CHILD MARRIAGE PROSECUTIONS IN INDIA

CASE LAW ANALYSIS OF ACTORS, MOTIVES AND OUTCOMES 2008–2017

PARTNERS FOR LAW IN DEVELOPMENT

NUMBER 3
ADOLESCENT SEXUALITY AND EARLY MARRIAGE SERIES

Partners for Law in Development (PLD) is a legal resource group founded in 1998 that facilitates realization of social justice and women's rights by relating law to contexts of marginalization shaped by gender, sexuality, culture and poverty, to tackle intersecting systems of oppression. We use three complementary strategies of knowledge creation, developing capacities and engaging in sectoral debates to shape state, civil society institutions and social policy perspectives, both domestically and globally.

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The **Adolescent Sexuality and Early Marriage Series** comprises of research studies, consultation reports and analysis by Partners for Law in Development (PLD), that bring out the complex interplay between the age of sexual consent, early marriage and structural inequalities in the lives of adolescents and youth from marginalized populations in India. Using a socio-legal lens, this series reveals ways in which deterrence approaches and criminalization render this population more vulnerable to harm and less able to access rights protection.

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The study evolved from an initial interest in judicial responses to adolescent consensual sex following the increase in the legal age of consent, from 16 to 18 years (2012), to its present focus on prosecutions connected with child marriage. Periodic reviews of data along different parameters, sectoral interest and engagement with the findings within a growing push for strong child marriage laws shaped the study's direction. The widespread assumption about the power of the law, indeed strong law, as the driver of social change, thrived in an evidence vacuum. With nothing but references to landmark cases or to the low numbers of prosecutions reported by the National Crime Records Bureau, the rhetoric that normative goals are best realized through punitive force remained largely uncontested. It became clear that evidence on how the law is used within local contexts was necessary for any meaningful engagement with law reform discourses. It then became compelling to review the case law along different parameters, to harvest its rich insights in ways that social power relations rather than intended legislative goals animate the use of law.

Our gratitude to the researchers, advisers and reviewers for their valuable contributions and to the fellow travellers and colleagues in the sector within and outside India—far too many to name but whose enthusiastic encouragement, support and belief in the value of this inquiry helped steer it towards the final finish. The research was undertaken in two phases. In the first, we acknowledge Akhil Kang for collating and tabulating case law from 2007 to 2015, and who along with Radhika Chitkara created the initial format for organizing the data; with Ikshaku Bezbaroa reviewing and updating the case law. In its second phase, Saumya Maheshwari expanded the database to include case law from 2016–2017, refined the tabulation and jointly with Mrinalini Ravindranath reviewed the data to fill gaps and pare it all down to the relevant database of 83 cases.

Successive iterations of the study findings for presentation at conferences and internal reviews would not have been possible without the able assistance of Saumya Maheshwari, who also helped organize the data by chapter, summarizing the case narratives for the draft report. Most of all, this study was energized by the keen interest evoked by the many presentations across conferences, in closed policy huddles and at national, regional and global levels, all of which emphasized the absence and dire need for evidence-based advocacy on law. To all the collaborating partners and participants in Mumbai, Chennai, Kolkata and Delhi consultations, to the National Coalition Advocating for Adolescent Concerns, the South Asia consortium allies who initiated similar documentation exercises in their countries, to the American Jewish World Service who stayed the course with this project, your engagement and validation were important to this process.

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CHAPTER 1

SIGNIFICANCE AND SCOPE OF THE STUDY

Making the legal framework stringent is widely believed to be the most effective way of combating child marriage. The push for stricter legal measures to enforce a stipulated minimum age of marriage is part of a global agenda that frames all underage marriages as both forced and the reason for poor maternal health and educational outcomes for girls.[1] In a similar vein in India, there are calls for increasing the minimum age of marriage for girls from 18 to 21 years to improve maternal health outcomes and achieve parity in age of marriage between young men and women.[2]

Successive laws in India on marriage since 1929 gradually increased the minimum age to the current 18 and 21 years for females and males, respectively.[3] Yet, even though the law makes it possible to prosecute adults organizing an

"This qualitative analysis looked at the extent to which the law serves its intended purpose and whether it empowers those it is intended for, by comparing categories of litigants who initiate legal action and the remedies sought against its consequences on the young for whom the law is intended."

[1] Target 5.3 of the Sustainable Development Goals calls for eliminating "all harmful practices, such as child, early and forced marriage…"

[2] Task force set up examining matters pertaining to age of motherhood, imperatives of lowering the maternal mortality rate, improvement of nutritional levels and related issues, 6 June 2020, https://bit.ly/2Qr83qj. In February 2021, the Supreme Court of India issued notice on the petition by Ashwini Kr Upadhyaya to transfer to itself pending petitions in the Delhi and Rajasthan High Courts that seek uniformity in minimum ages of marriage for men and women, at 21 years. See https://bit.ly/3rQWRnC.

[3] Child Marriage Restraint Act, 1929 (14 years for girls, 18 years for boys). The Act was amended in 1940 to raise the minimum age of marriage for girls to 15 years and again in 1978 to raise it to 18 years. The Prohibition of Child Marriage Act was enacted in 2006, in which the minimum age of marriage is 18 (female) and 21 (male).

underage marriage, once such a marriage has occurred, it is recognized as valid. The push to deny legal validity to underage marriages without exception to the context or circumstances and to increase the minimum age of marriage for girls to 21 years is premised on the belief that stringent law is the decisive means of social change. The states of Karnataka and Haryana amended their laws to declare that all child marriages, without exception, will be voided,[4] and there is a petition to the respective state High Court to do the same in Odisha and Delhi.[5]

National data shows a gradual decline in child marriage over time, from 46 per cent for females aged 45–49 years to 27 per cent for females aged 20–24 years.[6] It is accompanied with an increase in the median age of marriage, from 17.2 years in 2005–2006 to 19 years for women in 2015–2016 and from 22.6 to 24.5 years for men across the same time span. Due to the COVID-19 lockdown and ensuing economic distress, child marriage spiked in 2020, including in Karnataka State, where child marriages were voided in 2017.[7]

The steadily declining rates of child marriage over time and the reported spike during the pandemic begs the question of whether legislative change (let alone stringency) is truly the best approach to tackling child marriage. The absence of cogent evidence on the effectiveness of the law makes it difficult to answer how the law is used, what interests it serves or how it impacts the young beneficiaries it is meant to serve. This evidence gap is the basis of the present study. By examining how the law is used in relation to child marriage, this study found insights on what kind of law might best support girls who are most vulnerable to and within contexts of child and early marriage.

The findings of this study speak to the limits and possibilities of the law in relation to child marriage, for that reason must inform the law reform debates. Accordingly, it offers recommendations on what type of law might protect the rights of young persons while preventing child marriage.

1.1 Laws pertaining to child marriage

India has more than one law relating to child marriage. The primary law, the Prohibition of Child Marriage Act, 2006 (PCMA), defines child marriage, culpability, penalties and rights. Other intersecting penal and family laws outline penalties for actions accompanying child marriage and speak to issues of marriage validity, solemnization and matrimonial rights, which the following section outlines. These laws work in conjunction with each other.

[4] The states of Karnataka and Haryana have made statutory amendments to the PCMA to make all underage marriages void, https://bit.ly/2YIeDNs, https://bit.ly/2D6ARBi.

[5] A public interest petition in the Odisha High Court (November 2019) sought the declaration of all underage marriages as void, https://bit.ly/3jstSSD; *Aisha Kumari v. NCT of Delhi and Ors* (January 2021) seeks direction for declaring all underage marriages void in Delhi, see https://bit.ly/3phKHIR.

[6] National Family Health Survey, 2015–2016.

[7] See news reports from *Indian Express* and *The News Minute*, https://bit.ly/2LNsM97 and https://bit.ly/3pde2Oh.

Prohibition of Child Marriage Act, 2006

As the main law, the PCMA defines the minimum age of marriage at 18 years for women and 21 years for men.[8] It provides remedies for the following three situations in relation to child marriage, or marriage in which one or both parties are underage. It also designates a functionary at the district level—the child marriage prohibition officer—to raise awareness and initiate legal action to prevent underage marriages.

- **Where the marriage is yet to take place:** An impending marriage can be prevented by an application seeking an injunction against it.[9] The injunction is an order that prohibits the performance of such marriage. It can be granted by the magistrate at the district level, usually the subdivisional magistrate, upon an application for it brought by the child marriage prohibition officer, by a third party or even by a court. Marriages performed in the face of such an injunction are treated as invalid and voided.[10]
- **Where the marriage has already taken place:** Despite the law, if an underage marriage takes place, it is treated as valid in law.[11] The law, however, entitles the underage party in the marriage the option to repudiate or nullify the marriage at any point before two years of attaining majority.[12] The minor may file a petition for invalidation of marriage through a guardian, friend or the child marriage prohibition officer.[13]
- **Circumstances in which the marriage is unlawful and void:** Marriages in which a minor was enticed out of the lawful guardianship or compelled to marry by force or deceitful means or is sold for the purpose of marriage is considered as trafficked and are thus voided.[14] Marriages that take place in violation of a court's injunction order are also treated as void.[15]

Adults involved in performing or promoting child marriages may be prosecuted under the PCMA and be liable for imprisonment of up to a maximum of two years or a fine of up to 100,000 rupees.[16]

Statutory rape and age of sexual consent

A gradation of sexual offences is defined in the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) as well as the Indian Penal Code, 1860. An adult or minor husband of a minor girl may face additional charges of rape (if relevant) in the context of underage marriage. These penal laws assign the age of consent, which signifies when a person is considered to have the legal capacity to engage in consensual sexual activity.

8 Section 2(a), Prohibition of Child Marriage Act (PCMA).
9 Section 13, PCMA.
10 Section 14, PCMA.
11 Section 3(1), PCMA.
12 Section 3(3), PCMA.
13 Section 3(2), PCMA.
14 Section 12, PCMA.
15 Section 14, PCMA.
16 Sections 9 and 10, PCMA.

Sex with a person younger than the age of consent amounts to rape regardless of consent. Termed as "statutory rape", it implies that age rather than the presence or absence of consent is material to determining the offence.[17]

The age of consent in Indian law was 16 until 2012, when the enactment of a special law on child sexual offences, POCSO Act, set it at 18. A subsequent amendment to the Penal Code in 2013 increased the age of consent from 16 to 18 years. With the increase in age of consent to 18, all adolescent sexual activity came to be criminalized—bringing legal capacity for sex on par with the minimum age of marriage for girls. Accordingly, sexual activity among adults is deemed legal, while sexual activity involving a person under 18, even when consensual and with a peer, is treated as sexual abuse or statutory rape.

While sex with a minor constitutes statutory rape, the law creates an exception for a minor wife. The definition of rape in the Penal Code exempts marital rape charges between cohabiting spouses, unless the minor wife is younger than 15.[18] Hence, sex with a minor wife aged 15–18 years, ironically regardless of her consent, is not statutory rape.[19]

This overwhelming focus on age, to the exclusion of other factors like consent, coercion and proximity in age of parties, creates an unhelpful binary of either treating sex with an underage wife as statutory rape or as entirely shielded against rape charges. The *Independent Thought v. Union of India* case reversed the position in 2017. The verdict removed the bar against prosecuting the husband for rape of minor wife, without reference to consent, to hold all sex with a wife under 18 to be statutory rape.

The legal position after 2017, on account of the *Independent Thought* verdict treats sex with a minor wife to be an offence under both the POCSO Act and the Penal Code,[20] does not apply to this study as the data sample in this study predates this development. The cases arose prior to 2017, when sex with a minor was punishable under the POCSO Act but exempted from prosecution within marriage if the wife was older than 15.

An additional offence that relates to child marriage is kidnapping. When a minor is taken out of the lawful guardianship of her parents, the charges of kidnapping under the Penal Code might apply, which is punishable with up to 10 years of imprisonment in some cases.[21] The PCMA voids marriages involving kidnapping.

Personal, family, marriage and divorce laws

Personal laws that govern the validity of marriages prescribe a minimum age of marriage, which is 18 for girls and 21 for boys under the Hindu Marriage Act, 1955,[22] the Indian

[17] The purpose of setting this age bar is to protect children who are biologically and psychologically not ready, although the legal age varies across societies and shifts within societies over time, based on cultural rather than scientific considerations.
[18] Exception to Section 375, Penal Code.
[19] *Independent Thought v. Union of India,* W.P. (C) 382, 2013, S.C.C, 11 October 2017.
[20] Section 5(I) POCSO, Section 376(2)(m) Penal Code, punishable with life imprisonment.
[21] Section 366, Penal Code.
[22] Section 5(iii), Hindu Marriage Act.

Christian Marriage Act, 1872,[23] the Parsi Marriage and Divorce Act, 1936[24] and the age of puberty (usually assumed to be 15 years) in Muslim law. With the exception of Parsi law, all other personal laws treat underage marriage as valid, albeit voidable in limited circumstances.

1.2 Overview of the data and study methodology

About the study sample

The cases that were reviewed for this study span a decade, with all of them decided between 2008 and 2017. Most of the cases arose after 2012, when the age of consent was increased to 18 years, but a few date to earlier, when the legal age of consent was 16.

A total of 83 cases form the sample for this study. Of them, 56 cases were decided by the High Courts and 27 by District Courts. The state breakdown for all 83 cases is: Punjab and Haryana (29), Delhi (21) and Karnataka (13), with the remaining 20 distributed across Gujarat, Tamil Nadu, Rajasthan, Bihar, Kerala, West Bengal, Madhya Pradesh, Jharkhand and Maharashtra.

The study sample includes all reported cases from the High Courts from across the country, but the District Court cases were limited to Delhi, Haryana, Punjab and Rajasthan states.

Data selection and study methodology

The judgments and orders in which child marriage is specifically mentioned were selected for analysis. Thus, they encompass cases filed under the PCMA as well as legal action initiated under other laws in relation to child marriage. Accordingly, the study sample reflects diverse types of legal action, including and beyond the PCMA, that sought varied remedies available in civil, criminal and constitutional law. Even though the verdicts pertained to cases and issues intrinsic to child marriage, they did not necessarily involve the PCMA.

The cases were sourced from online platforms using references to the child marriage statute in their free text. This free-text search was conducted across two databases of Indian court judgments: manupatra.com and indiankanoon.com. Delhi District Court cases are available on the online portal indiankanoon.com, but the others are not. To access judgments relating to the PCMA from the District Court in other states, a search of the specific laws was conducted on ecourts.gov.in for each district of Haryana, Punjab and Rajasthan states.

In the first round of search, 187 cases were found using those search tools. They were then narrowed down to those case documents that contained sufficient factual background or deliberation on the issue of child marriage and the law. These additional filters reduced the sample size to the 83 cases, which offer, at the very least, some insight on facts, the legal remedy sought and the judicial reasoning.

[23] Section 60(1), Indian Christian Marriage Act.
[24] Section 3(c), Parsi Marriage and Divorce Act.

The availability of judgments of District Courts on the e-courts website varies and depends upon the extent of digitization undertaken by the staff of each court. While judgments from the District Courts in Haryana State were more easily available, those from districts in Punjab and Rajasthan states were not because digitized legal records from these courts were scarcely populated at the time of data collection. In Punjab, although the names of several cases under the PCMA were available, the final judgments were not. Most District Courts of Rajasthan had not uploaded details of cases under the PCMA, and in some cases where details were available, the final judgment was not. That more cases from District Courts in Haryana State are included in the study sample than from the other two states may not be an indication of a higher frequency of cases in that region but rather a consequence of more efficient digitization. Therefore, the study data are not an indicator of the extent of prevalence of child marriage and related litigation in the country.

Categories of legal proceedings in the data

The sample includes three types of cases: criminal cases, criminal writ petitions and civil cases. The criminal cases entailed trials, applications for bail and the quashing of criminal proceedings. The criminal writ petitions were largely in the nature of habeas corpus pleas, while the civil trials included matrimonial disputes and pleas for declaring the marriage as null and void.

- **43 criminal cases:** The largest grouping, the criminal cases involved the prosecution of accused persons for having committed penal offences. Among them were 13 trials that involved examination and cross-examination of persons and the presentation of evidence for the court to determine the guilt or innocence of the accused persons. It also included 17 bail applications, whereby the accused persons petitioned to be released from police custody and applications filed before the High Courts for the quashing of a first information report (the complaint registered with the police) or criminal proceedings on the grounds that a charge was not made against the accused person.
- **25 criminal writ petitions:** These cases were brought before the High Courts under Article 226 of the Constitution to seek the enforcement of fundamental rights through the issuance of an order or a writ. For example, one may seek a writ of mandamus directing the police to register a criminal case or a writ of habeas corpus demanding that a missing person allegedly in illegal confinement be produced before the court.
- **15 civil trials:** The civil trials included cases of a civil nature before a Trial or District Court. Of these cases, 12 were matrimonial disputes seeking declaration that the marriage was null and void, while the other three cases sought an injunction order under the PCMA to prohibit the solemnization[25] of a child marriage.

[25] In the context of marriage, solemnization refers to the performance of a ceremony. In India, prescribed religious or customary ceremonies are sufficient for solemnizing marriage.

Qualifications

While the sample size of 83 cases may be the largest review of child marriage judicial decisions to date, rendering it significant on that level, the data are by no means comprehensive or reflective of the actual number of cases filed at the district level in these states.

And to reiterate, the 83 cases covered in this study involved child marriage but not all of them involve use of the PCMA. As previously explained, there were criminal prosecutions under general law or special law as well as bail applications and constitutional remedies of habeas corpus in the mix of legal actions that the cases cover.

Because the study comprises a mix of short orders in bail requests, detailed trial court judgments, appeals and habeas corpus verdicts, some cases have minimal information on the circumstances while others contain adequate information. Further, the uneven digitization makes it impossible to access the entire trajectory of legal actions involving the same parties. Hence, in addition to the uneven level of information and facts across many cases, it is also not possible to uncover the full trajectory of cases pertaining to a single marriage or a mix of parties. These limitations are inherent with such data, and it is for this reason that the discussion in the chapters does not relate findings along each aspect of inquiry across all cases. Instead, comparative tables along each aspect are provided. This approach at least illuminates macro trends that the study sought to reveal.

It must also be clarified that the 83 cases in this study involve distinct parties and are not offshoots of or connected with the other cases in the database, even though they have arisen from prior or ongoing legal proceedings between the same parties (who are not part of this study sample). As explained further on, the cases are discussed discretely, in groupings designated by the party who approached the court and do not overlap with cases in the other chapters.

The report uses the terms "child marriage" and "underage marriage" interchangeably. While the Indian Majority Act, 1875 states that majority is attained at the age of 18 years,[26] the PCMA makes an exception to this general law by treating men younger than 21 as "children" for its purpose. Even though an underage girl or minor wife falls into the legal category of "child" (is younger than 18), the ages of husbands in this report vary from younger than 18 to between 18 and 21 to older than 21, making the term underage equally appropriate.

1.3 Profile of the parties in the reviewed cases

Age profile of girls and their husbands

Of the 83 cases, 71 case documents included the age of the girl at the time her marriage had been solemnized. A large majority of the cases pertain to older adolescent girls, aged 15–17. A small fraction were in the age category of 10–14 years. Only one case involved the marriage of a prepubescent girl.

[26] Section 3(1), Indian Majority Act, 1875.

TABLE 1 : AGE PROFILE OF GIRL/ MINOR WIFE

Younger than 10	10–14	15–17	Older than 18	Not mentioned	Total
1	14	55	1	12	83

Of the 83 cases, 42 case documents referenced the age of the girl's husband at the time of marriage. More than 60 per cent of them were aged between 21–25 years, while 21 per cent were aged between 15–20, and 14 per cent were 26–35 years old. Only one husband was older than 36 at the time of marriage.

TABLE 2 : AGE PROFILE OF HUSBAND

15–17	18–20	21–25	26–35	Older than 36–45	Not mentioned	Total
7	2	26	6	1	41	83

Where ages were included, a comparison of the girl's age and her husband's age revealed a range of differentials: In 11 cases, the difference in age was of two to five years, in nine cases it was a difference of six to eight years, and in another nine cases it was a difference of nine to twelve years. Only a few cases had an age differential of less than two years or more than 12 years.

TABLE 3: AGE DIFFERENCE BETWEEN MINOR WIFE AND HUSBAND

Less than two years	2–5	6–8	9–12	More than 12 years	Is not clear	Total
3	11	9	9	3	48	83

Economic profile of the parties

Although the reviewed judgments and orders mostly dwelled on contentions of the parties and legal issues, there were identifiers that indicated the economic profile of some of the parties. These identifiers entailed informal means of livelihood with low and/or erratic income, poor standard of literacy and formal education, non-availability of birth registration record and residence in a slum cluster or industrial site. Based on those factors, the parties involved in the reviewed cases were predominantly from poor, peri-rural and working-class backgrounds (62 per cent) with little or no means to secure a quality education nor a white collar or professional career. Their families depended largely on informal work, and their residence was located in a rural or slum area. Although the girls were going to school in many cases, there were also instances of girls who had dropped out of secondary school, and others who were unable to read or write. In some cases, the court made comments on the living conditions of the litigants, which were considered as an indicator of economic status (see Annex A for more details).

1.4 Structure of the report

The study qualitatively evaluated what the legal action in relation to child marriage says about the law and its ability to serve the intended purpose. It examined who initiated the legal action, the remedies sought, the judicial reasoning and what this information cumulatively says about how girls or minor wives are framed in the law. The chapters are organized to highlight these aspects.

Each chapter takes one category of litigants based on who approached the court. Within each chapter, litigants are divided by the remedies they sought, the legal provisions they invoked and the judicial determination. In many cases, the litigant party was pursuing counter action against prior ongoing litigation against them.

