

**CIVIL SOCIETY SUBMISSIONS
TO THE STATE LEVEL COMMITTEE CONSTITUTED TO DRAFT
THE UTTAR PRADESH RULES OF CHILD MARRIAGE PROHIBITION ACT, 2006**

Dated: 28-12-2021

A meeting was called by the National Coalition Advocating for Adolescent Concerns (NCAAC) on December 10, 2021 to discuss the UP State Draft Rules to the PCMA, and submit comments and recommendations invited by the Office of the Director, Mahila Kalyaan, Uttar Pradesh.¹ The meeting was attended by members of NCAAC, civil society organisations, women’s rights and child rights organisations, academics, lawyers and experts from across the country, including Uttar Pradesh. These submissions and recommendations are based on deliberations at the meeting on the subject. We place the following comments and recommendations for your kind consideration:

1. CONTRAVENTION OF JUDICIAL PRECEDENTS ON RESIDENCE OF MINOR PARTY

Rule 3(7), states that “Under no circumstance, the child who has not attained the age of majority contracting a marriage of his or her own accord, shall be allowed to live with the other contracting party, whether a child or not.” This rule proposes a uniform approach for parties in an underage marriage, when in fact, judicial precedents have laid down time and again, the need for a case-by-case approach, based on the interest of the child and their level of maturity. In *Court on Its Own Motion (Lajja Devi) v. State* [2012 SCC Online Del 3973,] the following questions were decided: (a) Whether a marriage contracted by a boy with a female of less than 18 years and a male of less than 21 years could be said to be valid marriage and the custody of the said girl be given to the husband? (b) Whether a minor can be said to have reached the age of discretion and thereby walk away from the lawful guardianship of her parents and refuse to go to their custody? (c) If yes, can she be kept in the protective custody of the State?

The Hon’ble Delhi High Court observed - “We feel that no straight jacket formula or answer can be given. It depends upon the facts and circumstances of each case. 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

¹ NCAAC is a coalition of 21 organisations from across the country, working with children and adolescents on empowerment, education, life skills, health, sexual and reproductive health information and services, child marriage, gender-based violence, sexual abuse and restorative justice in urban, rural and tribal contexts.

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

Rule 3(7) overrides the case-by-case approach, in contravention of both, the established jurisprudence and the PCMA. Two very important reasons, in fact and in law, make a case-by-case approach imperative, and the specific rule untenable and harmful. First, child marriage involves one or both parties to a marriage to be underage. A girl whether of 14 years or of 17 years 5 months, would both be considered underage for purposes of PCMA, although when prosecuted, judicial approaches to both based on precedents are likely to be different even if the facts involve both girls choosing to confirm their marriage. Likewise, instances where parents prosecute a self-initiated marriage of their adult daughter under PCMA, wrongly alleging that she is minor - the court may allow her to choose to stay in the matrimonial home, during the period of the trial. The effect of draft Rule 3(7) would be to compulsorily and uniformly, in all prosecutions of child marriage, remove girls from their matrimonial home, regardless of the facts and circumstances, what the girl seeks, or her being just a few months away from attaining majority. This principle of differentiating between younger children and older adolescents flows from the recognition of ‘evolving capacities’ of the child in the Convention on the Rights of the Child (CRC) to which India is signatory.

Secondly, Section 3 of PCMA is categorical in giving the minor contracting party to the marriage, the option of repudiation. This provision in law corresponds with the child’s right to be heard enshrined in the CRC, which will in effect stand revoked if such the draft Rule came into effect. There are multifaceted and diverse trends within child marriage- ranging from arranged marriages, kidnappings and forced marriages to self-arranged ones, calling for differentiated responses on a case-to-case basis to avoid inflicting unintended harm on children and young persons. **We therefore recommend that Rule 3(7) be deleted.**

2. RECOGNISE FRONTLINE WORKERS AND COMMUNITY GROUPS AS THE “NEXT FRIEND” UNDER RULE 2(9) AND “SUPPORT PERSON” 2(11):

Rule 3(3) emphasises the role of the ‘next friend’ in nullifying a child marriage, a term defined in Rule 2(9) to mean only CWC and any person designated by the CWC.

