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*Title: “Child Marriage Laws: A Critique”, Authored By: Anu Radha Kumari,
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I. INTRODUCTION:

In India, child marriage is perceived to be on murky legal grounds. A nation that takes pride in having the world's longest constitutions has nevertheless failed to express its position on a matter that breaches even the most fundamental of a child's human rights. ***The following key terms are defined in Section 2 of The Prohibition of Child Marriage Act, 2006 (PCMA):***

1. *A person is considered a "child" if, in the case of a male, they have not reached the age of twenty-one or, in the case of a female, they have not reached the age of eighteen.*
2. *A marriage in which one or both of the parties is a kid is referred to as a "child marriage."*

Sections 9, 10, and 11 of the same law include penalties for encouraging and participating in a juvenile marriage. Thus, despite being considered a crime, marriage is nonetheless recognised as lawful, unless it is declared null and void at the request of the contracting minors. In India, 11.9% of girls were married before they reached legal age, and 12 states had greater rates than the country as a whole, according to NFHS-IV¹. A deplorable statistic shows a rise in underage marriages in the states of *Himachal Pradesh and Manipur from 2005–2006 to 2016*. India has still not ratified the *United Nations Convention on Consent to Marriage, Minimum Age of Marriage*, and *Registration of Marriages Act, 1962*², which must be emphasised here. The impossibility to introduce such laws at the time was the Indian delegate's justification for refusing to ratify at the time. However, 60 years later, they are still unable to pass legislation that effectively supersedes local rules about the legal marriage age and supports child marriages instead of just being a silent observer. The government is already in breach of its duties under the *CEDAW and the Convention on the Rights of the Child (CRC)*, which they ratified in 1992 and whose article 32 mandates that they prevent any work that interferes with a child's education or is detrimental to the child's physical, mental, spiritual, moral, or social development. By refusing to sign the convention. The judiciary has also performed poorly and has been appallingly ineffective in bringing about social change. Due to the existing overlap

¹ National Family Health Survey, available at: National Family Health Survey (rchiips.org).

² Treaties, Conventions and Agreements of the United Nations available at: Treaties, Conventions and Agreements | Global Library (jgu.edu.in).

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between the PCMA's applicability and personal laws, it has upheld the validity of a marriage between minors and has further disguised its actions under the factum valet concept.

II. INCIDENCE AND CAUSES:

The government's ongoing unwillingness to put out strong legislation to prevent child marriages serves as a stark reminder of how carelessly this social issue has been handled. The impact it has on a child's life, particularly the life of a girl child, is too great to be disregarded. Growing dissatisfaction exists with the measures taken by the government to safeguard young girls. A girl who engages in the practise faces a serious risk of sexual assault from an early age. She is deprived of the required time to grow emotionally, psychologically, and physically through a child marriage, which results in an early pregnancy, malnutrition, and maternal mortality. This social ill needs to be addressed appropriately, and mechanisms to close the acts' loopholes need to be put in place. Instead, then upholding a damning practise in the name of tradition, the court must assume responsibility for decisions that positively explain the legislative branch's position and work as a change agent. More than 7% of girl children were married before the age of 15, and more than 27% were married before the age of 18, according to a 2018 UNICEF poll³. The deeply ingrained patriarchal character of Indian society is one of the factors contributing to the same. First off, a large portion of society views the financial burden that comes with a girl's development and treats her as a numerical component of the dowry that needs to be paid. As a result, the mentality is to marry off a girl kid as soon as feasible. Second, the same is done to safeguard her virginity till marriage. Since it is thought that a girl must stay "pure" until marriage, she gets married as soon as possible while maintaining her chastity since there is worry that she may become sexually active with the onset of puberty and choose her own spouse. Banwari Devi was horrifically gang-raped in 1984 as retaliation for rejecting a long-standing custom of child marriage. Thousands of children getting married on auspicious days like Akshaya Tritiya⁴ is an example of a sad reality where child marriage is regarded as a custom to be proud of and to uphold.

³ UNICEF, “Annual Report” (2018).

⁴ Akshaya Tritiya- Hotbed of Child Marriages, available at:
<https://www.aljazeera.com/features/2012/5/4/akshaya-tritiya-hotbed-of-child-marriages>.

