any person below the age of 18.
- Whereas The Prohibition of Child Marriage Act, 2006 defines a ‘child’ as one who has not completed the age of 21 in case of males and the age of 18 in case of females. ( Recent bill Prohibition of child marriage bill 2021 is pending before standing committee suggest equality of age i.e 21 years irrespective of gender ).
- A person is deemed to have the majority on completion of 18 years under the Indian Majority Act, 1875.
- A child is a person below 18 years of age under the Juvenile Justice (Care and Protection of Children) Act, 2000.
- As immoral traffic (prevention ) act , 1956 , section 2 (aa) [“child” means a person who has not completed the age of sixteen years;] ,
- The CHILD LABOUR (PROHIBITION AND REGULATION) ACT, 1986 defines child as person who has not completed his fourteenth year of age.
- In general sense it is fixed as 18 years , since the voting age is 18 , where as recent bill of 2021to amend prohibition of child marriage act prescribe 21 years for marriage which may creates several problem but a much needed step to curb child marriage .

## Child marriage and Prohibition of child marriage act

- The prohibition of child marriage act 2006 doesn't explicitly curb the child marriage the notable loopholes in this act is **Section 3(1)** read as Every child marriage, whether solemnised before or after the commencement of this Act, shall be **voidable** at the option of the contracting party who was a child at the time of the marriage, where the act specifically focused to curb childmarriage states child marriage is voidable and not void , on the other hand **Section 9 of the PCM Act, 2006** talks about punishment for an adult male marrying a child, “Whoever, being a male adult above eighteen years of age, contracts a child marriage shall be punishable with rigorous imprisonment which

may extend to two years or with fine which may extend to one lakh rupees or with both.” This is not the solution to end child marriage moreover the act under section 4 and 5 prescribes custody and maintenance of child who became victim to child marriage ,Rather than making such evil practice as void just criminalising the Child marriage which is noticed and highlighted by filing petition or registration of case regarding it won't be a proper solution for this problem and many child marriage are still not being noticed it's ultimately violation of children right to life under **Article 21** of constitution . **Section 12. Marriage of a minor child to be void in certain circumstances.**—Where a child, being a minor— (a) is taken or enticed out of the keeping of the lawful guardian; or(b) by force compelled, or by any deceitful means induced to go from any place; or(c) is sold for the purpose of marriage; and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes, such marriage shall be null and void”. the And **section 3 (3)** says The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority. That is child one wish to nullify the marriage can file petition before court before attaining age of 20 (i.e) two years of attaining majority . ( The new prohibition of child marriage bill 2021 enlarge the time period to 5 years ) .

- A survey carried out by UNICEF in 2018 states that 7% of girl children marry by the age of 15 and 27% marry before the age of 18. The survey confirms the prevalence of child marriages in India, As per the NCRB's annual Crime in India report, a total of 782 cases were booked under the Prohibition of Child Marriage Act, 2006 in the year 2020. This is about 50% more than the number of cases registered in 2019. This shows clearly that act is not effective to end the child marriage. <sup>1</sup>

### **Constitution and international perspective.**

- As Article 15(3) which gives powers to the legislature to create special provisions for women and children . Based on that various schemes and acts are passed for women and children, however the major lacuna in this no initiative regarding marital rape and child marriage .

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<sup>1</sup> <https://www.unicef.org/india/media/1176/file/Ending-Child-Marriage.pdf>

- Under the **doctrine of parens patriae** the State is duty-bound to protect the interest and look after the well-being of children, particularly minor girls, who are most vulnerable,”
- As the child basic fundamental right includes right to life and personal Liberty guaranteed under Article 21 of the Constitution is being affected due to child marriage , the child may lost their childhood due to the social stigma and custom of child marriage which is still being voidable under law . The child right to education enshrined in Article 21 A is also violated due to young marriage of child before completion of studies .
- Article 16(2) of the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) 1979, which India has signed and ratified, states that “the betrothal and marriage of a child shall have no legal effect...”. India has also ratified the UN Convention on the Rights of the Child (UNCRC) 1989, which puts an obligation on the states to protect the rights of the child. These rights include, but are not limited to, right to expression, right to freedom, right to health, right to education and right to protection from sexual exploitation, mental and physical violence, abuse, injury, etc. These are the very rights which are violated in a child marriage.

