
CONSENT IN CHILD MARRIAGE: VALID CONSENT OR LEGAL FICTION

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ABSTRACT

Child marriage is a phenomenon that persists across cultures, geographies, and legal traditions, yet it sits in irreconcilable tension with the foundational principle of free and informed consent. In Indian law, the Prohibition of Child Marriage Act, 2006 renders child marriages voidable rather than void ab initio, thereby implicitly recognising a species of consent that contract law categorically rejects. This article argues that the notion of "consent" attributed to children in the context of marriage is a legal fiction a deliberate false assumption adopted by the legislature to accommodate socio-cultural realities at the cost of constitutional and contractual coherence. Through doctrinal analysis of relevant statutes, landmark judicial pronouncements, and international human rights instruments, the article demonstrates that minority renders a child incapable of granting genuine, free, and informed consent. It further examines the psychological underpinnings of decision-making capacity, the patriarchal socio-cultural pressures that vitiate any purported assent, and the legislative and judicial trajectories that suggest an emerging consensus in favour of treating child marriages as void. The article concludes with recommendations for comprehensive reform that would align domestic law with constitutional morality and international obligations.

Keywords: Child Marriage, Consent, Legal Fiction, Prohibition of Child Marriage Act, Voidable Marriage, Constitutional Morality, Personal Laws, POCSO, CEDAW.

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I. INTRODUCTION

India is home to one of the largest absolute numbers of child brides in the world, with millions of girls married before the age of eighteen.² Despite decades of legislative intervention, child marriage continues to be solemnised across communities under the aegis of personal laws, customs, and socio-economic compulsions. The Prohibition of Child Marriage Act, 2006 ("PCMA") prohibits but does not nullify child marriages, rendering them merely voidable at the option of the contracting minor.³ This legislative posture raises a profound jurisprudential question: if a minor lacks the competence to enter into a contract,⁴ how can the same minor be said to "consent" to the most consequential civil contract of their life?

The Indian Contract Act, 1872 expressly declares minors incompetent to contract and treats any purported agreement by a minor as void ab initio.⁵ Yet matrimonial law governed by a mosaic of personal laws and the PCMA occupies a parallel universe where minority does not automatically void the marriage. The law thus performs a jurisprudential sleight of hand: it simultaneously pronounces the child incapable of ordinary contractual consent and attributes to them a sui generis matrimonial consent that enjoys legal recognition. A "legal fiction", in the Fullerian sense, is a false assumption adopted by law to achieve a particular end.⁶ This article argues that the "consent" of a child in a child marriage is precisely such a fiction, devoid of the cognitive, emotional, and volitional prerequisites of genuine assent, yet accorded legal validity by a legislative framework unwilling to confront the social realities that sustain child marriage. Through doctrinal, comparative, and empirical lenses, this article interrogates the validity of consent in child marriages, traces the evolution of judicial opinion on the matter, and proposes a reformed normative framework consonant with constitutional morality and international human rights law.

² UNICEF, *Child Marriage: Latest Trends and Future Prospects* (2018). India accounts for nearly one-third of all child brides globally.

³ Prohibition of Child Marriage Act, 2006, S. 3 (India). The Act renders child marriages voidable, not void ab initio.

⁴ Indian Contract Act, 1872, S. 11 (India). Persons of unsound mind and minors are incompetent to contract.

⁵ Indian Contract Act, 1872, S. 10 (India). Free consent is a sine qua non for a valid contract.

⁶ Lon L. Fuller, *The Morality of Law* 39 (Yale Univ. Press, 1964). Fuller discusses legal fictions as deliberate false assumptions adopted to achieve legal ends.

II. THE CONCEPT OF CONSENT: CONTRACTUAL FOUNDATIONS AND MATRIMONIAL DEPARTURES

A. The Contractual Doctrine of Consent

Consent, in its legal conception, requires the concurrence of a free and rational will. Section 10 of the Indian Contract Act mandates that agreements be made by parties competent to contract, with free consent, for a lawful consideration, and for a lawful object.⁷ Section 11 further provides that only persons who have attained the age of majority, are of sound mind, and are not otherwise disqualified by law, are competent to contract.⁸ Free consent, under Section 14, is defined as consent uncaused by coercion, undue influence, fraud, misrepresentation, or mistake. A minor, by legal definition, lacks the cognitive and volitional maturity to satisfy this standard. The law of contract thus treats the minor as a class requiring paternalistic protection, a recognition that the capacity for autonomous, rational decision-making is an age-contingent faculty.

