

## Sexual Abuse through Child Marriages- The Law in India

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### Commentary

Child marriages in India have been prohibited by law, yet continue to exist due to traditional and cultural practices. Even the Prohibition of *Child Marriages Act 2006* permits a child-spouse to validate his/her marriage upon attaining majority. In October 2017, the Supreme Court of India negated the permission for husbands to conduct sexual intercourse with a child-wife between 15-18 years of age, as such provision in the Indian Penal Code is unconstitutional and conflicts with special legislation on child sexual abuse. The judgment discussed the physical, mental and social consequences of child marriages upon girl children. Recent judicial decisions of Indian high courts favour non-criminalization of sexual activity when a child is determined as mature and responsible enough to understand the implications of his/her sexual act, in love marriages without parental consent. So long as the elements of sexual abuse or exploitation are absent, and it can be determined that the child has made informed consent to such sexual activity, such legal trends are in accordance with self-determination rights in Article 12 of the United Nations Convention on the Rights of a Child which guarantees the right to freedom for a child to express views in accordance with age and maturity.

The Prohibition of Child Marriage Act 2006; Exception 2 of section 375 of the Indian Penal Code 1860; The Protection of Children Against Sexual Offences Act 2012; United Nations Convention on the Rights of the Child 1989; Independent Thought vs. Union of India and Another in 2017; Verma Committee Report in 2010; Right against sexual abuse and exploitation; Right to self-determination

The context and the evolution of child marriage ought to be analyzed through the interaction of several legal orders: traditional customary laws, State legislation, judgments of the courts, and

international sources. Different rules coexist within the entire breadth and span of India, and State law may be in conflict with traditional or other kinds of rules concerning the appropriate age for marriage.

The rules on the legal age for marriage indicate general conceptions about marriage and the roles and duties within a marital relationship. The legal age for marriage is different in the official legal orders and unofficial practices of different countries. Two main points of reference are made to establish this required age: the attainment of the pubertal age, connected to sexuality and pregnancy, and the attainment of the age of consent to sexual relationships, which is connected to individual choice. Under the *Age of Majority Act 1875*, the legal age for marriages in India is set at 21 for males and 18 for females. Till 2006, the *Child Marriage Restraint Act, 1929 (CMR)* permitted the practice of child marriage.

Following the activism of movements for the rights of women and for international human rights, and due to a growing concern for the negative impact of child marriages on the living conditions of women and the social and economic development of the country, the *Prohibition of Child Marriage Act 2006 (PCM)* was introduced, repealing CMR [1]. Even then, this statute reiterates the validity of child marriage in the event the contracting minor party wishes to continue in the marriage within two years of attaining majority. Statistics report that between 2000 and 2010, one in seven girls of ages 20 to 24 are married by their 15th birthday, with one in five within the states of Andhra Pradesh, Jharkhand, and Rajasthan [2]. This chart shows the historical growth of the law regarding age of consent of women, adapted from the Law Commission of India-84th Report in 1980 (Table 1).

| Year | Laws  | Age of consent under section 375, 5th Clause, IPC | Age mentioned in the Exception to Section 375, IPC | Minimum age of marriage under the CMR | Minimum age of marriage under the PCM |
|------|---|---|--|---------------------------------------|---------------------------------------|
| 1860 | .....   | 10 years  | 10 years   | -                                     | -                                     |
|      | (Act 10 of 1891) (after the amendment of IPC) | 12 years  | 12 years   | -                                     | -                                     |
| 1925 | (After the amendment of IPC)                  | 14 years  | 13 years   | -                                     | -                                     |
| 1929 | (After the passing of the CMR)                | 14 years  | 13 years   | 14 years                              | -                                     |
| 1940 | (After the amendment of the IPC and the CMR)  | 16 years  | 15 years   | 15 years                              | -                                     |
| 1978 | .....   | 16 years  | 15 years   | 15 years                              | -                                     |
| 2013 | (After amendment of IPC)                      | 18 years  | 15 years   | 1                                     | 18 years                              |

**Table 1:** Historical growth of the law regarding age of consent of women.

From 1940 onwards, the Exception to section 375 IPC states that sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape. Hence a man cannot be guilty of raping of his own wife, if she is over the age of 15. Up till 2013, the age of consent of girls to sexual relationships was 16 years. After the *Criminal Law Amendment Act of 2013* amending IPC, no change was made to the content of this Exception (renumbered as Exception 2). However, the amended IPC raised the age of consent of women from 16 to 18 years in Section 375 IPC.