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III. LEGISLATIONS THROUGH THE YEARS:

III.I THE CHILD MARRIAGE RESTRAINT ACT, 1929:

During the British era, the reformer movement that was blossoming was influenced by their habits and ideas. The opposition to child marriage was sparked by the same factor. Many times, a social reform is brought about by the law. In 1929, Rai Sahib Hariblas Sarda filed a Bill in Parliament requesting the declaration of child marriages as invalid for Hindus. This was in line with the same idea. The Bill, however, was secular in its applicability and applied to every Indian citizen when it became an Act. The age limit was initially set at 14 for girls and 18 for guys. In 1949, the same was increased to 15 years, and in 1978, it was increased to 18 and 21, respectively, for males and girls. This law penalised adult males between the ages of 18 and 21 and those older than 21, as well as other parties involved in the marriage who made it possible. Because failure to prevent the same is equally punishable, it is thought that guardians bear tremendous duty under this Act. The Act also grants authority to stop child marriages from occurring. However, it restricts the police's ability to make arrests without a warrant, even while they are aware of the crime's cognizable character. The court was not permitted to take cognizance of any Act-related offence after a year had passed from the date of the offence. The Act curtailed this power while still allowing the court to issue an injunction by requiring the court to give the parties involved advance notice. This allowed the parties to evade responsibility as they saw fit. This Act had peculiar characteristics, such as the fact that no woman could ever be accused of complicity. An often-used loophole. Furthermore, even though the act made child marriages illegal, it said nothing about whether the marriage was valid or void. As a result, the message is that anyone willing to pay a price—specifically, the potential 3 months of simple imprisonment and a fine associated with the crime—can do so. Additionally, the restriction clause leaves a party left after a year with no option to declare a child marriage invalid.

III.II THE PROHIBITION OF CHILD MARRIAGE ACT, 2006:

The National Commission for Women (NCW) and the National Human Rights Commission continuously worked to expose the shortcomings and limitations of the CMRA, 1929. As a

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result, the legislators introduced the PCMA and repealed the CMRA while taking into account the objections and proposals. One would anticipate that the new Act would be considerably improved upon and more progressive than the prior Act. The validity of child marriages was addressed by Section 3 of the PCMA, which made them "voidable" solely at the discretion of either contracting minor party, or the "children" throughout the marriage. According to the Majority Act of 1875, a petitioner may only file a petition through a guardian if they are a minor at the time of filing. Therefore, a child marriage that occurs before the petitioner reaches adulthood may only be declared null and void if their guardian is ready to pursue legal action against it and risk being punished. When one considers the societal factors, it becomes a highly unlikely circumstance. The petitioner's limitation period is established at 2 years after reaching majority in this case. The Section 12 of the PCMA, which declares all child marriages void in the event that a minor child is kidnapped, kidnaped, or trafficked, was a more applauded component. Additionally, it makes any marriage that is solemnized in violation of an injunction order void from the start under section 14 of the Act. In addition to nullifying such marriages, the NCW recommended in its recommendation a large increase in the penalty in order to improve the deterrence against the crime. In response, PCMA had significantly harsher penalties than the 1929 Act. The penalty for a male adult who marries a juvenile female kid has been enhanced from a simple 3-month jail sentence and fine to a 2-year harsh sentence and a Rs. 1 lakh fine. In accordance with the Majority Act of 1875, it also no longer distinguished between male adults who were over 18 and those who were over 21. Additionally, the penalty for solemnizing a juvenile marriage has raised in proportion to the guardians of such children. The PCMA, like the CMRA, could not, however, make any woman accountable for a violation.

In addition to the increased penalties, Section 15 has made all of the Act's offences cognizable and non-bailable. With the District judge given the authority of a Child Marriage Prohibition Officer to stop mass marriages on days like Akshaya Tritiya, the court's discretion to grant an injunction under Section 13 is also expanded. The Child Marriage Prohibition Officer now has broad powers under Section 16 to prohibit a child marriage, and he may take whatever action judged appropriate to do so. Previously, the powers of a police officer were very constrained

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for any meaningful action. The actual situation, however, showed that the state governments had not even appointed people to the designated role, and many are still vacant today.

III.III INDIAN PENAL CODE, 1860 AND POCSO, 2012:

The POCSO act and the country's criminal code must both be mentioned in this context in order to safeguard children from sexual exploitation, sexual harassment, and pornographic material. According to a careful reading of both actions taken together, there is a mismatch between the age of consent at the time of the rape and the age of consent for rape committed within a marriage. This issue was resolved by the Supreme Court's long-awaited decision in *Independent Thought vs. Union of India*⁵. Prior to this ruling, the IPC did not adequately safeguard the rights of a girl child who had been married, and this had a significant impact on the legitimacy of child marriages. Child rape is implied to occur before the age of 16 by Section 375 of the IPC, which also specifies the legal definition of rape and the age at which consent must be given. A man having sex with his own wife who is over the age of fifteen is not committing rape, according to exception 2 to section 375. The portion falls under marital rape, which carries no legal consequences because it doesn't discuss consent or will. However, the punishment for a marital rape of a child wife between the ages of 12 and 15 is a maximum of 2 years of rigorous imprisonment, coupled with a fine, as opposed to a minimum of 10 years of rigorous imprisonment if she was not married.

