

## CHILD ABUSE: A SOCIO- LEGAL APPROACH TOWARDS CHILD MARRIAGES

Sneha Jheetay<sup>1</sup>

### ABSTRACT

*“The initial trauma of a young child may go underground, but it will return to haunt us.”*

*Crimes against women or girls have increased at a fast pace and although this malice is not a new concept, its meaning existed differently before. It has now changed its course and has become rather malevolent in nature. To bring about change, it is essential to find the root cause at micro level rather than focusing on an overall perception. There is substantial proof so as to say that girls are most vulnerable to sexual abuse today and need special care and attention. One form of child abuse is child marriage that has effects on children both physically and psychologically, leading to the death or permanent damage of many young girls. This paper will highlight the history and current scenario of this practice in India and its consequences by stating example of the auspicious festival called akhateej. With a brief discussion of the statutory provisions in Indian laws, I shall bring light to the fact that an attempt must be made in removing such a practice from its roots, preventing it altogether, rather than looking for only judicial remedies in the process.*

### INTRODUCTION

As rightly stated by Ji-Young Gong, “Behind every person who’s committed an unimaginable crime is an adult who committed unimaginable violence against them as a child. All of them, as if it was plotted that way. Violence begets violence, and that violence begets even more violence.” It is a fact that millions of girls and boys worldwide are being sexually abused within homes and outside. They are abused by strangers, families, and known persons. The perpetrator can be anyone who exploits the child's vulnerability to gain sexual gratification. India is home to nearly 19% of

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<sup>1</sup> Law College, Dehra Dun, Uttarakhand University

the child population of the world and 42% of the Indian population is below 18 years of age. Hence, there is a growing need to protect this dependent population. Child abuse in the form of physical abuse, emotional abuse, neglect treatment, sexual offences and exploitation by commercial means can be observed at homes or schools, orphanages, on the streets, in prisons and places of detention. One form of child abuse is child marriage, which is a popular practice in India. According to a report by the UNICEF, India is placed second in child marriages after Bangladesh in South Asia. The effects of child marriage are both physical and psychological and have led to the death of many young girls. In a way that is gender inequality because the trauma in comparison with boys and this brings in it in an even more relevant hemisphere. The practice prevails in many parts of India and the discussion of this paper is not that of a legal one but rather a philosophical and social approach towards this topic. Further, an example of custom versus law shall be highlighted by the example of the auspicious festival called *akhateej*. And also the fact that even though India wishes to step towards modernization, it is in still fact living comfortably or rather ignorantly within the premises of its conventional practices.

## INDIA: PERCEPTION AND LAWS

India is a land rich in heritage, customs and traditions both ancient and modern in nature. Their meanings differ from both region and essence, and it is this versatility that makes its character extraordinary. But it is also a land known for great social evils sati, dowry, gender inequality, female infanticide, cast discrimination, child labor and exploitation, child marriage etc. In a way most of these revolve around children, especially girls.

This paper shall not only focus on child marriages as the main social evil and put light on various facets of it. But let us first answer the basic question from which this arises, *what is child abuse?* Child abuse is when a parent or guardian, by an action or failing to act causes an injury or death or emotional harm or the risk of serious harm to a child. There are many forms of child maltreatment, which include physical, sexual, exploitation, emotional abuse and neglect.

- **Physical abuse:** when a child is physically harmed due to some interaction or any lack of interaction by another person, which could have been prevented by any person who was in a position of responsibility, of trust or power.

- **Emotional abuse:** a failure to provide a supportive atmosphere and prime figure for attachment for a child so that they may develop a full and healthy range of emotional abilities. It is also the act of causing harm the development of the child, when they could have been within reasonable control of a person responsible for the child. Some examples of these acts are restricting movement, threatening, scaring and discriminating, mocking, demeaning, etc. In India a rising concern is the pressure children feel to perform well in school and college examinations for example can be seen as a form of emotional stress and abuse.
- **Sexual abuse:** engaging a child in sexual activities that he/she does not understand and cannot give informed consent for it or is not physically, nor mentally nor emotionally prepared for any such activity. An adult, who is developmentally superior to the victim in age or in sex, usually conducts abuse of this nature. This includes using children for the purpose of pornography, sexual materials, prostitution and unlawful sexual practices.
- **Neglect:** it is purposeful omission of some or all-developmental needs of the child by a caretaker with the intention of harming the child. This includes several factors such as failure of protecting the child from any kind of harmful situation or an environment when feasible.

