

GIRLS NOT BRIDE

BY

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Introduction

Girls Not Bride, is a sensitive topic. It embraces not only the legal issues but encompasses in itself, a vast number of socio, economic, historical, cultural and political issues as well. The Report prepared by the CLA deals with the issue on the basis of the survey conducted on the legality of child marriages in various jurisdictions across the Globe.

I am adding one more aspect on this burning issue which is of paramount importance in the present scenario.

2. Earlier Efforts:

2.1 In India, during the ancient period prior to 600 AD, the position of women in the social fabric was very strong in as much as there were no instance of Child Marriages. Believing the ancient scriptures, (Epics and Shruti Texts) we learn that the girls entered into the wedlock only when they were mature enough to take a decision. They had full freedom to make a choice and normally had choice of the husband in a ceremony called "Swayamvar". There are well recorded instances, when during the course of "Swayamvar",

girl even objected to participation of certain person whom she considered unfit to participate, in that ceremony.

2.2 At that time the life span of a person was divided into different segments popularly known as Ashrams of 25 years duration. The first segment Ashram known as Brahmcharya Ashram signified first 25 years of the life of an individual and this period was dedicated to education at gurukul (School) Place of learning. Individual during this period was required to observe complete celibacy and devote himself to learning and education. It was only after completion of education that person would enter into grahstha ashram, i.e. marry and bring up the family. Thus by this division the age of marriage was fixed at 25 years.

2.3 Marriage amongst Hindu is one of the 16 sanskars, prescribed in Vedas to be performed during the life time of an Individual. “*Vivah Sanskar*” or marriage is prescribed as 14th Sanskara and comes after Upnayan Sanskar (10), Vidyaarambh Sanskar (11), Keshant Sanskar (12) and Samavartan Sanskar (13). The manner in which these sanskars have been organized itself provides that marriage can be performed only after completion of education and acquiring relevant prophecies. In this scheme there was no place for child marriage.

2.4 It was only after 600 AD, during Medieval Period (also known as dark period) of history that entire fabric of Indian Society underwent a seachange, and several ills including, Child Marriage got set in the Indian Social system. Over period of time these practices became so prevalent that it acquired the form of tradition and part of social system in India. For nearly thousand years, these practices mushroomed in every corner of the country and plagued the society. During this period the social system was constantly under stress in view of repeated foreign invasions which also influenced the social life, customs and traditions. It is during this period, these practices became part and parcel of Indian social and cultural system and traditions. Even stories and incidents glorifying such practices could be found in the contemporary literature of said period.

2.5 In 1860 the social reform movement was led by Raja Rammohan Roy a great reformist and revolutionary who espoused the cause of women. Social organization like the Brahmo Samaj and the Arya Samaj took up the cause of child marriage. They voiced their concerns and raised the need for a special law to save the child brides from the harassment, sexual and physical abuse from their husbands and in laws.

2.6 At the instance of another social reformist, Ishwar Chandra Vidyasagar in 1860, The Indian Penal Code provided for prohibition

on consummation of marriage if the girl was less than ten years old. Later reformers like Keshab Chandra Sen and Behramji Malabari considered this age low. He introduced a novel marriage ceremony whereby the consent of the groom and bride became essential. The marriageable age was fixed under the Brahmo Act, 1872 (The Native Marriage Act) for girls was 14 years and for boys was 18 years. Under this Act, bigamy, polygamy and infant marriages were made impossible.

2.7 Malabari was another social reformer who took up the cause of enforced widowhood and child marriage, and published a pamphlet “Infant Marriage and Enforced Widowhood”.

2.8 The death of Phulmani Dasi a girl of 11 years married to man of 35 years, who constantly cohabited and raped her, further accelerated the movement for suitable legislation to prevent child marriages. Thus in March 1891 the Age of Consent Bill was passed by whereby cohabitation with a wife under the age of 12 years was prohibited.