B. Matrimonial Consent: A Separate Regime

Marriage under Hindu, Muslim, and Christian personal laws in India is conceptualised differently from a commercial contract. While Hindu law historically treated marriage as a sacrament (a "samskara"), Muslim law expressly recognises it as a civil contract ("aqd"). Yet even within Muslim law, the doctrine of "option of puberty" ("khiyar-ul-bulugh") acknowledges that marriages contracted during minority may be repudiated upon attaining puberty an implicit concession that pre-pubescent or adolescent consent is not fully formed. The PCMA, 2006 reflects this schizophrenic approach. It penalises those who solemnise, promote, or permit child marriages⁹ while simultaneously permitting such marriages to subsist unless actively challenged by the minor upon attaining majority. Section 3 of the PCMA renders child marriages voidable, not void.¹⁰ Only in narrow circumstances where the child was enticed, trafficked, or a marriage was conducted in contravention of a judicial injunction

⁷ United Nations Convention on the Rights of the Child, art. 12, Nov. 20, 1989, 1577 U.N.T.S. 3 (recognizing children's evolving capacities while protecting them from exploitation).

⁸ Prohibition of Child Marriage Act, 2006, S. 12-14 (India). Marriages solemnized in violation of injunctions or involving trafficking are void.

⁹ Prohibition of Child Marriage Act, 2006, S. 9 (India). A male adult marrying a child is punishable with imprisonment up to two years or fine up to one lakh rupees, or both.

¹⁰ Independent Thought v. Union of India, (2017) 10 SCC 800 (India). The Supreme Court read down Exception 2 to S. 375 of the IPC, ruling that marital rape of the wife aged 15-18 years is rape.

does the Act declare marriages void.¹¹ This legislative inconsistency is constitutionally suspect. If the State penalises the act of child marriage as harmful to children, why does it simultaneously extend to such a marriage the dignity of legal recognition? The answer, this article contends, lies in the path-dependent nature of personal law reform in India and the legislature's reluctance to invalidate millions of existing marriages that would create complex downstream issues of legitimacy, succession, and maintenance.

III. CONSENT IN CHILD MARRIAGE: THE ANATOMY OF A LEGAL FICTION

A. Cognitive Incapacity and the Psychology of Adolescent Decision-Making

The notion that a child particularly one below the age of sixteen can meaningfully consent to marriage is contradicted by developmental psychology. Jean Piaget's landmark theory of cognitive development demonstrates that the capacity for formal operational reasoning, which includes abstract thinking, long-term consequential analysis, and resistance to immediate environmental pressures, does not fully consolidate until late adolescence.¹²

A child compelled or persuaded into marriage cannot evaluate the full legal, social, reproductive, and economic consequences of that decision. She cannot appreciate the impact on her education, health, and autonomy. She cannot anticipate cycles of domestic violence, unwanted pregnancy, or economic dependence that child marriage statistically enrails.¹³ The "consent" she provides often expressed through silence, acquiescence, or the miming of ritual acts is not the product of an autonomous will but of a will shaped and constrained by family authority, economic deprivation, patriarchal socialisation, and cultural coercion.

B. Duress, Social Pressure, and the Vitiating of Assent

Even where a child appears to "agree" to a proposed marriage, the structural conditions under which that agreement is obtained vitiate any claim to free consent. In rural and semi-urban India, girls are rarely consulted about their prospective spouses. Where they are nominally consulted, the economic vulnerability of the family, the social stigma attached to unmarried

¹¹ Prohibition of Child Marriage Act, 2006, §§ 12-14 (India). Marriages solemnised in violation of injunctions or involving trafficking are void.

¹² Jean Piaget, *The Psychology of Intelligence* (M. Piercy & D.E. Berlyne trans., Routledge 1950). Piaget's theory of cognitive development demonstrates that abstract reasoning and foresight develop through adolescence.