Exploitation can be commercial or otherwise in its origin, in which the child is used in for some form of labor, or other activities that are beneficial for others. A relevant example of this is child labor or prostitution amongst children.

Child abuse in India is often concealed especially since it happens mostly in the home or by family members. The focus with regards to abuse has generally been in the more public domain including child labor, child prostitution, child marriage, etc. Abuse taking place amongst families or abuse that takes place in institutions such as schools or government homes has received minimalistic attention. This could have been due to the structure of family in India or the role that children play in this structure. Children in India are often highly dependent on their parents and elders and they continue to have subservient and obedient roles towards their parents despite having moved out of their parental home. The belief that parents and family is the sole caretakers of children has proved to be a rather negative aspect when it comes to child protection laws and strategies. A number of cases on child abuse, which take

place at home, are hard to attain because most of these crimes go unreported. Societal abuses such as lack of education and health facilities, malnutrition, negligence, etc. are recognized in various forms by the Indian legal system as a result of poverty. But in India there is no such provision that protects children against abuse in the home. Ill-treatment by caretakers has the potential to emotionally and mentally harm children to an extremely different degree. Studies on intra-familial child abuse in the United States, for example, have shown a correlation in felony, crime, teenage pregnancy, and other psychosocial problems.<sup>2</sup>

The Centers for Disease Control and Prevention and the Department for Children and Families, in the United States defines child maltreatment as '*any act or series of acts of commission or omission by a parent or other caregiver that results in harm, potential for harm, or threat of harm to a child.*' It can occur in a child's home, or in organizations, in schools or communities that the child interacts with.

Child abuse is a heinous and personally damaging crime, and the form of child abuse that this paper shall focus on is not only abusive in nature but also a social evil that has been prevailing for centuries in the Indian community. This legally banned yet still popular practice, is that of child marriage.

According to the Hindu Marriage Act, 1955<sup>3</sup> marriage may be solemnized between two Hindus, if some conditions are fulfilled. These are namely:

- Neither party has a spouse living at the time of the marriage.
- At the time of the marriage, neither party-
  - Is incapable of giving a valid consent to it in the consequence of unsoundness of the mind or
  - Though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent so as to be unfit for marriage and the procreation of children or
  - Has been subject to recurrent attacks of insanity or epilepsy.
- The bridegroom has completed the age of 21 years and the bride the age of 18 years at the time of the marriage.
- The two parties are not within the degrees of prohibited relationship unless the custom or the usage governing each of them permits of a marriage between the

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<sup>2</sup>Available at: <http://www.childlineindia.org.in/child-abuse-child-violence-india.htm>

<sup>3</sup>Section 5, Hindu Marriage Act, 1955

two.

- The two parties are not *sapinda*s of each other, unless the custom or usage governing each of them permits of a marriage between the two.

The marriage of a female less than 18 years of age or a male of less than 21 years of age is considered voidable and not void.<sup>4</sup> The marriage can however, become valid if no steps are taken by such a child seeking declaration of marriage as to be void. The Child Marriage Restrain Act, 1929 was passed to eradicate the evil of child marriage. The main objective of this Act is to eliminate the special evil, which had the potential to endanger the life and health of a girl child, who could no longer withstand the stress and damages caused through her married life and to avoid early deaths of such delicate and juvenile mothers. It came into force on 1<sup>st</sup> April, 1930 and validates to the whole of India except Jammu and Kashmir. The provisions of the act however, do not penalize the minors nor does it invalidate the fact that the marriage has taken place, rather it provides that whoever be the major in both cases of men and woman, who contracts such a marriage shall be punished with imprisonment up to 15 days or fine upto Rs.1000 or even both. Further according to the Prohibition of Child Marriage Act, 2006 has the following definitions:

- Child: A child is a person who has not completed 21 years in case of male and 18 years in case of females.<sup>5</sup>
- Contracting party: Either of the parties whose marriage is or is about to be solemnized.<sup>6</sup>
- Child marriage: A marriage to which either party is a child.<sup>7</sup>
- Minor: A person who is not deemed to be major under Majority Act.<sup>8</sup>
- Voidable marriage: Every child marriage is voidable at the option of the contracting party who was child at the time of solemnization of marriage.