Following this introduction, chapter 2 presents the analysis of the circumstances in which girls approached courts; chapter 3 analyses the cases and legal actions filed by parents; chapter 4 looks at the cases filed by husbands; and chapter 5 considers the cases filed against the parents of either the girl or her husband by varying persons for the prosecution of those parents. The last category deviates by clustering cases in which the parents were prosecuted as a contrast to cases in which the parents sought legal action. As previously emphasized, the cases in each chapter are distinct from the other chapters, with no overlap, even where facts appear to be similar (see Annex B for the list of all 83 cases by chapter).

Chapter 6 brings together the findings to draw conclusions about the socioeconomic and factual contexts in which child marriage-related laws are used and to illuminate the use of law. It is followed by findings on the factors that informed the judicial responses and reasoning, and concludes with recommendations for law and policy reform—the very purpose for this study. We believe that the evidence on the use of the laws will be instructive for discussions on law reform and policy deliberations related to child and early marriages.

CHAPTER 2

CASES THAT GIRLS FILED

This chapter looks at the cases initiated by girls in which the PCMA was invoked. It would seem most likely that girls would typically invoke the PCMA to nullify their marriage, but this is not the situation reflected in the sample. Of the 83 cases reviewed, 15 were filed by girls. And the reasons those girls took legal action were more complex, as this chapter suggests.

The 15 cases reviewed fall within three clusters—those that were brought by a girl with a parent or relative, those that were filed without any co-petitioners and those filed by a girl jointly with her husband. There are five cases in each such category. For a sense of the social pressures within which the law assumes meaning, we examine the reasons that compelled these 15 girls to approach the law, the legal action sought and the judicial outcomes with the reasoning.

Although the 15 cases pertained to child marriage and the law, not all involved application of the PCMA. Some were brought as writ petitions under the Constitution or were filed as an application in already-pending litigation proceedings. That these cases were filed by girls does not imply that it was the girls who first approached the legal system to seek redress. In fact, in many cases, the girls approached the courts to counter prior or parallel litigation against them.

"It would seem most likely that girls would typically invoke the PCMA to nullify their marriage, but this is not the situation reflected in the sample."

2.1 Five cases filed by girls through a parent or relative

In the cluster of five cases in which a girl approached the courts with her parents or relatives, all of them sought to

annul the marriage that had taken place while the girl was a minor. Because all the girls were minors at the time of filing the case, they did so through their guardians.

Every such case invoked Section 3 of the PCMA, which states that a child marriage is voidable, and the child party to such a marriage can seek its annulment until two years after turning 18 years old, or the age of majority. If at the time of seeking an annulment a child party is still a minor, they can approach the court through a guardian or a child marriage prohibition officer. This is in line with the principle that minors lack legal capacity and thus cannot initiate legal proceedings by themselves.

TABLE 4 : REASON FOR NULLIFYING MARRIAGE UNDER SECTION 3 OF THE PCMA

Reason	5 cases
Breakdown of marriage due to the alleged cruelty of husband or his family.	4
Relatives of the girl forced her into marriage.	1

Four of the five cases involved the breakdown of a marriage that the parents of a girl had arranged. In these cases, however, the girl did not file the petition for reasons that her marriage had been arranged, forced or because she was a minor. Rather, cruelty by the husband and in-laws were cited as reasons for wanting to separate from the husband or leaving the marital home.

Only one of the petitions was filed soon after the solemnization of the marriage. In that case, *Kirandeep Kaur v. Manga Singh,*[27] the girl filed the petition through her brother. She stated that her uncle had forced her into marriage soon after her mother's death because he did not want her to stay in her natal family home. Unable to cohabit with her husband after 10–12 days of marriage, she wanted to return to her natal home. But her uncle refused to let her in. Hence, the formal proceedings for nullification of the marriage.

Judicial outcome and reasoning

TABLE 5 : JUDICIAL OUTCOME OF CASES FILED BY A GIRL WITH HER PARENTS OR RELATIVE

Legal action	5 cases
Decree of nullity of marriage granted	3 (with directions to prosecute girl's father in one case)
Decree of nullity granted with additional measures	2 (settlement of dispute between parties)

[27] *Kirandeep Kaur v. Manga Singh,* UID No. PB-0165, District Judge (Family Court), Moga, decided 14 February 2017.

The court granted the plea of annulment in all five cases. In two of those cases, *Kirandeep Kaur v. Manga Singh*[28] and *Kanwaldeep Kaur Bathal v. Mandeep Singh Brar,*[29] the annulment was granted because the parties had settled their dispute with the assistance of the court-attached mediation and conciliation centres. The husband in both cases eventually dropped their challenge to each girl's assertion that she was a minor at the time of marriage. In the settlements, the parties agreed to not bring any civil claims or file criminal cases against each other.

In the other three cases, *Bharti v. Vikram,*[30] *Pinki v. Harsukh*[31] and *Pooja v. Jitender,*[32] the legal issue was adjudicated by the court based solely on an investigation of the girl's age at the time of marriage. Even though the girls in each of these cases alleged cruelty by her husband or in-laws, these facts and issues were not relied upon to decide the case. Two of these cases were decided ex parte, and therefore, each girl's assertions regarding her age and marital cruelty remained unchallenged and unrebutted.

In *Pooja v. Jitender,*[33] the court nullified the marriage but directed prosecution under the PCMA against the girl's father for domestic violence and cruelty for arranging and solemnizing a child marriage. In her petition filed through her mother, the girl sought a declaration of nullity on the grounds of minority at marriage and cruelty on the part of the husband. She mentioned that her father had given dowry to her in-laws at the time of marriage. While granting a decree of nullity, the court relied on the girl's petition to also direct criminal prosecution against her father under the PCMA. No similar directions were given against the husband or his family, possibly because proceedings for dowry harassment, cruelty and forced abortion under the Protection of Women from Domestic Violence Act and Section 498A of the Penal Code had already been initiated by the girl.

The additional directions given by the courts were discretionary and inconsistent—as these cases illustrate. In two cases the parties were referred to mediation to settle disputes, including those of underaged forced marriage and cruelty, while in two others ex parte decisions were given without reference to allegations of cruelty. Yet, in one case the court directed prosecution against the girl's father following admission of an underaged arranged marriage.

2.2 Five cases filed by girls on her own

These five cases were distinctive because each girl approached the court entirely on her own (without any co-petitioner). They sought various legal actions, including release from a shelter home to return to the husband or against the parents for her forced marriage. The legal action sought was symbolic of each girl's assertion of her rights, independently of her family.

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[28] ibid

[29] *Kanwaldeep Kaur Bathal v. Mandeep Singh Brar,* FAO No. M-327 of 2011, High Court of Punjab and Haryana, decided 14 January 2013.

[30] *Bharti v. Vikram,* Petition No.115-HMA of 2014, Additional District Judge, Sirsa, Haryana, decided 31 July 2015.

[31] *Pinki v. Harsukh,* HMA Case No.6- PCMA of 2015, District Judge (Family Court), Hisar, Haryana, decided 7 May 2016.

[32] *Pooja v. Jitender,* Petition No. 5-PCMA, Additional District Judge, Hisar, Haryana, decided 2 August 2016.

[33] ibid.

TABLE 6 : CASES FILED BY A GIRL ON HER OWN

Legal action sought	5 cases
Against the lower court's directions asking that the girl live either in a shelter or parental home, applications were filed for permission to return to the husband's home.	3
Learning that her parents had fixed a date for her marriage, a girl filed a criminal case against her parents (and family members) under the PCMA for trying to solemnize her child marriage.	1
When a girl's marriage (arranged by parents) broke down, the girl filed a petition under the PCMA to annul the marriage.	1

Three of these five cases involved instances in which the girl had married a person of her choice and wanted to live with her husband but was forced to live in a shelter home or her parental home. In the petitions, the girls sought to claim the right to live in their matrimonial home. All three girls invoked the inherent powers of the High Court under Section 482 of the Code of Criminal Procedure to seek release from the shelter homes where they had been ordered to stay by a lower court.

The remaining two cases involved girls in arranged marriages. In *State v. Swaran Singh and Ors.*[34] the girl filed an application under Sections 10 and 11 of the PCMA (before the marriage was solemnized) to prosecute her parents for arranging her marriage. In *Naurti v. Kaalu @ Roshan Gujjar,*[35] the girl sought to exercise the option of repudiation under Section 3 of the PCMA to annul the marriage after its breakdown.

Judicial outcome and reasoning

TABLE 7 : COURT JUDGMENT IN FIVE CASES FILED BY A GIRL ON HER OWN

Legal action sought	Legal action granted	Legal action not granted
Release from shelter home to cohabit with husband	2	1
Decree of nullity	1	
Criminal prosecution of parents for planning and fixing wedding date of minor girl		1

[34] *State v. Swaran Singh and Ors.*, Judicial Magistrate (Ist Class), Ludhiana, Punjab, decided 16 December 2014.

[35] *Naurti v. Kaalu @ Roshan Gujjar,* Civil Miscellaneous Case No. 169A/2015, Additional District and Sessions Court, Kishangarh, Ajmer, Rajasthan, decided 10 March 2017.

The court granted the requested legal action to the girl in three of the five cases. In two cases, the girls were allowed to cohabit with their husbands, while in the third case, the girl was refused cohabitation. The one girl seeking annulment of her marriage had it granted. The girl who sought to charge her parents for arranging her marriage while she was underage subsequently changed her position in the proceedings, resulting in a failed prosecution under the PCMA.

■ Cohabitation of a minor wife with her husband

Although on the surface the three cases involved the question of whether a girl could be released from a shelter to return to her husband's home, there were more layers of complexity. In each case the court looked at the validity of the marriage in personal law and, importantly, the wishes of the minor girl.

In *Yunus Khan v. State of Haryana,*[36] the girl and her husband had eloped and married, which later resulted in criminal proceedings against the husband. The court had earlier ruled that they could cohabit after her husband deposited 500,000 rupees into her bank account. This condition remained unfulfilled, and the girl petitioned the court to be allowed to return to her husband's house. The Punjab and Haryana High Court, ignoring procedural technicalities related to the maintainability of her petition, held that the girl cannot be forced to stay away from her husband because she is in a legally valid marriage. The judge's ruling noted, "If this Court comes to the conclusion that he is her lawfully wedded husband but had consented to do so [make the deposit] on the insistence of this Court, even as a security measure for the protection of the minor, then such an order, in my opinion, would need to be modified to protect the liberty of the individual who seeks its modification and whose custody is rightfully to be given to the person whom she had married."[37] Because the marriage was held to be valid under Muslim law, which sets the minimum age of marriage at 15 years (the age of puberty), and recognizing the girl's capacity to consent in relation to marriage, the court held that the girl could not be said to have been enticed by her husband.[38] That the court dwelled on the girl's consent rather than the validity of marriage in personal law nuanced the judicial approach.

In Pallabi Chandra v. State of Jharkhand,[39] the girl's petition to be released from a shelter home to cohabit with her husband was challenged by her father. Although the father contested her age as per the school records, asserting she was a minor, the High Court of Jharkhand did not rely upon this assertion because the father was unable to produce any documentary proof in support of his claim. Because the father's claim that she was a minor did not stand, the court rejected his petition and granted that the girl be free to live wherever she wanted.

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[36] *Yunus Khan v. State of Haryana,* CRM No. 930 of 2014 in CRWP No. 1247, 2013, High Court of Punjab and Haryana, decided 17 February 2014.

[37] *Yunus Khan v. State of Haryana,* para. 28.

[38] *Yunus Khan v. State of Haryana,* para. 32.

[39] *Pallabi Chandra v. State of Jharkhand,* Cr. Rev. No. 894, 2015, High Court of Jharkhand, decided 17 December 2015.

In *Saba Parveen v. State of Bihar,*[40] a criminal case of rape had been filed by the girl's uncle against her husband. During that criminal trial, the girl was sent to live in a shelter home. She then filed an application to be released from the home and be allowed to cohabit with her husband. The Patna High Court rejected it, citing her age and the invalidity of the marriage to justify its decision. The court observed that the girl, a Muslim, had married her boyfriend, a Hindu, in a temple—and since an inter-religious marriage was not valid under Hindu law, it could neither be considered valid under the PCMA. Although the court did not consider the marriage valid, yet, taking into account the girl's wishes that she did not want to live with her parents, the court granted that she should not be forced to return to her parent's home. Thus, she had to continue living in the shelter home until she turned 18.

How the courts treated the wishes of the girl was a running thread across the three cases. Understanding these cases in terms of legalisms of validity of marriage in personal law would be partial and inaccurate. For while the validity of marriage in personal law is an essential peg for adjudication, the courts in these cases relied on the wishes of the minor girl to decide on cohabitation with the husband; in the case in which the marriage was ruled not valid, the court ensured that the girl, as per her wishes, stayed in the shelter home until age 18 so she could decide the future course of action without fear of parental reprisal.

■ Criminal prosecution for arranging a child marriage

In *State v. Swaran Singh,*[41] in which the girl sought the criminal prosecution of her parents for planning her wedding, the court acquitted all the accused persons. This occurred on account of the girl turning hostile during the trial, when she claimed that she did complain against her parents, but the police had obtained her signature on blank papers. All accused persons, including her parents and other relatives, and the parents of her prospective groom were acquitted.

■ Annulment of a child marriage

In *Naurti v. Kaalu,*[42] the girl sought a decree of nullity because her marriage, arranged by her parents, had broken down. The court granted the declaration of nullity. The petition was allowed primarily on the ground that the girl was a minor at the time of the marriage. Although the court noted the allegations of cruelty against her husband and that they had been living apart for three years, no related directions for prosecution were given—either against the husband or against the parents who had arranged the marriage, unlike in the case of *Pooja v. Jitender* (discussed in the previous section). The inconsistency in courts' *suo moto* use of the criminal offence provisions of the PCMA (taking action on their own initiative even when no such plea is made by the girl) is apparent from a comparison of the outcomes of these two cases.

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[40] *Saba Parveen v. State of Bihar,* Criminal Miscellaneous No. 24990, 2015, High Court of Patna, decided 31 March 2016.

[41] *State v. Swaran Singh and Ors.,* Judicial Magistrate (First Class), Ludhiana, Punjab, decided 16 December 2014.

[42] *Naurti v. Kaalu @ Roshan Gujjar,* Civil Miscellaneous Case No. 169A/2015, Additional District and Sessions Court, Kishangarh, Ajmer, Rajasthan, decided 10 March 2017.

2.3 Five cases filed by girls and her husband

In five of the 15 cases in this chapter, the girl approached the court jointly with her husband. This cluster comprises mainly cases in which the couple sought police protection because of violence or a threat of violence from the girl's family, with one case in which they sought to quash the criminal proceedings instituted by the girl's parents against the husband. All the cases invoked the inherent powers of the High Court under Section 482 of the Code of Criminal Procedure to petition the court.

TABLE 8 : CASES FILED BY A GIRL AND HER HUSBAND

Reason for case	5 cases
After a girl left her home to marry her boyfriend, the couple sought police protection, fearing family and community violence.	4
After a girl left her home to marry her boyfriend, her husband sought to quash the criminal case filed against him by the girl's parent.	1

All five cases were filed after a girl and her boyfriend left their homes to marry. In three cases, the parents of the girl filed a criminal case against the daughter's boyfriend or husband. At least one of these cases had sufficient facts to indicate that parental rejection and disapproval arose not only because the girl had married without her parents' knowledge and consent but also because the marriage was inter-caste.

Judicial outcome and reasoning

TABLE 9 : COURT JUDGMENT IN CASES FILED BY A GIRL AND HER HUSBAND

Outcome	5 cases
Protection granted to couple.	2
Police protection not granted to couple.	2
Criminal proceedings against husband quashed.	1

The court granted the petitioned legal action to a girl and her husband in three of the five cases. In one of those three cases, the couple was given police protection. In another case, the court directed that the girl live at a shelter home until she turned 18 but granted police protection to her husband, with permission for him to meet the girl twice a week. In the third case, the criminal case against the husband was quashed.

In the remaining two cases, the couple sought police protection, which was rejected. In one of the cases, after the court declined their petition, it directed proceedings under the PCMA be instituted against the husband.

Police protection

In *Anchal Sagar and Anr. v. State of Punjab,*[43] the girl had married against the wishes of her parents, and anticipating family violence, she sought police protection by filing a writ petition jointly with her husband before the Punjab and Haryana High Court. While the proceedings were pending, the High Court directed her to live in a shelter home. The court eventually granted the writ petition to the couple. Its decision was based on the finding that, contrary to the parents' contentions, as the marriage was not void under Hindu law, it could not be treated as void under the PCMA. The court examined the issue of her custody and came to the conclusion that because she faced a threat of violence from her parents, they could not be given custody of her. The court recognized that prolonged detention in a shelter home against her will was not in her best interests, while being allowed to cohabit with her husband would be. The girl's well-being was the paramount consideration for the court.

In *Meena and Anr. v. State,*[44] the girl married her boyfriend against her parents' wishes, the Delhi High Court granted police protection to the husband while holding that the girl should stay in a shelter home until she turned 18. The court's decision was motivated by interest to give the girl a "realistic" option of repudiating the marriage upon reaching majority age. According to the judgment, the option would be rendered irrelevant if the girl cohabited and consummated the marriage with her husband and had a child. In the words of the court's ruling, this direction was "passed because if the petitioner No. 1 delivers a baby, then her option to repudiate the marriage may be rendered illusory as in that circumstance it would stand overtaken by events".[45]

In the two cases in which the petitioned legal action was denied to the couple, the courts' decision hinged on an adverse finding on the validity of the marriage, an assessment of the threat of violence that the couple faced, concerns that granting the legal action might be viewed as rewarding child marriage and other policy considerations.

In *Amnider Singh v. State of Punjab,*[46] the parents of the girl disapproved of her marriage at age 16 because it was inter-caste and threatened the couple with violence. The Punjab and Haryana High Court refused to grant police protection to the couple. Instead, it declared the marriage void under Section 12 of the PCMA on the grounds that the husband had "enticed" the girl. The court held that because the marriage was void, the threat of violence emanating from it no longer existed. Further, the court held that granting police protection to the husband would amount to rewarding "a fugitive". The court's decision appears to have been neither be based on law nor precedent. Rather, it seems to have been based on its general disapproval of elopement, as noted in the first paragraph of the judgment: "This Court is flooded with the petitions filed by run-away couples in which the girls, who have just attained the majority, are filing petitions seeking protection for life and liberty allegedly threatened by their parents, who could be seen wailing helplessly and haplessly chasing their

[43] *Anchal Sagar and Anr. v. State of Punjab,* Criminal Misc. No. M-5647, 2011 (O&M), High Court of Punjab and Haryana, decided on 19 July 2011.
[44] *Meena and Anr. v. State,* W.P.(CRL) 1231/2012, High Court of Delhi, decided 17 October 2012.
[45] ibid, para. 11.
[46] *Amnider Singh v. State of Punjab,* CRM-M 29790, 2009 (O&M), High Court of Punjab and Haryana, decided 27 November 2009.

daughters in the corridors of this Court, who out of infatuation, are marrying young boys who could hardly provide them any future."[47]

In *Gurdeep Singh v. State,*[48] a girl and her boyfriend approached the court for police protection. Though unmarried, the couple sought protection fearing violence from the girl's family, who wanted to forcibly marry her to someone else. The couple wanted to wait and marry only when the girl turned 18. The same bench of the Punjab and Haryana High Court that decided the *Aminder Singh case*, adopting the same principled view to denounce elopements, denied the couple relief on the grounds that police protection, stating this could only be granted to married couples. Elaborating further, the court invoked the PCMA on its own, to hold that such reliefs under writ jurisdiction should not be allowed in the interest of maintaining public order. The court explained that granting such relief would amount to encouraging "illegal acts" punishable under the PCMA. In the words of the judge's ruling, "in order to maintain public order, it is the high time that this type of prayers made through these petitions, in the name of Article 21 of the Constitution of India, should be discouraged, otherwise the time would come when boys and girls of the tender age, even below 14 years, would come to the Court filing petitions against their parents in the name of asking for their right of life and liberty for the purpose of getting married."[49]

Judicial reasoning in these instances stemmed less from concern for underage marriages and more from concerns about daughters choosing to marry without parental approval. Both Aminder Singh and Gurdeep Singh cases were heard by the same bench, which cited exactly similar apprehensions against "run-away couples in which the girls, who have just attained the majority" secure protection of law to marry in face of parental disapproval. The court makes no reference to the prevalence of forced marriage or indeed, honour-based violence inflicted against couples who choose to marry against parental wishes. Repeating the same words he used in a similar case (and cited previously), the judge made clear his sympathies lie with parents "haplessly chasing their daughters in the corridors of this Court, who out of infatuation, are marrying young boys who could hardly provide them any future".

■ Quashing criminal proceedings

In *Court on its Own Motion (Lajja Devi) v. State,*[50] the Delhi High Court quashed the criminal proceedings initiated by the girl's parents against her husband. The court held that because the girl had chosen to marry her boyfriend and that because she, as an older adolescent, was capable of such decision-making, the criminal proceedings against her husband were liable to be quashed. In its ruling, the court distinguished between younger and older adolescents: "In case the girl is below 16 years, the answer is obvious that the consent does not matter. Offence under Section 376 [Penal Code on statutory aggravated rape] is made out. The charge sheet cannot be quashed on the ground that she was a consenting party. However, there can be special or exceptional circumstances, which may require consideration, in cases where the girl even

[47] ibid, para. 1.
[48] *Gurdeep Singh v. State,* CWP No. 4511, 2016, High Court of Punjab and Haryana, decided 10 March 2016.
[49] ibid, para. 8.
[50] The *Court on its Own Motion (Lajja Devi) v. State,* Crl. M.C. No. 1001/2011, High Court of Delhi, 27 July 2012.

after attaining majority affirms and reiterates her consent.... If the girl is more than 16 years, and the girl makes a statement that she went with her consent and the statement and consent is without any force, coercion or undue influence, the statement could be accepted and Court will be within its power to quash the proceedings under Section 363 or 376 [Penal Code]. Here again no straight jacket formula can be applied. The Court has to be cautious, for the girl has right to get the marriage nullified under Section 3 of the PCM Act. Attending circumstances including the maturity and understanding of the girl, social background of girl, age of the girl and boy etc. have to be taken into consideration."[51] [sic]

The Lajja Devi case is a landmark, often cited precedent, in fact comprises of four cases clubbed together by the Delhi High Court. In each of the four cases, the court came to different conclusions making the fundamental point that the judicial responses cannot be uniform; instead, they must be based on facts and circumstances of each case.