### **Aisha Kumari v. State of N.C.T. of Delhi & Ors.<sup>2</sup>**

CORAM: Chief Justice DN Patel and Justice Jyoti Singh

Aisha Kumari, petitioner, completed her B.Ed degree in 2018 and took the entrance examination for admission into the M.Ed . she was forcibly married to her aunt’s son during her 10 th standard by her and his parents. she had “no option to go against her parents and community’s wishes, and despite her request, she was compelled to give her consent for the child marriage ceremony.”In this case By citing the Karnataka government’s move in 2017 whereby it passed the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016, declaring child marriage as void ab initio, also relied on the Supreme Court’s judgment in the case of Independent Thought v. UOI 2017 10 SCC 800 to press the point that state of Delhi also needs to follow the suit.She also stated that the Delhi government’s failure to declare child marriages as void ab initio was violative of the fundamental and human right to live with

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<sup>2</sup> W.P.(C) 10945/2020 & CM APPL. 34285/2020,  
<https://indiankanoon.org/doc/49689261/>

dignity. Also by stating the **doctrine of parens patriae** the State is duty-bound to protect the interest and look after the well-being of children, particularly minor girls, who are most vulnerable,” The Delhi High Court asked for Central Government’s response with respect to declare all child marriages as void-ab-initio. On March 21, a Division Bench of Acting Chief Justice Vipin Sanghi and Justice Navin Chawla heard a Civil Writ Petition (Aisha Kumari V/s. State of NCT of Delhi & Ors.), and after the petitioner filed a Civil Misc. Application in an already pending Writ Petition before the High Court, the court issued notices to the Ministry of Law and Justice and the National Commission for Women asking them for their response on the issue raised by this Petition.

### **Child marriage and POCSO**

- The Preamble to the POCSO Act also recognises that it is imperative that the law should operate in a manner that the best interest and wellbeing of the child focused on paramount importance at every stage, to ensure the healthy, physical, emotional, intellectual and social development.
- **Section 5 and 6 of the POSCO Act**, where it is stated that if the husband of a girl child commits penetrative sexual assault on his wife, he is liable for aggravated penetrative sexual assault as has been provided under Section 5(n) of the POSCO Act. It is punishable under **Section 6** by rigorous imprisonment of not less than ten years which may even extend to imprisonment for life and fine. Whereas **Section 9** of prohibition of child marriage act prescribe certain punishment for child marriage when both contradict ultimately the POCSO stands by using its overriding power under Section 42A of POCSO act .
- **State of Karnataka vs Shankar Urf Shankarappa**<sup>3</sup> a division bench of Honourable Justice H.T. Narendra Prasad and Justice Rajendra Badamikar stated that “section 42A (POCSO Act) makes it clear that act is not in derogation of any other law and if there is any inconsistency with any other law for the time being in force, the provisions of POCSO Act.
- Same was held in **Independent Thought v. Union of India & Anr.**, was decided in

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<sup>3</sup> (CRL.A.NO.100242 OF 2018), <https://indiankanoon.org/doc/197345883/?type=print>

**October 2017)** <sup>4</sup>, any law inconsistencies with POCSO the POCSO Prevails since it has an overriding effect .As priorly discussed in the above cited case any inconsistencies between laws the POCSO will prevail even when conflict with IPC .where as the POCSO Prescribe punishment for those sexual harassment a raised out of marriage which is considered as the “Penetrative sexual assault” and “aggravated penetrative sexual assault” have been defined in Section 3 and Section 5 of the POCSO Act. Provisions of Sections 3 and 5 are by and large similar to Section 375 and Section 376 IPC. Section 3 of the POCSO Act is identical to the opening portion of Section 375 IPC whereas Section 5 POCSO Act is similar to Section 376(2) IPC.

- Since PCMA states the child marriage is voidable as per section 3(1) and section 9 prescribes it’s punishment ,however POCSO deals with sexual assault committed out of the child marriage . Similarly the POCSO Prevails when conflict between Prohibition of child marriage act and POCSO Araise this will be solved by judiciary prospectively

### **Child marriage and personal laws**

Section 5(iii) of Hindu marriage act establishes a requirement for the solemnization of marriage. The requirement being the completion of 21 years of age of the bridegroom, and the completion of 18 years of age of the bride at the time of marriage. Hence Section 18(a) of the Hindu Marriage Act, 1955 prescribes the punishment for not following the minimum age criteria stated under Section 5(iii) respectively. It gives the punishment of rigorous imprisonment of two years and a fine extending to rupees one lakh, or both. Section 11 Void marriage ,Any marriage solemnised after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5. When the act criminalise the child marriage but lacked to prevent the life of small children who was abused by the loophole (i.e) the child marriage is voidable upon option of parties . Whereas Muslim practice differs from the prescribed age given in the general laws The two requirements under the capacity to marriage in Muslim personal law are sound mind and majority. However, a Muslim attains majority (puberty) at the age of 15. The difference of opinion on personal laws there is no uniformity to declare marriage as void .

