CHAPTER 35

ANALYZING THE GAP BETWEEN PERSONAL AND PENAL LAWS CONCERNING CHILD MARRIAGES.

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9. ABSTRACT

Child marriages have been prevalent in India since time immemorial. These marriages traumatize the children of India physically and emotionally, ultimately, affecting their right to life. The subject matter of marriage is governed by personal laws due to the absence of a uniform civil code. The age of majority for marriage is different in all religions. For Hindus, it is 18 years for a woman and 21years for a man. For Muslims, it is the age of puberty that is generally agreed upon to be 15 years. Then, the penal laws prescribe 18 years of age as the minimum age for giving consent for sexual intercourse. The author of this paper hypothesizes that there is a huge contradiction between personal laws and penal laws concerning child marriages. It shall be endeavoured, through this paper, to explore the validity of such marriages under both personal and secular laws. Also, an analysis of penal laws protecting children like Protection of Children from Sexual Offences Act, 2012 and relevant provisions of Indian Penal Code, 1860 related to children shall be expounded in light of the validity of such marriages. This issue becomes significant to be researched upon after the verdict of the Supreme Court in the case of *Independent Thought v. Union of India,* (2017) 10 SCC 800, which has criminalized sexual intercourse in child marriages. The author of this paper shall be using doctrinal methods of research to study this contemporary issue.

Keywords: Child Marriages, Personal Laws, Penal Laws, Legal age of marriage, Secular Laws, Hindu Marriage Act, 1955, The Dissolution of Muslim Marriage Act, 1939, Protection of Children from Sexual Offences Act, 2012, Indian Penal Code, 1860, Prevention of Child Marriage Act, 2006.

1. RESEARCH PROBLEM

Child marriages deprive children a safe and healthy childhood by causing physical and mental trauma. The nature of child marriages, including its legal validity is endeavoured to be determined through this paper. Also, the child marriages have civil as well as criminal consequences. Any gap between the civil (personal and secular) and criminal law concerning child marriages is sought to be deduced through this paper. Also, if such a gap actually exists, then, through this paper, an effort shall be made to bridge such a gap by providing solutions.

2. Objectives

- To understand the prevalent practice of Child Marriages in India.
- To enunciate socio-legal issues involved in Child Marriages.
- To study and analyse the different laws, both civil (personal and secular) and criminal (penal), that provide for legal age to marry.
- To assess cases when sexual intercourse would be an offence
- To determine the gap and differences that exist amongst these laws concerning the legal age.
- To discuss and draw attention towards the recent judicial pronouncements on this issue.
- To expound upon the relevance to have uniformity in the law concerning child marriage.
- To ascertain the role of judiciary and legislature in providing clarity on this subject area.
- To provide relevant solutions for bridging this legal gap and emphasising on the possibility of harmonious reading of the bare provisions.

3. RESEARCH QUESTIONS

- What are child marriages?
- Who can be a child in a child marriage?
- What is the position of child marriages under personal laws?
- What is the position of child marriages under secular laws?
- Is sexual intercourse in a child marriage an offence?
- Is there any inherent contradiction within the laws of India concerning child marriages.

4. RESEARCH METHODOLOGY

The library method and case study method have been adopted keeping into consideration the aim of study and the research questions. Primarily, the study is theoretical and doctrinal. Relevant data has been collected from the files, documents, reports, judicial decisions, books written on the subject and articles published in newspapers.

5. Marriage as an institution

The term “marriage” implies association, union, or companionship. It is an institution that has two objects. The primary object of marriage is to confer legitimacy upon children born within wedlock whereas the secondary object of marriage is the satisfaction of the primal instinct of sexual intercourse. The second object is secondary since it is possible to achieve it without being married, however, it is impossible to confer legitimacy upon children without being married. Such is the importance of the institution of marriage. A child born out of wedlock faces ignominy from the world. He is called a bastard and the blemish of illegitimacy is cast upon him without any fault on his part. This is why marriage is given a huge amount of sanctity in our society. In the early days of human civilization, when the institution of marriage was not in existence, it was difficult to ascertain the paternity or fatherhood of a child. Since, due to the non-existence of the concept of marriage and consequently due to the absence of the concept of adultery, promiscuous relationships were prevalent. (Paras Diwan, 2013)