2.4 Synthesis

The data set of 15 cases in which girls sought recourse through the legal system is small when compared with the number of cases in which other categories of petitioners' approach the courts. Of these 15 cases, two were resisting a forced marriage, five wanted to nullify a parent-arranged marriage that had broken down, and eight were elopement situations. Elopement refers to leaving home to marry without parental consent and typically in the face of parental opposition.

That a small number of cases in the dataset of 83 cases related to girls' accessing the legal system and within that a miniscule two girls who sought to prevent a forced marriage, is indicative of the enormous barriers for girls seeking legal redress. The five cases in which girls approached a court with a family member pertained to an arranged (or possibly forced) marriage that had broken down on account of cruelty, violence or dowry harassment. With support of a family member, the girls sought to nullify the marriage under Section 3 of the PCMA. That the girls were unable to access the court for preventing the forced marriage and only appear to have sought the nullity with support of a family member (possibly involved in arranging the

"The largest category in this chapter, eight of the 15 cases, pertained to elopement. The girls (alone or with the husband) pleaded for protection against parental backlash and sought cohabitation with their husband."

[51] *Lajja Devi,* paras. 48 and 50.

marriage) should be a cause of serious concern. Of the 15 girls who approached the courts, at least 10 were aided by their husband or a family member, but none by the child marriage prohibition officer or a state agency officer designated to help implement the PCMA. Yet, the PCMA assumes that girls alone or with the support of a guardian or third party can prevent an impending marriage or repudiate one within two years of attaining majority.

The largest category in this chapter, eight of the 15 cases, pertained to elopement. The girls (alone or with the husband) pleaded for protection against parental backlash and sought cohabitation with their husband. The legal action sought indicated that these cases were attempts to shield a couple against criminal prosecutions initiated by parents.

Although "age" of marriage or minority status alone is not the primary motivation for legal redress, it is a fundamental requirement for accessing the legal system and a legal fulcrum upon which courts rationalize decisions. The primary drivers to nullify a marriage in these cases were forced marriage or breakdown of an arranged marriage. And the girls who approached the courts alone or with their husband were driven by the need to shield a self-arranged marriage from parental retribution.

In most cases, the courts relied on the facts of each case to discern elements of capacity, consistency of stand and discretion, the unique circumstances and personal law. The judges seemed to weigh a girl's wishes and assessed the validity of the marriage before deciding upon a girl's custody or protection from marriage. Although the judicial approaches leaned towards affirming the validity of marriage to allow for cohabitation or granting protection to couples in self-arranged marriages to protect the girls from parental retaliation, it would be a mistake to interpret this as a judicial validation of underage marriage. Rather, these were contextually specific responses to minimize risks to a girl while acknowledging her evolving capacities and preservation of family life where the couple sought to protect their marriage.

A few cases (in this data set) led to judicial discretion exercised against a girl's wishes and in favour of her parents. Thus, references to parental sentiment, even in the context of inter-caste marriage by their daughter, or the worthiness (or unworthiness) of her chosen husband were ways by which the courts restored parental control. What is missing in these cases are directions that protect a vulnerable girl from punishment or forced marriage at the hands of her parents. Even as the judges dwelled on age and the vulnerability of a girl to restore her parental custody, the silence on her fate within the context of tabooed love exposes the limitations of an approach in which "age" as a determinant trumps welfare and the empowerment of a girl.

Regardless of the outcomes of the cases, what is apparent is that the judicial approaches did not rely upon age alone, even though it was an important factor in the judicial reasoning. If anything, these cases underscore the need for laws to explicitly accommodate the complexity of concerns rather than mask it. While the PCMA does allow for flexibility that makes judicial discretion and innovation possible, there are troubling silences in the law. The concerns relating to forced marriage, links with quality support services, state obligation to allocate resources for girls and the dysfunctional legal functionaries deserve greater attention in law reform discussions than they get.

CHAPTER 3

CASES THAT PARENTS FILED

This chapter looks at 19 cases filed by parents of a girl or by a relative (without the girl being a party to the requested legal action). These cases were initiated by the parents, as opposed to and different from cases filed against parents, which are discussed in chapter 5. This distinction is relevant to bring out the ways in which the law is used by and against different categories of litigants, such as parents.

Of the 19 cases (or 23 per cent of the total 83 cases), 17 were filed by the parents. One was filed by a sister and one by an uncle. All but one were in response to a girl running away from home to marry a boy of her choosing. The single exception involved a girl moving in with her boyfriend to escape a forced marriage.

TABLE 10 : PARENTS WHO FILED A CASE

Legal action sought	19 cases
Recovery of custody of the daughter.	12
Criminal prosecution of the daughter's husband.	7

This discussion clusters cases based on the kinds of legal action sought by the parents to look at the circumstances leading to that legal action and the legal provisions most used as well as the judicial responses to parental assertion of control over a daughter who eloped.

"These cases were initiated by the parents, as opposed to and different from cases filed against parents, which are discussed in chapter 5. This distinction is relevant to bring out the ways in which the law is used by and against different categories of litigants, such as parents."

3.1 Twelve cases filed by parents for custody of their daughter

The circumstances that led the parents to file a case against their daughter's marriage shed light on what triggers legal action. In all 12 cases, the judgment noted that the daughter left home on her own accord to marry her boyfriend, although one girl had fled home to escape a forced marriage. How many of these elopement situations occurred because of the need to escape an impending forced marriage is an aspect that may not find mention in the case law but nonetheless is useful for understanding this significant trend in underage marriages.

TABLE 11 : PARENTS WHO FILED A CUSTODY CASE

Reason for legal action	Action sought by parent	12 cases
A girl left home with her boyfriend. A girl left home when she suspected that her mother would arrange her marriage.	Writ of habeas corpus for the production of the daughter in court (Article 226, Constitution of India)	11
As a consequence of legal action by her parents, a minor wife was placed in a shelter home. On her request to leave the shelter to live with her husband, the court released her.	Appeal against order of lower court	1

In 11 of the 12 cases, the parents directly approached the High Court with a plea for a writ of habeas corpus under Article 226 of the Constitution. Habeas corpus literally translates to "produce the body" and demands that a missing person allegedly in illegal confinement be presented before the court.

In eight of these 11 writ cases, the parents first filed a criminal case against the husband and then later filed the habeas corpus petition before the High Court. As we did not have access to the parallel criminal cases, they are not part of the study data and consequently this chapter. In *Shamsuddin v. State,*[52] for instance, the girl and her boyfriend, a neighbour, eloped. In retaliation, her father reported the incident to the police, alleging kidnapping and rape. He later filed a writ petition before the High Court seeking the issuance of a writ of habeas corpus.

In *Veljibhai Banabhai Prajapati v. State of Gujarat,*[53] the girl left home due to parental physical abuse and because she had been forced to discontinue her studies by her father. Her boyfriend and his mother asked her to return to her parents after the first two instances of her leaving her family home. However, when she left for the third time, she and her boyfriend solemnized their marriage to protect her from her father's claim of custody. Her father reported the marriage to the police as one of kidnapping and sexual assault and later filed a habeas corpus writ petition.

[52] *Shamsuddin v. State,* WP(CRL) 13/2009, High Court of Delhi.
[53] *Veljibhai Banabhai Prajapati v. State of Gujarat,* Special Criminal Application (Habeas Corpus) No. 3807, 2016.

In *Pratapa Ram v. State,*[54] the parents sought custody of their daughter through an appeal against a lower court order. The girl and her boyfriend had eloped and solemnized their marriage. Her father filed a criminal case against her husband. During the legal proceedings, she was sent to a shelter home by the court. Her father appealed the court's decision, claiming custody rights and seeking her return to the family home.

Judicial outcomes and reasoning

Nine of the 12 cases were decided in favour of the girl, respecting her wishes to ward off assertions of parental authority and punishment. The courts decided in favour of the parents in only three cases.

TABLE 12 : VERDICT IN CASES FILED BY PARENTS

Judgment in favour of parents	3 cases	Rejection of parents' case	9 cases
Writ of habeas corpus issued and custody granted to parents.	2	Custody not given to parents.	9
Custody granted to parents.	1		

■ Where legal action was denied to the parents

In nine cases, the judges declined to grant custody of the girls to their parents. In seven of the habeas corpus cases, the court declined to intervene and allowed each girl to reside with her husband.

In one case,[55] the court held the marriage to be valid but directed that the girl be placed in a shelter until she turned 18, based on a technical reading of the guardianship law and the unsuitability of her parents as well as her husband as competent guardians. The judicial reasoning varied, with different principles relied upon to justify the validity of marriage and marital cohabitation.

Recognition of the girl's capacity to decide or her "intelligent preference"

In Shamsuddin v. State,[56] the girl's father filed a criminal case against her husband, leading to his arrest. While he was in custody, the court took into account the girl's willingness to stay with her parents-in-law and declined the natal family's assertion over her custody.

In other cases, such as *Tahra Begum v. State,*[57] the courts emphasized that taking the girl's views into account was an aspect of upholding the welfare of the child. The Delhi High Court underscored that it cannot appoint a guardian against the girl's will because that was

[54] *Pratapa Ram v. State,* S.B. Criminal Misc. Petition No.1154/2012.
[55] *Veljibhai Banabhai Prajapati v. State of Gujarat,* Special Criminal Application (Habeas Corpus) No. 3807, 2016.
[56] *Shamsuddin v. State,* WP(CRL) 13/2009, High Court of Delhi.
[57] *Tahra Begum v. State,* W.P. (CRL) 446/2012, Crl. M.A. 3701/2012, High Court of Delhi, para. 10.

statutorily prohibited and would also not promote her welfare.[58] In *Parthiv Singh v. State,*[59] the Rajasthan High Court emphasized the importance of considering the wishes of a girl who is capable of forming an 'intelligent preference' and, more importantly, of taking a compassionate approach to cases of elopement and marriage as opposed to a technical or formulaic response, noting: "The court is required to consider the wishes of the girl also, if the girl is found to be old and matured enough to form an intelligent preference as to with whom she would be more happy." Notably, the court was of the view that the exercise of extraordinary jurisdiction under Article 226 of the Constitution calls for a human touch rather than strict construction of statutory provisions.[60]

In *Mohd. Anis v. State of NCT of Delhi,*[61] the parents filed a writ petition after their daughter ran away from home a second time to stay with her husband. The court relied upon an earlier precedent from *Vivek Kumar @ Sanju and Anjali @ Afsana v. The State*[62] to rule: "If a girl around 17 years of age runs away from her parents' house to save herself from the onslaught of her father or relatives and joins her lover or runs away with him, it is no offence either on the part of girl or on the part of boy with whom she ran away and married."

In the *Court on Its Own Motion (Lajja Devi) v. State,*[63] the Delhi High Court decided four cases of elopement of underage girls. The rulings emphasized the need for judges to consider the facts and circumstances of each case before arriving at a decision that best advances a girl's well-being. According to the ruling, "The decision will largely depend upon the interest of the boy and the girl, their level of understanding and maturity, whether they understand the consequences, etc. The attitude of the families or parents has to be taken note of, either as an affirmative or a negative factor in determining and deciding whether the girl and boy should be permitted to stay together or if the girl should be directed to live with her parents. Probably the last direction may be legally justified, but for sound and good reasons, the Court has option(s) to order otherwise. We may note that in many cases, such girls severely oppose and object to their staying in special homes, where they are not allowed to meet the boy or their parents. The stay in the said special homes cannot be unduly prolonged as it virtually amounts to confinement, or detention. The girl, if mature, cannot and should not be denied

[58] "10. Section 17 (1) of the Guardians and Wards Act, 1890 specifically stipulates that in appointing or declaring a guardian of a minor, the Court shall, subject to the other provisions of the said Section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. This makes it clear that while appointing a guardian of a minor, the Court has to consider the personal laws of the minor and more importantly the welfare of the minor. What is more important is Section 17 (5) which says that the Court shall not appoint or declare any person to be guardian against his will." *Tahra Begum v. State,* para. 10.

[59] *Parthiv Singh v. State,* DB habeas corpus petition No. 236/2012, High Court of Rajasthan.

[60] ibid, para. 6, states: "The instant case is also one of such cases, which is required to be decided with a human touch, without strictly construing the rights of the parties flowing from statutory provisions, more particularly while exercising extraordinary jurisdiction under Article 226 of the Constitution of India."

[61] *Mohd. Anis v. State of NCT of Delhi,* W.P. (Crl.) No. 835 of 2016, High Court of Delhi.

[62] *Vivek Kumar @ Sanju and Anjali @ Afsana v. The State,* Crl. M.C. No. 3073-74 of 2006, High Court of Bihar, decided 23 February 2007.

[63] *Court on Its Own Motion (Lajja Devi) v. State,* W.P. (Crl.) No. 338/2008 and Crl. M.C. No. 1001/2011 and Crl. M.A. No. 3737/2011, Along with W.P. (Crl.) No. 821/2008 and Crl. M.A. No. 8765/2008 and W.P. (Crl.) No. 566/2010, High Court of Delhi.

her freedom and her wishes should not get negated as if she has no voice and her wishes are of no consequence."

Special measures to protect the best interests of a girl within the matrimonial home

The courts invoked innovative measures to ensure that a girl's well-being was secured within her matrimonial home. Recognizing the need for oversight to secure a girl's best interests, the Delhi High Court in *Tahra Begum v. State*[64] upheld the girl's wishes to stay with her parents-in-law, simultaneously directing the girl, her husband and the parents-in-law to appear before the Child Welfare Committee every six months until she turned 18. This direction was made to ensure that the Child Welfare Committee offered counselling, including in relation to delaying child birth and monitoring the girl's well-being.

Validity of the marriage influences custody over the girl

In several cases, the courts refused to recognize the parents as guardians of the minor girl in view of her valid marriage. The courts reasoned, that in view of the validly performed marriage of the minor girl as per personal law, her father could no longer assert guardianship rights over her. Thus, the lawful guardian of a married minor girl in Hindu as well as Muslim law was her husband; and because her husband was her lawful guardian, she could cohabit with him.

In *Mohd. Anis v. State of NCT of Delhi,*[65] the Delhi High Court held that because the girl had attained the age of puberty, she could reside with her husband. The court also relied upon Muslim personal law to underscore the validity of the marriage and to state that the option of repudiation was available to the girl, irrespective of whether she resided with her husband or not. In *Shamsuddin v. State,*[66] the court assumed that the marriage was valid despite the absence of any documentary proof (nikahnama) because cohabitation raised a presumption of marriage in Muslim law. According to the court, it was only up to the husband and wife to contest the validity of their marriage. In *Ruhul Amin Sekh v. State of West Bengal,*[67] the Kolkata High Court relied on Muslim personal law to decide that the father of the girl could not be given custody because he was not her lawful guardian under personal law.

Habeas corpus cannot be issued if a girl is not unlawfully detained

In *Kulwant Kaur v. State of Haryana,*[68] the Punjab and Haryana High Court held that the petition seeking the issuance of writ of habeas corpus was not maintainable because the girl had willingly and with full knowledge of her actions left the natal home to marry. Because the girl was capable of understanding the consequences of her actions and wanted to stay with her husband, she could not be said to be in unlawful detention. In its ruling, the court explained, "Habeas Corpus can only be issued when the detention [is] against the wishes of a person and if not, otherwise [sic.] petition is liable to be dismissed."

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64 *Tahra Begum v. State,* W.P. (CRL) 446/2012 and Crl. M.A. 3701/2012, High Court of Delhi.
65 *Mohd. Anis v. State of NCT of Delhi,* W.P. (Crl.) No. 835 of 2016, High Court of Delhi.
66 *Shamsuddin v. State,* WP(CRL) 13/2009, High Court of Delhi.
67 *Ruhul Amin Sekh v. State of West Bengal,* W. P. NO. 8619 (W), 2015.
68 *Kulwant Kaur v. State of Haryana,* CRWP No. 978, 2015.

Acceptance of marriage by the husband's family

In one case, the court noted that the family members of the husband had accepted the marriage. Although this was not explicitly stated as a reason for allowing the girl to stay in her matrimonial home, it seemed to make the option more realistic. In *Shamsuddin v. State,*[69] for example, the Delhi High Court noted the girl's parents-in-laws' acceptance of the marriage: "But, since he [her husband] is in custody, till such time, he is released from custody, she has expressed her clear desire to reside with her parents-in-law. Her mother-in-law Momina is present in Court and so is her father-in-law Mausam Ali. Both have acknowledged the fact that their son Bhura @ Furqan is legitimately married to Mst. Gulshan. Both of them have expressed their desire and willingness for the return of their daughter-in-law Mst. Gulshan." The cooperation of the girl's parents-in-law was a factor in the court's determination, despite an ongoing criminal case against the husband.

Assigning custody based on a girl's best interests

The issue of who to assign custody of a girl was a recurring issue in the cases reviewed, with the options being the parents, the husband or a shelter home. In *T Sivakumar v. Inspector of Police,* the High Court of Madras issued its opinion on questions of law raised by a smaller bench of the court, observing that the PCMA had had indirectly nullified the husband's guardianship rights under Hindu personal law.[70] In its ruling, the court explained that although child marriage is valid under Hindu law, it is voidable under the PCMA, which is to say it is neither "invalid" nor strictly "valid". According to the judges' opinion, a "valid but voidable" marriage did not confer "all" the rights arising from a marriage upon the husband of a minor girl. Hence, the custody of the girl had to be decided on the basis of where her best interests lay rather than being assigned or claimed as a matter of right by the husband solely on the grounds of their marital relationship.

The Gujarat High Court relied on this decision while rejecting the parents' claim to recover custody of their daughter, directing the girl to leave her matrimonial home for residence in a shelter. The court held that the girl should be in the protective custody of the State and not with her husband. In *Veljibhai Banabhai Prajapati v. State of Gujarat,*[71] the Gujarat High Court held that, being special legislation, the PCMA overrides the older Hindu Maintenance and Guardianship Act, which confers guardianship over a minor wife to her husband. The court observed that because the wife was underage as per the PCMA, her husband could not be assigned guardianship rights over her, noting: "…we are of the view that it will be very safe to hold that after the advent of the Prohibition of Child Marriage Act since the male contracting party to a child marriage does not attain the full status of the husband until the child attains the eligible age, like a husband of a full-fledged valid marriage and consequentially since he is not the guardian of the female child of such child marriage, he is not entitled for the custody of the minor. If a different interpretation is adopted to say that such husband is entitled for the custody of minor wife will only defeat the very object of the Act."

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[69] *Shamsuddin v. State,* Supra at 66.

[70] *T Sivakumar v. Inspector of Police,* H.C.P. No. 907/ 2011, High Court of Madras

[71] *Veljibhai Banabhai Prajapati v. State of Gujarat,* Special Criminal Application (Habeas Corpus) No. 3807, 2016.

The judges were also concerned that the girl was 14 years old when she left her home to marry. In view of her age and the criminal allegations of kidnapping against her husband by her parents, the girl's marriage could be voided under Section 12 of the PCMA when she turned 18. The judges noted "that till the minor Manisha attains the age of majority, she and the third respondent are merely contracting parties and not husband and wife, at this stage it cannot be said that there is any legal relationship between minor Manisha and the third respondent's mother."

■ Where legal action was granted to the parents

In a small fraction of cases, the court granted the petitioned legal action to parents. In these cases, custody was the primary concern, and the court ruled in favour of the parents.

Wishes of the girl paramount

In one of the four cases decided in *Lajja Devi*, the Delhi High Court held that the best interests of the girl was based on her wishes. Noting the girl's desire to return to her parental home, the court ruled: "We are of the opinion that simply because the marriage is not void, it should [sic.] [not] automatically follow that the husband is entitled to the custody of the minor girl. We have already noted in detail the serious repercussions of child marriage. … The overriding and compelling consideration governing custody of guardianship of the child is the child's welfare and claim to the status as a guardian under the said section is not a right." The court held that the marriage remained valid, and the arrangement of the girl living with her parents would continue until she turned 18, upon the parents' agreeing that she would not be married to anyone else in the meantime.

In *Parvatiben v. State,*[72] the second case in which a girl's custody was handed over to her petitioner mother, the Gujarat High Court invoked the girl's wishes to allow the petition. The requested custody was allowed even though the girl's mother admitted that the 12-year-old girl had left home because she (the mother) was under immense social and economic pressure to arrange her marriage. In addition to issuing the writ of habeas corpus, the court directed the local police inspector to "look after the safety and security of the petitioner's family and prevent any offence being committed in respect of them."