The POCSO statute, which prohibits non-consensual sexual behaviour with girls under the age of 18, contains numerous parts that apply to both married and unmarried girl children. More specifically, the clause violates Sections 5 and 6 of the POSCO Act, which state that if the husband of a girl child violates his wife in a penetrating manner, he is liable for aggravated penetrative sexual assault in accordance with Section 5(n) of the POSCO Act. According to Section 6, it is penalised by strict imprisonment for at least ten years, with the possibility of life imprisonment, as well as a fine. As a result, there was a situation where the IPC recognised an immunity from rape conferred by marriage yet the same act would still result in a criminal

⁵ Independent Thought V. Union of India, LNIND 2017 SC 12307

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punishment under POCSO. The court ultimately acknowledged these incongruous clauses in *Independent Thought vs. Union of India, 2017*, and ruled that the exemption needed to be interpreted down. The Supreme Court ruled that the age for the marital rape exception must be raised from 15 to 18 years in order to comply with India's international obligations under the Treaties and Conventions it has signed or ratified regarding women's and children's rights. Even while it condemned child weddings, it did not declare them to be invalid.

III.IV MISCELLANEOUS:

There are numerous laws in Indian law that operate under the presumption that child marriages are legal. *According to section 6(c) of the Hindu Minority and Guardianship Act, 1956*, a married girl's husband is her legal guardian in the case of a minor married girl. The Dowry Prohibition Act of 1961's section 6(1)(c) also takes into account the legality of a child marriage's occurrence and stipulates that anyone who receives a minor wife's dowry must hold it in trust for her benefit and transfer it to her within a year of her turning 18 years old. The father of a minor bride must support her if her husband does not have the resources to do so, according to the Criminal Procedure Code, 1973's proviso to section 125(1)(d). The underlying message of such laws emphasised the broad acceptability and lax attitude of the nation's legislators towards underage marriages.

IV. VALIDITY UNDER PERSONAL LAWS:

The personal laws of the many communities in India are permitted to regulate issues that are fundamental to their culture and history, one of which is marriage. *Currently, the various personal laws take the following positions on child marriage:*

IV.I HINDU MARRIAGE ACT, 1955:

A lawful Hindu marriage must meet the requirements outlined in Section 5 of the statute. The bride must be at least 18 years old and the husband must be at least 21 years old at the time of marriage, according to Section 5(iii) of the Act. The ages were initially 15 and 18, respectively. *The Child Marriage Restraint (Amendment) Act of 1978* strengthened the existing law and eliminated the provision that permitted a marriage between a child under the age of 15 and an

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adult under the agreement of the guardians. Currently, a marriage that violates the aforementioned provision is not void because section 11 of the act, which specifically specifies clauses (i), (iv), and (v) of section 5 but leaves out sub-section, does not include it as a reason to declare a marriage void. (iii). Additionally, sub-section (iii) is not mentioned as a ground in Section 12 of the act, which deals with the voidability of marriage under the HMA while again mentioning other provisions. Therefore, according to the Hindu Marriage Act, child marriage is neither void nor voidable. Later, under Section 18 (a), it imposes criminal penalties for 2 years of hard imprisonment and a fine on the contracting parties in a child marriage, in this case the children. Muslim Personal Law is based on a variety of sources, including the Quran, Hadis, Ijmas, and Qiyas, and it is not codified in India. According to interpretation, the legal age for marriage is 15 years old, or after the onset of puberty, whichever occurs first. And any union that lasts less than seven years is regarded as null and void from the beginning. Furthermore, with a guardian's approval, even a person who has not reached puberty can get married. A girl child had the option of divorce if her father or another guardian gave her in marriage before she turned 15 years old under Section 2 (vii) of the Dissolution Of Muslim Marriages Act, 1939, read with Section 275 of Mulla's Principle of Mohamedan Law. However, she would have to repudiate the marriage before turning 18 years old and it would have to happen before the marriage was consummated.