A decree of nullity can be obtained by such person by filing petition before the District court for annulment of marriage within 2 years after attaining majority.<sup>9</sup> While granting a decree, the district court shall make an order directing both parties and their

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<sup>4</sup>*Court on its own motion (Lajja Devi) v. State* 2012

<sup>5</sup> §2(a)

<sup>6</sup> §2(c)

<sup>7</sup> §2(b)

<sup>8</sup> §2(f)

<sup>9</sup> §3

parents or guardians to return to the other party, money, gold, ornaments, gifts and other valuables.<sup>10</sup>

Despite the legislation forbidding child marriage further in the Prohibition of Child Marriage Act, 2006, children are still being married off at young age and this problem is anything but increasing today. The main object of the Act is to prohibit the solemnization of child marriage and all connected and incidental matters. Also, it ensures that child marriage is completely eradicated from within the society, by replacing the earlier legislation of Child Marriage Restraint Act, 1929. This new Act is equipped with qualifying provisions to prohibit for child marriage, protect and provide relief to victims and enhance punishment for those who are an accomplice, promote or solemnize such marriage. This Act also calls appointment Child Marriage Prohibition Officers who may help in the implementing this Act.

## INDIA AND CHILD MARRIAGES

According to a report by the UNICEF, India stands second in child marriages after Bangladesh in South Asia. It believes that nearly 40% of all the child marriages of the world take place in India. UNICEF defines child marriage as '*marriage before 18 years of age and considers this practice as a violation of human rights. The harmful consequences of child marriage are segregation from family and friends, limiting the child's interactions with the community and peers, lack of opportunities for education.*' UNICEF and partners agreed to focus on five indicators related to child marriage:

- Percentage of women 20 to 49 first married or in union by age 15 and 18, by age group.
- Percentage of girls 15 to 19 years of age currently married or in union.
- Spousal age difference.
- Percentage of women currently in a polygynous union, by age groups.
- Percentage of ever-married women who were directly involved in the choice of their first husband or partner.<sup>11</sup>

Child marriages take place simply because they have been taking place for

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<sup>10</sup>§3(4)

<sup>11</sup>Multiple Indicator Cluster Surveys (MICS), Demographic and Health Surveys (DHS) 2003

generations, especially in a country like India that follows its customs and traditions with utmost faith. Of course, one may argue that the motive behind child marriage was different before and is not exactly the same now. A psychologist once commented that its easier to train a girl than to train a woman to adjust into a joint-families like that in India so that she can be accustomed to the functioning of her new family at an early age and does not face any problems in adjusting her tastes and preferences. This does seem like a logical perspective towards the idea of child marriage pertaining there is no physical and mental burden but upon the girl child expressly. When this concept was introduced, there were however, different circumstances such as:

- Low literacy rate amongst women.
- Women were not allowed to be bread earners of the family
- They were considered of inferior birth and hence confined to selected freedom.
- Their jobs included household work and taking care of children.

And so, there really was no need for any actual 'waiting for eighteen' when it came to women. They, of course, only engaged into sexual activities once they were physically ready to do so. But today, it is more of releasing the burden off the parents' shoulders more like fulfilling economic necessities of the family, protection for their daughters since a young age by a man, bearing children early to get stability, and of course, following the oppressive traditional values, norms and customs. Parents who engage their children in the practice of child marriage are often too poor to support their families' livelihood and hence marry off their daughters to reduce economic burden and are sometimes paid by the bride grooms' family for the same. Many parents marry off their daughters because they feel that it is in their best interest to be protected from physical or sexual assault ensuring their safety in potential risk areas.