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<sup>4</sup> WRIT PETITION (CIVIL) NO. 382 OF 2013 <https://indiankanoon.org/doc/87705010/>

## Case laws

The petitioner contention in the case of **Manish Kumar vs. State of UP**<sup>5</sup>

In this Manish Kumar is a youth, aged about 16 years and a half. He has married Jyoti, as he says, of his freewill. Jyoti is a major and an adult in the cognizance of law, just above the age of 18 years. Haushila Devi is Manish Kumar's mother. She appears to have thought that Jyoti, her mother Pramila Devi and her brothers, Arjun and Bheem have enticed away her minor son and forced him into a marriage of sorts, which is illegal for want of the minor's competence under the law. She has gone on to say that Manish Kumar, her minor son, is illegally detained by Pramila Devi, Arjun, Bheem and Jyoti, arrayed as respondent nos. 5, 6, 7 and 8. In keeping with her thought and word, Haushila Devi has effectively instituted the present Habeas Corpus Writ Petition, arraying Manish Kumar as the first petitioner and herself as the second, asking this Court to order Manish Kumar, her minor son, to be produced on a Rule Nisi before this Court and upon production, set at liberty in the manner that Manish Kumar be entrusted to her care and custody.

- A plain reading of Sections 5, 11 and 12 of the HMA do not indicate the consequences that would attach to a marriage solemnized in breach of Section 5 (iii). that the legislature has not provided for any consequence about a marriage solemnized in breach of Section 5 (iii) regarding its validity; the marriage would neither be void or voidable. It would be valid punishment for the party, who is a major. It says that if both are minors, their guardians, with whose consent the marriage has been solemnized, would be liable for the offense. Nevertheless, whatever be the penal consequences of a marriage solemnized in breach of Section 5 (iii) of the HMA under Section 18, the scheme of the Act considered wholesomely, cannot lead one to the conclusion that a breach of the clause under reference would render the marriage either void or voidable; the marriage would be valid. However, that in order to render a marriage void under Section 12 of the PCMA, the conditions stipulated under clauses (a), (b) and (c) of Section 12 would have to be strictly established by the person who impugns the marriage; else the marriage would be voidable at the option of the party, who was a child at the time of marriage. However the judgement ordered the child under the custody of home until age of majority .

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<sup>5</sup> WRIT PETITION No. - 451 of 2020 <https://indiankanoon.org/doc/42941052/>

This shows that the personal laws and PCMA only prescribe the punishment for the offense not in position to declare the marriage is void or valid, then why so the punishment is needed. This marriage should be held void as there is gross violation of rights of the children and mental health.

**Independent Thought v. Union of India & Anr., was decided in October 2017**,<sup>6</sup> The court discussion related to the concern of child marriage.

- In the decision, the Court affirmed that child marriage is an indisputable “reprehensible practice, an abhorrent practice; that violates the human rights of a child.” The decision highlights the serious risks faced by girls when they are denied their reproductive autonomy, providing the clearest recognition to date of the links between child marriage, reproductive health harms, and violations of the human rights and fundamental rights of girls. fundamental right to a life of dignity, as child marriages strip away “the self esteem and confidence of a girl child and subjects her, in a sense, to sexual abuse. Under no circumstances can it be said that such a girl lives a life of dignity.”
- The Court emphasized that girls “cannot be treated as a commodity having no say over her body or... no right to deny sexual intercourse. The Court stated that allowing a husband “full control over [a girl’s] body” can be understood as having “effectively destroyed” a girl’s constitutionally protected rights to bodily integrity and “freedom of reproductive choice.”
- This was the first decision rendered by the Supreme Court on the substance of the Prohibition of Child Marriage Act (PCMA). In both opinions, the justices emphasized the need for greater efforts by the government to implement the PCMA and end child marriage. Justice Lokur stated, **“Welfare schemes and catchy slogans are excellent for awareness campaigns, but they must be backed up by focused implementation programmes, other positive and remedial action, so that the pendulum swings in favor of the girl child who can then look forward to a better future.”**
- Justice Gupta also spoke to the ambiguity about the primacy of the PCMA, and stated that, in my opinion, the PCMA is a secular act applicable to all. It being a special act

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<sup>6</sup> WRIT PETITION (CIVIL) NO. 382 OF 2013 <https://indiankanoon.org/doc/87705010/>



dealing with children, the provisions of this act will prevail over the provisions of both the Hindu Marriage Act (HMA) and the Muslim Marriages and Divorce Act, in so far as children are concerned. The Court further clarified that the PCMA also has primacy over the IPC.

