

Law Reform Research on Female Child Marriages in India

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Abstract

Child marriages in India and abroad has been taking away the fundamental rights. The child marriage is gross violation of the human rights of any child, but the implications of such marriages are more severe on female child than the male child, because she will be exposed to violence, abuse and exploitation and loose her access to right to education, nutrition, health, and most importantly her childhood. Due to child marriage, girl child will not be able to complete the education and she will fail to secure financial stability further in the life due to early maternity or other outcomes of the marriages. Ending child marriage is a target under the Sustainable Development Goals. This research has been divided between three parts first part is problem identification. Second part is of legislative analysis in India and conclusion and last part is recommendations to improve the current situation on the issue.

KEYWORDS: female marriage, legislations and practices relating to child marriage, reforms

Introduction and need of study:

Child marriage in India has been an illegal act since more than hundred years, but the boys and girls are still getting married before 18 years of the age or the status of marriages are imposed on them by their parents. The child marriage is gross violation of the human rights of any child, but the implications of such marriages are more severe on female child than the male child, because she will be exposed to violence, abuse and exploitation and loose her access to right to education, nutrition, health, and most importantly her childhood. Delaying marriage for girls can contribute towards reducing maternal and infant mortality, preventing HIV infection, improving women's educational and economic status, and ensuring women's rights and gender equality¹.

In a study conducted on child marriages in India, based on the census of 2011, it was found that 3% girls between 10 to 14 years of age were got married and about 20% girls were married before attending the age of 19 years². The World Health Organization, in a report mentioned that 11% of the births worldwide are amongst adolescents and which account for 23% of diseases³.

Child marriage has also connected with the fertility and population growth of the country.⁴ Due to child marriage, girl child will not be able to complete the education and she will fail to secure financial stability further in the life due to early

¹Delaying Marriage for Girls in India: A Formative Research to Design Interventions for Changing Norms

²A Statistical analysis of CHILD MARRIAGE IN INDIA, Based on Census 2011 published by Young Lives and National Commission for Protection of Child Rights (NCPCR)

³World Health Organization Report on "Early Marriages, Adolescent and Young Pregnancies", Sixty-Fifth World Health Assembly dated 16th March, 2012

⁴<http://www.costsofchildmarriage.org/> last assessed on 17th Jan 2018

maternity or other outcomes of the marriages. Ending child marriage is a target under the Sustainable Development Goals.

Many countries, have adopted strategies to curtail the percentage of the child marriages, including the promotion of free education and other schemes to prevent child marriages, but still more could be done on this. It is evident from the various surveys and studies that child marriages are prevalent in all parts of the world and in India particularly. Rate of child marriages in all the states of India and in all social groups is unacceptably high⁵.

This research aims at analysis of current legislation, finding out the gaps in current legislation and suggesting remedies for such gaps.

Existing legislations and practices relating child marriages

1. Analysis of legislations and practices:

Statutes mentioned below are statutes made for females, giving them special status as intended by constitutional forefathers in Article 15(3). The definition of child in all the statutes stated below makes it clear that child means person who has not completed the age of 18 years.

a. The Prohibition of Child Marriage Act, 2006(PCMA):

Section 3 of the PCMA, made child marriage is voidable marriage at the option of the one party to it. Parliament has made child marriage as a punishable offence under Section 9 and person above the age of 18 years of age solemnizing marriage with a girl child shall face rigorous imprisonment for two years and with fine which may extend to one lakh rupees. Other Sections⁶ of the statute made other people also liable under this act for performing, conducting, directing, abetting or promoting or permitting solemnization of a child marriage.

It is clear from above mentioned statutory provisions that, Indian legislatures have been trying to protect the child marriages and practices relating to it, at the same time parliament considered child marriage as a criminal activity.

b. The Protection of Children from Sexual Offences Act 2012(POCSO):

POCSO is not directly dealing with the issue of child marriages. But the Act is based on the reference data collected by National Crime Records Bureau (NCRB). Said data collected by NCRB which indicates the increase of sexual offences against children in India. This can be confirmed by the "Study on the Child Abuse in India 2007⁷", conducted and published by the Ministry Women and Child Development, Government of India. Above mentioned studies refer to harmful traditional practices relating to the child marriages and adverse effects of these marriages and how it will result in the violence against girl child⁸.

⁵ District Level Household & Facility Survey – 3, available on http://rchiips.org/pdf/INDIA_REPORT_DLHS-3.pdf last assed in 15th Jan 2018

⁶ Section 10 and 11 of Prohibition of Child Marriage Act, 2006

⁷ Available on: <https://www.childlineindia.org.in/pdf/MWCD-Child-Abuse-Report.pdf> last accessed on 25th Jan 2018

⁸ *ibid* page number 7

Reference of POCSO is also relevant at this stage because it makes “penetrative sexual assault⁹” on the child as a punishable offence under Section 6 of the POCSO. But it is not the rape under Section 375 of Indian Penal Code.

