

Child Marriages and the Law

Contemporary Concerns

PALLAVI GUPTA

Child marriages are widely prevalent in India despite the promulgation of various laws. This paper examines the policy debates and legal framework on child marriage, and sets out to help identify the gaps and problems therein. It tries to understand the historical and sociolegal context within which the debates on child marriage are located and the various associated aspects like age of discretion, guardianship and elopement that play out in jurisprudence. It attempts to capture how these debates have furthered the movement against the practice of child marriage.

Introduction

The National Family Health Survey (NFHS)-III estimates that 47% of women in India, aged 20-24, were married before the age of 18. This figure stood at 53% in rural areas and 30% in urban areas. On the whole, this is a decline from the status registered in NFHS-I; but our population, especially between 20 and 24, has increased since NFHS-I, thus offsetting any fall that we see in percentage terms. According to the District Level Household Survey 2007-08, there are eight states in India where more than 50% of the women between 20 and 24 years have been married before the legal age, during the last decade or so alone. According to the National Population Policy, "over 50% of girls marry below the age of 18, resulting in a typical reproductive pattern of 'too early, too frequent, too many', resulting in a high IMR" (National Commission on Population 2000).

India has ratified various international conventions and treaties that obligate amendments in the legal framework in order to guarantee the rights of children and prevent child marriages. The Universal Declaration of Human Rights, 1948, states, "marriage shall be entered into only with the free and full consent of the intending spouses".¹ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), ratified by India in 1993, states:

The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.²

The Convention on the Rights of the Child (CRC)³ defines a child as a person below 18 years and identifies the rights of children. A woman's right to free and informed choice in the matter of a marital relationship is a fundamental human right which is secured by the provisions of a number of international human rights instruments, viz, Article 23 of the International Covenant on Civil and Political Rights (ICCPR),⁴ Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵ and Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).⁶ These international covenants and treaties enumerate various human rights standards for the protection of children, choice of relationship and the age at marriage, and inform the laws on child marriage in India.

However, as data shows, child marriages are widely prevalent in our country despite the promulgation of various laws, largely due to well-entrenched social dogma. There is tremendous hostility among different sections of society towards any opposition to

The web version of this article corrects a few errors that appeared in the print edition.

I would like to thank Samita Sen and Kalpana Kannabiran for their critical inputs. The research for this article has been supported by Asmita Resource Centre for Women and Council for Social Development, Hyderabad, as part of a collaborative research-cum-advocacy programme on "Combating Child Marriage, Eliminating Discrimination against the Girl Child". Financial support for this project was provided by The Ford Foundation, Delhi, and the Department of Planning, Government of Andhra Pradesh.

Pallavi Gupta (Pallavigupta28@gmail.com) is a coordinator at the Asmita Resource Centre for Women.

this practice, and unwillingness to address this issue. A case in point is that of Bhanwari Devi from Bhatari village in Rajasthan. She was working with the Women's Development Programme⁷ trying to combat the practice of child marriage and in the process attracted the ire of the upper castes in her village who gang-raped her as "punishment" for opposing a long-standing custom. Furthermore, the state government refused to take any action against the perpetrators despite various pleas and protests by women's groups. Her case embodies the severe challenges facing those in India who work for the elimination child marriage.

This paper examines the policy debates and legal framework dealing with child marriage, and analyses the gaps therein. It tries to understand the historical and sociolegal context within which the debates on child marriage are located, and the various associated aspects like age of discretion, guardianship and elopement that play out in jurisprudence. By examining the legal and rights implications, it tries to capture how these debates have furthered the movement against the practice of child marriage.

Policy Debate on Child Marriage

The report "Towards Equality" with regard to child marriage states:

We recommend legislation prohibiting courts from granting any relief in respect of a marriage solemnised in violation of the age requirements prescribed by law unless both the parties have completed the age of 18 years (GOI 1974: 114).

The Government of India introduced several policy initiatives to address the problem of early marriages. The National Population Policy 2000 promotes delayed marriage for girls and the National Policy for the Empowerment of Women, 2001, recognises the critical need of men and women to suitably address the issues of early marriage and aims to eliminate child marriage by 2010. The National Youth Policy 2003 calls for sensitisation among adolescents with regard to the correct age for marriage.

The Law Commission of India reviewed the rape provisions in 2000 (Law Commission of India 2000) and the Prohibition of Child Marriage Act, 2006, and other allied laws in 2008 (Law Commission of India 2008). One of the recommendations was that the term sexual assault should be used in place of rape and should include all forms of penetration, both human and object. The 2008 report recommended that "child marriage below 18 for both boys and girls should be prohibited and that marriages below the age of 16 be made void while those between 16 to 18 be made voidable" (ibid: 7).