- The opinions also emphasized that married girls should be considered children in need of care and protection under the Juvenile Justice Act (JJA). Implementation of this decision is critical, especially given the greater barriers in access to justice faced by married girls. The judgment made significant pronouncements, not only on the issue of marital rape within child marriages, but also more broadly on issues of gender equality and the harms of child marriage more generally.

### **Lajja Devi v. State (2012)<sup>7</sup>**

- The issue before the Delhi High Court was whether the marriage of Charan and Meera, provided that Meera was a minor at the time of the marriage, would be void under the Hindu Marriage Act, 1955. The Court analysed the provisions of the Prohibition of Child Marriage Act and held that the Act would override the personal laws, and the child marriage contracted by a minor girl, shall be voidable. The Court also held that since the provisions of the Prohibition of Child Marriage Act, 2006, provide that a child marriage shall be voidable, it cannot be held void in any case.
- The case also discussed the Legislative endorsement and acceptance which confers validity to minor's marriage in other statutes definitely destroys the very purpose and object of the PCM Act-to restrain and to prevent the solemnization of Child Marriage.
- **These provisions containing legal validity provide an assurance to the parents and guardians that the legal rights of the married minors are secured. The acceptance and acknowledgement of such legal rights itself and providing a validity of Child Marriage defeats the legislative intention to curb the social evil of Child Marriage.**
- Thus, even after the passing of the new Act i.e. the Prohibition of Child Marriage Act 2006, certain loopholes still remain, the legislations are weak as they do not actually

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<sup>7</sup> 2013 CrLJ 3458 <https://indiankanoon.org/doc/41067986/>

prohibit child marriage. It can be said that though the practice of child marriage has been discouraged by the legislations but it has not been completely banned.

- As held above, PCM Act, 2006 does not render such a marriage as void but only declares it as voidable, though it leads to an anomalous situation where on the one hand child marriage is treated as offence which is punishable under law and on the other hand, it still treats this marriage as valid, i.e., voidable till it is declared as void. We would also hasten to add that there is no challenge to the validity of the provisions and therefore, declaration by the legislature of such a marriage as voidable even when it is treated as violation of human rights and also punishable as criminal offence as proper or not, cannot be gone into in these proceedings.
- The remedy lies with the legislature which should take adequate steps by not only incorporating changes under the PCM Act, 2006 but also corresponding amendments in various other laws noted above. In this behalf, we would like to point out that the Law Commission has made certain recommendations to improve the laws related to child marriage by concluding that the marriage contracted with a female of less than 18 years or a male of less than 21 years would not be a void marriage but voidable one, which would become valid if no steps are taken by such “child” within the meaning of Section 2(a) of the PCM Act, 2002 under Section 3 of the said Act seeking declaration of this marriage as void.”

In order to overcome this situation, the legislature has introduced the Prohibition of Child Marriage (Amendment) Bill, 2021. The Bill seeks to amend the minimum age of marriage of a female child and bring it at par with that of a male child to 21 years. In addition to this, the Bill also seeks to increase the limitation period, The present limitation period under Section 3(3) of the Act is two years after attaining the legal age for marriage, i.e. 21 years for males and 18 years for females. The Bill proposes this period be increased to five years.

## **Conclusion**

The move taken by the Karnataka is appreciable that Karnataka government’s move in 2017 whereby it passed the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016, declaring child marriage as void ab initio, even the contract entered by the minor is void ab initio but the marriage is only voidable make no sense due to custom and usage, however the Prohibition of child marriageable amendment bill, 2021 guarantees PCMA Override power

against personal laws and custom and usage but even though the problem assurance to the parents and guardians that the legal rights of the married minors are secured. The acceptance and acknowledgement of such legal rights itself an error on its part that encourages child marriage which should be held void ab initio and the same practice should be abolished and the enlargement of punishment for offenders is needed .