Exception 2 to Section 375 of the Indian Penal Code is in the direct conflict with Section 5 (n) of the POCSO. This conflict also makes it difficult to operate as per true intention of the POCSO Act that is reflected in the preamble which states, “in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy, physical, emotional, intellectual and social development of the child” preamble also states that, “sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed”.

c. The Protection of Human Rights Act, 1993(PHRA):

PHRA defines human rights as “the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in international covenants and enforceable by courts in India¹⁰”. In the light of current PHRA, the Convention on the Elimination of All Forms of Discrimination Against Women (CEADW) and the Convention on the Rights of the Child (CRC), the forced sexual intercourse with the girl child would be gross violation of her liberty and dignity guaranteed by the Indian Constitution and by above mentioned international documents.

d. The Juvenile Justice (Care and Protection of Children) Act, 2015(JJ Act):

JJ Act defines a child who requires care and protection in Section 2 (14), “a child who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnization of such marriage”. It is clear from above section that child who married before 18 years of age requires care and protection. JJ Act also makes it compulsory to produce the child before Child Welfare Committee for rehabilitation.

e. Guardianship in Muslim Marriages(Jabbar) and The Dissolution of Muslim Marriage Act, 1939:

It is very much possible in Muslim religion to impose a status of marriage on minor through a parent or any other person authorized to solemnized the marriage of the Minor and the right is recognized by the Quran know as Jabbar.

A woman married under Muslim law to obtain a decree of dissolution of marriage if she is given in marriage by her father or other authorized person before she attained the age of 15 years and she repudiates the marriage before attaining the age of 18 years provided that the marriage has not been consummated.

⁹ Section 5 (n) of POCSO

¹⁰ Section 2(d) of PHRA

This provision deals with girls below the age of 15 years who have got married. So this act makes it difficult for Muslim female to repudiate the marriage. Even if it is void marriage under PCMA she has to take decree of dissolution of her marriage under this Act before attaining the age of majority. And if there is forceful sexual intercourse by the husband, that will amount to enjoyment or consummation of that marriage and girl child will be deprived of her right to repudiate the marriage.

f. **The Hindu Marriage Act, 1955(HMA):**

A Hindu girl can file a petition for divorce on the ground that her marriage under Section 13(2)(iv) of the Act, whether consummated or not, was solemnized before she attained the age of 15 years and she has repudiated her marriage after attaining the age of 15 years but before attaining the age of 18 years.

This provision is also in conflict with the PCMA because according to PCMA marriage below the age of 15 years of age is void marriage and there is no need to seek divorce under the HMA.

One more conflict or anomaly is that the girl child getting married before the age of 15 can repudiate the marriage after attaining the age of 15 and before 18 years of her age under HMA. The question comes of locus standi. The helpless child, who has been forced to the marriage, will not be able to approach to the court and repudiate the marriage.

It is obvious from above discussion that child is a person below 18 years of age who is entitled to the protection of her fundamental human rights. It is also quite clear that due to Exception 2 to the Section 375 of Indian Penal Code husband will not be punished for sexual intercourse with girl child if there is marriage between them. In other words Parliament per se is prohibiting child marriages but the girl child who needs care and protection, there is no any remedy available.

g. **Article 15(3) of Indian Constitution of India:**

Article 15(3) has given special status to the females and children by separating them from the general public and the intention of the constitutional framers is also relevant at this point and in this problem in the backdrop of analysis of above statutes.

The Constitutional Assembly discussed and finalized above provision after the suggestion given by Prof. K. T. Shah. Prof Shah had suggested addition of the scheduled class and schedule tribes into the Article 15(3) in the words,

“Sir, it must be distinguished from the preceding article. I read it, at any rate, that this is a provision for discrimination in favour of women and children, to which I have added the Scheduled Castes or backward tribes. This discrimination is in favour of particular classes of our society which, owing to an unfortunate legacy of the past, suffer from disabilities or handicaps. Those, I think, may require special treatment; and if they do require it, they should be permitted special facilities for some time so that real equality of citizens be established.

The rage for equality which has led to provide equal citizenship and equal rights for women has sometimes found exception in regard to special provisions that, in the long range, in the interest of the country or of the race, exclude women from certain dangerous occupations, certain types of work. That, I take it, is not intended in any way to diminish their civic equality or status as citizens. It is only intended to safeguard, protect or lead to their betterment in general; so that the long-range interests of the country may not suffer.

In regard to the scheduled castes and backward tribes, it is an open secret that they have been neglected in the past; and their rights and claims to enjoy and have the capacity to enjoy as equal citizens happens to be denied to them because of their backwardness. I seek therefore by this motion to include them also within the scope of this sub-clause (2), so that any special discrimination in favour of them may not be regarded as violating the basic principles of equality for all classes of citizens in the country. They need and must be given, for some time to come at any rate, special treatment in regard to education, in regard to opportunity for employment, and in many other cases where their present inequality, their present backwardness is only a hindrance to the rapid development of the country.”¹¹

The response given by Dr. Ambedkar to this is interesting and required and relevant at this point to understand the position of females in the country