In 2004, in order to ensure stringent laws dealing with the issue of child marriage, the Prevention of Child Marriage Bill was introduced in the Rajya Sabha and was referred to the Parliamentary Standing Committee to examine the provisions of the bill. The report of the Parliamentary Standing Committee (2005) took cognisance of the annual reports of the National Commission for Women (NCW), the National Human Rights Commission (NHRC) and the violent attack on an Integrated Child Development Services (ICDS) supervisor from Madhya Pradesh.⁸ The NCW and NHRC in their draft bill⁹ recommended: (i) the punishment provided under the Act should be made more stringent; (ii) marriages performed in contravention

of the Act should be made void; and (iii) the offences under the Act should be made cognisable. Although this bill was not passed at that time, it did become the basis for the Prohibition of Child Marriage Act, which was passed much later in 2006.¹⁰

Rajya Sabha debates on the issue reveal that there has been inadequate dissemination and implementation of the Prohibition of Child Marriage Act (hereinafter referred to as "Child Marriage Act, 2006"), among Members of Parliament (MPs). On 16 August 2010, an MP posed a starred question to the minister of women and child development (MWCD) regarding strict implementation of the Child Restraint Act, 1929,¹¹ and in May 2007 another question regarding effective implementation of the Child Marriage Restraint Act (CMRA), 1976, was raised,¹² both MPs unaware that a new legislation has been in force since 2007. A few, however, have raised significant questions. Gyan Prakash Pilonia, during the Rajya Sabha, asked the MWCD whether the Child Marriage Act, 2006, had been successful in achieving its aim and if not the action proposed to be taken. Krishna Tirath, the MWCD, stated that the success of the Child Marriage Act, 2006, effective from November 2007, shall become known after the publication of the 2011 Census results. She also stressed that awareness generation, dissemination and implementation of the Child Marriage Act, 2006, lay with the states and the government had written to them to appoint prohibition officers under the Act, frame rules, and to take all possible steps to prevent child marriages. The MWCD also pointed out that child marriage is a social phenomenon, which cannot be tackled by legislative interventions alone. What is required is a change in mindset and advocacy, with a focus on the evil effects of this practice.

Legal Framework on Child Marriage

In the pre-Independence period, the debate on the age of consent was closely related to the campaign for legislation on child marriages. This continued into the 20th century, with the CMRA in 1929 also known as the Sarda Act.¹³ The aim of the Act was to restrain solemnisation of child marriages. The Act raised the minimum age of marriage for girls to 14 years and for boys to 18 years. The Act was amended in 1949, raising the minimum age of marriage for girls to 15 years; and again, in 1978, to raise the minimum age for girls to 18, and that of boys to 21 years. The CMRA was a result of sustained pressure by social reform groups and individuals. However, the objectives did not cross the boundaries of sexual consideration. They merely focused on the appropriate age for a husband to have sexual relations with his wife. There was no reference to the negative effects on the development of a girl child or her free consent (Sagade 2005: 37).

The Child Marriage Act, 2006, replaced the CMRA. The purpose of the Child Marriage Act, 2006, is not simply to restrain but prohibit child marriages. It lays down the minimum age for marriage as 21 for males and 18 for females. The anomaly of two different ages at marriage for women and men was raised before the Parliamentary Standing Committee, while some members opposed this; the government commented that "for the purpose of marriage, two different ages have been accepted socially as well as culturally in the country".

Section 3 of the Child Marriage Act, 2006, provides that a child marriage will be rendered voidable only if the children or their guardians file legal proceedings. It is unlikely that any such case will be filed given the societal norms that surround it. Under Section 3(3), a petition for annulment of the marriage by the contracting party who was a child at the time of marriage may be filed any time, before (the child filing the petition completes) two years of attaining majority, which allows a male of 23 years and female of 20 years to file a petition. But it is unlikely that these child brides or their families will choose to nullify their marriages, as by the time they decide to go to court their marriages would have been consummated.

The Act, under Section 12, lays down that child marriages will be void only in three cases – one, when the girl is “enticed out of the keeping of the lawful guardian”; second, in cases of compulsion or deceitful means; and, third, for the purpose of trafficking. These correspond to the provisions under various matrimonial laws where the lack of valid consent is grounds for annulment of marriage. This section validates other forms of customary and traditional child marriages which remain voidable and valid till invalidated by the contracting party.

Section 14 of the Act states that child marriages performed in contravention of injunction orders issued, under Section 13, whether interim or final, will be void. These injunctions can be issued by a magistrate based on a complaint or even suo motu cognisance of a report regarding child marriage being arranged. It obligates the district magistrate to prevent solemnisation of mass marriages, while acting as a child marriage prohibition officer. The Act legitimises children born out of child marriages and ensures protection in the form of maintenance and custody, both for the minor girl and her child.