The requirement for such a passage emphasizes how lawful such a marriage is under Muslim personal law, provided the girl child does not reject it. A person under the age of 21 is considered a minor pursuant to Section 3 of the Christian Marriage Act of 1872. According to Section 19 of the legislation, a guardian must consent to the marriage of a minor in order for it to be considered valid. In addition, the Act's sections 15, 18, 22, 39, 42(b), and 43 expressly outline the conditions that must be followed in various circumstances for a marriage between minors in order for it to be recognised by the law and receive complete validity. ***According to Section 4(c) of the Special Marriages Act of 1954***, a male must be 21 years old and a female must be 18 years old in order for a marriage to be considered lawful. Furthermore, in contrast to HMA, Section 24(1)(i) of the Special Marriages Act declares a marriage void if the conditions of Clause (c) of Section 4 are not satisfied. In addition, section 3(c) of the Parsi

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Marriage and Divorce Act, 1936 specifies that a male must be 21 years old and a female must be 18 years old before they can legally wed. Furthermore, unless all conditions under section 3 are satisfied, including sub-section (c), such a marriage is void from the start in the absence of provisions being purposefully excluded or chosen, as in the Hindu Marriage Act.

V. JUDICIAL INTERPRETATION:

Since earlier times, many high courts have generally upheld child marriage as legal while referencing the pertinent passages from various personal laws. With the exception of a few rulings, child weddings are often approved by judges. The Madras High court clarified and discussed the shortcomings of the CMRA in *Sivanandy vs. Bhagwathyamm*⁶, which was decided in 1962. It stated clearly that the validity of marriage is outside the scope of this legislation and that no provision exists that renders a marriage invalid. A minor's marriage without the guardian's approval can be judged to be lawful on the basis of the factum valet concept, the court continued, highlighting the validity under the HMA.

In *Naumi vs. Narottam*⁷, the Himachal Pradesh High Court reiterated this position in 1963 and left out the CMRA, ruling that a child marriage is not void nor voidable under HMA. In its 1970 ruling in *Budhan vs. Mamraj*⁸, the Punjab and Haryana High Court went against popular opinion and remarked that while a marriage may not be recognised if the parties are not of legal age, the same cannot be said of an RCR petition. The same was maintained by the P&H high court in its 1972 ruling in *Krishni Devi vs. Tulsan*⁹. The 59th Law Commission report, published in 1974¹⁰, resolved the uncertainty brought on by this ruling and determined that child marriages are legal unions under the HMA. P.A., the Andhra Pradesh High Court. According to Ganpatalu¹¹, 1975, all child marriages are invalid from the beginning. The earlier decision was reversed in 1977 by the same high court's entire bench. It was thought that this

⁶ B Sivanandy V. P Bhagavathy Amma, LNIND 1961 Mad 5.

⁷ Naumi v. Narotam, LNIND 1962 HP 9.

⁸ Amrinder Kaur v. State of Punjab, LQ 2014 HC 2832

⁹ Krishni Devi v. Tulsan Devi, AIR 1972 P&H 30

¹⁰ Law Commission of India, “59th Report on Hindu Marriage Act, 1955, and Special Marriage Act, 1954” (Ministry of Law, Justice and Company Affairs, Government of India, 1974)

¹¹ Panchireddi Appala Suramma v. Gadela Ganapatlu, AIR 1975 AP 193

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ruling would turn innocent infants into "*bastards*," as the HMA only grants legality to children born out of void or voidable marriages. Interestingly, the Supreme Court used child weddings as an example of a union that is punished but not null in 1978. In *Neetu Singh vs. State*¹², the Delhi High Court overturned a lower court's decision to send an underage bride to Nari Niketan in the year 1999. It also ruled that the HMA solely recognises age as a basis for voidability and declared that the Section 18 penalty is appropriate. In both situations, the minor girl's natural guardianship—which was granted to her husband under the Hindu Minority and Guardianship Act—was also upheld. With the establishment of the PCMA in 2006, a fresh set of cases emerged. These cases involved children who eloped, and the parents or guardians sought to declare the marriage null and invalid from the beginning, citing section 12 of the PCMA's kidnapping provision that declares marriages null and void. The couple requested protection from the girl's family, who were threatening them, but the court denied their request in *Amrinder Kaur vs. State of Punjab and Haryana*¹³, a case from 2009. It was decided that because the bride, who was 16 at the time of the marriage, had been coerced out of legal guardianship, the marriage was invalid under section 12 of the PCMA. In *Jitender Kumar Sharma vs. State and Others*, the Delhi High Court ruled that the PCMA is in fact a secular law and supersedes personal laws.