Underage marriage invalid, younger adolescents lack capacity to decide

In *Pratapa Ram v. State,*[73] the court restored custody to the father, who had appealed against a lower court's order placing his daughter in a shelter home. In its decision, the Rajasthan High Court was of the opinion that the girl was too young to know where her well-being lies or to understand the consequences of her actions. The girl's young age, according to the court, did not allow capacity for making an intelligent preference. In their ruling, the judges noted, "…it is evident that the petitioner's daughter is minor aged 14½ years. She at present is neither mentally nor morally in a position to assess the consequences of the act of elopement which she did by going away with accused Ashok. Though she has claimed that she has married to Ashok but such marriage has no credence in the eye of law." [sic]

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[72] *Parvatiben v. State,* SCR.A/351/2012.
[73] *Pratapa Ram v. State,* S.B. Criminal Misc. Petition No.1154/2012.

The court declined to allow the girl to cohabit with her husband, viewing this as court-sponsored perpetuation of an offence. It also decided against her continued stay in a shelter home because living there for more than three years before she turned 18 would not be in her best interest. Even as the court deemed her father's home to be the only legally viable option, it asked the father to submit an undertaking (a written promise) before the court that he would look after the welfare of the girl, perhaps in apprehension of parental punishment or forced marriage.

3.2 Seven criminal cases filed by parents against their daughter's husband

Seven of the 19 cases in this category involved criminal prosecution of the husbands. Five of these cases were filed before the POCSO Act was enacted (in 2012), which explains why it was not invoked in the offences registered.

TABLE 13 : CASES OF CRIMINAL PROSECUTION FILED BY PARENTS AGAINST SON-IN-LAW

Reason for prosecution	Provision of law invoked	7 cases*
A girl left home with her boyfriend (7 cases)	Section 363, Penal Code (punishment for kidnapping)	6
	Section 366, Penal Code (kidnapping woman to compel her marriage)	5
	Section 376, Penal Code (rape)	4
	Section 366A, Penal Code (procuring a minor girl for illicit intercourse)	1
	Section 9, PCMA (punishment for male adult marrying a child)	5
	Section 10, PCMA (punishment for solemnizing a child marriage)	2

**The total cases exceed the number of cases due to multiple provisions invoked in each one.*

All of the criminal proceedings were initiated by a girl's parents or relative in response to her running away to marry a boyfriend, against parental wishes. In *State of Gujarat v. Bipinbhai Nanalal Jani,*[74] the girl had been working in a diamond factory with her sister. Her sister had earlier forced her to change the factory unit where she worked to separate her from her boyfriend. When the girl eloped, her sister registered a case of kidnapping, rape and solemnizing child marriage against the husband and implicated the priest who solemnized the marriage and the advocate who had helped the couple register their marriage.

[74] *State of Gujarat v. Bipinbhai Nanalal Jani,* MANU/GJ/2358/2016.

In *State v. Jagbir,*[75] the girl ran away from home to marry her boyfriend, with the knowledge of her parents. Yet, her father registered a case of kidnapping against her husband. Once the couple was traced by the police, the girl was sent to a safe house and later to a shelter home and the husband was arrested.

The most commonly invoked offences included kidnapping, kidnapping with the intent to compel marriage, sexual assault and solemnizing child marriage. The Penal Code was frequently invoked in addition to the PCMA to criminalize an underage marriage. The offences related to solemnizing child marriage under the PCMA carry a maximum sentence of two years of imprisonment, while those under the Penal Code carry longer sentences, which may go up to 10 years for kidnapping with the intent to marry and life imprisonment for rape.

While all of these offences are considered serious in nature, are cognizable and non-bailable, the use of provisions dealing with rape and kidnapping under the Penal Code adds to the seriousness with which the court views a case, adversely impacts bail application and creates the possibility of long-term incarceration of the husband. It is worth recalling that eight of the habeas corpus writ petitions discussed earlier in this chapter refer to parallel criminal cases, indicating that parental prosecutions are much greater than what this section represents.

Judicial outcome and reasoning

Of the seven criminal cases filed by parents against their daughter's husband, the courts acquitted the husband in six cases. In the one exception, the conviction was based on a legal technicality and was followed by a lenient sentence.

TABLE 14 : COURT JUDGMENT OF PARENTS' CASE AGAINST DAUGHTER'S HUSBAND

Legal action granted to parents	Case	Legal action not granted to parents	Cases
Girl's husband convicted	1	Girl's husband acquitted	6

■ Husband was acquitted

The most frequently cited reason for acquitting the husband of charges of kidnapping was that the charges could not stand if the girl's decisional capacity was recognized, given the absence of enticement and the use of force by the accused.

For example, in *State v. Prem Singh,*[76] the District Court in Rohini, Delhi relied upon the Delhi High Court's decision in *Bunty v. State*[77] to hold that the accused was not guilty of kidnapping because the girl had voluntarily accompanied him without enticement. The judge noted, "…from her testimony, it is clearly made out that the victim A, who was at the verge of maturity, had voluntarily eloped with the accused and solemnized marriage with the accused in a temple and that she was not enticed by the accused, in any manner, whatsoever to go

[75] *State v. Jagbir,* Sessions Case No: 38 of 2013; CIS No. 985, 2013.
[76] *State v. Prem Singh,* Sessions Case No. 273/14; Unique ID case No. 02404R0391842014.
[77] *Bunty v. State* (G.N.C.T.), Crl. Appeal no. 846/2009, High Court of Delhi, decided 16 March 2011.

with him or to establish physical relations with him ... Thus, as far as the factum of forcible marriage or taking away of the prosecutrix for the purpose of said marriage is concerned, there is not even an iota of evidence on record."

In *State of Gujarat v. Bipinbhai Nanalal Jani,*[78] the High Court of Gujarat acquitted the husband of kidnapping because there was no conclusive proof that the girl was underage. Additionally, the girl had been staying with her sister, who was not her lawful guardian, when she eloped. In view of the possibility that the girl was 18 at the time of marriage, the court held that benefit of doubt must be given to the accused. Elaborating on the value of different kinds of evidence to prove age, the court ruled, "medical evidence about age based upon epiphyses of bones is based on scientific test and is acceptable. But if there is any conflicting evidence, e.g. conflict between medical evidence and entry in school certificate, the benefit of the uncertainty as to age should go to the accused. The only conclusive piece of evidence of girl's age may be the birth certificate, but unfortunately, in this country, such a document is not ordinarily available."

In *State v. Kanak Raj,*[79] the District Court in Rohini, Delhi held that because the husband was unaware of the actual age of the girl (that she was younger than 18), he could not have had the intention to marry a minor girl and thus could not be held guilty under Section 9 of the PCMA. Similarly, in consummating the marriage, he was merely performing his marital duties without knowledge that his wife was a minor, so statutory rape was not applicable. The court effectively introduced the requirement of "criminal intention" into Section 9 of the PCMA and Section 375 of the Penal Code, even though it is not statutorily envisaged.

The court acquitted the husband of rape charges in *Ram Kumar v. State of Punjab*. The Punjab and Haryana High Court relied on the testimony of the girl that sexual intercourse only occurred after marriage to acquit the husband of rape charges on the grounds that "once marriage is performed, sexual intercourse with wife cannot be called rape."[80]

- **Husband convicted**

In the case of *State v. Jagbir,*[81] which was adjudicated before an Additional Sessions Judge in Kaithal, Haryana, who convicted the husband under Section 9 of the PCMA for marrying a minor girl. The conviction was based on the prosecution successfully proving that the girl was a minor, being about 17 years old at the time of marriage, through a medical test. However, in view of the fact that they had been living together, had a young child and the accused was the sole earning member of the family, the judge awarded a light punishment, with the period of imprisonment already fulfilled and a fine of 5,000 rupees.

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78 *State of Gujarat v. Bipinbhai Nanalal Jani,* Manu/GJ/2358/2016.

79 *State v. Kanak Raj,* SC No.41/2013: FIR No. 78/2012, Delhi District Court Rohini.

80 Criminal Appeal No. D-574, DB of 2013, High Court of Punjab & Haryana, decided on 14-01-2014. Although problematic, the blanket immunity provided for marital rape in Indian criminal law served to acquit husbands who had been accused of statutory rape by parents of the minor wife. This position was changed by a decision of the Supreme Court in Independent Thought in 2017, that treats sex with underage wife, even when consensual, as statutory rape.

81 *State v. Jagbir,* Sessions Case No: 38 of 2013; CIS No. 985, 2013.

3.3 Synthesis

All the cases in this chapter pertained to elopement except one that involved a girl fleeing a forced marriage. Based on the findings of other studies, it is likely that some of the girls eloped as a last resort to escape an impending forced marriage. All the cases were filed by the parents of the girls. The motivation for legal action appears to have been to assuage family dishonour associated with elopement rather than concern about the age of marriage. Hence, the cases of kidnapping and rape filed against the husband, unlike the cases filed by girls (with their parents) in the previous chapter, sought nullity due to the breakdown of the arranged marriage.

To a large extent, the judicial responses appear to counter the retaliatory use of the law by the parents. Without condoning underage marriage, the jurisprudence emerging from these cases tended to take into account a girl's wishes in determining whether or not she should be handed over to her parents. Particularly with older adolescents, aged 16–18, the courts acknowledged the girls' wishes to stay with the husband as an exercise of discretion – or intelligent preference. Implicit in this reasoning is that the wishes and feelings of a girl who is months away from attaining majority age cannot be discounted.

The legal position that underage marriage is voidable makes textured jurisprudence possible, allowing courts to respond to the distinct circumstances of each case and be attentive to the wishes of a girl. Although not uniformly or consistently, the judicial approaches recognized self-arranged marriages, differentiated between capacities of older and younger adolescents to take personal decisions and stipulated measures to avoid childbirth during the period within which the minor wife may exercise the option to repudiate her marriage. In many instances, the court shielded girls from parental retaliation or viewed acceptance by in-laws favourably in determining what constitutes "best interest of the girl". Looking to strike a balance, the courts placed girls variously—in state shelters, the natal or the matrimonial home—but not always aligning best interests with the girl's wishes. Sometimes the court extracted an undertaking from the in-laws, husband or even parents of a girl; or allow

"The legal position that underage marriage is voidable makes textured jurisprudence possible, allowing courts to respond to the distinct circumstances of each case and be attentive to the wishes of a girl. Although not uniformly or consistently, the judicial approaches recognized self-arranged marriages"

the couple to cohabit while subjecting them to regular oversight of the Child Welfare Committee.

The various legislation—criminal laws, personal laws and the PCMA—and their inconsistencies as well as commonalities in viewing underage marriage as valid (though voidable) created the space for discretion and responsiveness towards the facts and circumstances of these cases. The element of valid but voidable underage marriage contributed greatly towards the judiciary shielding marriages that were affirmed by the minor wife, her husband and the in-laws. The PCMA provision that vests the minor party with the right to repudiate the marriage serves as a statutory aid for courts.

Until 2017, the period within which the case law in this study was drawn, the Penal Code exempted marital rape (of wives older than 15 years) from prosecution, despite the age of consent being 18 years. This legislative inconsistency opened possibilities for husbands to be acquitted in retaliatory prosecution for rape by a girl's parents. This position was altered in October 2017 by the Supreme Court's verdict in the case of *Independent Thought vs Union of India,*[82] which struck down the marital rape exception for girls aged 15–18 years. The judgment extended the protection of statutory rape (to girls younger than 18) to girls within marriage, without recognizing adolescents' capacity to consent.

Consequently, the judicial discretion to shield the husbands from retributive prosecution in elopements is greatly eroded. This speaks to the flawed statutory principles, caught between treating all sex with a minor wife as statutory rape or to equate marriage with irrevocable consent and accordingly forbid prosecutions for marital rape. The issue of legal age of consent cannot be divorced from discussions on child marriage and must be addressed. Adolescent sexuality must be decriminalized by lowering the age of consent, especially within non-coercive relationships between peers.

[82] *Independent Thought vs Union of India,* (2017) 10 SCC 800.

CHAPTER 4

CASES THAT HUSBANDS FILED

Of the 83 cases involving an underage marriage, a total of 35 were filed by the husband of a minor wife, or 42 per cent. While the most common reason for seeking legal recourse was to defend themselves in criminal proceedings instituted against them, a small number of cases were brought to secure custody of their minor wife confined in a shelter or the parental home. Some were filed to nullify the marriage solemnized when the husband was younger than 18.

TABLE 15 : HUSBANDS WHO FILED A CASE

Legal action sought	35 cases
Defence against criminal proceedings	22
Recovery of wife's custody	8
Nullify marriage	5

Most of these 35 cases (30) related to defending themselves or to secure the custody of their wife. Only five cases were filed by the husband to nullify the marriage.

"The most common reason for seeking legal recourse was to defend themselves in criminal proceedings instituted against them, a small number of cases were brought to secure custody of their minor wife confined in a shelter or the parental home."

4.1 Twenty-two cases filed by husbands to defend themselves against allegations of criminality

In 22 of the 35 cases filed by a husband in defence against a criminal proceeding initiated against them in relation to child marriage, one sought anticipatory bail, 10 sought bail, 10 asked to quash the criminal proceedings and one was appealing a conviction.

TABLE 16 : HUSBANDS' COUNTER-CASE AGAINST CRIMINAL ALLEGATION

Initiator of criminal proceedings	22 cases
Parents or relatives of the girl	18
The girl or wife	3
The court	1

The criminal prosecution of the husbands was initiated primarily by the parents and a few relatives of the minor wife. All 22 cases involved elopement or marriage against the wishes of the girl's parents, hence the retaliatory legal action. Three cases involved a prosecution case by the wife. And in one exceptional case, the prosecution was directed by the court against the husband.

The contexts within which elopement occurred were broadly similar: the girl sought to escape the burden of household chores and caregiving for children (in one case, the girl lived in her uncle's home)[83] or to escape severe restrictions on mobility following parental discovery of a romantic relationship.[84] Other studies corroborate that early burden of housework, strict control over movement outside the house and reprisal for socializing with boys drive elopement.[85]

In two of the three cases in which the wife had first filed for prosecution action against the husband, there were charges of harassment and dowry demands. In the third case,[86] the girl accused her husband of solemnizing child marriage and wanted a divorce. The court-initiated prosecution came about after a couple who had eloped approached the court seeking police protection.

Husbands availed the legal recourse, such as bail, quashing and appeal, to defend themselves against criminal prosecution.

TABLE 17 : HUSBANDS' DEFENCE AGAINST CRIMINAL PROSECUTION

Legal provision invoked	Legal action sought	22 cases
Section 439, CrPC: Special Powers of the High Court and Sessions Court regarding bail	Bail	10
Section 482, CrPC: Inherent powers of High Courts	Quashing of criminal proceedings	10
Section 438, CrPC: Grant of bail to person apprehending arrest	Anticipatory bail	1
Section 374, CrPC: Appeal from convictions	Appeal against conviction by lower court	1

[83] *Baban Pandurang Gaikwad v. State of Maharashtra,* Petition No.150-HMA of 2014.

[84] *Madesha v. State,* Criminal Petition No. 3504, 2015, High Court of Karnataka, decided 23 June 2015; also *Sri Manjunath v. State,* Criminal Petition No. 101845/2015, High Court of Karnataka, decided 27 November 2015.

[85] See Madhu Mehra and Amrita Nandy, *Why Girls Run Away to Marry,* Delhi: Partners for Law in Development, 2019, https://bit.ly/2Zc2Y9v.

[86] *Jaspreet Singh v. State of Punjab,* CRM-M-36187-2014, High Court of Punjab and Haryana, decided 28 July 2015.

Judicial outcome and reasoning

In the majority of the cases (18), the courts ruled in favour of the husband, leaving four cases not in their favour.

TABLE 18 : COURT JUDGMENT OF HUSBANDS' CASES

Legal action granted to husband	18 cases	Legal action not granted to husband	4 cases
Criminal proceedings quashed	8	Criminal proceedings not quashed or replaced Penal Code proceedings with PCMA	2
Bail granted	9	Bail not granted	1
Anticipatory bail granted	1	Conviction upheld in appeal	1

■ Court judgment in favour of the husband

This section looks at the primary rationale as well as literature references to courts that create the jurisprudence around factors that help determine the validity or invalidity of an underage marriage.

Eight cases in which the court quashed criminal proceedings against the husband

Judges relied on one or more of the following factors in arriving at their judgment.

The parents had accepted the marriage and did not want to continue prosecuting the husband: This was an overriding factor for the court in the quashing of a kidnapping case against the husband. In some of these cases, such as *Krishan Chander Dass v. State*,[87] *Mohd. Wasim v. State,*[88] *Akshit Sachdeva v. State*[89] and *Mahesh v. SHO,*[90] the quashing application was made several years after the first information report was filed, during which time the parents came to terms with their daughter's choice. In *Krishan Chander Dass v. State*, the mother filed a kidnapping charge against her daughter's husband. After she learned that the couple was living together with a baby, she did not oppose the husband's quashing petition. The court's decision to quash the first information report came nine years after it had been registered.

In *Ramu Mandal v. State,*[91] the court quashed the case even though the girl was 13 years old at the time of her (self-arranged) marriage because there were no allegations of sexual assault, and the mother of the girl refused to cooperate with the prosecution.

The offence of kidnapping was not established because the girl had left the guardianship of her parents of her own free will: In addition to the reason that the parties had solved

87 *Krishan Chander Dass v. State,* Crl. M.C. 902/2016, High Court of Delhi, 1 April 2016.
88 *Mohd. Wasim v. State,* Crl. M.C. No. 121, 2016, High Court of Delhi, 12 January 2016.
89 *Akshit Sachdeva v. State,* W.P. (Crl.) 578/2016, High Court of Delhi, 10 August 2016.
90 *Mahesh v. SHO,* Crl. M.C. No. 8229, 2016, High Court of Kerala at Ernakulam, 31 January 2017.
91 *Ramu Mandal v. State,* Crl. M.C. No. 799, 2016, High Court of Delhi, 24 February 2016.

their disagreement regarding the elopement, in three cases *(Krishan Chander Dass v. State, Mohd. Wasim v. State and Ramu Mandal v. State),* the Delhi High Court noted that while the parents were unaware of their daughter's relationship (and came to accept her self-arranged marriage eventually), the girls had left willingly, and therefore the charge of kidnapping could not hold.

The couple's child would suffer if criminal proceedings continued: In cases in which the eloping couple had a child, the courts quashed the criminal charge in the interest of the welfare of their child, with the underlying assumption that such prosecution would only result in suffering for that child. In *Dinesh Kumar and Ors. v. State of Haryana,*[92] the Punjab and Haryana High Court observed, "Admittedly, Kavita, daughter of the complainant, is presently residing happily in her matrimonial home. Keeping in view the larger interest of justice in mind, it would be just and expedient to quash the criminal proceedings against the petitioners so that the marriage of the daughter of the complainant does not suffer. It is also in the interest of minor child that the criminal proceedings in the present case are quashed."[93] Although the evidence indicated the wife was underage at the time of the marriage and her husband was nearly 21 years old, the judicial rationale focused on a "happy marriage" and the couple's child.

The marriage was valid though voidable and the couple was happily married: Other mitigating factors that supported the decision to quash the criminal proceedings were that the marriage was prima facie valid and the couple was residing "happily" together.

False allegations: In *Jaspreet Singh v. State of Punjab,*[94] in which the husband sought to quash proceedings initiated by his wife, the court held that the allegations made by the girl were false and were intended to malign the husband because their marriage had broken down. The court's decision was based on the inconsistent statements made by the girl and the parties' mutual decision to settle their dispute and obtain a divorce.

Ten cases in which the court granted bail or anticipatory bail

In most of the 10 cases, the judges granted bail unless the prosecution presented a strong argument to reject it. Although granting bail did not shed light on the final outcome of the case, it signalled that the court did not view the charges against the accused to be heinous and that the accused did not pose a threat to the witnesses or the investigation.

The observations in granting bail included that the offences alleged to have been committed were not punishable by death, hence lacked gravity; that the offence of sexual assault was not borne out by the facts stated in the first information report; that the marital rape exception to Section 375 of the Penal Code does not allow allegations of rape to hold within marriage; and that without mention of the use of "force" in sexual relations, the charge of sexual assault in the complaint could not be accepted.

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92 *Dinesh Kumar and Ors. v. State of Haryana,* CRM No.M-7090, 2011 (O&M), High Court of Punjab and Haryana, 24 September 2013.

93 *Dinesh Kumar v. State of Haryana,* para. 6.

94 *Jaspreet Singh v. State of Punjab,* CRM-M-36187-2014, High Court of Punjab and Haryana, decided 28 July 2015.

Two other reasons for which bail was granted included that inconsistencies in a girl's statement or the veracity of a girl's statements could only be tested at trial, so no conclusion could be made at the time of bail and that the accused did not have a history of criminality to withhold his plea for bail. The courts also considered the possibility that the girl could choose to remain in the marriage by not exercising the option of repudiation (allowed under the PCMA) and that choice was hers to make.

In the one request for anticipatory bail, which was granted, the court observed that it was a love marriage and therefore no evidence was to be recovered from the husband. He was granted anticipatory bail on the condition that he would make himself available for interrogation and would not interfere with the investigation.[95]

Legal action not granted to the husband

With the courts rejecting the application of the husband in only four of the 22 cases, taking action against elopement emerges in this data set as the exception rather than the rule. This section looks at reasons connected with these four cases to show that judicial perspectives are important in influencing the outcomes, sometimes inconsistently, in contextually similar cases.

Three cases in which the court did not quash the criminal proceedings and refused to acquit the husband

The girl's young age: In the single case of *Prito Bai and Ors. v. State of Punjab,*[96] the court focused on the girl's age instead of other factors, such as the validity of underage marriage in the law, disruption to the marriage and its consequences for the girl marrying against parental wishes. Although the husband had secured pre-emptive police protection and judicial direction forbidding registration of kidnapping or rape case against him in relation to their marriage, the girl's parents managed to get a first information report registered against him. The husband then sought to quash the criminal proceedings, but the judge declined to do so on the grounds that the girl was immature at 14 years old. The judge reasoned that the age of 14 was sufficient cause for discounting the girl's willingness to marry because it did not allow adequate maturity to understand the consequences of leaving her home and getting married.