Registration of marriages¹⁴ is not addressed in the Child Marriage Act, 2006, but the Andhra Pradesh Compulsory Registration of Marriages Act, 2002, is strongly taken up in the state rules. The child marriage prohibition officer has to ensure “scrupulous adherence” to the Andhra Pradesh Compulsory Registration of Marriages Act, 2002, as per the Andhra Pradesh Prohibition of Child Marriage Rules, 2012. Moreover, the Law Commission also recommends that “registration of marriage be made compulsory” (Law Commission of India 2008: 7).

Criminal and Marriage Legislations

For a critical understanding of child marriages in India, a thorough examination of the gaps and commonalities in criminal and marriage legislations is essential. Therefore, a reading of the Child Marriage Act, 2006, needs to take into account the implications of the various personal laws and the secular law on marriages.

While the Hindu Marriage Act does stipulate conditions for a valid marriage under Section 5(iii) of the Hindu Marriage Act, 1955¹⁵ (hereafter referred to as “HMA”), the male should have completed 21 years of age and the female 18 years to fulfil the conditions of a Hindu marriage. However, marriage in contravention of the above-mentioned condition is not void and Section 18(a) of the HMA provided simple imprisonment up to 15 days or with fine which may extend to Rs 1,000 or with both. The Parliamentary Standing Committee report highlighted the

mismatch: two different punishments under the two different laws were being offered for the same offence. Therefore, Section 18(a) of the HMA has been amended, keeping in mind the provisions under the Child Marriage Act, 2006, enhancing the punishment to rigorous imprisonment of two years or with fine which may extend to Rs 1,00,000, or with both.

The provisions of the Child Marriage Act, 2006, are further diluted due to personal laws on marriage. For instance, the Muslim law on marriages lays down the age of puberty as the age of marriage. However, as per Section 2(vii) of the Dissolution of Muslim Marriages Act, a Muslim woman can dissolve her marriage if it was performed before she attained 15 years of age, but she has to repudiate her marriage before attaining the age of 18 years, provided the marriage has not been consummated. In both Muslim and Christian marriage laws, consent of the guardian is essential for a minor’s marriage. Section 3 of the Christian Marriage Act, 1872, defines a minor as a person who has not completed 21 years. As per Section 19 of the Act, consent of father, or guardian, or mother is mandatory for marriage of minors, therefore the Act does not invalidate minor marriages. On the other hand, the Special Marriages Act, 1954, is the only Act where child marriages are void; Section 4(c) states that the male must have completed 21 years of age and the female 18 years for a valid marriage.

Now let us look at the provisions of the Indian Penal Code (IPC) and the resulting implications on child marriages. The criminal law in India aims to provide certain protection to women. However, a reading of the provisions reveals a lack of explicit disapproval of child marriages. Section 375 states,

A man is said to commit ‘rape’ who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:- Firstly- Against her will. Secondly- Without her consent ... Sixthly- With or without her consent, when she is under sixteen years of age.

Whereas the exception to Section 375 of the IPC states that “sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape”.

Section 376 (1) states,

Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term... which may be for life or for a term which may extend to ten years and shall also be liable to fine *unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both...*

Sections 375 and 376 read together reveal that the IPC has set out different ages for child rape, and the rape of married and unmarried women. One can infer that child rape falls under Sections 375 and 376 of the IPC. A child is defined as a person below 18 years of age and the reading of Section 375 clearly illustrates that sexual intercourse with a girl below 16 years of age “with or without her consent” is child rape. However, the exception to the rape provision states that engaging in sexual intercourse with a wife, if she is over 15 years of age, does not amount to rape. The exception does not talk about any aspect of “consent” or “will” of the girl. This exception applies to cases of child rape as well, although the same has not been defined explicitly under the IPC.

In addition, under Section 376, the rape of a child wife between 12 and 15 years of age is punishable with imprisonment, a fine, or both. Imprisonment is limited to a maximum of two years, even though the minimum punishment for the rape of a child under the age of 12 years is 10 years' imprisonment. While on the one hand our Indian penal laws do not acknowledge marital rape, on the other they provide implicit approval to child marriage. This is in spite of a range of international conventions and treaties ratified by India. In 2005, the Parliamentary Standing Committee highlighted this anomaly and in its report (Parliamentary Standing Committee 2005) and recommended that the government should consider amending/deleting the exception to Section 375 of the IPC to bring it in conformity with the provision of the Prevention of Child Marriage Bill and the international convention. The second instance when the deletion of the exception to Section 375 of the IPC was recommended, members of the 172nd Law Commission stated that it would amount to "excessive interference with the marital relationship" (Law Commission of India 2000: 12).