2.9 To eradicate the evil of child marriage, the Child Marriage Restraint Act was passed in 1929. The object of this Act was to eliminate the social evil which had the potentialities of dangers to the life and health of a female child, who could not withstand the stress

and strains of married life and to avoid early deaths of such minor mothers. This Act was amended in 1940 to increase the marriageable age of girls.

2.10 This Act, continued to be dead letter in Law, as the Child marriages remained quite rampant in Indian Societies, irrespective of location, religion or caste.

3.0 Prohibition of Child Marriage Act, 2006

3.1 In 2006 this Act fixing the marriageable age for girls at 18 years and boys at 21 years was enacted. However the provisions in this regard are in direct conflict with the Hindu/ Muslim personal law and that makes the law ineffective.

3.2 This act provides for punishment which is imprisonment upto 2 years or fine of Rs 1 lakhs on the abettors of the Child Marriage. It also provides for maintenance to be paid by husband if he is major or by his parents if he is minor. It also provides for declaration of marriage as void by the consent of the parties.

3.3 It also provides for appointment of Child Marriage Prohibition officer, who is not only responsible for stopping the Child Marriages but also for creating the awareness about its ill, within the society.

3.4 It is to be noted that institution of marriage in India is governed by the personal laws rather than this Act. As per the personal laws

the age of marriage for girls prescribed is much less than the age prescribed under this Act. Hence though an violation of this Act, can result in punishment prescribed, but would not result in annulment of the marriage which is in consonance with personal laws.

4.0 Marriages in India

4.1 Scheme of marriage in India vary from community to community to community and from region to region.

4.2 In various communities, the marriage ceremony signifying a social contract between the persons married is followed by another ceremony known as “Gauna”. Gauna which is start of personal contract between the wedded, is start of co-habitation and marital relations. Depending on the age of performance of marriage and traditions in community “Gauna” could be performed immediately or even years after the solemnization of marriage. Thus a marriage in India can happen today, but actual co-habitation may start much later.

4.3 This scheme of marriage, in a manner provides for taking care of ills of the early marriage on the health of the girl. Though socially the girl get wedded at the time of marriage, but actual co-habitation would start much later. However this scheme also will not take care of all the ills that are associated with the early child marriage.

5.0 Reports and Literature Highlighting the Enormity of Problem and Associated ills of Child Marriage

5.1 There is no dearth of reports and literature which highlight the consequences and ill effects of the Child Marriages in Indian Context.

(a) “Delaying Marriage for Girls in India: A Formative Research to Design Interventions for Changing Norms”. This report was prepared in March 2011 under the supervision of UNICEF India.

(b) “Reducing Child Marriage in India: A Model to Scale up Results”. This report was prepared in January 2016 and also under the supervision and guidance of UNICEF India.

(c) “Economic Impacts of Child Marriage: Global Synthesis Report” released in June 2017. Prepared by International Centre for Research on Women and the World Bank and it deals with the impact of child marriages on (i) fertility and population growth; (ii) health, nutrition, and intimate partner violence; (iii) educational attainment; (iv) labour force participation, earnings and welfare, and (v) women’s decision-making and other impacts.

(d) “A Statistical Analysis of Child Marriage in India based on Census 2011”. Prepared by Young Lives and the National Commission for the

Protection of Child Rights. In chapter 5 highlighting the consequences of this ill, report states

“Child marriage is not only a violation of human rights, but is also recognized as an obstacle to the development of young people. The practice of child marriage cut shorts a critical stage of self-discovery and exploring one’s identity. Child marriage is an imposition of a marriage partner on children or adolescents who are in no way ready and matured, and thus, are at a loss to understand the significance of marriage. Their development gets comprised due to being deprived of freedom, opportunity for personal development, and other rights including health and well-being, education, and participation in civic life and nullifies their basic rights as envisaged in the United Nation’s Convention on the Right of the Child ratified by India in 1989. Marriage at a young age prevents both girls and boys from exercising agency in making important life decisions and securing basic freedoms, including pursuing opportunities for education, earning a sustainable livelihood and accessing sexual health and rights.”