And the girls who are subjected to this torture find no end to their agony. Not only do they suffer mental torture and deprivation of opportunities like education, they are subjected to physical pain as well. Then there is of course the idea that the only role a girl/ woman has to play is that of child-bearer and the ultimate motive of her life is to engage only in family-oriented activities. Lastly, as discussed before, the main reason for child marriage to still prevail is the fact that this practice has been going on for years now becoming a custom, which with all hope does not overshadow law. It is

followed-up without questioning the sanctity and saneness of this activity.

### **CONSEQUENCES OF CHILD MARRIAGE**

The effects of child marriage are both physical and psychological and have led to the death of many young girls. The damages caused are irreversible and frightening in nature. Some of these are as listed below:

- The trauma of early childbirth causes harm to the body of that young child as well as the baby who is born out of her womb. Globally more than one third of women between the ages 20-24 were married before they reached the age of 18. There is approx. of 14 million adolescent girls between the ages 15-19 giving birth each year and so in this age group are twice more likely to die during child birth than women in their twenties. Because of the early and often closely timed pregnancies before their bodies are able to handle the stress of pregnancy, adolescent mothers give birth prematurely or to low weight babies. Both the child and mother's health are at risk and often they do not survive.
- These girls are also subjected to prostitution i.e., commercial sexual exploitation and are said to be abused physically as compared to older women. A study conducted in India showed that child marriage makes girls twice more vulnerable to domestic violence, they are slapped, beaten and threatened by their husbands and are three times more likely to be sexually abused.
- Girl children also face problems such as bonded labor and enslavement, which in turn ruins their opportunity of getting primary education and of making some amendments to the damage that has already been caused.
- Lastly, lack of protection for early and repeated pregnancies and to selectively eliminate pregnancies exposes them to serious health problems and also the infant mortality rates increase as compared to the national average in states where child marriages are dominant. They are subjected to unsafe physical contact and are often under the threat of getting Sexually Transmitted Diseases like HIV/AIDS.

According to the census of 2001, there are 1.5 million girls, in India, under the age of 15 already married. Out of these, 20% are mothers of at least one child. The census of 2001 also estimated the average age of marriage has risen to 18.3 for females and 22.6 years for males. But child marriage is still widespread across the nation. States like Rajasthan(22%), Uttar Pradesh(8.9%), Madhya Pradesh, Jharkhand(14.1%) ,

Chhattisgarh, Bihar(9.3%) and Assam(8.8%) still have average age of marriage below the legal age of eighteen for females.

### **AKSHAYA TRITIYA (AKHA TEEJ): A CASE STUDY**

‘AkhaTeej is considered an auspicious day, when one does not have to consult any astrologer. This is the best time for marriages ... Even our epics mention about child marriages. There is no harm in performing it, as the children do not live together and stay together only after attaining adulthood.’ – Priest in Rajasthan<sup>12</sup>

On the third day after ‘amavasi’ (new moon) in the Hindu month of Vaishakha, AkshayaTritiya takes place that is considered the most auspicious day for marriage by the Hindus. On this day children are married in masses. The communities practicing this in Rajasthan believe that some principles, such as marriage are non-negotiable and they must be enforced. It is quite clear that such a notion is from those who are stricken by poverty and lack of education. What they fail to understand is that child marriage robs millions of girls off their childhood, their rights and dignity. Among all the districts in Rajasthan, the percentage of child marriages is the highest in Bhilwara (54%), Rajsamand (42%), Bundi (38.4%), Jhalawar (36.6%) and Dausa (34.6%).

Most of the girls say that they have no choice but to accept it. Even if they revolt against the marriage, they will have no place to go and once they have children the entire meaning of the child marriage changes and they are no longer accepted in the society. The parents also often state that it is better for the girl to be married early and be sent away at an early age so that in case of any mishap no shame is brought about to the family, whose name and dignity is far more relevant in comparison to that of their daughter. This kind of social stigma strongly triumphs in this region of India especially, although it is quite evident in other parts of the country as well. One other problem that exists here is the strong hold of Panchayati Raj especially caste Panchayats in this region. Even though some communities through caste Panchayats have declared that they shall no longer engage in child marriage, the others are still dominating this practice and even though there are programs educating people on the ill effects of child marriage, there seems to be no substantial change in the mindset of the people.