Identification of Gaps and Problems

The issue of child marriage is addressed in jurisprudence in three ways. First, in the context of "age of discretion" – in relation to habeas corpus petitions in cases of "elopement or love marriages", where approval from parental authority is lacking. Second, in relation to "enticement of girls from lawful guardianship", which is grounds for declaring child marriages void, even with the minor's approval. The third is in relation to Muslim personal laws that hold the "age of puberty" as the age of marriage, which has been contested in a recent case on child marriage. However, what is surprising is the absence of cases of forced child marriages of girls with older men with parental approval. This is because "the patriarchal bastions are too strong and well fortified for a modern feminist discourse to enter and change social mores through legal dictates" (Agnes 2012).

The figures from the National Crime Records Bureau (NCRB), 2005, indicate that out of 122 cases of child marriages reported under the CMRA 2005, about 45 resulted in a conviction. The report of the Law Commission (2008) highlights that from the earliest cases, high courts and the Supreme Court have upheld the validity of child marriages. These include judgments like *Durga Bai vs Kedarmal Sharma*,¹⁶ *Shankerappa vs Sushila Bai*,¹⁷ *Rabindra Prasad vs Sita Dass*¹⁸ among others. A few prominent case laws on lawful guardianship, elopement and personal laws have been examined in the following sections.

*Amrinder Kaur and Another vs State of Punjab and Haryana and Others*¹⁹ was a case of a runaway couple seeking protection under Article 21 of the Constitution as they were being threatened by the girl's family. The minor girl of 16 years got married as per Sikh rites to a Jat man of 21 years; her counsel argued that since she has attained the age of discretion, her marriage is not void. The couple married without approval from the girl's family and the girl's father lodged a complaint that a man in his neighbourhood, along with his parents, had kidnapped his daughter with the intention to marry her.

The Court, referring to prior judgments²⁰ on the issue, held that none of the referred judgments took into consideration the provisions of the Child Marriage Act, 2006, which came into force in 2007. Relying on Sections 2(a), (b) and 12(a) of the Child Marriage Act, 2006, the Court held that the marriage is child marriage, as the petitioner is 16 years and two months old, who has been enticed out of the keeping of the lawful guardian and cannot contract the marriage; therefore, her marriage shall be null and void. The Court held that in the garb of providing police protection it cannot declare the void marriage as valid. The Court stated that "the life and liberty of the petitioners is only endangered and threatened by the girl's family so long [as] their marriage legally subsists, but once their marriage is declared to be void, there is no threat to their life and liberty".

Unlike cases under the CMRA, the Court in this case took note of the Child Marriage Act, 2006, and held that underage marriages between 16 and 18 years, even with the consent of the girl, are void and cannot be provided protection.²¹ The other high courts have, however, taken a slightly differently position with regard to "elopement marriages". Such cases of elopement are usually filed under the writ of habeas corpus or under Section 363 of the IPC, which deals with kidnapping of minors. A reading of a few "elopement" or "love marriage" cases reveals that courts have, at least in a few instances, upheld these marriages based on the consent of the minor woman. What also comes out in such cases of "enticement from the lawful keeping of the father" is the issue of guardianship, whether the husband can be guardian of a minor wife.

In *Makemalla Sailoo vs Superintendent of Police and Ors*,²² the Court in deciding on where the 13-year-old Arpitha, who got married under the HMA, should stay referred to the HMA, Hindu Minority and Guardianship Act 1956 (hereinafter referred as HMGA) and stated that they had no option but to allow the girl to go with her husband. The Court, however, opined that the legislatures had not done enough to stop the menace of child marriages, and that this practice "did not ensure the healthy growth of the society".

In *Jitender Kumar Sharma vs State and Another*,²³ both Poonam and Jitender were minors, who eloped and married under the HMA. The Delhi High Court, in deciding the validity of such marriages, stated that "merely on account of contravention of Section 5(iii) of the HMA, Poonam's marriage with Jitender is not void under HMA or the Child Marriage Act, 2006. It is, however, voidable, as now all child marriages are." Similarly, in deciding the custody of Poonam, the courts read together Sections 17, 19, 21 of the Guardians and Wards Act, 1890, and Sections 6 and 13 of the HMGA and took a broad, tolerant view that the welfare of the minor (who is old enough to make an intelligent preference) is paramount. Talking about Poonam's guardianship, the court held that Poonam's natural guardian was now her husband and not her father, and that no one else can take that place until and unless her husband is found to be unfit to take that responsibility. The court upheld the girl's right to life and liberty in allowing her to choose her guardian and categorically stated that she cannot be forced to live in Nari Niketans or with her parents just because she is a minor.