“The key consequences of child marriage of girls may include early pregnancy; maternal and neonatal mortality; child health problems; educational setbacks; lower employment/livelihood prospects; exposure to violence and abuse, including a range of controlling and

inequitable behaviours, leading to inevitable negative physical and psychological consequences; and limited agency of girls to influence decisions about their lives. Census data have demonstrated an upswing of female deaths in the age group of 15-19 years. This high mortality rate could be attributed to the deaths of teenage mothers. Child marriage virtually works like a double-edged sword; lower age at marriage is significantly associated with worse outcomes for the child and worse pregnancy outcomes for the mother. All these factors push girls and their families into perpetuation of intergenerational poverty and marginalization. The impact of early marriage on girls - and to a lesser extent on boys - is wide-ranging, opines the Innocenti Digest on child marriage. Child brides often experience overlapping vulnerabilities - they are young, often poor and undereducated. This affects the resources and assets they can bring into their marital household, thus reducing their decision-making ability. Child marriage places a girl under the control of her husband and often in-laws, limiting her ability to voice her opinions and form and pursue her own plans and aspirations. While child marriage is bound to have a detrimental effect on boys who would need to shoulder the responsibility of a wife and in most cases, have to also discontinue their education, there is very little research evidence to capture the long term economic and psychological effect

on boys who are married early. The Lancet 2015 acknowledges that adolescent boys are not important and neglected part of the equation. The assumption that girls need more attention than boys is now being challenged. Looking at the impact of early marriage from rights perspective, it can be said that the key concerns are denial of childhood and adolescence, curtailment of personal freedom, deprivation of opportunities to develop a full sense of selfhood and denial of psychosocial and emotional well-being reproductive health and educational opportunity along with consequences described earlier.”

5.2 Thus the ill effects of Child Marriage on girls in particular are well documented. It is also well documented that despite all the ills these marriages happen and do happen in large number. The reason for such marriages thus needs to be identified and needs to be remedied.

5.3 It can be shown that at-least in India in there is no dearth of law on the subject.

6.0 Law on the Issue

6.1 Article 15 of Constitution of India following the doctrine of protective discrimination, provides for special attention to children

through necessary and special laws and policies that safeguard their rights. Article 39 enjoins that the State shall, in particular, direct its policy towards securing that “children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and childhood and youth are protected against exploitation and against moral and material abandonment”.

6.2 Initiatives against child marriage have been taken pre independence, and first law restraining child marriages came into existence in 1929. Known as the Sarda Act, it prohibited child marriages of girls below the age of 15 years and of boys below the age 18.

6.3 Section 366 of the Indian Penal Code makes kidnapping/abduction of a woman to compel her marriage or for illicit intercourse and use of criminal intimidation or any other method of compulsion is a punishable offence. Section 496 makes going through the marriage ceremony with fraudulent intention a punishable offence.

6.4 Registration of marriage is compulsory under the Christian Marriage Act, 1872, The Parsi Marriage and Divorce Act, 1936, and the Special Marriage Act, 1954, and optional under the Hindu Marriage Act, 1955. Supreme Court of India has in 2006 and again reiterated in 2007, that marriages of all citizens of India, irrespective of their religion,

needs to be compulsorily registered in the States where the marriage is solemnized.

““Delaying Marriage for Girls in India, a formative research to design interventions for changing norms”” This report was prepared in March 2011 under the supervision of UNICEF India .

Another report was prepared by a Collaborative organization for Protection of Child Rights which referred Child Marriage not only a violation of human rights but also recognized it as an obstacle to the development of young people. Practice of child marriage cut short a critical stage of self discovery. Data demonstrated upswing of female death in the age group of 15-19 years.

In the year 2006, Prohibition of Child Marriage Act (PCMA) was enacted. For the purpose of PCMA, a child is a male who has not completed 21 years of age and a female who has not completed 18 years of age. Child marriage is when either of the contracting party is a child.

Section 3 of the Act provides Child Marriage voidable at the option of any one of the parties to the Child Marriage.