There has never been any problem in determining the maternity of a child since it becomes apparent at the birth of the child. However, in such conditions, it was always difficult to ascertain the paternity of the child. Hence, one may deduce that eventually the institution of marriage was created to determine the fatherhood/paternity of the child. Even today, technically, the term legitimate child of a man means a child born to a woman who is married to a man with whom the nexus of legitimacy is sought to be established. Hence, the term legitimacy construes the existence of marriage between the mother of the child and a man who claims to be the father of such child. This position is also apparent from section 112 of the Indian Evidence Act which provides for a presumption of legitimacy. It postulates that where a child is born to a woman during the existence of a marriage or within 280 days after such marriage is dissolved, the husband of such woman or to whom she was married, as the case may be, shall be deemed to be the father of the child and such child to be his legitimate child. (Indian Evidence Act, 1872)

As far as the nature of marriage is concerned, it is to be deduced in the light of the law under which it is performed. If it is the personal law under which it is being performed, nature has to be gathered from the tenants of that particular religion as in how the institution of marriage has been held in such religion. Also, the implication of any codified personal law upon such uncodified personal law is to be taken into account concerning the nature of marriage. Thus, if the age of majority concerning marriage, recognition of child marriage, and civil and criminal consequences of such marriage are required to be evaluated, the position of

such marriages in codified and uncodified personal laws is required to be studied along with the penal provisions concerning such marriages, if any.

5.1 Position of child marriages under Hindu law.

Under the customary Hindu law, there was no specific age for marriage. Child marriage was the prevalent form of marriage among Hindus. As such the parties were married by the parents of the children though it was only after attaining puberty that the bride was meant to leave her parent's home to reside at the matrimonial home. This ceremony of leaving one's parental home after attaining majority is called *muklawa*. But there is no denial of the fact that there were cases when the groom would take away the bride even before she attained puberty. The bride was not only forced to have sexual intercourse before attaining puberty but also, she was forced to do all household chores at such a tender age. Pregnancy at such a young age compromised the reproductive health of such young brides. It took a toll on their mental health as well. The reason why there was no specific age for marriage provided under the uncodified law could be that the Hindu marriage was always a sacramental institution. It was something that every Hindu was meant to perform to obtain complete spiritual benefit. Therefore, in society marriages among Hindus were considered indispensable. Due to this, it was no longer an optional thing as is nowadays. Hence, the parents always considered it to be their duty to perform the marriage of their children at a young age since so much sanctity was attached to it.

5.2 Effect of Codification of Hindu Law

The codification of Hindu laws was done in 1955 and 1956. The parliament passed the Hindu Marriage Act, 1955 regulating marriages among Hindus. The effect of this Act upon the uncodified law is provided under section 4 of the Act. Section 4(a) of the Act specifically provides that the Hindu customary law shall cease to exist or have any effect upon the matter which are being regulated by the Hindu Marriage Act. (Hindu Marriage Act, 1955)

The court in *Chandra Sen v. CWT*, though dealing with the matter of inheritance, pointed out that the Hindu Succession Act, 1956 is an amending and a codifying Act. It agreed with the decision of Andhra Pradesh

High court in *CWT v. Mukundgirji* that it was the intention of the legislature to do away the old uncodified Hindu law in certain aspects. This spirit is reflected under section 4(a) of the Hindu Succession Act, 1956. This observation of the Supreme Court is relevant in subject matter of this paper since section 4(a) of Hindu Succession Act, 1956 and of Hindu Marriage Act, 1955 are in *pari materia*. Hence, the ratio of Chandra Sen's case can also be applied upon the subject matter of marriage so far, the effect of codification is concerned. (*Commissioner of Wealth Tax. Kanpur. Etc. v. Chander Sen Etc*, 1986) (*Commissioner of Wealth-Tax v. Mukundgirji*, 1983)

In other words, the matter pertaining to marriage for which provisions are made under the Act shall only be governed by the codified law and the uncodified law upon such matters shall cease to exist. The age of majority for marriage is provided for by section 5(iii) of the Act. It implies the customary law to this extent shall be deemed to have been repealed. The Indian Majority Act which otherwise generally provides for the age of majority too provides for an exception marriage under section 2 of the Act. Section 2 of the Act is a saving clause. Clause (a) section 2 provides that the capacity of persons pertaining to marriage, dower, divorce and adoption shall not be regulated by the Act. Thus, the age of majority for marriage among Hindus is not regulated by the Indian Majority Act, 1875 but by the Hindu Marriage Act, 1955.