The court highlighted the distinction between child marriages, where children are forced into them, and modern-day marriages, where minors fall in love and marry out of their own free will. As the courts put it:

The sooner the legislature examines these issues and comes out with a comprehensive and realistic solution, the better, or else courts will be flooded with habeas corpus petitions and judges would be left to deal with broken hearts, weeping daughters, devastated parents and petrified young husbands running for their lives chased by serious criminal cases, when their sin is that they fell in love.

The full bench of the Madras High Court in *T Sivakumar vs (1) Inspector of Police, Thiruvallur Town Police Station; (2) Anbu; (3) Samandan*,²⁴ revisited the issue of runaway/elopement marriages and addressed five pivotal questions:

- (1) Whether a marriage contracted by a person with a female of less than 18 years could be said to be a valid marriage and the custody of the said girl can be given to the husband (if he is not in custody)?
- (2) Whether a minor can be said to have reached the age of discretion and thereby walk away from the lawful guardianship of her parents and refuse to go in their custody?
- (3) If yes, can she be kept in the protective custody of the state?
- (4) Whether in view of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the JJ Act), a minor girl, who claims to have solemnised her marriage with another person, would not be a juvenile in conflict with law, and whether in violation of the procedure mandated by the JJ Act, the court dealing with a writ of habeas corpus has the power to entrust the custody of the minor girl to a person who contracted the marriage with the minor girl and thereby committed an offence punishable under Section 18 of the HMA and Section 9 of the Child Marriage Act, 2006?
- (5) Whether the principles of Sections 17 and 19(a) of the Guardians and Wards Act, 1890, could be imported to a case arising out of the alleged marriage of a minor girl, admittedly in contravention of the provisions of the HMA?

Sivakumar, father of minor girl, Sujatha, 17 years old, filed a petition of habeas corpus demanding custody of the child. Sujatha in her affidavit stated that she had fallen in love with Anbu and that she was being forced by her parents to marry her uncle. Referring to earlier high court judgments,²⁵ the division bench held that marriage contracted with a minor girl is voidable until it is annulled by a competent court under Section 3 of the Child Marriage Act, 2006. The court said that the marriage is not valid in a strict sense but it is not invalid either. The male contracting party shall not enjoin all the rights which would otherwise emanate from a valid marriage, but only limited ones.

The court held that the adult male contracting party to a marriage with a female child shall not be the natural guardian of the female child, in keeping with the provisions of the Child Marriage Act, 2006; nor will he be entitled the custody of the female child, even if she expresses her desire to go to his custody. However, as an interested person in the welfare of the minor girl, he can apply to the court to set her at liberty if she is illegally detained by anybody. In habeas corpus proceedings, while granting custody of a minor girl, her welfare and

safety is paramount, notwithstanding the legal right of the person who seeks custody.

Talking about the “age of discretion”, the court held that this is a question of fact which each court has to decide based on the facts and circumstances of the case. Most importantly, the court stated that if the girl expresses her desire not to go with her parents, provided, in the opinion of the court, she has the capacity to determine, the court cannot compel her to go to the custody of her parents and instead may entrust her in the custody of a fit person subject to her volition.

The really significant aspect of this judgment is that while the court did not allow her to cohabit with her adult husband, it also upheld the minor girl's decision to not stay with her parents. Employing the “age of discretion” to decide in the best interest of the child, the court held that in such habeas corpus petitions the decision of the minor would be taken into account.

The third category of cases is in relation to Muslim personal laws that hold the “age of puberty” as the age of marriage. In the recent *Mrs Tahra Begum vs State of Delhi and Ors*²⁶ the Delhi High Court held that a Muslim minor girl could marry in accordance with the principle of the “Option of Puberty” or *khiyar-ul-bulugh*. However, in accordance with this very principle, the minor girl may also choose to repudiate the marriage upon attaining majority. In this case, the minor girl clearly expressed her choice to reside with her husband and the court upheld her agency and choice, over age and minority status. This case has revived the debate about the interplay between the Child Marriage Act, 2006, and the various personal laws (Faizur 2012).²⁷ However, in a recent full bench,²⁸ the decision of the Delhi High Court²⁹ held,

The Child Marriage Act is a secular law which specifically deals with the problem of child marriages. Religion of the contracting party does not matter. Being a “special Act” and being a subsequent legislation will override the provisions of HMA Act or for that matter any personal law. However, this should not be interpreted that we have held that a petition for dissolution of marriage under Section 13(2)(iv) is not maintainable. Both provisions, i.e., Section 13(2) (iv) and Section 3 operate, apply and have their own consequences. These are two concurrent provisions, which can be invoked by the ‘parties’ satisfying the conditions stipulated in the two sections.