This creates two classes of girl children. Between the ages of 15-18 years, a married girl child is deemed to have consented to sexual relations with her husband even if she does not actually consent. For an unmarried girl child between 15-18 years, any sexual relationship, with or without consent, would be deemed statutory rape. A recent special legislation, the *Protection of Children against Sexual Offences Act 2012 (POCSO)* criminalizes all sexual activity with children below 18 years, based on the principle that consent of a child is considered as no consent at all, even if he/she provided consent. So, it is evident that POCSO is inconsistent with PCM as well as IPC.

In *Independent Thought v. Union of India and Another* [3] the Supreme Court determined that even though the Exception 2 of Section 375 IPC states that sexual intercourse with a girl between the ages of 15 and 18 is not rape, this exception creates an artificial distinction between a married girl child and an unmarried girl child, which is arbitrary and against the best interests of the girl child. It struck down this exception as violative of constitutional rights of equality, non-discrimination and life and personal liberty. This provision of IPC conflicts with provisions of *POCSO* defining the offences of penetrative sexual assault and aggravated penetrative sexual assault. The Supreme Court upheld the prevalence of *POCSO* over IPC based on section 42A *POCSO* which lays down the pre-eminence of *POCSO* over conflicting laws.

The judgment described documentary evidence depicting immense adverse effects upon the physical and mental health of the girl child along with social consequences, like early pregnancy, maternal and neonatal mortality, child health problems, exposure to violence and abuse, negative physical and psychological consequences, educational setbacks, lower employment/livelihood prospects and limited agency to influence decisions about their lives. The Supreme Court stated that such adverse effects might impact child-wives for the rest of their lives, and some may even cause an inter-generational impact.

However, *POCSO* is used to prosecute males in love marriages without parental consent where the female is a minor. Recent case law of Indian high courts shows that there is a judicial trend to favour non-criminalization of sexual activity when a child is determined as mature and responsible enough to understand the implications of his/her sexual act [4]. The Verma Committee Report (2010) stated that the aim of the *United Nations Convention on the Rights of the Child 1989 (UNCRC)* upon which the *POCSO* is based is to protect children from sexual assault and abuse and not to criminalize consensual sex between two persons even if they are below 18 [5]. Note the case of *Yunusbhai Usmanbhai Shaikh in 2015*, where a girl of 16 got married to a man twelve year older to her against the wishes of her parents the Delhi High Court did not prosecute the husband, as it could not find proof of kidnapping or rape of the child.

It seems there is a need to balance rights of protection from sexual abuse or exploitation with self-determination rights. It can be understood that so long as the child marriage involves informed consent on the part of the minor party in the absence of abusive or exploitative contexts, such child marriages ought not to be criminalized and may be treated as valid. This would uphold self-determination rights as seen in Article 12 of the *UNCRC* which guarantees the right to freedom for a child to express his views in accordance with his age and maturity. Yet, from a health perspective, strong government policy of public dissemination of information regarding negative effects of child marriages is necessary, in order to empower girl children to make such informed choices.

## References

1. Francavilla D (2011) Interacting legal orders and child marriages in India. *J Gend Soc Policy Law* 19: 529-547.
2. Population council and UNFPA (2009) The adolescent experience in-depth: Using data to identify and reach the most vulnerable young people: India 2005-06 (New York: Population Council, 2009).
3. [http://supremecourtindia.nic.in/supremecourt/2013/17790/17790\\_2013\\_Judgement\\_11-Oct-2017.pdf](http://supremecourtindia.nic.in/supremecourt/2013/17790/17790_2013_Judgement_11-Oct-2017.pdf)
4. Mathew LA (2017) Legislative models of prosecuting child sexual abuse in India: A review and critical analysis.
5. Verma JS, Justice, Subramaniam G, Seth L (2013) Report of the committee on amendments to criminal law, New Delhi: Government of India.