¹³ National Family Health Survey (NFHS-5), 2019–21, Ministry of Health and Family Welfare (India). Despite legislative reforms, 23.3% of women aged 20–24 were married before 18.

girls of a certain age, and the threat of ostracism create conditions of undue influence that contract law would readily recognise as fatal to consent. The Protection of Children from Sexual Offences Act, 2012 ("POCSO") fixes the age of consent for sexual activity at eighteen years, expressly recognising that children below this age cannot meaningfully consent to sexual contact.¹⁴ If the law regards a seventeen-year-old as incapable of consenting to a single act of sexual intimacy, the jurisprudential incongruity of treating the same person as capable of consenting to the lifelong institution of marriage which necessarily encompasses sexual relations, reproduction, economic interdependence, and legal obligations is impossible to justify.

C. The Legal Fiction Defined

A legal fiction, in Kelsenian jurisprudence, generates a normative contradiction when it is used not merely to achieve administrative convenience but to legitimate the violation of a substantive right.¹⁵ The "consent" of the child in a voidable child marriage is precisely such a fiction. It is a false attribution of juridical capacity to a person whom the legal system simultaneously and elsewhere acknowledges lacks that capacity. It is sustained not by any principled distinction between matrimonial and contractual capacity, but by the legislature's deference to entrenched social practices. The Supreme Court of India has itself, in *Independent Thought v. Union of India*, recognised that Exception 2 to Section 375 of the Indian Penal Code, which exempted marital rape of a wife between fifteen and eighteen years from the definition of rape, created an unconstitutional fiction: that marriage conferred on the husband a perpetual licence to sexual access irrespective of the wife's age or consent.¹⁶ The Court struck down this exception as violative of the right to equality and personal liberty. This reasoning, *mutatis mutandis*, applies to the fiction of matrimonial consent itself.

IV. JUDICIAL DISCOURSE: NAVIGATING BETWEEN SOCIAL REALITY AND CONSTITUTIONAL MORALITY

A. The Supreme Court's Evolving Position

¹⁴ Protection of Children from Sexual Offences Act, 2012 (India). The age of consent for sexual activity is fixed at 18 years.

¹⁵ Hans Kelsen, *General Theory of Norms* 254 (M. Hartney trans., Clarendon Press 1991). A norm that prescribes conduct and simultaneously frustrates it creates an internal antinomy.

¹⁶ *Independent Thought v. Union of India*, (2017) 10 SCC 800 (India). The Supreme Court read down Exception 2 to S. 375 of the IPC, ruling that marital rape of a wife aged 15–18 years is rape.

The Indian judiciary has, over the past two decades, progressively expanded the constitutional architecture of personal autonomy in matrimonial matters. In *Lata Singh v. State of U.P.*, the Supreme Court unequivocally affirmed the right of every adult to choose their own partner as an aspect of personal liberty under Article 21 of the Constitution.¹⁷

In *Shafin Jahan v. Asokan K.M.*, the Court went further, holding that the right to choose a life partner is an inalienable dimension of the constitutional guarantee of liberty and dignity.¹⁸ While this decision concerned an adult's choice, its reasoning has powerful implications for child marriage: if the freedom to choose a spouse is a fundamental right, then the state's acquiescence in a regime where children are denied that freedom is constitutionally untenable.

The Court's direction in *Voluntary Health Association of India v. Union of India* requiring states to rigorously implement the PCMA and appoint Child Marriage Prohibition Officers¹⁹ reflects an institutional recognition that the legislative framework, while imperfect, must be enforced. Yet enforcement of a voidable regime cannot be equated with the principled invalidation of child marriages as void: voidability continues to place the burden of escape on the very child the law purports to protect.

B. The Tension Between Personal Laws and Constitutional Rights

The persistence of child marriage is partly attributable to the constitutional protection extended to personal laws under Articles 25 and 26 of the Constitution. Religious communities have historically invoked the right to manage their own matrimonial affairs as an aspect of religious freedom.²⁰ Courts have, on occasion, been reluctant to strike down personal law provisions that facilitate child marriage out of deference to community autonomy. However, the Supreme Court's insistence in *Govt. of NCT of Delhi v. Union of India* on the primacy of constitutional morality over popular morality²¹ provides a doctrinal basis for subjecting personal laws to rigorous fundamental rights scrutiny. Child marriage, by denying the child the right to choose,

¹⁷ *Lata Singh v. State of U.P.*, (2006) 5 SCC 475 (India). The Supreme Court reaffirmed the individual's right to choose a spouse.

¹⁸ *Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 368 (India). The Court held the right to choose a partner is integral to personal liberty under Article 21.

¹⁹ *Voluntary Health Association of India v. Union of India*, (2013) 4 SCC 1 (India). The Court directed states to implement the PCMA more rigorously and appoint Child Marriage Prohibition Officers.