Conclusions

What is important in the above-mentioned cases is the legal and rights implications of choices these young women make. Feminists have debated the issues of the age at marriage and the age of consent.³⁰ It is important to note that fixing a mandatory age at marriage would serve as a double-edged weapon because while on the one hand it would prevent pre-pubertal marriages, on the other it would impinge upon the right of minor girls who have attained the age of discretion to choose a partner and marry. As the cases presented in the earlier sections show, there are minor girls who are forced into alliances; at the same time, there are instances where they are hounded with habeas corpus petitions for marrying a person of their choice. What then can be the way out for the girls, while not endorsing the idea of legalising marriages in the age group of 16-18 years? This is the grey area that needs to be addressed by society rather than legislatures alone.

Allowing girls' freedom in relationships and sexual autonomy is important; however, does this mean that marriages should be

legalised at the age of 16 years? This brings us to the following question: what is the age at which girls are capable of exercising choice? Courts have employed the “age of discretion” test in many judgments but the problem emerges when one tries to answer whether the recognition of age of discretion has been common across the board, in all cases? There is a visible elasticity in ascertaining “age of discretion” and judgments differ despite similar facts. In most cases, the age of discretion has been employed when young girls of 16-18 years have exercised their choice in the matter of sexual relationships, and parents have objected to such relationships. Fixing the age for marriage at 18 is not problematic from the standpoint of pre-pubertal marriages; it becomes a concern when one starts conflating age at marriage and age of consent, thereby negating any form of sexual freedom that young girls below that age group can exercise. However, lowering the bar from 18 as the age at marriage would give families free access to perform arranged marriages or forced marriages, thereby increasing child marriages.

Child Marriage Act, 2006

While there is a long history of resistance to pre-pubertal and mass child marriages, one needs to re-examine the Child Marriage Act, 2006, vis-à-vis the criminal law provisions of the IPC. The IPC fails to address the discrepancy in the age of consent at the time of rape and the age of consent for rape within a marriage, which constitutes discrimination against women – especially married women – and has severe implications for child marriages in India. Non-recognition of the rape of a wife, who is 15 years old, by her husband, limits the control women have over their sexuality. This adverse situation is exacerbated by the rather mild punishment of two-year imprisonment that is awarded in the case of rape by a man of his wife who is above 12 years but below 15 years of age. The recent legislation on the Protection of Children from Sexual Offences Act, 2011, aims to protect children from offences of sexual assault, sexual harassment and pornography and provides for the establishment of special courts for trials of sexual offences. This is the first legislation regarding sexual offences committed against children; it protects them from sexual exploitation and abuse by adults. While protecting children from adults, the law also criminalises sexual exploration among children who are 16 to 18 years of age. Children need protection from various forms of violence, exploitation and abuse, as stated in the Act³¹ but the fear of violence should not take away their right to discover their sexuality and to take charge of their bodies. It is within this grey area between age and agency that the debate on child marriage is located.

Another pertinent point is punishment under the Child Marriage Act, 2006, which is a combination of rigorous imprisonments and fines. To whom do these punitive measures apply? Under Sections 10 and 11(1), whoever performs, conducts, directs or abets any child marriage shall be punishable under the Act. Therefore, any family member, institution or association of persons can be held liable for punishment under the Act. While punitive measures are important to highlight the problem of child marriage, how logical are these punishments? The NCRB 2012 records on child marriage reveal low conviction rates. Moreover, girls forced into child marriages

are fearful of approaching the authorities, lest their parents are imprisoned and fined.³² It is important to revisit these questions to understand who is liable for the practice of child marriage rather than focusing on the quantum of punishment itself and whether the punishment under the Act is logical and can help combat the practice of child marriage.

Though our courts have been progressive in some of their judgments, by not penalising the girls bordering majority (between 16 and 18 years) for their consensual underage marriage, our society has been less accepting of such marriages and has victimised such girls. Another disturbing trend seen is the attitude of society towards girls who have experienced early marriages and who are now trying to find their feet again. Recent newspaper reports have highlighted that at least two girls aged 17 years were denied admission due to child marriages (Mohamed 2012) fearing they would set a bad example for other students or discuss familial matters in school.

The high incidence of child marriages in India remains a major concern despite efforts by various child rights and women's rights groups. The National Plan of Action for Children 2005 set out a goal to eliminate child marriage completely by 2010. Though that timeline is long over and the plan has failed to address child marriages, there are several states like Andhra Pradesh that have recently issued the necessary rules and guidelines to implement the provisions of the Child Marriage Act, 2006 (*The Asian Age* 2012) which came into force in November 2007. After a gap of five years, rules have been issued in the state and till date no appointments of child marriage prohibition officers have been made, highlighting the lack of political will and initiative on the issue.