Section 9 of the Act renders Child Marriage as an offence. Any male adult above the age of 18 years marrying a child shall be punishable with rigorous imprisonment which may extend to 2 years or fine upto 1 lakh or both.

Section 10 provides that whosoever conducts, performs, directs, abets any child marriage, shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh.

Section 11 provides for punishment for promoting or permitting solemnization of Child Marriage.

Section 13 empowers jurisdictional Judicial officer to issue injunction against performance of Child Marriage.

Section 14 declares the Child Marriage solemnized in violation of injunction order to be void.

Protection Of Children From Sexual Offences Act 2012 was enacted by the parliament of India.

Section 5 of the Act provides that if the husband of a girl Child commits penetrative sexual assault on his wife, he commits aggravated penetrative sexual assault under section 5 (n) of the POCSO which is

punishable under section 6 of the Act by a term of rigorous imprisonment not less than 10 years which may extend to life and fine.

6.5 Hon'ble Supreme Court of India recently has in case of **Independent Thought Vs Union of India [2017 (10) Supreme Court Cases 800]** had an occasion to examine this issue vis a vis the law on the subject and has recorded as follows:

“52. It is obvious from a brief survey of the various statutes referred to above that a child is a person below 18 years of age who is entitled to the protection of her human rights including the right to live with dignity; if she is unfortunately married while a child, she is protected from domestic violence, both physical and mental, as well as from physical and sexual abuse; if she is unfortunately married while a child, her marriage is in violation of the law and therefore an offence and such a marriage is voidable at her instance and the person marrying her is committing a punishable offence; the husband of the girl child would be committing aggravated penetrative sexual assault when he has sexual intercourse with her and is thereby committing a punishable offence under the POCSO Act. The only jarring note in this scheme of the pro-child legislations is to be found in Exception 2 to Section 375 of the IPC which provides that sexual intercourse with a

girl child between 15 and 18 years of age is not rape if the sexual intercourse is between the girl child and her husband. Therefore, the question of punishing the husband simply does not arise. A girl child placed in such circumstances is a child in need of care and protection and needs to be cared for, protected and appropriately rehabilitated or restored to society. All these 'child-friendly statutes' are essential for the well-being of the girl child (whether married or not) and are protected by Article 15(3) of the Constitution. These child-friendly statutes also link child marriages and sexual intercourse with a girl child and draw attention to the adverse consequences of both.

77. There is no doubt that pro-child statutes are intended to and do consider the best interest of the child. These statutes have been enacted in the recent past though not effectively implemented. Given this situation, we are of opinion that a few facts need to be acknowledged and accepted. Firstly, a child is and remains a child regardless of the description or nomenclature given to the child. It is universally accepted in almost all relevant statutes in our country that a child is a person below 18 years of age. Therefore, a child remains a child whether she is described as a street child or a surrendered child or an abandoned child or an adopted child. Similarly, a child remains a child whether she is a married child or an unmarried child or a divorced child or a separated

child or a widowed child. At this stage we are reminded of Shakespeare's eternal view that a rose by any other name would smell as sweet - so also with the status of a child, despite any prefix. Secondly, the age of consent for sexual intercourse is definitively 18 years and there is no dispute about this. Therefore, under no circumstance can a child below 18 years of age give consent, express or implied, for sexual intercourse. The age of consent has not been specifically reduced by any statute and unless there is such a specific reduction, we must proceed on the basis that the age of consent and willingness to sexual intercourse remains at 18 years of age. Thirdly, Exception 2 to Section 375 of the IPC creates an artificial distinction between a married girl child and an unmarried girl child with no real rationale and thereby does away with consent for sexual intercourse by a husband with his wife who is a girl child between 15 and 18 years of age. Such an unnecessary and artificial distinction if accepted can again be introduced for other occasions for divorced children or separated children or widowed children.