Age of girl, disparity between ages of a couple, father's feelings: In *Usmanbhai Shaikh v. State of Gujarat,*[97] although the court quashed the criminal proceedings for kidnapping and rape against the husband, it directed the police to register a case under the PCMA against him and the Qazi who officiated the marriage. The judge ruled that 16 years is too young to marry, alongside the age disparity between the minor wife and the husband, who was 12 years her senior. The judge also relied on the feelings of the girl's father, noting: "The father would definitely be feeling very bad as his feelings are hurt. The father must

[95] *State v. Sunny Nishad,* Bail Application No. 33, 2016, Additional Sessions Judge, Gurdaspur, Punjab, 4 May 2016.

[96] *Prito Bai and Ors. v. State of Punjab,* Criminal Misc. No. 26267 M, 2010, High Court of Punjab and Haryana, 9 August 2011.

[97] *Usmanbhai Shaikh v. State of Gujarat,* CMA No. 8290 of 2015, High Court of Gujarat, 23 September 2015.

have toiled day and night to take care of his family, more particularly, his two minor daughters. One day, the father finds that the daughter has left the parental home and has got married with a man who is 12 years elder to her. This, in my view, is nothing but the lack of maturity, understanding and education on the part of the girl. Sixteen years is not an age for a girl to get married. At this age, probably, a girl would not even clear her S.S.C. Exam. At times, I fail to understand that how she would be able to go ahead in life. Most of the time, unfortunately, this type of marriages fails, and one day, the girl would come back to her parents. By that time, it is too late in her life to realize her mistake as it would be very difficulty for the parents to get her again settled in life."[98] [sic]

Girl only a few months younger than minimum age of sexual consent: In *Baban Pandurang Gaikwad v. State of Maharashtra,*[99] the High Court of Bombay upheld the decision of the lower court convicting the husband of kidnapping and sexual assault of a minor. The court treated the age of the girl, at nearly 16 years (the age of consent under the Penal Code prior to the enactment of the POCSO Act in 2012), in two divergent ways. The lower court applied the law strictly to treat the case as one of statutory rape, whereas the Appeals Court retained the conviction but reduced the sentence because the girl had almost reached the age of legal capacity. The girl, who had been residing with her uncle, eloped to escape the burden of excessive housework. Her uncle's missing person's report to police was converted into a kidnapping and sexual assault first information report when the girl reported that the accused had raped her after promising to marry her. Later, before the trial court, she said that the sexual relationship was consensual. On these facts, the court held that the accused was guilty of kidnapping and, as a consequence, of sexual assault. Reasoning that at the age of 15 years and 9 months, the girl was just three months short of the age of sexual consent, the act of taking away a girl on the promise to marry would amount to enticement. On this premise, the court took the view that kidnapping established and declared the self-arranged marriage to be void as per Section 12 of the PCMA. With the marriage being void, the husband was not covered by the marital rape exception in Section 375 and was found guilty of rape. The Appeals Court retained the conviction but reduced the sentence in view of the fact that the relationship was consensual and that the criminal incidents occurred when the girl was only a few months short of the age of consent (before the POCSO came into force) and that since the trial began, she had married someone else.

One case in which the court did not grant bail

In this isolated case in which bail was not granted, the court relied on the initial statement of the girl, whom the accused had forcibly taken in a vehicle, tied turmeric to her neck and declared he and she married. Thereafter, he had forcible intercourse with her. The medical report confirmed penetration. This statement differentiated the case from the other cases of elopement and became the reason for declining bail.[100]

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[98] *Usmanbhai Shaikh v. State of Gujarat,* para. 39.

[99] *Baban Pandurang Gaikwad v. State of Maharashtra,* Criminal Appeal No. 341 of 2015, High Court of Bombay, decided 22 November 2016.

[100] *Sri Kumar v. SHO,* Criminal Petition No. 3953 of 2014, High Court of Karnataka, 21 July 2014.

4.2 Eight cases filed by husbands for custody of their minor wife

All the cases in which the husband pursued legal action to regain custody of his minor wife pertained to elopement. In each case, the girl had either been moved to a shelter home (at the behest of her parents) by the police or the court as part of legal proceedings initiated by the parents of the girl or had been confined to her parental home. Of these eight cases, seven girls were in a shelter home, with the eighth one in her parental home and not allowed to meet with her husband.

In *Jitender Kumar Sharma v. State,*[101] for example, the girl's marriage was opposed by her parents, who filed a criminal case of kidnapping and rape against her husband. She was initially detained by her parents and later sent to a shelter home by the police. Her parents intervened to bring her back home, but she left them to live with her husband. On judicial intervention, she was again returned to the shelter home. Her husband, also a minor, was sent to a juvenile home. He later applied for and obtained bail and then filed a writ petition seeking her release.

Irfan Khan v. State of M.P.[102] also involved a girl running away to marry her boyfriend despite parental opposition. Her brother filed a criminal case against her husband for kidnapping. When the couple was apprehended by the police, the husband was taken into custody and the girl was sent to a shelter home because she refused to go to her parents' house. The husband's custody application was refused twice, so he filed a habeas corpus petition to seek her recovery.

TABLE 19 : CASES FILED BY HUSBANDS FOR CUSTODY OF MINOR WIFE

Legal provision invoked	Legal action sought	8 cases
Article 226, Constitution of India	Issuance of writ of habeas corpus, custody of the girl and police protection, with ancillary relief of quashing the criminal proceedings	6
Criminal Miscellaneous petition, section and statute not mentioned	Issuance of writ of habeas corpus and custody.	1
Section 52, Juvenile Justice Act 2000 (before the 2016 amendments)	Reversal of the Child Welfare Committee's decision dismissing a husband's custody plea.	1

In most cases, the husbands tried to recover custody of their wives by approaching the High Court in its writ jurisdiction. In one case,[103] the husband approached the Child Welfare Committee, which rejected his application for custody. He then appealed to the High Court under Section 52 of the Juvenile Justice Act, which stated (before 2016 amendments) that

[101] *Jitender Kumar Sharma v. State,* WP (CRL) 1003/2010, High Court of Delhi, 11 August 2010.
[102] *Irfan Khan v. State of M.P.,* W.P. No. 3663, 2016, High Court of Madhya Pradesh, 17 June 2016.
[103] *Pankaj @ Sher Singh v. State,* Crl. Appeal No. 30/12, Additional Sessions Judge, Karkardooma, Delhi, 24 May 2012.

a person aggrieved by an order of a competent authority under the Act can approach a Court of Session in appeal.

Judicial outcome and reasoning

TABLE 20 : COURT JUDGMENT IN CASES FILED BY HUSBANDS FOR CUSTODY OF MINOR WIFE

Legal action granted to the husband	7 cases	Legal action not granted to the husband	1 case
Writ of habeas corpus issued, and custody granted to the husband with additional directions in some cases.	7	Refused to grant custody of the minor wife to the husband in appeal.	1

In this cluster of cases, the courts ruled in favour of the husband in all but one case. Relying upon various factors outlined here (including that the girl had attained majority age by the time the trial ended and her wishes, based on her exercise of discretion), the court leaned towards allowing the couple to unite and preserve the marital relationship.

- **Seven cases in which the court granted the girl's custody to her husband**

The reasoning of the court in these cases was based on acknowledgement of the capacity of the girl to make decisions within her limited context, believing that the assertion of parental or judicial authority to be harmful to her well-being. The observations noted that the case involved an underage marriage, but it was valid in law (due to having taken place) and that in situations of an intercommunity marriage, the court ought to protect the girl or couple from harm. The Delhi courts particularly devised innovative measures to provide financial security, sexual and reproductive health information and oversight to secure the well-being of a girl.

Girl's maturity, intelligent preference and well-being: In *Pankaj @ Sher Singh v. State,*[104] the court recognized that the girl wanted to live with her husband and that she was mature and understood the consequences of her decisions. The judge cited the precedent in *Jitender Kumar Sharma v. State* to underscore that "preferences of [a] minor who is old enough to make an intelligent preference ought to be considered by the Court."[105] The girl's clear and consistent statement contributed to the judge's conclusion. In *G. Saravanan v. Commissioner of Police,*[106] the court cited Section 17 of the Guardians and Wards Act, 1890 in support of its decision to consider the girl's "intelligent preference."[107]

In *Furqan v. State,*[108] the court observed that a prolonged stay in a shelter home would have undesirable effects on the girl. It noted that forcing the girl to stay there amounted

[104] *Pankaj @ Sher Singh v. State,* Crl. Appeal No. 30/12, Additional Sessions Judge, Karkardooma, Delhi, 24 May 2012.
[105] *Pankaj @ Sher Singh v. State,* para. 9.
[106] *G. Saravanan v. Commissioner of Police,* H.C.P. (MD) No.190 of 2011, High Court of Madras, 6 April 2011.
[107] *G. Saravanan v. Commissioner of Police,* para. 22.
[108] *Furqan v. State,* W.P.(CRL) 1025/2012, High Court of Delhi, 22 January 2013.

to detention and violated her fundamental constitutional rights. Although recognizing it as a case of an inter-religious self-arranged marriage, the High Court of Delhi noted the ill-effects of a prolonged stay in a shelter home: "Khushboo @ Aarti has been in Nirmal Chhaya since 06.06.2012, for more than seven months. On each and every date of hearing, Khushboo @ Aarti has categorically stated that she willingly married Furqan and wants to live with him. She is unwilling to go and stay with her parents. Seven month's stay in Nirmal Chhaya has not changed her mind, and she remains as firm as ever. Throughout and on each date, she has beseeched us to allow her to go with Furqan and his family. To her, Nirmal Chhaya is a confinement and detention, which infringes upon her liberty and right of choice. Prolonged detention of Khushboo @ Aarti for next one year would be detrimental and against her interest and well-being. This confinement will deprive her of love, affection and care which she requires and needs from Furqan and his family."[109] [sic]

Validity of the marriage: The PCMA and the personal laws were cited to affirm the validity of a marriage. With either party in the marriage underage, the marriage was voidable but not voided in law. And the law accorded to the underage party, and no one else, the right to exercise the option of repudiation or nullification.

In *G. Saravanan v. Commissioner of Police,* in which a girl was detained by her family and the husband was threatened with violence, the court observed: "Excepting the detenue, nobody has the locus-standi to question the validity or otherwise of the marriage with the petitioner. In this case, not only she does not want to exercise this right conferred on her under Section 3 of the Prohibition of Child Marriage Act, but she also wants to reinforce and strengthen, consolidate and preserve their marital bond by living together as she married the petitioner on her own will and volition."[110]

In some cases,[111] the court relied on personal law and judicial discretion to hold that the marriage was valid. In *G. Saravanan v. Commissioner of Police,* in which the girl's parents contested the validity of the marriage, the court reasoned that although the marriage had been solemnized in contravention of Section 5(iii) of the Hindu Marriage Act, which specifies the minimum age of the bride and bridegroom, it nevertheless was a valid marriage. Accordingly, there was no legal bar on the husband acting as the guardian of his minor wife. As per Hindu law, the guardianship of a minor wife rests with her husband and not her father, and the husband can be displaced as a guardian only if he is proved to be "unfit".

Conditions to secure well-being of the girl: The Delhi High Court adopted an innovative approach to go beyond declarations on the validity of marriage or criminality in two cases. While allowing an underage girl to return to her husband and matrimonial home, the judges imposed certain conditions for the parties to follow. In *Furqan v. State,* for example, the Delhi High Court directed the husband to deposit 100,000 rupees in the

[109] *Furqan v. State,* para. 7.
[110] *G. Saravanan v. Commissioner of Police,* para. 19.
[111] See *G. Saravanan v. Commissioner of Police* and *Bholu Khan v. State,* W.P. (Crl.) 1442/2012, High Court of Delhi, 1 February 2013.

name of the girl, of which half the amount (50,000 rupees) was to be available to her upon reaching majority age and the balance available when she turned 20. Further, the court directed that the girl and her husband be counselled at Nirmal Chhaya (shelter home) for two days regarding "the effects and consequences of such marriages" and the problems associated with early pregnancy and child-birth, after which the girl may return to her matrimonial home. This counselling, however, was to be ongoing on a monthly basis. The court also directed the parents of the girl to undergo counselling. Additionally, the girl was to be given the contact details of a police officer or a child welfare officer to contact in case of an emergency, and the court recorded the couple's statement that the girl would continue her studies and begin skill development training.

Similarly, in *Bholu Khan v. State,*[112] the Delhi High Court required monthly counselling for the couple and the girl's parents, along with vocational training for the girl and direct contact with a police officer.

Girl attained majority age: In two cases, *Mohd. Nihal v. State*[113] and *Court on its Own Motion (Lajja Devi) v. State,*[114] the girl had attained majority by the time the court began proceedings. In both cases, the court held that the case had become infructuous, and the girls were free to reside at a place of their choice.

- **One case in which the court refused to grant the girl's custody to her husband**

In *Irfan Khan v. State of M.P.,* the court rejected the husband's application for custody of his wife. The couple had eloped and married in a mosque. They wrongly projected themselves as adults to the Qazi, stating they were 19 and 22 years old. Criminal proceedings against the husband ensued, and the girl was sent to a shelter home. After the husband's application for custody and its review were both rejected, he filed a writ petition. According to the court, a writ of habeas corpus was not maintainable because the girl was not in illegal custody. The husband instead ought to have challenged the order of the magistrate for sending the girl to a shelter home in appropriate proceedings. Further, the court held that the guardianship of the girl could not be granted to the husband because he could not be deemed a "fit person" within the meaning of Section 2(28) of the Juvenile Justice Act because criminal proceedings were pending against him. The court relied on a precedence from the Calcutta High Court[115] to conclude that, "Under the said [Juvenile Justice] Act, the custody of a minor girl cannot be given to a person who is not 'fit person'. In the present case the petitioner who is facing trial under Sections 363 and 366-A of the Indian Penal Code cannot be said to be a 'fit person' to whom the custody of respondent No. 5 can be given because as on today respondent No. 5 is a minor girl."[116] [sic]

The issue of a girl's custody is sensitive, framed within principles of minority status and the girl's voice in matters relating to her well-being alongside the prickly issue of parental or

[112] *Bholu Khan v. State,* W.P. (Crl.) 1442/2012, High Court of Delhi, 1 February 2013.
[113] *Mohd. Nihal v. State,* W.P.(CRL.)591/2008 and Crl. M.A. 5507/2008, High Court of Delhi, 8 July 2008.
[114] *The Court on its Own Motion (Lajja Devi) v. State,* Crl.M. No. 566/2010, High Court of Delhi, 27 July 2012.
[115] *Rahul Amin Sekh v. State of W. Bengal and Ors,* W. P. NO. 8619 (W) OF 2015, High Court of Calcutta, 16 June 2015
[116] *Irfan Khan v. State of M.P.,* para. 5.

husband's guardianship. Despite no easy answers and within the confines of shelter homes and patriarchal limitations, the Delhi courts innovatively carved out solutions to secure a girl's well-being within the marital home while paying equal attention to developing her capacities through education and skill-building. The jurisprudence in this context was therefore more an outcome of judicial discretion and perspective on a girl's well-being than obedience to statute.

4.3 Five cases filed by husbands to nullify the marriage

In this cluster of cases by husbands seeking to nullify their marriage, four of them were married between the ages of 17 and 19 years, while one was married at age 21. All of them sought a declaration of nullity of marriage under Section 3 of the PCMA, which allows child marriages to be nullified at the option of the underage party within two years of attaining majority age. In the law, the minimum age of marriage for men is 21 years.

The reasons for seeking nullification of marriage had less to do with the minority of age but rather with the primary concern relating to conflict, relationship breakdown and incompatibility between the spouses.

In four of the five cases, the husband filed a suit or petition for declaration of the marriage as null and void following the breakdown of the marriage. The grounds for seeking annulment did not dwell on being younger than the minimum age at marriage as a factor. Instead, these cases argued marital discord and dispute between the families of the husband and wife, the girl being two years older in age than the husband,[117] and, in three cases, allegations of cruelty arising from desertion,[118] physical violence[119] and frequent visits by the wife to her natal home.[120]

In *Balbir @ Jaskirat v. Harpreet Kaur @ Jasmeen,*[121] the 21-year-old husband (in the case) and his brother were married to two sisters. The husband filed an application to nullify his marriage after learning his wife was much younger, aged 12 years (in class 7), which was unacceptable and a fundamental basis of incompatibility.

Judicial outcome and reasoning

TABLE 21 : COURT JUDGMENT IN CASES FILED BY HUSBANDS TO NULLIFY THE MARRIAGE

Legal action granted to the husband	4 cases	Legal action not granted to the husband	1 case
The marriage involved an underage party and thus was nullified.	4	The husband moved the application for nullification of marriage after the statutory period of two years from attaining majority at 18 years.	1

[117] *Jagdish v. Asha, H.M.A.* Petition No. 44, 2014, District Judge, Jhajjar, Haryana, 28 October 2016.
[118] *Sanjay v. Mamta,* Petition No.148-HMA, 2014, Additional District Judge, Sirsa, Haryana, 29 April 2015.
[119] *Jagdish v. Asha,* H.M.A. Petition No. 44, 2014, District Judge, Jhajjar, Haryana, 28 October 2016.
[120] ibid.
[121] *Balbir @ Jaskirat v. Harpreet Kaur @ Jasmeen,* H.M.A. Case No. 315, 2015/2016, Additional District Judge, Sirsa, Haryana, 21 February 2017.

Four cases in which the decree of nullity was granted to the husband

In the four cases in which the petition of the husband was accepted and a decree of nullity granted, the court cited that the petitioner was of minor age at the time of the marriage. In addition to the age of the husband, the court cited other reasons for declaring the marriage as null and void, such as the dispute between the parties was settled. In *Balbir @ Jaskirat v. Harpreet Kaur @ Jasmeen,* the girl declared in her written statement that she did not object to the declaration of nullity if her dowry, worth 200,000 rupees, was returned to her.

Two of the four cases, *Sanjay v. Mamta*[122] and *Vinod Kumar Naik v. Neelam,*[123] were decided ex parte, or without hearing the girl's side of the case. Ex parte proceedings are usually decided in favour of the petitioner because the facts asserted are not contradicted or disproved by the opposing party.

In *Balbir @ Jaskirat v. Harpreet Kaur @ Jasmeen,* the Additional District Judge at Sirsa, Haryana granted a decree of nullity after the dispute had been amicably settled by the parties. Although the husband was not underage at the time of marriage (he was 21 and the girl was 12), the court granted the decree even though it was sought by the husband rather than the wife because it was a child marriage regardless of who petitioned the court.

One case in which the decree of nullity was refused

In *Jagdish v. Asha,*[124] in which the court dismissed the petition of nullity, the judge interpreted two years from attaining majority age for boys to be 20 years—that is, from the age of majority set out in the Indian Majority Act, 1875, which is 18 years. The PCMA states the minimum age of marriage for boys at 21 years (not the age of majority). The husband, whose marriage was organized by his parents when he was 18, filed the petition of nullity when he was 23 years old. He alleged that the marriage was arranged by his parents, and at the time, he was unaware that the girl was two years older. And she left the matrimonial home 15 days after their marriage. The District Judge at Jhajjar held that even though the husband, married at the age of 18, was technically underage as per the PCMA, he could not seek nullification of the marriage after the age of 20. Because his petition was filed when he was 23, it was dismissed.

4.4 Synthesiss

Of the 35 cases discussed in this chapter, the largest cluster (22) involved husbands defending their marriage and themselves from criminal prosecution by the girl's disapproving parents, with three cases brought by the wife against the husband and one case in which the prosecution was directed by the court. The second cluster of eight cases related to a husband seeking custody of his minor wife, and in the smallest cluster of five cases, the

[122] *Sanjay v. Mamta,* Petition No.148-HMA of 2014, Additional District Judge, Sirsa, Haryana, 29 April 2015.
[123] *Vinod Kumar Naik v. Neelam,* Petition No.150-HMA of 2014, Additional District Judge, Sirsa, Haryana, 29 April 2015.
[124] *Jagdish v. Asha,* H.M.A. Petition No.44 of 2014, District Judge, Jhajjar, Haryana, 28 October 2016.

husbands wanted to repudiate their underage marriage. Of the 35 cases, 27 pertained to elopement or a self-arranged marriage.

Notably, the age of marriage was not the driver of the legal action in any of these cases. The arguments—by the girls' parents or the boys who wanted to nullify their underage marriage—did not centre on age, even though age is the primary factor in child marriage discourses and in the law. In these cases, age was a reference to peg other grievances and seek relief within the legal framework. The petitioners, be it parents or underaged husbands who wanted to opt out of marriage or even a minor wife who wanted to affirm a marriage, turned to the court with concerns relating to the breakdown of the marriage, incompatibility, disapproval of intercommunity unions, parental disapproval or protection from parental reprisal.

Chapter 2 includes a cluster of five cases of girls seeking to nullify their marriage—the same number of men doing the same highlighted in this chapter. The distinction between the two sets of cases, however, is that the men approached the court on their own while the girls filed a case with a family member as co-petitioner. Although being underage was not the reason for wanting to nullify the marriage by both parties, the reasons were distinguished by gender—with girls complaining of cruelty, dowry demands and forced marriage. For the men, it was incompatibility, domestic discord, the wife's frequent visits to her natal home or the wife being older than the husband.