Non-governmental organisations (NGOs) have played a proactive role in working towards the prevention of child marriages through counselling and awareness generation. One such successful instance is the Child Line 1098 service, which has been able to successfully prevent child marriages in the state of Andhra Pradesh. A case in point is Srikakulam district of Andhra Pradesh where 18 cases have been dealt with, with the aid of the helpline.³³

The CEDAW Committee in its concluding observations³⁴ in 2007 recommended that India take up comprehensive, effective and stringent measures aimed at eliminating child marriages and protection of human rights of the girl child. Provisions of the constitution, regarding non-discrimination on the basis of sex, equal protection of the law, equality before the law, and the protection of life and personal liberty safeguard this right and temper the interpretation of the entire range of special and religious laws. However, despite the framework of national and international legal protection, this right has proved to be one of the most complex and difficult to put into practice in the sociocultural context of India (National Alliance for Women 2006).

Inconsistency in the different personal laws regarding the legally permissible age at marriage, the option of puberty in personal laws, and judicial computation of the age of discretion inhibits implementation of the Act, but at the same time have been successful and upheld consensual marriages with choice of partner.

While it is important to implement the provisions of the Child Marriage Act, 2006, it is also important to ensure children's right to life with liberty and non-discrimination; provide spaces where children can explore and understand their sexuality, even while

they are protected from practices like forced child marriages. Moreover, laws alone cannot address the problem of child marriages; there must also be adequate support, information dissemination and capacity enhancement from various quarters.