5.3 Age of majority under the Hindu Law

Section 5(iii) of the Hindu Marriage Act, 1955 provides a minimum of 18 years of age for a bride and 21 for a bridegroom. The marginal note attached to Section 5 of the Act reads as "**Conditions for a Hindu Marriage".** However, it is interesting to note that violation of all these conditions doesn't lead to the nullity of marriage. Violation of these conditions doesn't lead to the same consequence. For instance, a Hindu marriage shall become void only if the conditions mentioned in Section 5(i), 5(iv) and 5(v) are violated. This is given under Section 11 of the Act. Similarly, violation of the condition mentioned in 5(ii) renders a marriage voidable, and not void, under section 12(b) of the Act. It is pertinent to note that the violation of aforesaid conditions affects the nature of the marriage rendering such a marriage either void or voidable. However, for the violation of the condition pertaining to the age of majority mentioned under Section 5(iii) as such no consequence upon the validity of the marriage is provided for. The marriages which are void have been mentioned under section 11. Similarly, Section 12 talks about marriages which are voidable. However, none of these sections includes a child marriage i.e. a marriage performed in contravention of

Section 5(iii) within its ambit. It means if a marriage is properly solemnised although Section 5(iii) remains violated yet such a marriage shall be completely valid. Hence, it can be said that under Hindu law child marriages are recognised as valid marriages. (Hindu Marriage Act, 1955)

The Karnataka High Court, while dealing with the violation of Section 5(iii), observed that the parliament has intentionally excluded Section 5(iii) from the grounds mentioned under Sections 11,12 and also under Section 13 which provides for dissolution of marriages. An obvious reason for this is the stigma which may get attached to the parties to such a child marriage if the marriage, later on, at some point of time in future is declared void just because of the fact the parties to such marriage were under-aged at the time of solemnisation of their marriage. For girls particularly such a provision will be prejudicial considering the social conditions of our country. Parties to such marriage may be living happily but because of age factor at the time of their marriage it shall be an unwarranted intrusion to adjudge their marital bond. The court further observed that in no case this means that such an interpretation shall make the provision of Section 5(iii) useless. The parliament intentionally didn't want to make child marriage void or voidable, but it also didn't want to give a license to perform child marriages. The spirit of Hindu Marriage Act, 1955 is to prohibit the child marriages without causing an unproportionate harm to the parties to such marriage and children born out of it. Section 18 of the Act still provides for punishment in case someone procures a child marriage. (*V. Mallikarjunaiah v. HC Gowramma*, 1996)

5.4 <u>Consequences of a child marriage under Hindu Law</u>

The Hindu Marriage Act provides for only two consequences for violation of Section 5(iii). Neither of these consequences affects the validity of child marriages. These two consequences are provided under section 13(2)(iv) and section 18 of the Act. These two consequences may be discussed as below. (Hindu Marriage Act, 1955)

Option of puberty under section 13(2)(iv) as a ground of divorce

Section 13(2) of the Act provides for special grounds of divorce for Hindu women. Under clause (iv) of subsection (2) of section 13 of the Act, a peculiar situation of child marriage is provided for.

It contemplates a situation where a woman was married before she attained the age of 15. Such a woman is given a right to claim divorce if she has either expressly or implied repudiated the marriage before attaining the age of 18. However, it is to be noticed she is not given a right to present a petition for annulment of such a marriage. Rather she is given a right to claim divorce if the conditions met under Section 13(2)(iv) are met. Thus, Hindu law subtly recognizes child marriage as a valid marriage by providing for a right of divorce

instead of a petition of annulment. Moreover, Section 13(2)(iv) is gender-specific from point of view of the petitioner. Hence, a Hindu boy who is married before attaining the age of 15 has no option to repudiate the marriage. He is given no remedy even of divorce under Hindu law. Such marriage is a completely valid marriage under Hindu law.