In addition, the court read Sections 6 and 14 of the Hindu Minority and Guardianship Act with regard to the application of Section 12, and it presented a tolerant view where it held that the girl is capable of making her own decisions and cannot therefore be forced to live with her parents or in a Nari Niketan. In *T Sivakumar vs. Inspector of Police, Thiruvallur Town Police Station & others*¹⁴, which was heard by the Madras High court in 2011, the issue of age of discretion was raised once more. The marriage is neither strictly valid nor invalid, according to the court. The spouse cannot be the natural guardian, even if the female child expresses her wish, according to the court, who also cited the PCMA's restrictions. Regarding the age of discretion, the court thought that it could be determined based on the facts and circumstances

¹² Nitu Singh V. The State, LNIND 1999 Del 44

¹³ Amrinder Kaur v. State of Punjab, LQ 2014 HC 2832

¹⁴ T Sivakumar v. The Inspector Of Police Thiruvallur Town Police Station, LNIND 2011 Mad 4101

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of the case. In the present instance, since the girl can be said to be able to make decisions, it cannot force her to live with her parents and may instead place her in the custody of a suitable person, subject to her will. Similar attitudes were held by the courts about Muslim Personal Law, which was frequently cited as superseding PCMA. Maryland's Patna High Court in 1980. According to *Idris vs. State of Bihar & Ors*¹⁵, Mulla's Principle of Mahomedan Law's article 251 was referred, and it was held that parents' approval is not necessary for marriage after the age of puberty. In *Vivek Kumar vs. The State*¹⁶, the Delhi High Court found in 2006 that there is no legal restriction on a girl under the age of 18 falling in love, and supported the legality of an elopement marriage under Muslim personal law.

In *Shamsuddin vs. State*¹⁷, the girl child's reaching of puberty was once more highlighted, and as a result, the immunity from Section 12 of the PCMA was once more given. The Delhi High Court also made the same ruling in *Mrs. Tahra Begum vs. State of Delhi & Ors.*, a 2012 decision. The court upheld that the PCMA must be followed while implementing the "option of puberty" or khiyar-ul-bulugh. The court maintained the minor girl's agency and choice in this case despite her age and status as a minor since she indicated her desire to live with her husband rather than her parents. However, the same Delhi High Court affirmed the PCMA's supremacy over all personal laws in another 2012 ruling, *Association for Social Justice and Research vs. Union of India*¹⁸, referring to it as a "special act." The Supreme Court's most recent occasion to discuss the legality of child marriages was in the 2019 case of *Hardev Singh vs. Harpreet Kaur*¹⁹. However, the court disclaimed any responsibility and stated that it was not pronouncing on the legality of marriages contracted by men between the ages of 18 and 21 and adult women out of "abundant caution." As can be seen, save from the occasional ruling, the courts have generally ruled that child weddings are legal under Indian law and haven't made any attempts to offer anything legally-binding to stop this social atrocity from occurring.

¹⁵ Md. Idris vs State Of Bihar And Ors, 1980 CriLJ 764

¹⁶ Vivek Kumar v. The State, MANU/DE/7222/2007

¹⁷ Shamsuddin vs State, MANU/DE/2189/2009

¹⁸ Association For Social Justice v. Union of India, 2010 SCC OnLine Del1964

¹⁹ Hardev Singh v. Harpreet Kaur, LNIND 2019 SC 932.

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VI. CONCLUSION:

Thus, the Indian legislation as it currently stands is unfit and incapable of putting a stop to the social ill of child marriage. The penalties imposed by the PCMA and the earlier CMRA do not work to prevent child marriages. Children frequently do not want to see their parents in jail because it itself plays a negative influence. When viewed in light of its effects on a child's development and in accordance with the various international treaties and conventions, such as CEDAW and CRC, which India has signed and ratified, the widespread acceptance of child marriage and the government's unwillingness to fill the same void at the outset are horrifying.

The majority of incidents, as was noted in the NHFS-IV, occur in rural regions, so it is necessary to make an effort to raise public knowledge about the negative effects of the abovementioned practice, which results in numerous violations of one's fundamental rights. Ratification and fulfilment of the duties outlined in the Convention of Consent, Minimum Age, and Registration of Marriages would be an effective strategy to reduce child marriages. As things are today, change must start with at least a unified, secular act that nullifies all private regulations regarding the legal age of marriage. Following the Karnataka model, which not only upholds the application of the PCMA above all personal laws but has also inserted a subsection in section 3 of the PCMA and declared all child marriages going forward to be void ab initio, has been recommended to the states and the centre by the Supreme Court in *Independent Thought vs. Union of India*.