In response, the courts relied on other factors in addition to age at marriage. The judges prioritized harmonious matrimonial as well as extended family relations when they seemed evident; the risks to a girl facing parental disapproval of marriage; the adverse social and individual consequences of non-recognition of marriage for a girl; and a child born of such a marriage. Importantly, the judges acknowledged an adolescent girl's capacity to exercise discretion and intelligent preference within her limited circumstances and, for this reason, rejected charges of kidnapping based on the facts and circumstance that demonstrated willingness and mutuality of the parties.

Even as the judges expressed distress at insufficient efforts to address underage marriage, they took into account the consequences of withdrawing social and legal protection to a marriage of choice that was against the parental

"Notably, the age of marriage was not the driver of the legal action in any of these cases. The arguments—by the girls' parents or the boys who wanted to nullify their underage marriage—did not centre on age, even though age is the primary factor in child marriage discourses and in the law."

wishes, especially for girls. The judicial discretion in these cases allowed for safety nets, such as distinguishing responses to older adolescents from younger adolescents – hence discounting a 14-year-old's wishes or voiding a marriage with a 12-year age disparity. This discretion arose from the flexibility and scope for it within the PCMA. Although the law treats an underage marriage as valid (while penalizing performance of such a marriage), Section 3 allows for the minor party in a marriage the option to repudiate the marriage within two years of attaining majority.

This leeway in the statute, through which a minor's right to be heard and judicial discretion made possible, is of paramount importance. Even as varying judicial approaches create inconsistencies in application of the law, this statutory characteristic opens possibilities for nuanced, customized solutions. Rather than compel the courts to adjudicate along binaries of void and voidability—or parental or shelter homes, this possibility allowed the Delhi courts to craft insightful responses that attempted to address the precise vulnerability of girls in such a union. By stipulating financial arrangements, securing commitment for continuing education and livelihood skills training and mandating regular counselling to secure a girl's reproductive rights, the two cases in Delhi demonstrated that "best interest" and "well-being" within lived realities can go far beyond what age-centric parameters allow.

CHAPTER 5

CASES FILED AGAINST PARENTS

The 14 cases discussed in this chapter involve prosecution of the parents under the PCMA. Child marriage practices are generally understood to be custom driven and arranged by parents and communities, which the law seeks to deter. It thus comes as a surprise that so few cases, only about 17 per cent in the data set, related to charges against parents for arranging and conducting such marriage.

The 14 cases were divided into two categories: 10 cases involving criminal proceedings and four cases relating to civil proceedings. While the criminal proceedings involved anticipatory and regular bail applications as well as criminal prosecutions of the parents for solemnizing a child marriage, the civil cases pertain to injunctions against the solemnizing of a child marriage and custody dispute over a married girl.

"Child marriage practices are generally understood to be custom driven and arranged by parents and communities, which the law seeks to deter. It thus comes as a surprise that so few cases, only about 17 per cent in the data set, related to charges against parents"

5.1 Ten criminal prosecutions of parents in relation to child marriage

This group of cases involved the criminal prosecution or bail application of parents for arranging their daughter's marriage. The girl's marriage had been arranged by her parents in all but two cases, following which criminal proceedings were instituted against her parents and husband.

Of these 10 criminal proceedings, four were initiated by the child marriage prohibition officer, three by an unknown complainant, two by the girl and a single case by one of the girl's parents against the other parent. The husband of the girl was implicated in eight of these cases, along with either

or both sets of parents, the marriage broker and the priest. The criminal provisions invoked against the parents only pertained to the PCMA, without any additional offences under the Penal Code.

TABLE 22 : PROSECUTION OF PARENTS

Law invoked	Section	Description of legal provision	16 cases*
Prohibition of Child Marriage Act	9	Punishment for male adult marrying a child	3
	10	Punishment for solemnizing a child marriage	4
	11	Punishment for promoting or permitting solemnization of child marriages	3
Code of Civil Procedure	439	Bail	2
	438	Anticipatory bail	4

**Multiple offences under different sections of the law are applied simultaneously, which explains why a total of 16 offences were invoked in 10 cases.*

Judicial outcome and reasoning

TABLE 23 : COURT JUDGMENT IN PROSECUTION CASES AGAINST PARENTS

Decision favourable to parents	7 cases	Decision not favourable to parents	3 cases
Bail granted	5	Bail not granted	1
Acquitted of criminal offences	2	Convicted of criminal offences	2

**In eight cases, the husband was also prosecuted with the parents.*

■ Six bail cases

Courts granted bail to the parents in the majority of cases.

Bail granted

The courts' decisions to grant bail were based on technicalities of the criminal procedural law and the rule of thumb that bail should be granted unless there are compelling reasons to continue custodial detention. In most of the cases, the courts recognized that the allegations, while serious, hinged on questions of fact that could only be determined at trial. For instance, in *Mahaveer Dhulapala Balikai v. State of Karnataka,*[125] the girl alleged that her parents married her in exchange for money, although she wanted to marry someone else. The High Court of Karnataka granted bail to all the accused persons, including her husband and the marriage broker, on the grounds that the determination of the guilt of the accused hinged on the girl's age at marriage, which could only be established at trial. Moreover, the allegations of sexual assault against the husband, however grave, related to sexual intercourse after the marriage,

[125] *Mahaveer Dhulapala Balikai v. State of Karnataka,* Order dated 18 July 2014 in Criminal Petition No.101111/2014 (High Court of Karnataka at Dharwad).

which was exempt from criminal liability. The judges noted that Section 375 of the Penal Code on the definition of rape excluded sex by a man with his wife if she was aged 15 or older.

In *Ramahia and Anr. v. State of Karnataka,*[126] the parents' plea for anticipatory bail was granted by the court because they had been mistakenly implicated in the case. It was filed by a medical officer against both parents on suspicion rather than actual knowledge of an underage marriage. When approached by the pregnant girl for medical help, the doctor wrongly assumed that the girl's parents had forcibly married her off, alerting a local child development officer who filed a case against the parents. In fact, the girl had eloped with her boyfriend, and her parents were in the dark about her marriage or her pregnancy. They had not reported to the police because they were trying to locate her on their own. This being a case of elopement, the High Court of Karnataka granted bail to the parents.

Bail refused

In one case, bail was denied to the fathers of the boy and the girl but allowed for the mothers. In *Saidalvi and Ors. v. State of Kerala,*[127] the criminal case of solemnizing a minor girl's marriage was registered against her husband, the girl's parents and her husband's parents. The High Court of Kerala granted bail to the girl's husband, her mother and the husband's mother while denying it to the fathers. Fixing a higher level of responsibility on the fathers, the judges ruled, "The parties are bound to know the law of the land and they are bound to obey the same so long as the law is in force. No exemption or exception has been provided for under the statute. The operation of the provision is not restricted to any area or community or in respect of any class of persons." The judges also noted that because the offences alleged under the PCMA were cognizable and non-bailable and that the girl's minority age at the time of marriage was not disputed, bail could not be granted to the fathers.

■ Four criminal prosecutions

Of the four cases in which the parents were prosecuted for solemnizing a child marriage or for permitting such a marriage to occur, two ended in acquittals and two in convictions.

Parents were acquitted

In the two cases in which the accused were acquitted of offences related to child marriage, the judges cited the prosecution's failure to establish the girl's minority age at the time of marriage as the primary reason for the acquittal.

In *State v. Sajjan,*[128] the child marriage prohibition officer informed the police that a child marriage was pending. By the time the investigation began, the marriage had been performed, thus a criminal case was registered against the girl's husband, her father and her husband's

[126] *Ramahia and Anr v. State of Karnataka,* Criminal Petition No. 2934/2015, High Court of Karnataka, decided 26 May 2015.
[127] *Saidalvi and Ors. v. State of Kerala,* Bail Application No. 4624/2012, High Court of Kerala, decided 6 July 2012.
[128] *State v. Sajjan and Ors.,* Sessions Case No. 01/2014, Additional Sessions Court, Kaithal, Haryana, decided 18 March 2014.

father. The Additional Sessions Court held that the prosecution had failed to prove that the girl was a minor at the time of her marriage and acquitted all the accused persons.

In *State v. Seema,*[129] the girl's father filed a case against her mother and the husband for solemnization of child marriage on account of a fundamental disagreement between the parents on the question of the daughter's marriage. After initiating legal action against his spouse, the girl's father turned hostile, and the prosecution failed to prove that the girl was a minor at the time of her marriage, leading to acquittal of the girl's mother and husband.

Parents were convicted

In two cases, the court convicted the parents—one ostensibly to set an example and the other because of intentionally misrepresenting the minor girl to be an adult.

In *State v. Subhash Chander and Ors.,*[130] the girl's mother filed a case against the girl's father, her son-in-law's parents and the pandit (priest). The Judicial Magistrate convicted the accused because the prosecution proved that both parties were minors at the time of their marriage. Noting that a lenient punishment would amount to "sending the wrong message to society", the judges sentenced the fathers and the priest to two months imprisonment and a fine of 5,000 rupees for each offence because the parties were "poor labourers".

In *State v. Sukhdev,*[131] the complainant (whose relationship to the girl is unknown) alleged that the girl and her partner obtained police protection from the court by submitting forged documents regarding their ages. The girl's father appeared to be complicit in the submission of the forged documents to the court and was involved in the solemnization of his minor daughter's marriage. He was convicted and sentenced to one year imprisonment and a fine of 10,000 rupees.

5.2 Four civil cases against parents in relation to child marriage

These four cases involved applications by child marriage prohibition officers to injunct the solemnization of child marriage as well as contestations of such injunction orders by parents and a case over the girl's custody.

In one case, the child marriage prohibition officer approached the court to injunct the solemnization of a minor girl's marriage. The officer invoked Section 13 of the PCMA, under which a Judicial Magistrate is empowered to issue an order of injunction against the solemnization of a child marriage.

[129] *State v. Seema and Anr.,* CIS No. 40/2015, Sub-Divisional Judicial Magistrate, Meham, Haryana, decided 14 September 2016.
[130] *State v. Subhash Chander and Ors.,* COMA/91/2014, Judicial Magistrate First Class, Yamuna Nagar at Jagadhri, Haryana, decided 8 February 2016.
[131] *State v. Sukhdev,* CIS No.CHI/214/2014, Judicial Magistrate First Class, Hoshiarpur, Haryana, decided 4 March 2015.

In the other two cases, the parents approached the court for reversal of an earlier court order prohibiting them from solemnizing their minor daughter's marriage. In both cases, on complaint of a child marriage prohibition officer, the court granted an injunction against the parents from marrying their minor daughter. The parents approached the courts to get the injunction against marriage vacated. One of the two cases was filed before the High Court, under Section 401 of the Criminal Procedure Code, seeking a revision of the lower court's order. The other case was filed before a Judicial Magistrate.

The fourth matter related to custody of a girl. In *Association for Social Justice and Research v. Union of India,*[132] a civil society organization filed a writ petition before the High Court of Delhi asking for a writ of habeas corpus so as to trace the whereabouts of a minor girl whose marriage had been solemnized by her parents. When the couple was found, it transpired that the marriage was consensual. Because the girl was 17 years old, the court had to decide whether she should reside with her husband or her parents.

Judicial outcome and reasoning

In three cases, the courts retained the injunction on the underage marriage or placed an injunction upon its solemnization. In the fourth case, the court directed the minor wife to reside with her parents instead of her husband until she turned 18.

TABLE 24 : OUTCOME OF CASE AGAINST PARENTS

Decision favourable to parents	1 case	Decision not favourable to parents	3 cases
A girl directed to stay with her parents.	1	Marriage injuncted.	1
		Injunction on marriage not lifted.	2

In *Child Marriage Prohibition Officer v. Kailash Yadav,*[133] the Judicial Magistrate issued an order of injunction against the solemnization of a child marriage with the consent of the girl's father. In his statement to the court, the girl's father argued that he had been unaware of the law, assuring the court that he would not solemnize his daughter's marriage until she turned 18.

In the other two injunction-related cases, the parents approached the court to vacate the injunction against the marriage of their daughter. The court refused to do so. In *Savita Rana v. Alimuddin,*[134] the husband approached the court to have the injunction against his marriage with the girl vacated. The case was dismissed because the marriage had been performed by the girl's parents in violation of the court's injunction order. Moreover, because the injunction order was passed against the girl's parents, it could not be vacated on an application by her husband. Notably, the court did not comment on the validity of the marriage or the possibility

[132] *Association for Social Justice and Research v. Union of India and Ors.,* W.P. (Crl) 535/2010, High Court of Delhi, decided 13 May 2010.
[133] *Child Marriage Prohibition Officer v. Kailash Yadav,* Judicial Magistrate First Class, Faridabad, Haryana, decided 23 February 2017.
[134] *Savita Rana v. Alimuddin,* Judicial Magistrate First Class, Karnal, Haryana, decided 1 July 2016.

of initiating criminal proceedings against the girl's parents for solemnizing her marriage, even though it was performed in contravention of a judicial injunction.

In *Abdul Khader v. K Pechiammal,*[135] a lower court had restrained the parents of a Muslim girl from solemnizing her marriage. The parents thus approached an appellate court, requesting it to lift the injunction and allow them to conduct their daughter's marriage. The Appellate Court dismissed the parents' appeal to revoke the injunction. The court held that vacating the injunction would amount to condoning the practice of child marriage and that child marriage cannot be solemnized by taking recourse to personal laws because it is prohibited under the PCMA. The judgment stated, "…in the instant case what is claimed is a right to practice that which the personal law allows i.e., marriage of Muslim girl upon attaining puberty, on the premise that it has obtained legislative sanction under the Shariat Act, 1937. Rightly, such right is not claimed as a matter of religious faith. The practice would run counter to the social objective of the provisions of the Prohibition of Child Marriage Act, 2006 aimed to prevent the evil practice of solemnization of child marriages in the country towards enhancing the health of child and the status of women." [sic]

In the custody case, the court held that because the girl was 17, she should reside with her parents until she turns 18, although her marriage remained valid. Her husband and parents were called upon to ensure that the marriage was not consummated and that the *gauna*[136] be performed only after the girl turned 18 and only after taking her consent for the marriage. The judge explained that although the PCMA does not make marriage void, the court can delay cohabitation until majority for primarily two reasons: (i) to eliminate harm to girls. The ruling noted: "The purpose and rationale behind the Prohibition of Child Marriage Act, 2006 is that there should not be a marriage of a child at a tender age as they are neither psychologically nor physically fit to get married. There could be various psychological and other implications of such marriage, particularly if the child happens to be a girl." And (ii) to ensure that a girl's right to repudiate her marriage under the PCMA remained uncompromised by childbearing and motherhood. To ensure that a girl freely exercised the option of repudiating her marriage, the judge wrote, "Neither the parents of Chandni nor the husband, Yashpal will be allowed to perform the gauna ceremony without taking the option and consent of Chandni at that time. To put it otherwise, we may make it clear that it is the option of Chandni to accept this marriage or not. In case she does not accept this marriage, it shall be treated as null and void."

5.3 Synthesis

In the data set of 83 cases, only 14 were filed against parents for solemnizing child marriage and only seven of those 14 cases were filed by the child marriage prohibition officer designated under the law to prevent underage marriages and take action when one is

[135] *Abdul Khader and Ors. v. K. Pechiammal (CMPO),* Crl. R. C. No. 1441/ 2012 and M.P. No. 1/2012, High Court of Madras, decided 3 March 2015.

[136] A custom to mark the entry of the wife-girl to the matrimonial home, often several years after marriage, on attaining puberty.

discovered. Twelve of the cases in this chapter pertained to an arranged marriage, while one related to elopement and one to forced marriage.

The most striking finding in this chapter is that the PCMA appears nearly a non-functional law, scarcely activated by the designated functionary appointed for the purpose. As chapters 2–4 demonstrate, the PCMA is not accessible redress for girls in forced marriages. Although in a small number of cases, it was accessed for nullifying arranged marriage that had broken down. Only in the rarest of cases were parentally arranged marriages prosecuted. Marriages may be performed in spite of a judicial injunction, which may attract no consequences even when such a violation comes to the notice of the court, as in the case of *Savita Rana v. Alimuddin*.

The PCMA is internally inconsistent in taking cognizance of circumstances in which the minor party may have a say and when they may not. This has a bearing on the issue of consent and force, which in different ways are both present and absent in the PCMA. In giving the underage party in a marriage the prerogative of repudiation or declaring the marriage void makes a girl's consent to marry an essential aspect of a valid marriage. Likewise, judicial opinion often factored in a minor wife's viewpoint (in addition to other considerations) on decisions of whether she could reside in the matrimonial, natal or shelter home.

Yet, Section 12 of the PCMA,[137] which lists the coercive circumstances that render an underage marriage void, does not include forced marriage by the family. Forced marriages are distinct from arranged marriages, as in the case of *Mahaveer Dhulapala Balikai v. State of Karnataka,* the girl who prosecuted her parents and others for forcibly marrying her to someone other than the man she wanted to marry. The court, much like the statute, made no attempt to explore the applicability of Section 12 with

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[137] Section 12 of the PCMA states that in the following three circumstances, marriage of a minor will be void: (a) is taken or enticed out of the keeping of the lawful guardian; or (b) by force compelled or by any deceitful means induced to go from any place; or (c) is sold for the purpose of marriage; and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes, such marriage shall be null and void.

the facts and circumstances of the case. Instead, it limited the legal issue to that of age of marriage.

This chapter offers evidence of three types of underage marriages: elopement or marriage entered wilfully by the parties (against parental wishes); marriage arranged by one or both parents; and marriage foisted by the parents on a girl, disregarding her protests or her desire to marry someone of her choice. Despite the prevalence of these trends, the PCMA neither distinguishes elopement from enticement or recognizes forced marriage by parents. These distinctions, presently missing from the scope of Section 12 of the PCMA, which declares categories of child marriage as void ab initio, are deserving of serious attention and need to be part of the law reform debates.[138]

The criminal prosecution of parents involved offences only under the PCMA and not the Penal Code, leaving the parents implicated in forced or arranged underage marriages to be tried for lesser offences with lighter sentences. Adult husbands were also prosecuted, as in some cases in this chapter, but the prosecution in arranged marriages was limited to the PCMA and not rape. In contrast, rape prosecutions were routinely carried out in cases involving elopement.

While not arguing for strong punitive measures, the cases in this chapter highlight the glaring disparity between the offences charged and punishments due for arranged and forced marriage by parents versus runaway marriages (elopement) by young lovers. A boyfriend or husband was seen in cases described here fighting a heinous charge of kidnapping and rape, while the parents or others confronted charges of solemnizing underage marriage punishable by no more than two years imprisonment.

A final point on the value of punishment per se for underage marriage is warranted, particularly when it occurs in the context of poverty of daily wage-earning parents. It does fly in the face of the girl's best interests (and that of her siblings), when daily wage-earning parents or father are jailed, leaving the family further impoverished. It begs the question of whether welfare measures or punitive responses might best secure the well-being of girls and their future.

[138] The facts of *Mahaveer Dhulapala Balikai v. State of Karnataka* in this chapter and *Kirandeep Kaur v. Manga Singh* in chapter 2 refer to forced marriage.

CHAPTER 6

CONCLUSIONS

The disparity in the national statistics between the cases registered under the PCMA and the prevalence of child marriage is staggering. Although an estimated 27 per cent of women aged 20–24 in 2015–2016 were married before the age of 18,[139] the registered cases under the PCMA in those years were 293 and 326, respectively.[140] While the crime data confirm that the law is scarcely used, it offers no insight into why this might be so.

Yet, the abysmally small figure of case registration under the PCMA is cited to justify the need for making the law stringent. Without evidence on how the law is implemented, the calls to make underage marriages void (invalid from the outset)[141] and to increase the minimum age of marriage of girls—despite popular appeal—are unfounded. The findings of this study make an indictment of the law, but they also reveal indicators of how to make the law accessible and responsive to girls within early and child marriage or at risk. Although not comprehensive, the analysis of case law over a 10-year span offers valuable insights into the workings of the law and the areas that would benefit from reform. The findings are presented here in two parts: the first relating to the interface of the law within the social realities of child marriage, and the second identifies the jurisprudential principles instructive for law reform debates on child marriage.

"The findings of this study make an indictment of the law, but they also reveal indicators of how to make the law accessible and responsive to girls within early and child marriage or at risk."

[139] The National Family Health Survey-IV, 2015–2016.

[140] National Crime Records Bureau (2016), table 1.3, p. 5. The same report shows 16,938 cases of kidnapping of a minor for purpose of marriage under the Penal Code (table 2C.3 (i), p. 112). Because the law reform debates relate to the PCMA only, the cases registered under the Penal Code are not relevant comparison.

[141] The states of Karnataka and Haryana have brought statutory amendments to the PCMA to make all underage marriages void, see https://bit.ly/2DvAu3A and https://bit.ly/3gRsEyM. The Orissa High Court is adjudicating on public interest litigation sought for the declaration of all underage marriages as void, see https://bit.ly/31WLwII; Centre for Reproductive Rights and Centre for Law and Policy Research have called for strengthening, compulsory registration, making child marriages void ab initio, https://bit.ly/320WBsd.

Drawing lessons from these findings, the study arrived at several recommendations, offered in the final section.

6.1 Findings on how the law interacts with social contexts

- **Most underage marriages occur in resource-poor socioeconomic contexts.**

The limited indicators available in the judgments and orders suggest that litigation relating to elopement and early marriage arise primarily within resource-poor contexts. Even as marriage remains a compulsory institution for women in India, the occurrence of underage marriage is overwhelmingly within a context of poverty, lack of opportunities and resources. This is borne out by references in the case law to low-paid and uncertain livelihoods, lack of official identity and birth documentation, residence in urban slums, peri-urban industrial localities and rural areas, as well as low levels of education among many of the girls who were first-generation literate, with some girls unable to finish school. These findings correspond with other reports that show underage marriage and elopement to be a facet of early adulthood, which the young shoulder in the context of intergenerational poverty.[142] This lived reality compels us to ask whether the futures of girls within these vulnerable populations are better secured by punitive measures that delay marriage or whether they require interventions that eliminate the underlying deprivations and provide them with opportunities.