5.5 <u>The penal consequence of such a marriage under Hindu law</u>

Though child marriage is recognized as a valid marriage under Hindu law yet certain penal consequences shall follow if it is performed. Section 18(a) of the Act provides for such penal consequences. It provides that in case the condition mentioned under Section 5(iii) in performance of marriage is violated, the person who procures such marriage for himself/herself (non-child party) shall be liable to punishment. Such punishment shall be rigorous in form and may extend to two years. Besides the imprisonment, such a person may also be required to pay a fine which may extend to one lakh rupees.

Hence, it can be seen that child marriages under Hindu law are recognized as completely valid marriages.

5.6 **<u>Cohabitation a natural incident of marriage under Hindu law</u>**.

As observed above, child marriage is a perfectly valid marriage under Hindu law. A natural corollary to marriage is cohabitation. Section 9 of the Hindu Marriage Act, 1955 talks about the restitution of conjugal rights. Section 9 contemplates a situation where a spouse leaves the company of the other spouse without any reasonable excuse and without his consent. In such an event the other spouse can file a petition before the court requesting it to restore the conjugal rights of the parties. From Section 9 of the Act, it is apparent that cohabitation if is not the only thing in the marriage, constitutes a part and parcel of married life. Any unreasonable deprivation of cohabitation is a violation of the right of a spouse arising out of marriage. Such a spouse is given a remedy under Section 9 to enforce such a right of cohabitation. (Hindu Marriage Act, 1955)

The Supreme Court has already upheld the constitutional validity of Section 9 of the Act. Although no arrest of a woman can be made in execution of the decree passed under Section 9 yet it does not prevent the court from executing other modes of execution of decree. (*Smt. Saroj Rani v. Sudarshan Kumar Chadha*, 1984)

Thus, Hindu law recognizes consummation as a vital aspect of marriage. This is apparent not only from Section 9 but also from other provisions of this Act. Section 12(1)(a) of the Act makes it quite clear that if a marriage is not consummated owing to impotency it can be declared as void. Also under Section 13(1)(ia) refusal to have sexual intercourse is considered cruelty to a spouse and on that basis a spouse can seek divorce from the other spouse. Similarly, under section 13B of the Act, in order to seek divorce on ground of mutual consent it is required to be proved that the parties have been living separately for at least one year. (Hindu Marriage Act, 1955)

5.7 Conflict of Hindu Marriage Act, 1955 with Protection of Children From Sexual Offences Act, 2012 and Indian Penal Code, 1860

The aforementioned observation leads to a major inconsistency of Hindu law with the Indian Penal Code, 1860 and Protection of Children from Sexual Offences Act, 2012. Under section 375 of the Indian Penal Code, 1860 the definition of the offence of rape is given. Exception 2 of section 375 declares that if the prosecutrix is the wife of the accused then no offence of rape is committed although all the requisites of section 375 may be fulfilled. However, the exception further provides that if the wife is below the age of 15 years then notwithstanding the existence of marriage between the accused and the prosecutrix, the offence of rape is complete. (Indian Penal Code, 1860)

The exception 2 of section 375 has, further, been read over by the Supreme Court in *Independent Thought v. Union of India*. The judgment provides that instead of 15, it has to be read as 18 in exception 2 to section 375 of Indian Penal Code, 1860. The effect of this judgment is that even if the prosecutrix is the wife of the accused, it still shall be an offence of rape if the wife is below the age of 18 years. A natural corollary from this observation is that in child marriages where wife is a child, the sexual intercourse in such marriage is an offence of rape. The consent of such a wife is immaterial as per section 375 of Indian Penal Code, 1860 since she is below the age of 18 years and is not competent to give consent for sexual intercourse. So, it can be noticed that on one hand Hindu law recognises child marriages to be completely valid marriages and it also recognises conjugal rights and cohabitation as part and parcel of married life. However, on the other hand, the Indian Penal code makes sexual intercourse in such a marriage an offence of rape. (*Independent Thought v. Union of India*, 2017)