“With regard to amendment No. 323 moved by Professor K.T. Shah, the object of which is to add "Scheduled Castes" and "Scheduled Tribes" along with women and children, I am afraid it may have just the opposite effect. The object which all of us have in mind is that the general public. For instance, none of us, I think, would like that a separate school should be established for the Scheduled Castes when there is a general school in the village open to the children of the entire community. If the words are added, it will probably give a handle for a State to say, 'Well, we are making special provision for the Scheduled Castes'. To my mind they can safely say so by taking shelter under the article if it is amended in the manner the Professor wants it. I therefore think that it is not a desirable amendment.”¹²

The response of Dr. Ambedkar clearly negates the amendment suggested by Prof. K. T. Shah. Further it is also suggested that the intention of the Constitutional makers is to give freedom to the females and children from

¹¹<http://parliamentofindia.nic.in/ls/debates/vol7p15.htm> last assessed on 29th Jan 2018 at 8.00 pm

¹²*ibid*

the patriarchal glitches. Statues controlling marriages are against the spirit of constitution due to two reasons, firstly every statute operating in one sphere has not considered other sphere or other statue present. Secondly, amendments are inserted in statutes without looking into the loopholes of overall system.

It is clear from above analysis of all the statutes which, deals with female and children are not in consonance with the intention of the constitutional makers. Legislature framing has been legislating without understanding previous statutes, their provisions and their effects on current legislation.

A. Analysis legislations

From above interviews of victims, practicing lawyers and experts it is clear that child marriages in India are resulting into painful consequences for the girl child and her family.

The following inferences can be drawn from the analysis of legislations:

- i. Due to child marriages, there is detrimental effect on girl child's health, her education, her employability, her nutrition, and her general well being.
- ii. Girl child who is willing to repudiate the forceful marriage or report the sexual abuse, but it is not possible for her either due to provisions present in various statutes or due to no support from State or social organizations.
- iii. No locus standi to any other person or next friend of the child to file a case on the behalf of child in any statute.
- iv. Statues mentioned above are apparently inconsistent with each other and there is a need to harmonise the same.
- v. The Preamble of our Constitution brings out our commitment to social justice, but unfortunately, implementation of current statutes clearly brings out that social justice laws are not implemented in the spirit in which they are enacted by Parliament.¹³

The problem lies in the system, in legislations. There are legislations but legislations are either failing in implementation or they are in conflict with each other.

B. Reforms

On the basic of analysis, researcher gives following suggestions to improve the current situation in the form of legislation.

The Dissolution of Marriages Act, 2018

An Act to consolidate and amend the provisions relating to child marriage.

CHAPTER I

PRELIMINARY

1. Short Title of the Act:

¹³ Indepedenat Thoughts vs. Union of India AIR 2017 SC 4904

This Act may be called as The Child Dissolution of Marriages Act, 2018

2. Application of Act:

- 1) This Act applies to all the females married under any legislative law or personal laws before or after commencement of this Act irrespective of their religion.
- 2) This Act extends to the whole of India except the State of Jammu and Kashmir.

3. Definitions:

In this Act unless context otherwise requires –

- 1) “child” means any person who has not completed the age of 18 years;
- 2) “child marriage” means a marriage to which either of the contracting parties is a child;
- 3) “welfare of child” means any decision taken regarding the child, to ensure fulfillment of his basic rights, identity, social well – being and physical, emotional and intellectual development;
- 4) “Court” means court in whose jurisdiction the child ordinarily resides.

4. Overriding effect of the Act:

Any text, rule or interpretation of any law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act.

CHAPTER II

DISSOLUTION OF MARRIAGES

5. Grounds for Dissolution of Marriages:A woman married under any legislative or personal law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds if she has been given into the marriage before attending the age of 18 years, namely:

- 1) that she, has been given in marriage by her father or other guardian or person by fraud or by negligence;
- 2) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of one year or more;
- 3) That the husband treats her with cruelty, that is to say,
 - i. habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or
 - ii. attempts to force her to lead an immoral life or
 - iii. attempts on her any sexual activity without her consent, or
 - iv. disposes of her property or prevents her exercising her legal rights over it

- 4) on any other ground which is recognized as valid for the dissolution of marriages under any legislative law or personal or customs or usages.

6. Procedure and practices for dissolution of the marriages:

The child or on the behalf of child any other person may file a complaint on any ground mentioned in Section 5:

- 1) Any person who has care and affection for the child may file a case into the court for dissolution of the marriage or report it to the appropriate authority made under any other law.
- 2) She is entitled to get protection under existing laws.
provided that, the police officer of the area has under the obligation to provide all support and protection with the help of lady police officer, till she receives such protection.
- 3) Court is bound disposed of any of the application or complaint received under this section within 60 days of time.

7. Punishment for forceful marriage of the child

- 1) No person shall give or agree to give the child into the marriage under any of the laws made for the marriages or custom or usages.
- 2) No person shall abate, participate, promote or solemnize a child marriage.
- 3) If any person contravenes the provisions of sub-section (1) he shall be punishable with imprisonment which may extend to seven years or with fine of two lakh rupees or with both.
- 4) If any person contravenes the provisions of sub-section (2) he shall be punishable with imprisonment which may extend to threeyears or with fine of one lakh rupees or with both.

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