- **Elopement is the primary cause for legal action, with forced marriage the least cause.**

The largest cluster of cases in this data relate to elopement or self-arranged marriage by girls. This comprises the cases of parents prosecuting the husbands or seeking custody of their daughter as well as cases in which the husband or the couple sought protection, cohabitation, bail or quashing of criminal charges. Overall, 65 per cent of the cases pertained to elopement and 35 per cent to arranged and forced marriages.

TABLE 25 : ALL 83 CASES, BY TYPE OF MARRIAGE

	Elopement	Arranged	Forced	Total
Cases filed by girls	8	5	2	15
Cases filed by parents	18	0	1	19
Cases filed by husband	27	8	0	35
Cases filed against parents	1	12	1	14
Total	54	25	4	83
Percentage	65.06%	30.12%	4.82%	

[142] Madhu Mehra and Amrita Nandy, *Why Girls Run Away to Marry,* Delhi: Partners for Law in Development, 2019, https://bit.ly/2Zc2Y9v. See also Nirantar Trust, *Early and Child Marriage in India: A Landscape Analysis,* Delhi, 2015.

Most of the arranged marriage cases came about due to the breakdown of the marriage due to domestic abuse, disagreements or incompatibility and thus an application for annulment. Fewer cases involved prosecution for arranging the marriage of minors. The cases in which forced marriage was specifically alluded to by a girl are categorized separately, although this category is likely to be larger than what is visible. It is likely that many arranged marriages were in fact forced, and equally likely that elopement was often a means to escape an impending forced marriage. Because the statute as well as judicial opinion were silent on forced marriages by parents, it is deserving of attention now.

While a girl's minority age was a criterion for initiating legal proceedings, it was not the primary motivation for legal action. Age appears to have been instrumental for accessing the legal system, although the real driver was parental disapproval of elopement, the breakdown of marriage and so on. Each of these drivers of litigation reveal how the law was understood, accessed and operationalized within social hierarchies and power relations in a given context.

- **Parents have the greatest access to the law, while girls have the least access.**

It was primarily the parents of girls who approached the legal system with their grievance. A total of 56 of the 83 cases, or 67.4 per cent, were initiated by parents (or relatives). This covered different types of cases: seeking custody of their daughter who had eloped or to prosecute the husband; seeking to nullify the daughter's marriage that had broken down or, in a few cases, appealing against a judicial injunction barring them from marrying their daughter. It also included cases in which the husband approached the court seeking bail or cohabitation with his minor wife or to defend himself against criminal proceedings—with each of these in response to a prior legal action by the wife's parents.

Husbands were the second-most active in seeking legal recourse. Of the total cases, 7.5 per cent were initiated by a husband, either to nullify an arranged marriage or to seek protection for a self-arranged marriage in conjunction with the girl (and apprehensive of reprisal from the girl's family).

Only 7 per cent of the cases was initiated by a child marriage prohibition officer—the state functionary designated for implementing the law. From civil society accounts, it seems that this district-level functionary has limited knowledge or contact within vulnerable communities; and typically is assigned responsibilities in addition to their main work, thus making the post more symbolic than effective. The social backlash arising from prosecuting or nullifying arranged marriages, evident from field accounts,[143] make legal prosecutions an undesirable and risky proposition.

Another 7 per cent of the cases were filed by a third party, including an NGO, or suo moto action by the court. And in a few cases, the identity of the person filing the case was not clear. Together with the child marriage prohibition officer, the third-party prosecutions accounted for 14 per cent of all cases.

[143] See *Grassroots Experiences of Using PCMA,* Delhi: Partners for Law in Development, 2019.

Girls accessed the law on their own the least. Only 3.5 per cent of the cases were filed to seek the nullification of their arranged marriage or to initiate criminal legal action against their parents for arranging an underage marriage. The evidence presents stark disparity in accessing the law, with parents using the proceedings to assert control over their daughters, whereas the girls, who are the law's intended beneficiaries, were unable to access it without support from their husband or parents. The child marriage prohibition officer appears to have been the least likely actor in enabling legal recourse for girls.

- **Criminalization of underage marriages invokes disproportionate burden and impact on young people.**

The application of rape and kidnapping charges under the Penal Code and the rape charges under the POCSO Act, in conjunction with the PCMA, was exclusive to prosecutions against husbands in self-arranged marriages. Attracting charges of "repeated rape", which is an aggravated offence, the husbands in underage marriages may be prosecuted for heinous crimes, which receive sentences of 10 years to life imprisonment if convicted under Section 376(2) of the Penal Code and a minimum of 20 years to a maximum punishment of death under Section 6(1) of the POCSO Act. Although husbands may be prosecuted for grave offences, minor wives are placed in apathetic shelter homes, which offer neither education, life skills or nurturance.

In contrast, offences for performing or solemnizing a child marriage under the PCMA come with no minimum sentence and a maximum sentence of imprisonment for two years and/or fine.[144] This is corroborated by the national crime data. In 2019, 525 cases were registered under the PCMA,[145] compared with 6,590 children who were "deemed" to have been kidnapped on account of an elopement or love relationship and 12,724 cases of children who were kidnapped for the purpose of marriage. The elopement category in the crime records on children is distinguished from the category of kidnapping for marriage. This appears to be a colloquial use of elopement, for running away with a lover—as distinct from its formal connotations of secretly marrying without parental knowledge or consent. Hence, the second category of cases of kidnapping for marriage might also include elopement along with forced kidnapping.

This disproportionate burden of criminality and stigma on husbands in self-arranged marriages lends the law to malicious and retributive use, which it was not enacted for. Criminalization of underage marriage under such circumstances consequently serves to punish elopement while being ill-equipped to address arranged or forced underage marriage.

[144] The sentencing for rape was increased through central and state amendments under both the Penal Code and the POCSO Act; under the Penal Code, the minimum sentence for rape simpliciter was increased from seven to 10 years in 2013. The minimum sentence for rape of a girl younger than 16 was increased from 10 to 20 years in 2013 (Section 376(3)); under the POCSO Act, the minimum sentence for aggravated penetrative sexual assault (which includes repeated rape of a minor and the rape of a minor connected to the accused by marriage) was increased from 10 to 20 years, and the maximum from life imprisonment to death in 2019. The punishments under the PCMA have remained the same since it was enacted in 2006.

[145] National Crime Records Bureau (2019), p. 6, table 1.3, S. No. 7 on cases registered under the PCMA.

This is not to argue for equivalence in harsh sentences and increased criminalization of arranged underage marriages. Rather, this argument seeks to highlight the weaponization of the law to settle family dishonour and question the relevance of criminalization when conditions of poverty and insecurity are drivers of early marriage. And the arrest of parents typically results in the abandonment of siblings and children at home.

6.2 Findings in relation to judicial responses and reasoning

As much as 86 per cent of the cases that involved elopement resulted in a favourable judicial outcome for a girl and her husband.[146] Overall, the judicial responses avoided a purely age-based application of the law, instead factoring in acceptance by the family, the validity of marriage in personal law, the birth of a child, the interests of a girl and attention to the circumstances.

"Overall, the judicial responses avoided a purely age-based application of the law, instead factoring in acceptance by the family, the validity of marriage in personal law, the birth of a child, the interests of a girl and attention to the circumstances."

Although the judicial vocabularies and approaches varied, the following elaborates on some of the significant principles of jurisprudence on underage marriage arising in the context of elopement, which was the most litigated category in this study.

- **Validity of marriage**

Relationship between personal law and the PCMA

Although two laws set conditions for the validity of underage marriage, there appears to be room for judicial discretion. The courts in the cases reviewed tended to satisfy themselves of the validity of marriage under the relevant personal law before deciding whether to treat them as valid under the PCMA. This can be challenging in cases of inter-religious marriages, which cannot be validly conducted under personal law.[147] Once the marriage withstands the test of personal law, it is tested against Section 12 of the PCMA, which treats marriage involving kidnapping, coercion and trafficking as void ab initio.

[146] In 49 of 57 cases.
[147] *Saba Parveen, Gurdeep Singh,* Ch 2.

Marriages conducted in violation of a judicial injunction are also void. Yet, there is evidence of other factors, such as discussed further on, that account for discretion and subjectivity in judicial responses.

Girl's capacity for discretion and intelligent differentiation:

This principle ran through most judgments that were reviewed, whether civil or criminal. It was often the basis on which a court allowed conjugal cohabitation to a couple, denied parents' claim for custody of a girl[148] or acquitted a husband of a kidnapping charge.[149] The determination of intelligent differentiation leaned in favour of girls who are nearly 18 years old. In such cases, the courts most often aligned their decision to the wishes of the girl. In doing so, there was an implicit differentiation in judicial reasoning between older and younger adolescents, infusing the former with legal capacity that statutory law has yet to categorically recognize.[150] Courts may draw on various legal justifications, including the Muslim personal law,[151] or the legal requirement to consider a child's wishes[152] to accommodate the voice of an adolescent girl.

Family harmony and sanctity of marital bond:

Judges factored into their perspectives the larger context and facts of the case, beyond the limited issue of "age" that was statutorily recognized as relevant to judicial decision-making. The frequent invoking of the "best interests" principle,[153] although used in inconsistent and sometimes contradictory ways, nonetheless leaned towards upholding a marital bond when there was support from in-laws, belated acceptance by the girl's family,[154] childbirth, or especially when these aligned with the girls wishes.

Protection from retributive violence:

Some of these cases explicitly referred to the need to protect a girl and/or her husband from family and community violence, especially in cases of inter-community marriage.[155] This principle was used by courts to grant police protection[156] and deny parents' claims of custody in the face of allegations of physical violence. However, there were exception cases of denying a plea for police protection despite a clear threat of violence from the girl's parents.[157]

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148 *Kulwant Kaur v. State of Haryana,* Ch 4.
149 *Krishan Chander Dass, Mohd. Wasim and Ramu Mandal,* Ch 5.
150 *Lajja Devi,* Ch 3; *Mohd. Anis v. State of NCT of Delhi, Veljibhai Banabhai Prajapati,* Ch 4; *Pankaj @ Sher Singh v. State, G. Saravanan v. Commissioner of Police,* Ch 5.
151 *Yunus Khan,* Ch 3.
152 *Tahra Begun, Parthiv Singh,* Ch 4.
153 The best interests of the child principle is one of the guiding principles in the Convention on the Rights of the Child (article 3), to which India is a signatory.
154 *Shamsuddin, Court on Its Own Motion (Lajja Devi) v. State,* Ch 4.
155 *Furqan v. State,* Ch 5.
156 *Aanchal Sagar,* Ch 3.
157 *Amninder Singh, Gurdeep Singh,* Ch 3.

On the question of cohabitation

Relationship between the validity of marriage and the right to cohabit:

While the courts held that cohabitation naturally followed from a valid marriage in some cases,[158] they applied a stricter standard of judicial scrutiny to questions of cohabitation in other cases due to concerns associated with early domesticity, pregnancy and childbirth. The latter position held that even though valid, a child marriage did not confer all the rights arising from a marriage because it was voidable. Thus, judges accordingly denied custody of a girl to the husband on the grounds that conjugal life may not have been in her best interests and may have compromised her ability to repudiate the marriage.[159]

Adverse implications of early marriage:

In some cases, the court devised a special arrangement to mitigate the effects of early domesticity for a girl while upholding the validity of the marriage. Citing apprehensions of early motherhood and poor health outcomes, the courts denied conjugal cohabitation to a girl. Adopting varying approaches on a case-to-case basis, the courts placed girls in a shelter home until attainment of majority age to avoid pregnancy or early domesticity or they devised arrangements for the girl's financial security while she resided in the matrimonial home. They also stipulated that a family report to the child protection agency for counselling on sexual and reproductive health information.[160]

Adverse implications of detention:

In some cases, the courts referred to a flimsy legal basis for detaining girls in a shelter home against their wishes, in the absence of any wrongdoing on their part, as well as the likely adverse effects of such detention, to allow cohabitation with the husband.[161]

On the husband's criminal liability

Exercise of discretion by girl is not enticement:

The most frequently cited reason for granting bail to a husband accused of kidnapping a girl was that the charge would not stand if the girl had age-related decisional capacity or was not enticed. The offence of kidnapping under the Indian Penal Code requires "taking away" a minor by force, enticement or otherwise from lawful guardianship.[162] The term "enticement" refers to some form of allurement that is intended to tempt a minor into leaving with the

[158] *Yunus Khan,* Ch 3; *Mohd. Anis v. State of NCT of Delhi, Ruhul Amin Sekh v. State of West Bengal,* Ch 4.
[159] *T. Sivakumar,* Ch 4; *Veljibhai Banabhai Prajapati v. State of Gujarat,* Ch 4.
[160] *Tahra Begum,* Ch 4.; *Furqan v. State and Bholu Khan v. State,* Ch 5.
[161] *Aanchal Sagar, Ch 3; Court on Its Own Motion (Lajja Devi) v. State,* Ch 4; *Furqan v. State,* Ch 5.
[162] Section 361 of the Indian Penal Code reads: "Whoever takes or entices any minor under 1[sixteen] years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship. Explanation—the words 'lawful guardian' in this section include any person lawfully entrusted with the care or custody of such minor or other person...."

accused, which they otherwise, in the absence of such allurement, might not have done.[163] The reading of this section has been nuanced over the years by the courts to hold that when a girl wilfully decides to leave her parents' guardianship, it cannot amount to enticement. [164] With few exceptions, the courts in this study distinguished between enticing a minor to leave their guardian and a minor of mature age and understanding exercising discretion to leave without any offer or allurement to acquit a husband of the charge of kidnaping.[165]

No use of force or knowledge about the girl's minority age:

Considering the facts and circumstances, the courts acquitted husbands of kidnapping. Where no force was used to remove the girl from the lawful guardianship of her parents, the courts held that a kidnapping case was not established against the husband.[166] In one case, in which the husband believed the girl he married was 18, he was not held criminally liable for marrying a minor.[167]

6.3 Recommendations

The findings of the study tell us how different actors within the context of underage marriage were enabled and disabled by the law. While girls' capacity to repudiate marriage was scarcely in evidence, their validation of self-arranged marriage was overwhelming. The consistent assertion of parental authority through the law contrasted

"The consistent assertion of parental authority through the law contrasted against the inactivity of the state functionaries (including the child marriage protection officers) to execute their mandate."

[163] *Thakorlal D. Vadgama v. State of Gujarat* AIR 1973 SC 2313.

[164] *Varadarajan v. State of Madras (SC, 1964); Bunty v. State* (G.N.C.T.) of Delhi, High Court of Delhi, 2011.

[165] *Baban Pandurang Gaikwad v. State* is an outlier case in which the promise to marry was deemed an enticement, on the basis of which the court declared the marriage void and convicted the husband of kidnapping.

[166] In *State v. Vicky, State v. Shiv Balak and State v. Prem Singh,* the court found no enticement when a girl eloped with her boyfriend to marry him; in *State of Gujarat v. Bipinbhai Nanalal Jani,* the court ruled that the sister was not a lawful guardian and the girl left the house on her own; in *Yunus Khan v. State,* the court ruled that a Muslim girl could not be taken away because the age of puberty is 15; and it was the girl who insisted on marriage; *State v. Prem Singh,* Ch 4.

[167] *Kanak Raj,* Ch 4.

against the inactivity of the state functionaries (including the child marriage protection officers) to execute their mandate. The evidence on how the law plays out within social hierarchies and vulnerabilities in the context of child marriage calls for a wider discussion on the purpose, nature and nuances of the PCMA, much beyond the limited debate framed by proposals to make underage marriage void and to increase the minimum age of marriage for girls.

Undertaken against the backdrop of a push towards stringent legislative solutions, this study is instructive for law reform. The premise of the law reform must be towards empowering children and adolescents vulnerable to marriage and towards crafting redress that transforms the conditions driving early marriage. Placing the beneficiary at the centre allows for looking at ways to enhance rights and protections and give voice to girls through the law—goals that mere deterrence and delay of marriage do not fulfil. The recommendations offered here draw on the findings of the study, the jurisprudence arising from the cases and the principles enshrined in the United Nations Convention on the Rights of the Child (CRC).

Underage marriages must be voidable, not void

The PCMA declares underage marriages valid though voidable even as it treats marriages involving kidnapping, use of force, enticement or trafficking as void. The position of valid though voidable is contextually necessary because of the diverse contexts and trends that comprise child marriage. Self-arranged marriages, although scarcely mentioned in the child marriage discourse, emerged as the most prosecuted category in this study. The courts are able to secure couples against parental backlash and sometimes to craft innovative protections for girls. To much less extent, arranged marriages that have broken down also get succour, while worryingly forced marriages are minimally prosecuted. In the plural legal system and at the societal level, regardless of the PCMA, the matrimonial status of a couple is recognized. Legal declarations of void will not end child marriage, as evidence from the amended law in Karnataka shows. Girls in marital cohabitation will invest unpaid reproductive labour and bear children as de facto wives without matrimonial rights under the law. This will render girls more vulnerable while absolving husbands of legal consequences, should they choose to remarry.

The present legal position of conditional validity to underage marriages allows for judicial discretion and makes it possible for courts to craft responses to the particular circumstances of each case. Judicial discretion is essential to the spectrum of circumstances and contextual nuances in child marriage cases and must be retained.

Underage marriage must be voided under specific circumstances and situations

Currently, the law treats underage marriages as void when evidence of enticement, force, compulsion, deceit, sale for immoral purposes or for trafficking exists, under Section 12 of the PCMA.[168] Marriages involving coercion, deceit, fraud and exploitation must be rightly

[168] Section 12 of the PCMA states "Marriage of a minor child to be void in certain circumstances: Where a child, being a minor--(a) is taken or enticed out of the keeping of the lawful guardian; or (b) by force compelled, or by any deceitful means induced to go from any place; or (c) is sold for the purpose of marriage; and made to go through a form of marriage or if the minor is married after which the minor

treated as void ab initio. However, forced marriage arranged by parents also ought to be recognized within the scope of the law as being void ab initio. The data in this study show that only alleged cases of enticement (elopement) and not arranged marriage were prosecuted as having no validity. It seems that arranged marriages were not tested against Section 12 and, instead, tested only against age to decide if they were voidable, even when allegations of force might have existed.[169]

This points to a failure of the legal functionaries, the law enforcement machinery and the judiciary to prosecute such cases under Section 12, given that a vast number of arranged child marriages are likely to be forced. In fact, elopement is often a measure of last resort by girls to escape a forced marriage arranged by their family. In the interest of gender justice and best interests of a child, it is necessary for the law to acknowledge this phenomenon as well.

Recognize a minor spouse's right to repudiation of marriage

The decision to declare marriage void must rightly be in the hands of the underage party to the marriage, as the law presently recognizes. The study provides ample evidence of the underage parties defending a self-arranged marriage and, to a much lesser extent, seeking repudiation after the breakdown of the marriage. Other studies show that when supported by social workers, underage girls may repudiate a forced marriage.[170] Section 3 of the PCMA states that "a petition for annulling a child marriage by a decree of nullity may be filed ... only by a contracting party to the marriage who was a child at the time of the marriage". This aligns to the CRC principle of a minor's right to be heard, with a corresponding obligation of the courts to assess these views. Affirmation of the marriage as well as acts of repudiation are facets of a minor's capacity for discretion and intelligent differentiation, which constituted a significant aspect of the domestic jurisprudence in this study.

Flexible time period for girls to repudiate marriage

An underage marriage may be repudiated by a minor party within two years of reaching majority age. Thus, girls can exercise repudiation until the age of 20, whereas boys can do so until age 23. There is a good case for having a flexible time limit within which a girl may seek to repudiate her marriage by allowing for condonation of delay where reasons exist. Alternatively, or in addition, the number of years within which a girl may repudiate her marriage could be increased, but again, with provision for condonation of delay.

The longer timespan as well as provision of condoning delay for girls is necessary in the context of gendered social realities. Girls not only form the bulk of married minors but they have no voice in their natal or matrimonial families during adolescence and youth. Their

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is sold or trafficked or used for immoral purposes, such marriage shall be null and void."

[169] *State v. Swaran Singh and Ors.,* Judicial Magistrate First Class, Ludhiana, Punjab, decided on 16.12.2014. In this solitary case in the data, the girl initially alleged forced marriage, but later turned hostile.

[170] HAQ: Centre for Child Rights and MV Foundation, *Strengthening Existing Systems for Prevention of Child Marriage: Process Documentation,* Delhi, 2015, p. 39; Madhu Mehra, *Grassroots Experiences of Using the Prohibition of Child Marriage Act, 2006,* Delhi: Partners for Law in Development, 2019, p. 15.

socialization and restrictions limit both mobility or ability to speak with those outside of the immediate family. It is therefore not surprising that they assert the validity of marriage with support of their chosen husbands or seek to nullify an arranged marriage upon its breakdown, with support of their family. There was scarcely any instance of girls accessing the law alone in the cases reviewed. Keeping in mind this gendered reality of girls, the time limit for repudiating marriage should not just be extended but also allow for condoning delay.

Further, the information on the right to repudiation must be disseminated widely—as widely as the minimum age of marriage—among girls in resource-poor communities, who are more vulnerable to child and early marriages. Additionally, state functionaries, front-line workers and school staff must be enabled to help girls access courts to exercise the repudiation of an underage marriage.