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<sup>12</sup>Available at:<http://www.aljazeera.com/indepth/features/2012/04/201242465347804562.html>

## CUSTOM VERSUS LAW

Sources, which have contributed to what we know as law today, still prevail and pay an essential contribution to judicial decisions. Child marriage in India has been a custom, which has been followed for generations now and hence the biased approach towards it would certainly over power law, as it seems. Looking at the provisions of the Indian Penal Code, 1860 we can see another aspect to the legal approach towards child marriages. The Indian Legal System provides special aid and protection to women but the following clearly state its lack of disapproval to the implications of complete annulment of child marriages. Section 375 states,

‘A man is said to commit ‘rape’ who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:- Firstly- Against her will. Secondly- Without her consent ...Sixthly- With or without her consent, when she is under sixteen years of age.’

Section 376 (1) states,

‘Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term... which may be for life or for a term which may extend to ten years and shall also be liable to fine *unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both...*’

Here, the provisions read together clearly exhibit that the law as not explicitly focused on disapproving child marriages and not acknowledging marital rape. Upon the suggestion of the deletion of the exception of Section 375, the 172nd Law Commission revolted stating that it would amount to “excessive interference with the marital relationship.”

Further it has been argued that it is a custom, a part of Indian marital system which cannot change. Defining both custom and law Stanley Diamond states,<sup>13</sup>“... We live in a law-ridden society; law has cannibalized the institutions, which it presumably reinforces or with which it interacts.... We are encouraged to assume that legal behavior is the measure of moral behavior.... Efforts to legislate conscience by an external political power are the antithesis of custom: customary behavior comprises precisely those aspects of social behavior which are traditional, moral and religious--in short, conventional and non-legal. Put another way, custom is social morality. The relation between custom and law is basically one of contradiction, not continuity.” His theory is relevant and is of importance here when we talk about ending this social custom. Law prohibits this custom but this custom has deep end roots. Just like polygamy and polyandry are prohibited practices but are customs in some communities in India and cannot be over-ruled by any law. So the question finally arises, whether or not law should over power this custom. Giving a modern perception of this custom, it is relevant to state that every individual must have the right to choose a partner when mentally and physically able to do so. Yet contradicting this would mean that a custom began for a purpose and if that purpose has definite meaning and is followed on such a large scale, there is extensive proof to state that the practice ought to continue with some monitoring. But there are ample examples which prove that this social practice has not been checked and has now become a social evil, a state of horror for many your girls and women.

## CONCLUSION

This social evil, just like any other cannot be dealt with all at once nor can one person make alterations to it. It needs time, faith, compassion and knowledge, it needs a change in the perspective that both men and women have towards girls. In a country where goddesses are worshipped, it's a shame that what is mortal, living in front of our eyes, and is of the same kind, is ill-treated, looked down upon, made to feel as a burden, and is subjected to violence of every possible nature. The solutions both legal and moral in nature have been discussed and implemented for long. But these are of no use until and unless the people implement it in their lives. What the authorities

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<sup>13</sup>Diamond, Stanley, in "The Rule of Law versus the Order of Custom," in *In Search of the Primitive: A Critique of Civilization*

must focus on is education, for it has the power to bring light upon any darkness. These education programs need not just be confined to one category but rather focus on all age groups. To end the problem of child marriage there is a need to invest in girls until they are mentally, physically and psychologically ready for marriage and that means that the focus need to be on building healthier families, stronger societies and more vibrant economies. Further, it is imperative that the focus should not only to define and enunciate what the evil is but also to voice out the opposite of that evil. The main challenge is to show a positive vision to young girls. As discussed before, the problems that people face, which has resulted in child marriages need to be tackled first on the part of the authorities so that the question of a girls safety for example, does not make her early marriage a consequence. Lastly, there is a special need to empower those girls who have already been through the trauma of child marriage. They deserve every opportunity there is just like everyone else to make their life meaningful just as they wish it to be. The society needs to accept the choices that they make as well.

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