NOTES

- 1 Article 16 at <http://www.un.org/en/documents/udhr/> (last viewed on 23 July 2012).
- 2 Article 16(2) at <http://www.un.org/womenwatch/daw/cedaw/> (last viewed on 23 July 2012).
- 3 Article 1 defines a child. See <http://www2.ohchr.org/english/law/crc.htm> (last viewed on 23 July 2012).
- 4 <http://www2.ohchr.org/english/law/ccpr.htm> (last viewed on 23 July 2012).
- 5 <http://www2.ohchr.org/english/law/cescr.htm> (last viewed on 23 July 2012).
- 6 <http://www2.ohchr.org/english/law/cerdc.htm> (last viewed on 23 July 2012).
- 7 The Women's Development Programme was sponsored by the government and was started in Rajasthan in 1984, to integrate women in the development process. It envisaged the formation of groups wherein women could take up development issues.
- 8 Shakuntala Verma went to village Bhangarh in Dhar district of Madhya Pradesh on 11 May 2005 after a tip-off that local families there were planning to marry off their young daughters. As instructed by the sub-divisional magistrate, she asked for proof of the girls' ages, but was forced to leave after members of the families threatened her. Later that evening, a person, armed with a sword, came to her house and attacked her. As she tried to protect herself, her one hand was severed and the other cut. In addition, she received serious injuries to the head. She was rushed to a hospital in Indore where she battled for her life. After a 16-hour operation, her severed hand was reattached by rejoining the arteries, bones, veins, and nerves. She had spent 10 days explaining to the locals why child marriage could prove harmful to their children but to no avail.
- 9 The Prevention of Child Marriage Bill, 2004, after being introduced in the Rajya Sabha in December 2004, was subsequently referred to the Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice.
- 10 For Rajya Sabha debates on the Prevention of Child Marriage Bill, 2004, that was eventually amended and passed as the Prohibition of Child Marriage Act, 2006, see [http://rsdebate.nic.in/bitstream/123456789/30112/1/PD_209_14122006_17_p294_p361_22.pdf#search=](http://rsdebate.nic.in/bitstream/123456789/30112/1/PD_209_14122006_17_p294_p361_22.pdf#search=Prohibition%20of%20Child%20Marriage,%202006) "Prohibition of Child Marriage, 2006" (last viewed on 14 July 2012).
- 11 For Rajya Sabha Debate Part 1 (Question and Answer) on implementation of the Child Marriage Restraint Act, 1929, Session No 220, Dated 16 August 2010, see [http://rsdebate.nic.in/bitstream/123456789/405171/2/PQ_220_16082010_S319_p53_p54.pdf#search=](http://rsdebate.nic.in/bitstream/123456789/405171/2/PQ_220_16082010_S319_p53_p54.pdf#search=child%20marriage) "child marriage" (last viewed on 14 July 2012).
- 12 For Rajya Sabha Debate Part 1 (Question and Answer) on women married before legal age, Session No 210, Dated 14 May 2007, see http://rsdebate.nic.in/bitstream/123456789/33418/1/PQ_210_14052007_U4276_p207_p207.pdf (last viewed on 14 July 2012).
- 13 Raj Saheb Harbilas Gour Sarda, a campaigner, demanded legal intervention on child marriages keeping in mind the detrimental effects of low age of consummation of marriages and its detrimental effect on girls.
- 14 In the case of *Seema vs Ashwini Kumar* (2006 (2) SCC 578), the court issued directions regarding issue of notification by various states on compulsory registration of marriages, including amendment of existing state rules or framing new rules to ensure compulsory registration of marriages.
- 15 As per Hindu Marriage Act 1955, the minimum age of marriage was 15 for girls and 18 for boys; this was amended in 1976, increasing the minimum age to 18 for girls and 21 for boys.
- 16 1980 (Vol VI) HLR 166.
- 17 AIR 1984 Kar 112.
- 18 AIR 1986 Pat 128.
- 19 Case No CRM-M 29790 of 2009; Date of decision 27 November 2009.
- 20 *Ravi Kumar vs The State and Another* 2006(1) RCR (Criminal) 41, a single bench judgment of this court in *Ridhwana and Another vs UT Administration and Others* 2008(4) RCR (Criminal) 242, a decision of the Supreme Court in the case of *Lata Singh vs State of UP and Another* (2006) 5 SCC 475 and another judgment of this court in *Pardeep Kumar Singh vs State of Haryana* 2008(3) RCR (Criminal) 376.
- 21 Justice Rakesh Kumar Jain stated that no protection under Section 482 of the CrPC can be granted by this court because in that eventuality police protection has to be granted to a fugitive of law.
- 22 II (2006) DMC 4.
- 23 2010 (171) DLT 543.
- 24 HCP No 907 of 2011.
- 25 *Saraswathi Ammal vs Dhanakoti Ammal* (1924) 47 MLJ 614 (Madras High Court); *Seema Devi @ Simran Kaur vs State of Himachal Pradesh* (1928) 2 Crimes 68 (Himachal Pradesh High Court); *Neetu Singh vs State* (1999) II AD Delhi 37 (Delhi High Court); *Ravikumar vs State*, 124 (2005) DLT 1 (Delhi High Court); *Manish Singh vs State*, AIR 2006 DELHI 37 (Delhi High Court); *Association for Social Justice and Research vs Union of India* (decided on 13 May 2010 by Delhi High Court); *Latori Chamar vs State of Madhya Pradesh* (decided on 10 January 2007 by Madhya Pradesh High Court); *Avinash vs State of Karnataka*, CDJ 2011 KAR HC 373 (Karnataka High Court); and *Jitendar Kumar Sharma vs State* (decided on 11 October 2010 by Delhi High Court).
- 26 *Mrs Tahra Begum vs State of Delhi and Ors*; WP(CRL) 446/2012.
- 27 Various activists have also condemned the judgment. See <http://www.indianexpress.com/news/city-activists-shocked-at-delhi-hc-ruling-that-reduces-marriageable-age-for-muslim-girls-to-15/959695/> (last viewed on 13 June 2012).
- 28 A full bench consisting of acting chief justice A K Sikri and justices Sanjiv Khanna and V K Shali said the legislature must make the law stringent to completely ban child marriage.
- 29 The court was dealing with four writ petitions, namely, WP (Crl) No 338/2008, CrIMC No 1001/2011 & Crl MA No 3737/2011, WP (Crl) No 821/2008 and Crl MANo.8765/2008, WP(Crl) No 566/2010. Judgment pronounced on 27.07.2012.
- 30 Sarda Bill and the Age of Consent Committee under the aegis of M V Joshi examined the provisions for raising the age of consent under Section 375 of the IPC. In its report, it submitted that the age of consent under Section 375 of the IPC should be 15 years. Section 375 of the IPC defines rape as an act of sexual intercourse by a man with a woman against her will and without her consent. If the woman is below the age of consent, that is, 16 years, sexual intercourse – even if with her consent – would amount to rape. However, if a man has sexual intercourse with his wife who is 15 years of age, whether the act is without her consent or against her will, it would not amount to rape.
- 31 The Protection of Children from Sexual Offences Act, 2011, recognises penetrative sexual assault, aggravated sexual assault and sexual harassment as offences.
- 32 Proceedings of the regional meeting on child marriages and the role of civil society; discussion with child rights groups in Srikakulam, Andhra Pradesh, on the challenges in implementing the Child Marriage Act, 2006.
- 33 "Need to Curb Child Marriages Stressed", <http://www.thehindia.info/News/Article.asp?category=5&subCategory=2&ContentId=71524> (last viewed on 15 July 2012).
- 34 "Concluding Comments of the Committee on the Elimination of All Forms of Discrimination against Women: India", CEDAW/C/IND/CO/3.

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