Elopement is not necessarily enticement

It is important, as the courts have consistently done, to distinguish cases in which girls exercise intelligent preference to marry from cases of enticement. Section 12 of the PCMA treats marriages involving enticement as void, making a distinction along the lines of the jurisprudence necessary between marriages for which girls are lured and those that are initiated at the behest of the girl or both parties jointly.[171] Judicial precedents have acknowledged and upheld the capacity of discretion in adolescents in the context of self-arranged marriage. This study confirms the mostly consistent upholding of the precedent, which is aligned to the principles of evolving capacities of adolescents, with the right to be heard and the obligation to take into account their views enshrined in the CRC.

Decriminalize consensual relations between young peers

With the age of consent being the same as the minimum age of marriage for girls, the POCSO Act and the Penal Code cannot be divorced from the law reform discussion. The increase in age of sexual consent from 16 to 18 years with the enactment of the POCSO Act in 2012 enabled the weaponization of the law by parents in the event a child elopes. While the offences under the PCMA carry a maximum sentence of two years, the prosecution of husbands in self-arranged marriages often include rape under the POCSO Act. A conviction for repeated rape currently under the POCSO Act carries a minimum of 20 years imprisonment, with no judicial discretion for reducing it.[172] The increase in age of consent (introduced despite much opposition) in effect criminalizes adolescent sexuality entirely, without regard to consensual non-coercive relations between peers. With underage marriages being primarily an outcome of poverty and insecurity, the law is overwhelmingly weaponized against poor populations.

To deny sexuality until adulthood flies in the face of the CRC General Comment 20, which acknowledges adolescent sexuality and recommends a balance between protection and

[171] *Thakorlal D. Vadgama v. State of Gujarat,* MANU/SC/0191/1973.

[172] Section 6(1), POCSO Act. Substituted by the Protection of Children from Sexual Offences (Amendment) Act, 2019, for the following: "Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine."

evolving capacities when determining the legal age for sexual consent. At any rate, it asks State parties to "avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity".[173] Sexual development with the onset of puberty is a biological reality that cannot be wished away or penalized. Rather, the State needs to acknowledge and invest in providing comprehensive sexuality education to enable adolescents to understand their physical and emotional changes, be cognizant of risks and seek confidential support services when faced with harm.

In increasing the age of consent to 18, the POCSO Act obstructs access to sexual and reproductive health information and services by requiring health care providers to mandatorily report underage pregnancies and abortions to the police for prosecution under Section 19 of the Act. This pushes girls to seek unsafe abortions or not disclose pregnancy until it is too late for an abortion to be permitted. The age of consent must be lowered in accordance with the recommendations of the National Commission for Protection of Child Rights' POCSO Bill (2010), which set it for 12–14 years for non-penetrative sexual contact between peers no more than two to three years apart and at 16 years for non-coercive and consensual penetrative sexual contact between peers.[174]

Minimum age of marriage for girls must not exceed the age of majority

The premise for a recent government proposal to increase the minimum age of marriage for girls to 21 years claims to be a means of addressing maternal and child mortality and a step towards gender equality. Going by this study, increasing the age of marriage for girls will only extend the years of parental control, multiply the number of prosecutions and result in the criminalization of elopement. The law will be weaponized to serve honour, caste and community controls against young couples while not stopping underage marriages. The outcome of the law will render girls voiceless in personal decision-making for longer, with legal backing.[175]

The law can only set a minimum age of marriage (not an ideal age). The legal minimum age does not incentivize early marriage but only defines the limit of state interference in personal matters and legal liabilities. This age must correspond age of adulthood in domestic and international law—when a person acquires capacity to contract, vote, among other things. Instead of proposals to increase minimum age beyond 18 which is untenable,

[173] United Nations Committee on the Rights of the Child, General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20, para. 40: "… States parties should take into account the need to balance protection and evolving capacities, and define an acceptable minimum age when determining the legal age for sexual consent. States should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity."

[174] Protection of Children from Sexual Offences Bill, 2010—Section 3 of this Bill prepared by the National Commission for Protection of Child Rights deals with "unlawful sexual act with the child" and states that any sexual act with the child younger than 16 years with or without the consent of the child is an offence. One of the exceptions to this is contained in Section 3(ii), which exempts consensual sexual acts performed by minors older than 14 years and within three years of each other's age, from criminal liability.

[175] Madhu Mehra, "Eighteen and over", *The Indian Express,* 25 Aug. 2020, https://bit.ly/2Z2KKrA.

the state must address issues of malnutrition, maternal health concerns and of girls dropping out of education, through resource investment and affirmative action for girls in contexts of poverty.[176]

Strengthen the role of the child marriage prohibition officer

The study is a testament to the inaction of child marriage prohibition officers to implement the law. Not only are the number of such officers inadequate but they are typically additionally assigned to state functionaries at the district level. These systemic flaws make it impossible for them to carry out their primary function. The difficulties related to monitoring also arises from the inaccessibility of these officers to villages, which explains the negligible prosecutions led by them. These flaws must be corrected by appointing officers with the sole duty of implementing the PCMA. Their duties must extend beyond prevention and prosecution to assisting married minor girls by linking them to support services or social welfare schemes to ensure their well-being and possibility exercising their right to repudiate the marriage if they so decide.

As part of its preventive measures, the law must mandate the availability of scholarships, education and vocational and livelihood opportunities to girls from disadvantaged populations, where necessary. The spectrum of interventions and rights must go beyond delay and deterrence to also deliver the promise of empowering girls, including those who are married. In addition to determining the parameters of a valid and void marriage, the law needs to incorporate state obligations towards underage married girls for health care, sexual and reproductive health information as well as education and skill development for livelihoods.

"The law cannot eliminate child marriage, but if sensitive to social contexts, power relations and vulnerabilities, the law can better redress violations while avoiding unintended harmful consequences."

[176] "CSO memorandum to the Task Force set up to examine age of motherhood and related issues", July 2020, https://bit.ly/359YvbG; "NCAAC submissions to the Task Force constituted to examine the matters pertaining to the age of motherhood among other concerns", 9 July 2020, https://bit.ly/2Gqvtu2. See also NHFS-4 data (2015–2016) on girls aged 6–14 discontinue education: 24.8 per cent for lack of interest in studies; 19.3 per cent for high cost of education; 14.5 per cent to cope with the burden of household work; only 7.9 per cent reported marriage as a reason for dropping out of school.

6.4 Concluding comments

The reported spike in cases of child marriage under COVID-19-induced lockdown and economic crisis, including in Karnataka State, where child marriage has been declared void by state law, confirms that the practice is rooted in economic distress and insecurity.[177] The law cannot eliminate child marriage, but if sensitive to social contexts, power relations and vulnerabilities, the law can better redress violations while avoiding unintended harmful consequences. Given its significant though limited role, the law needs to focus on strengthening and enabling those it identifies as victims and not just confine its scope to delaying or pronouncing marital status. Its objective must involve transforming the vulnerabilities of girls who are most likely impacted by it, in addition to preventing, monitoring and prosecuting underage marriage.

As outlined in the recommendations, the law needs to be part of a gamut of state responses dedicated to empowering married adolescents or those vulnerable to early marriage. In exceptional instances, the courts have taken innovative steps towards ensuring financial security, family counselling and sexual and reproductive health education to support married girls. It is desirable that these elements be incorporated by statutory provisions that mandate links between girls and affirmative measures, opportunities and support services. The need for such measures as part of legal redress alongside the recommendations made here could help transform the life chances of girls along with their marginal status in relation to the family and the law.

To make the law truly transformative, beyond its prevention and deterrence ambitions, it needs to empower adolescents from disadvantaged populations, particularly those within or most vulnerable to early marriage.

[177] "Telangana witnesses sharp increase in child marriages during COVID-19 pandemic", *The New Indian Express,* 4 Sep. 2020, https://bit.ly/2Z9Ysc1; "Sharp rise in Karnataka during COVID-19 lockdown", *The Indian Express,* 29 Aug. 2020, https://bit.ly/2R0gMQG; "COVID-19 leads to more child marriages in India", *The Citizen,* 20 July 2020, https://bit.ly/3jP9LhJ.

ANNEXURE A : INDICATORS

Indicators that the cases relating to child marriage arise within resource-poor contexts.

Indicator	Description
Means of livelihood	The occupations of the litigants or their family members in all cases where such information was provided (21 per cent) fell into the category of unorganized work and included manual labour, work in a factory, agricultural work, work as a porter, bus or taxi driving, tailoring and household and caretaking work. In some cases, they were in low-paid jobs; these include the husband's sister being an auxiliary nurse at a medical college, the girl's mother a teacher at a private school or the husband working in the transport business.
Place of residence	Of the 21 cases in which information about the place of residence of at least one of the parties was available, at least one of the parties in 80 per cent of the cases resided in rural areas and the rest in semi-urban areas.
Education and literacy	Information on a girl's standard of education, gathered from 14 cases, indicates that most studied in government schools. One girl did not go to school at all. Most of the girls were in senior secondary school; one had dropped out after class eight, and only one was in college. In two cases, the parents of the girl did not know how to read and had difficulty in explaining her date of birth, indicating a low level of literacy in the family.
Amount of dowry	In two cases, the girl's family claimed that 500,000 rupees and 700,000 rupees were paid as dowry to the husband. In one case, the husband's family claimed to have spent 200,000 rupees on wedding arrangements.
Economic status	The court noted in two cases that the girl's family was from a "poor", "uneducated" or "rural" background. In two cases, the parties claimed they were "poor".

ANNEXURE B : DATABASE OF 83 CASES CITED THROUGHOUT THE ANALYSIS

Chapter 2—Cases that girls filed

1. *Amnider Singh v. State of Punjab,* CRM-M 29790 of 2009 (O&M), High Court of Punjab and Haryana, decided on 27.11.2009.
2. *Anchal Sagar and Anr. v. State of Punjab,* Criminal Misc. No. M-5647 of 2011 (O&M), High Court of Punjab and Haryana, decided on 19.07.2011.
3. *Bharti v. Vikram,* Petition No.115-HMA of 2014, Additional District Judge, Sirsa, Haryana, decided on 31.07.2015.
4. *Gurdeep Singh v. State,* CWP No. 4511 of 2016, High Court of Punjab and Haryana, decided on 10.03.2016.
5. *Kanwaldeep Kaur Bathal v. Mandeep Singh Brar,* FAO No. M-327 of 2011, High Court of Punjab and Haryana, decided on 14.01.2013.
6. *Kirandeep Kaur v. Manga Singh,* UID No. PB-0165, District Judge (Family Court), Moga, decided on 14.02.2017.
7. *Meena and Anr. v. State,* W.P.(CRL) 1231/2012, High Court of Delhi, decided on 17.10.2012.
8. *Naurti v. Kaalu @ Roshan Gujjar,* Civil Miscellaneous Case No. 169A/2015, Additional District and Sessions Court, Kishangarh, Ajmer, Rajasthan, decided on 10.03.2017.
9. *Pallabi Chandra v. State of Jharkhand,* Cr. Rev. No. 894 of 2015, High Court of Jharkhand, decided on 17.12.2015.
10. *Pinki v. Harsukh,* HMA Case No.6- PCMA of 2015, District Judge (Family Court), Hisar, Haryana, decided on 07.05.2016.
11. *Pooja v. Jitender,* Petition No. 5-PCMA, Additional District Judge, Hisar, Haryana, decided. on 02.08.2016.
12. *Saba Parveen v. State of Bihar,* Criminal Miscellaneous No. 24990 of 2015, High Court of Patna, decided on 31.03.2016.
13. *State v. Swaran Singh and Ors.,* Judicial Magistrate (First Class), Ludhiana, Punjab, decided on 16.12.2014.
14. *The Court on its Own Motion (Lajja Devi) v. State,* Crl. M.C. No. 1001/2011, High Court of Delhi, 27.07.2012.
15. *Yunus Khan v. State of Haryana,* CRM No.930 of 2014 in CRWP No.1247 of 2013, High Court of Punjab and Haryana, decided on 17.02.2014.

Chapter 3—Cases that parents filed

1. *Kulwant Kaur v. State of Haryana,* CRWP No. 978 of 2015, High Court of Punjab and Haryana, decided on 19.10.2015.
2. *Mohd. Anis v. State of NCT of Delhi,* W.P. (Crl.) No. 835 of 2016, High Court of Delhi, decided on 16.05.2016.

3. *Parthiv Singh v. State,* Habeas Corpus Petition No.236/2012, Rajasthan High Court, decided on 06.12.2012.
4. *Parvatiben v. State,* SCR.A/351/2012, High Court of Gujarat, order dated 07/02/2012.
5. *Ram Kumar v. State of Punjab,* Criminal Appeal No. D-574, Division Bench of 2013, High Court of Punjab & Haryana, decided on 14-01-2014
6. *Pratapa Ram v. State,* S.B. Criminal Misc. Petition No.1154/2012, High Court of Rajasthan (at Jodhpur), decided on 24.07.2012.
7. *Ruhul Amin Sekh v. State of West Bengal,* W. P. NO. 8619 (W) OF 2015, High Court of Calcutta, decided on 16.06.2015.
8. *Shamsuddin v. State,* WP(CRL) 13/2009, High Court of Delhi, decided on 15.05.2009.
9. *State of Gujarat v. Bipinbhai Nanalal Jani,* MANU/GJ/2358/2016, High Court of Gujarat, decided on 28.09.2016.
10. *State v. Jagbir,* Sessions Case No: 38 of 2013; CIS No.: 985 of 2013, Additional Sessions Judge, Kaithal, decided on 25.08.2015.
11. *State v. Kanak Raj,* SC No.41/2013: FIR No.78/2012, Additional Sessions Judge, Rohini, New Delhi, decided on 02.03.2015.
12. *State v. Prem Singh,* Sessions Case No. 273/14, Additional Sessions Judge, Rohini, Delhi, decided on 13.01.2015.
13. *State v. Shiv Balak,* Sessions Case No. 243/14, Additional Sessions Judge, Rohini, Delhi, decided on 02.12.2014.
14. *State v. Vicky,* Sessions Case No. 223/14, Additional Sessions Judge, Rohini, Delhi, decided on 29.11.2014.
15. *T Sivakumar v. Inspector of Police,* H.C.P. No. 907/2011, High Court of Madras, decided on 03.10.2011.
16. *Tahra Begum v. State,* W.P. (CRL) 446/2012, Crl. M.A. 3701/2012, Delhi High Court, decided on 09.05.2012.
17. *The Court on its Own Motion (Lajja Devi) v. State,* W.P. (Crl.) No. 338/2008, High Court of Delhi, 27.07.2012.
18. *The Court on its Own Motion (Lajja Devi) v. State,* W.P.(Crl.) No. 821/2008, High Court of Delhi, 27.07.2012.
19. *Veljibhai Banabhai Prajapati v. State of Gujarat,* Special Criminal Application (Habeas Corpus) No. 3807 of 2016, High Court of Gujarat, decided on 01.08.2016.

Chapter 4—Cases that husbands filed

1. *Akshit Sachdeva v. State,* W.P. (Crl.) 578/2016, High Court of Delhi, decided on 10.08.2016.
2. *B S Santhosh Kumar v. State by Metgalli Police,* Criminal Petition No. 2456/2015, High Court of Karnataka, order dated 20.04.2015.
3. *Baban Pandurang Gaikwad v. State of Maharashtra,* Criminal Appeal No. 341 of 2015, High Court of Bombay, decided on 22.11.2016.

4. *Balbir @ Jaskirat v. Harpreet Kaur,* HMA Case No. 315 of 2015, Additional District Judge, Sirsa, Haryana, decided on 21.02.2017.
5. *Bholu Khan v. State of NCT of Delhi,* W.P. (Crl.) 1442/2012, Delhi High Court, decided on 1.02.2013.
6. *Dinesh Kumar and Ors. v. State of Haryana,* CRM No.M-7090 of 2011 (O&M), High Court of Punjab and Haryana, decided on 24.09.2013.
7. *Furqan v. State,* W.P. (Crl) 1025/2012, High Court of Delhi, decided on 22.01.2013.
8. *G. Saravanan v. The Commissioner of Police,* H.C.P. (MD) No. 190 of 2011, High Court of Madras (at Madurai), decided on 06.04.2011.
9. *Irfan Khan v State of M.P.,* W.P. No. 3663 of 2016, High Court of Madhya Pradesh, decided 17.06.2016.
10. *Jagdish v Asha,* HMA Petition No. 44/2014, District Judge, Jhajjar, Haryana, decided on 28.10.2016.
11. *Jaspreet Singh v. State of Punjab,* CRM-M-36187-2014, High Court of Punjab and Haryana, decided on 28.07.2015.
12. *Jitender Kumar v. State,* W.P. (CRL) 1003/2010, High Court of Delhi, decided on 11.08.2010.
13. *Krishan Chander Dass v. State,* Crl. M.C. 902/2016, High Court of Delhi, decided on 01.04.2016.
14. *Madesha v. State,* Criminal Petition No. 3504 OF 2015, High Court of Karnataka, decided on 23.06.2015.
15. *Madhu @ Mahadeva v. State,* Criminal Petition No. 2382 of 2015, High Court of Karnataka, order dated 25.04.2015.
16. *Mahesh v. SHO,* Crl. M.C. No. 8229 of 2016, High Court of Kerala at Ernakulam, decided on 31.01.2017.
17. *Manjunath v. State of Karnataka,* CRL.P No. 100050 of 2016, High Court of Karnataka (at Dharwad), order dated 22.02.2016.
18. *Mohd. Nihal v. State,* W.P. (CRL) 591/2008, High Court of Delhi, decided on 08.07.2008.
19. *Mohd. Wasim v. State,* Crl. M.C. No. 121 of 2016, High Court of Delhi, decided on 12.01.2016.
20. *P.V. Raghavendra Rao v. State,* Criminal Petition No. 100370/2015, High Court of Karnataka (at Dharwad), order dated 25.02.2015.
21. *Pankaj @ Sher Singh v. State* (Govt of NCT) of Delhi, Additional Sessions Judge, Karkardooma, Delhi, order dated 24.05.2012.
22. *Prito Bai and Ors. v. State of Punjab,* Criminal Misc. No.26267 -M of 2010, High Court of Punjab and Haryana, 09.08.2011.
23. *Ramu Mandal v. State,* Crl. M.C. No. 799 of 2016, High Court of Delhi, decided on 24.02.2016.
24. *Ravi v. Jyoti,* HMA Case No. 127/2014, Additional District Judge, Rewari, Haryana, decided on 02.11.2016.

25. *Sanjay v Mamta,* HMA 148 of 2014, Additional District Judge, Sirsa, Haryana, decided on 29.04.2015.
26. *Sonu v State,* Bail Application No. 219/2015, Additional Sessions Judge, Kurukshetra, Haryana, decided on 30.04.2015.
27. *Sri Kumar v. Station House Officer,* Criminal Petition No. 3953 of 2014, High Court of Karnataka, order dated 21.07.2014.
28. *Sri Manjunath v. State of Karnataka,* Criminal Petition No. 101845/2015, High Court of Karnataka (at Dharwad), order dated 27.11.2015.
29. *State v. Sunny Nishad,* Bail Application No. 33/2016, Additional Sessions Judge, Gurdaspur, Punjab, decided on 04.05.2016.
30. *The Court on its Own Motion (Lajja Devi) v. State,* Crl. M. No. 566/2010, High Court of Delhi, 27.07.2012.
31. *Umesha v. State,* Criminal Petition No. 8221/2014, High Court of Karnataka, order dated 23.12.2014.
32. *Vijay v. State of Karnataka,* Criminal Petition No. 2570 of 2015, High Court of Karnataka, order dated 14.05.2015.
33. *Vinod Kumar v. Neelam,* HMA 150/2014, Additional District Judge, Sirsa, Haryana, decided on 29.04.2015.
34. *Yunusbhai Usmanbhai Shaikh v. State of Gujarat,* CMA No. 8290 of 2015, High Court of Gujarat, 23.09.2015.
35. *Yusuf Ibrahim Mohammed Lokhat v. State of Gujarat,* Criminal Misc. Application No. 13658 of 2014, High Court of Gujarat, decided on 02.12.2014.

Chapter 5—Cases filed against parents

1. *Abdul Khader and Ors. v. K. Pechiammal,* (CMPO), Crl. R. C. No. 1441/ 2012 and M.P. No. 1/2012, High Court of Madras, decided on 03.03.2015.
2. *Anteshwar v. State,* Criminal Petition No. 200411/2016, High Court of Karnataka (at Kalaburgi), order dated 28.03.2016.
3. *Association for Social Justice and Research v. Union of India and Ors.,* W.P. (Crl) 535/2010, High Court of Delhi, decided on 13.05.2010.
4. *Child Marriage Prohibition Officer v. Kailash Yadav, Judicial Magistrate First Class,* Faridabad, Haryana, decided on 23.02.2017.
5. *Harnam Singh and Anr. v. State of Haryana,* Bail Application No. 180/2017, Additional Sessions Judge, Fatehabad, Haryana, order dated 01.05.2017.
6. *Mahaveer Dhulapala Balikai v. State of Karnataka,* Criminal Petition No. 101111/2014, High Court of Karnataka (at Dharwad), order dated 18.07.2014.
7. *Ramahia and Anr v. State of Karnataka,* Criminal Petition No. 2934/2015, High Court of Karnataka, decided on 26.05.2015.
8. *Saidalvi and Ors. v. State of Kerala,* Bail Application No. 4624/2012, High Court of Kerala, decided on 6.07.2012.

9. *Savita Rana v. Alimuddin,* Judicial Magistrate First Class, Karnal, Haryana, decided on 1.07.2016.
10. *Sri Manjunath and Ors. v. State of Karnataka,* Criminal Petition No. 3604/2014, High Court of Karnataka, order dated 01.07.2014.
11. *State v. Sajjan and Ors.,* Sessions Case No. 01/2014, Additional Sessions Court, Kaithal, Haryana, decided on 18.03.2014.
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