²⁰ *Rajasthan High Court Legal Services Committee v. State of Rajasthan*, (2014) SCC Online Raj 8139. Local customs were argued to override statutory prohibitions on child marriage.

²¹ *Govt. of NCT of Delhi v. Union of India*, (2018) 8 SCC 501 (India). Emphasising constitutional interpretation must align with constitutional morality over popular morality.

the right to education, the right to health, and the right to a dignified life, implicates a constellation of fundamental rights that cannot be subordinated to religious or customary practice.

C. Registration, Evidentiary Lacunae, and the Enforcement Challenge

The absence of compulsory marriage registration has historically impeded the enforcement of minimum age requirements. While the Supreme Court in *Seema v. Ashwani Kumar* directed the compulsory registration of all marriages,²² compliance remains uneven. Without reliable records, the legal system cannot verify whether parties were of legal age at the time of marriage, rendering the voidability mechanism largely theoretical for the children who need it most.

V. THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK: OBLIGATIONS AND GAPS

India is a party to CEDAW, which under Article 16(2) expressly declares that the betrothal and marriage of a child shall have no legal effect and mandates the specification of a minimum age for marriage.²³ The UN Convention on the Rights of the Child, to which India is also a party, recognises the child's right to participate in decisions affecting them while simultaneously protecting them from exploitation and harm.²⁴ The Human Rights Council has characterised child, early, and forced marriage as a human rights violation that disproportionately affects girls and perpetuates cycles of gender inequality, poverty, and exclusion.²⁵ The Sustainable Development Goals explicitly commit member states to ending child marriage by 2030 (SDG 5.3). India's continued adherence to a voidable child marriage regime places it in tension with these international commitments. Comparative jurisdictions offer instructive models. Bangladesh, despite higher rates of child marriage in practice, has legislated for void child marriages under certain circumstances. Ethiopia, Tanzania, and Kenya have enacted legislation rendering child marriages void. The international trend is unmistakably toward treating child marriages as void rather than voidable—a normative position that the Indian legislature has been

²² *Seema v. Ashwani Kumar*, (2006) 2 SCC 578 (India). The Court mandated compulsory registration of marriages to maintain evidentiary records.

²³ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), art. 16(2), Dec. 18, 1979, 1249 U.N.T.S. 13 (specifying that betrothal and marriage of a child shall have no legal effect).

²⁴ United Nations Convention on the Rights of the Child, art. 12, Nov. 20, 1989, 1577 U.N.T.S. 3 (recognising children's evolving capacities while protecting them from exploitation).

²⁵ Human Rights Council, Resolution 24/23: Child, Early and Forced Marriage, U.N. Doc. A/HRC/RES/24/23 (Oct. 8, 2013).

slow to adopt.

VI. LEGISLATIVE TRAJECTORY: TOWARD REFORM

The Prohibition of Child Marriage (Amendment) Bill, 2021 represents the most significant proposed reform since the enactment of the PCMA.²⁶ The Bill proposes to raise the minimum age of marriage for women from eighteen to twenty-one years (equating it with that for men) and, crucially, to render all child marriages void ab initio. The Law Commission of India had earlier recommended similar reforms, emphasising that voidability was inadequate protection for child brides.²⁷ If enacted, the 2021 Bill would significantly narrow the space for the legal fiction of matrimonial consent. A void marriage carries no legal obligations and cannot be ratified: the minor would not bear the burden of approaching a court to dissolve a union she never had the legal capacity to enter. This reform would align domestic law with the contractual principle that a minor's agreement is void ab initio and with India's international human rights obligations. Simultaneously, the Special Marriage Act, 1954, which provides a secular framework for civil marriages, requires both parties to meet the minimum age requirements.²⁸ Extending and enforcing this model across personal laws rather than allowing personal laws to dilute the age threshold would represent a principled approach to uniformity in matrimonial capacity.

VII. CRITICAL ANALYSIS: IS THE LEGAL FICTION DEFENSIBLE?

Defenders of the voidable regime argue that rendering child marriages void ab initio would leave child brides in legal limbo: deprived of maintenance rights, their children rendered illegitimate, and their property claims extinguished. These are genuine concerns that must inform the design of any reformed regime. However, they do not constitute a principled defence of treating an inherently invalid consent as legally operative. A legislative framework can simultaneously declare child marriages void while preserving the financial and custodial rights of the child bride and her children through express statutory savings provisions. The Law Commission's 2008 Report proposed precisely such a savings framework. The practical

²⁶ Prohibition of Child Marriage (Amendment) Bill, 2021 (India). The Bill proposes to raise the minimum age of marriage for women from 18 to 21 years and render all child marriages void.