104. The Preamble to our Constitution brings out our commitment to social justice, but unfortunately, this petition clearly brings out that social justice laws are not implemented in the spirit in which they are enacted by Parliament. Young girls are married in thousands in the country, and as Section 13 of the PCMA indicates, there is an auspicious

day – Akshaya Trutiya - when mass child marriages are performed. Such young girls are subjected to sexual intercourse regardless of their health, their ability to bear children and other adverse social, economic and psychological consequences. Civil society can do just so much for preventing such child marriages but eventually it is for the Government of India and the State Governments to take proactive steps to prevent child marriages so that young girls in our country can aspire to a better and healthier life. We hope the State realizes and appreciates this.”

7.0 Status of the Problem

7.1 As per National Family Health Survey-III, 46% of women between the ages 18-29 years in India were married before the age of 18. It is also estimated that there are 23 million child brides in the country.

7.2 As National Plan of Action for Children, 2016: Safe Children – Happy Childhood, [Available at <http://wcd.nic.in/sites/default/files/National%20Plan%20of%20Action%202016.pdf>]:

“In India, between NFHS-3 (2005-06) to RSOC (2013-14), there has been a considerable decline in the percentage of women, between the ages 20-24, who were married before the age of 18 (from 47.4% to 30.3%). The incidence is higher among SC (34.9%) and ST (31%) and in families with lowest wealth index (44.1%). Child marriage violates children’s basic rights to health, education, development,

and protection and is also used as a means of trafficking of young girls. Child marriage leads to pregnancy during adolescence, posing life-threatening risks to both mother and child.

It is indicated by the Age-specific Marital Fertility Rate (ASMFR) which is measured as a number of births per year in a given age group to the total number of married women in that age group. SRS 2013 reveals that in the age group of 15-19 years; there has been an upward trend during the period 2001-2013. ASMFR is higher in the age group 15-19 years in comparison to 25-29 years.”

8.0 Conclusions

8.1 “Girls Not Bride” is not a legal issue alone for which a legal prescription can be prescribed to cure. Elaborate legal framework has evolved or been provided to tackle the issue, however the reality which needs to be accepted that such marriages are quite prevalent not only in India but across every nation in the world.

8.2 It is true that that such marriages are being performed with the consent of the parents of the girl and are accepted socially. Such marriages are driven by numerous factors of which social traditions, poverty lack of educational avenues etc., are major drivers.

8.3 Can by way of law such marriages be annulled without impacting the interest of the child bride. Who will take care of such bride in case

where such marriages are to be annulled and declared void? What happens to such a bride, in future who will marry her in future? Whether the own parents of such bride come forward and take care of her till the time she attains marriageable age, in her marriage as child is annulled? Will social system accept such parent and bride? These and many questions which need to be answered before a complete cure to this menace can be found.

8.4 The social cost of a child marriage is itself quite enormous. The economic cost to the country which would be obliged to take care of infants who might be malnourished and sickly; the young mother of the infant might also require medical assistance in most cases.

8.4 It is true that social and economic problems need to find the solution by way of social reforms and education. Role of NGO's and agencies in rehabilitation of such child brides is not only significant but needs to be emphasized. The report needs to have look into these aspects and provide a framework for creation of social awareness on the ills of such child marriages. It may be easy to condemn the same but far more difficult to prevent the same where they happen as result of social customs, traditions and economic reasons.

8.5 Another vital aspect that needs to be looked into is the voice of such child bride who is most impacted. Does she have any voice in

performance of such marriage? Are they not treated as commodity/instrument by their own parents for the purpose of fulfillment of social and economic obligations? Do they have right to stand and raise voice of concern against their own parents violating their right to better live by refusing to marry at young age?

8.6 UNICEF, NGOs and government organizations need to play an active and effective role curbing the rampant practice of child marriages. Poverty and lack of education are the major factors that undermine the efforts in this regards.

8.7 Community education and mobilization programs could provide for an effective solution to various ills of Child Marriage. Such programs could focus on creating awareness, education, promoting gender equality, providing for relevant economic support and all sort of support to child bride against possible physical, mental and sexual abuse.

Thank you,