When a husband in a child marriage files a petition under section 9 of the Hindu Marriage Act, 1955 against the child-wife for restitution of conjugal rights, the courts shall face an anomaly in the law. If the court enforces the conjugal rights in such a marriage, it shall be permitting the parties to commit an offence of rape under Indian Penal Code, 1860. Also, under Protection of Children from Sexual Offences Act, 2012, sexual intercourse with child wife shall amount to an offence of penetrative sexual assault under section 4 of the Act. Therefore, if the court enforces cohabitation in a child marriage, it shall also be inciting the parties to commit an offence under Protection of Children from Sexual Offences Act, 2012. This inconsistency has to be done away with. What is regarded as part and parcel of a married life is considered an offence under criminal law. (The Protection of Children from Sexual Offences Act, 2012)

6. The conflict between Muslim Law and Indian Penal Code, 1860 & Protection of Children From Sexual Offences Act, 2012 concerning child marriages

Under Muslim personal law, age of puberty is regarded as the age of majority for marriage. Unless there is evidence to contrary, it is presumed that a person acquires puberty at the age of 15 years. (Aqil Ahmed, 2016) Hence under Muslim law too child marriages are completely valid. This can also be ascertained from the codified Muslim law. Under section 2 of The Dissolution of Muslim Marriage Act, 1939 grounds for divorce for Muslim women are given. Clause (vii) of section 2 provides for a ground where woman has been married by her guardian before she attained the age of 15 years. Such a woman has the right to seek divorce if she has repudiated the marriage before the attaining the age of 18 years. It is to be noted that such a marriage, like under Hindu law, is neither made void nor voidable. The remedy of divorce is given. Hence, such a marriage must be recognised as a valid marriage by the Act. Therefore, on the similar lines it can be said that the Muslim personal law too is inconsistent with the spirit of penal laws of India i.e. Indian Penal Code, 1860 and Protection of Children From Sexual Offences Act, 2012. (The Dissolution of Muslim Marriage Act, 1939)

7. Age of majority under Prohibition of Child Marriage Act.

Section 2(b) of The Prohibition of Child Marriage Act, 2006, hereinafter called Prevention of Child Marriage Act, 2006, defines child marriage. It implies a marriage to which either of the parties to the

marriage is a child. The term ‘child’ too is defined under the Act. Section 2(a) of the Act defines ‘child’. It means a person who is below the age of 18 years if such a person is a female and below the age of 21 years if such a person is a male. Prevention of Child Marriage Act, 2006 makes the child marriages voidable at the instance of the child who was a party to the marriage. However, under certain circumstances like where marriage is solemnised after kidnapping the child or where marriage is solemnised in contravention of an injunction, the child marriages are made void by the Act. (The Prohibition of Child Marriage Act, 2006, 2007)

Therefore, one may notice that even under Prevention of Child Marriage Act, 2006 child marriages are not void generally. Only under some circumstances, they have been declared void. However, ordinarily, they are declared as voidable. The term voidable means valid until avoided. The option of avoiding such a marriage is given to that contracting party to the marriage who is a child. Moreover, only within two years from the date of attaining the majority, such a marriage can be avoided. Upon lapse of this period of two years, the marriage shall become permanently valid. Most of the time the child is not aware of this provision and if he is aware of it, he is not able to put up the courage to get the marriage avoided. Thus, due to the fallacy in the Prevention of Child Marriage Act, 2006 of not rendering the child marriages void *ab intio*, the child marriage ends up remaining permanently valid. The intention of the parliament to recognise the child marriages under Prevention of Child Marriage Act, 2006 can also be discerned from the fact that the Prevention of Child Marriage Act, 2006 also provides for the grant of maintenance to the female child from the other contracting party to the marriage and if such other contracting male party is minor then the parents/guardians of such minor shall be under an obligation to pay maintenance for the female child. Also, the children born out of such marriage are declared to be legitimate by the Act. Further, the court may also pass appropriate orders concerning the custody of such children. These observations cumulatively allude to the fact that though Prevention of Child Marriage Act, 2006 intends to prohibit child marriage yet it recognises such a marriage to be a valid form of marriage. This type of approach may have been suitable in the 1990s but not in modern times. The foremost requirement in modern times is to make the child marriages null and void from the very beginning. Under the garb of child marriages various offences against children and women are committed. Trafficking children and forcing women into prostitution is also done under the pretext of child marriages.