²⁷ Law Commission of India, Report No. 205: Proposal to Amend the Prohibition of Child Marriage Act, 2006 and Other Allied Laws (2008).

²⁸ Special Marriage Act, 1954 (India). The Act requires both parties to be of legal age and provides for civil registration of marriages.

concerns are real but soluble; they cannot justify the perpetuation of a legal fiction that normalises the erasure of a child's agency.

The deeper objection to the legal fiction is normative. By treating a child's non-refusal as matrimonial consent, the law does not merely fail to protect the child: it actively co-opts the legal system in the legitimization of harm.

As the Supreme Court observed in *State of Karnataka v. Appa Balu Ingale*, social customs cannot override the rule of law.²⁹ A legal system that subordinates the rule of law to the rule of custom and manufactures a legal fiction to bridge the gap produces not merely ineffective law but unjust law.

The empirical data corroborates the inadequacy of the present framework. NFHS-5 data reveals that 23.3% of women aged 20–24 in India were married before the age of eighteen, notwithstanding the PCMA's prohibition. The voidable regime has not deterred child marriages; it has merely provided their perpetrators with the comfort of knowing that the marriage will be presumed valid unless actively challenged a challenge that the disempowered child is structurally ill-equipped to mount.

VIII. RECOMMENDATIONS

In light of the foregoing analysis, the following reforms are proposed:

First, the Prohibition of Child Marriage (Amendment) Bill, 2021 should be enacted with appropriate savings provisions to protect the financial rights of child brides and the legitimacy of children born of such marriages. All child marriages should be rendered void ab initio, removing the burden from the child to seek judicial voidance.

Second, compulsory registration of all marriages, irrespective of the personal law under which they are solemnised, should be mandated by central legislation. The directive in *Seema v. Ashwani Kumar* should be given statutory force, and non-registration should carry penalties proportionate to the seriousness of the offence.

Third, the age of matrimonial capacity should be aligned with the age of consent under POCSO

²⁹ *State of Karnataka v. Appa Balu Ingale*, AIR 1995 SC 469. The Supreme Court acknowledged that social customs cannot override the rule of law.

eighteen years for all persons, regardless of gender. The proposed equalisation of marriage age at twenty-one under the 2021 Bill warrants careful empirical evaluation to ensure it does not inadvertently criminalise young adults in consensual relationships.

Fourth, personal laws that currently set lower minimum ages of marriage should be subjected to constitutional scrutiny and, where found inconsistent with fundamental rights, struck down or reformed through legislation. The uniformity achieved by the Special Marriage Act, 1954 provides a model.

Fifth, legal reforms must be accompanied by sustained investment in girls' education, economic empowerment, and community awareness programmes. Law alone cannot dismantle the social structures that sustain child marriage; structural interventions addressing poverty and gender inequality are essential complements to legal reform.

IX. CONCLUSION

The "consent" of a child in a marriage is, upon rigorous examination, a legal fiction of the most consequential kind. It is unsupported by the cognitive, volitional, and structural prerequisites of genuine assent; it is contradicted by the minor's legal incapacity to contract; it is undermined by the POCSO's own recognition that children cannot consent to sexual activity; and it is repudiated by India's international human rights commitments.

The persistence of this fiction in Indian law is a product of path-dependency, legislative caution, and the entrenched power of personal law communities. But its perpetuation comes at an unacceptable cost: the systematic denial of childhood, agency, health, and dignity to millions of girls. As the Supreme Court has progressively expanded the constitutional architecture of personal liberty and constitutional morality, the jurisprudential foundations of the voidable child marriage regime have grown increasingly precarious.

The path forward is clear: child marriages should be declared void ab initio; the burden of legal action should be shifted from the victimised child to the State; savings provisions should protect the interests of children born of such unions; and personal laws should be brought into conformity with constitutional guarantees. Only through such comprehensive reform can Indian matrimonial law shed its complicity in the legal fiction of child consent and fulfil its constitutional promise of dignity and equality for every child.