8. Inconsistency between personal laws and Prevention of Child Marriage Act, 2006

Further the conflict between personal laws and Prevention of Child Marriage Act, 2006 can be observed. Prevention of Child Marriage Act, 2006 is a secular law. It applies to all the persons irrespective of their religion. Under Prevention of Child Marriage Act, 2006 child marriages are either void or voidable. However, under the personal laws of Hindus and Muslims, same marriages have been regarded as valid marriages and remedy for divorce is given that too only if certain conditions are met. Further, under the codified Muslim law i.e. the Dissolution of Muslim Marriage Act the option of divorce is available only if the marriage is not consummated. Moreover, neither the codified Muslim personal law nor the uncodified Muslim personal law provides for any punishment for procuring or solemnising a child marriage. Hence, there is a huge inconsistency between personal laws and Prevention of Child Marriage Act, 2006. (The Telegraph, 2017)

For Parsis, it is the Parsi Marriage and Divorce Act, 1936 which regulates marriages among them. Section 3(1)(c) of the Act does provide for the age of majority concerning marriage. It provides that the male must be of 21 years of age at least and the female to be of 18 years of age at least. However, the act is silent as to the consequences of violation of this condition. Thus, only creating an ambiguity and possibly recognising that the child marriages are recognised as valid marriages under the Parsi Law as well. (The Parsi Marriage and Divorce Act, 1936)

8.1 Inconsistency between the Prevention of Child Marriage Act, 2006 and the Protection of Children from Sexual Offences Act, 2012 & Indian Penal Code, 1860.

The recognition of child marriages as voidable i.e. valid until avoided has resulted in an inconsistency between Prevention of Child Marriage Act, 2006 on one side and Indian Penal Code, 1860 and Protection Of Children from Sexual Offences Act, 2012 on the other side. There is an inherent contradiction between the Prevention of Child Marriage Act, 2006 and the penal laws concerning sexual intercourse with a child. Prevention of Child Marriage Act, 2006 does not make child marriages void and recognises them as valid marriages though an option of avoiding them is given. However, Indian Penal Code, 1860 under section 375, as is interpreted and read over in *Independent Thought v. Union of India*, and Protection of Children from Sexual Offences Act, 2012 under section 3 of the Act sexual intercourse within such marriage is a heinous

offence. Prevention Of Child Marriage Act, 2006 should be consistent with the penal laws of India. Therefore, an amendment is required in Prevention of Child Marriage Act, 2006 to make it consistent with Protection of Children from Sexual Offences Act, 2012 and Indian Penal Code, 1860. The child marriage under Prevention of Child Marriage Act, 2006 should be made void so that the same spirit is reflected under the Prevention of Child Marriage Act, 2006 which is found in Indian Penal Code, 1860 and Protection of Children from Sexual Offences Act, 2012. (*Independent Thought v. Union of India*, 2017) (The Protection of Children from Sexual Offences Act, 2012) (The Prohibition of Child Marriage Act, 2006, 2007)

9. Conclusion/Suggestions

Therefore, one can easily observe the inherent conflict within the law concerning child marriages. Penal laws like the Protection of Children from Sexual Offences Act, 2012 and the Indian Penal Code, 1860 provide for strict liability in case of sexual intercourse within a child marriage. It shall be an offence of rape and penetrative sexual assault. However, the personal laws recognise such a marriage to be completely valid. Furthermore, these personal laws contemplate sexual intercourse to be a part and parcel of marriages. This can easily be deduced from the fact that the personal laws provide for the remedy of restitution of conjugal rights. But then these personal laws are at loggerheads with the penal laws of India. Moreover, it is not just the personal laws here which are in direct conflict with the penal laws of India. Also, the secular law Prevention of Child Marriage Act, 2006 recognises such marriages to be completely valid until avoided. Hence, it too is contradictory to the spirit of penal laws.

Thus, there is a dire need to revamp the civil law concerning child marriage. The Supreme Court in a plethora of cases has pointed out that the parliament should bridge this gap between the personal laws and the penal laws. The court has emphasised that childhood is something that can never be restored. If an injury is caused to a person or his property, the same may be compensated and restored back to the original position. However, if childhood is filled with trauma and pain, both physical and mental, the same can never be restored. Therefore, securing a safe and healthy childhood is the first and foremost duty of the state. Only a safe childhood can ensure safe womanhood and in turn a safer motherhood. Hence, it is a dire need that the Parliament must make the child marriages void ab initio.

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