This provision limits the definition of ‘next friend’ to the CWC and persons designated by CWCs, whereas in the large majority of cases, girls are supported by frontline workers and community groups working with women and adolescents. Further, CWCs may not be

functional in all districts. **We therefore recommend that Rule 2(9) be amended to state:** “Next Friend” as referred to in Section 3(2) of the Act means the Committee constituted under Section 27 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016) or any other person as designated by the Committee deemed fit for such responsibilities in the best interest of the child **and includes any person or organisation working in the field of child rights or child protection.**”

3. CONFLICT WITH JJ ACT

Being delegated or subordinate legislation, the UP Rules cannot override or expand the ambit of a central legislation. This position has been established by the Supreme Court of India in the case of *Indian Express Newspapers (Bombay) Pvt Ltd v. Union of India*.² In this case, it was held that:

“A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature Subordinate legislation may be questioned on any of grounds on which plenary legislation is questioned. In addition, it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary.”

However, Rule 3(8) provides that a child who has contracted child marriage, even of his or her own accord, before attaining the age of majority shall be a child in need of care of protection, which is in contravention of Section 2(14)(xii) of the Juvenile Justice (Care and Protection of Children) Act, 2015, JJ Act, which is limited to those “at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardians and any other persons are likely to be responsible for solemnisation of such marriage.” **To the extent of this overreach, we recommend that Rule 3(8) be deleted.**

4. UP RULES TRAVEL BEYOND THE SCOPE OF DELEGATED LEGISLATION

Delegated legislation needs a statutory peg to stand on and cannot travel beyond the parent Act. In the case of *State of UP v. Renu Sagar Power Co*,³ the Supreme Court held that, “If the exercise of power is in the nature of subordinate legislation the exercise must conform to the

² *Indian Express Newspapers (Bombay) Pvt Ltd v. Union of India*, AIR 1986 SC 515.

³ *State of UP v. Renu Sagar Power Co*, AIR 1988 SC 1737.

provisions of the statute. All the conditions of the statute must be fulfilled.” Section 19(1), PCMA vests the State Government with the power to “make rules for carrying out the provisions of this Act.” This power does not extend to the creation of any new offence. However, Rule 9 and 10(2) lack a statutory basis and amount to creation of an offence, and are thus untenable. Further, Rule 9(2) purports to apply the provisions of POCSO on solemnisation of child marriage, wrongly and incorrectly conflating consummation with solemnisation of child marriage. This rule, by conflating solemnisation of child marriage with consummation of it, creates a new offence and goes beyond the authority or scope allowed to a delegated legislation. **Accordingly, we recommend that Rule 9(2) be deleted.**

5. CMPOs ON SINGLE CHARGE IN HOTSPOTS:

The step towards appointment of CMPOs at different levels of governance, including at the village level is an important and necessary step. One of the main reasons for inaction of the CMPOs across the country, is that they are assigned this responsibility on additional charge and are distant from the village level. Even as the federated structure of CMPOs closes the distance between the district headquarters and the village level, the Rules must stipulate that the CMPO is appointed on sole charge in the hotspots or high prevalence districts.

Although Rule 16 provides that inactive CMPOs will face punitive action, we recommend that the Rules specify what constitutes inactivity, who has the power to report this inactivity and what the nature of the penalty will be. Penalties need to be strictly defined in order to avoid arbitrariness and selectivity in penalising the CMPOs and will help inform CMPOs of what is expected of them. **We recommend the removal of Rule 30 which provides an exception for action taken in good faith as only an Act, not Rules, can create such an exception.**

6. OTHER RECOMMENDATIONS

- Rule 20 is superfluous and unnecessary as the POCSO Act and Rules adequately address mandatory reporting.
- There is a need for affirmative action through scholarships, girls’ hostels, programmes and provisions to provide quality education, skill building and livelihood. We therefore recommend that the Rules include a provision requiring the State Government to develop schemes and programmes on these lines with a view to prevent child marriage.
- A positive obligation on awareness-creation and empowerment through education should be considered. We recommend the following provision: “The State

Government shall develop and integrate age-specific curriculum for schools and colleges on child rights education, gender sensitivity, life skills, gender identity, sexuality education and empowerment, restorative approaches, and crimes against children, gender-based violence and other aspects of violence against children.”

- Rule 27 should include a sub-clause which states that appropriate legal action shall be initiated against organisers of mass child marriages.
- Data is critical to understand the implementation of the law and formulate evidence-based programmes and interventions. We therefore recommend that the following provision be included: “The State Government shall collect data annually on the implementation of the Act and Rules, including the number of reported cases of child marriage, number of child marriages prevented, number of injunctions passed, number of petitions filed for nullity, and their disposal under the processes provided under the Act and a report based on this data shall be made available on the website of the nodal department.”
- Rule 28 details various steps that the state government needs to take to carry out awareness generation and capacity building. While these measures are necessary as is the mention of state responsibility in relation to its implementation - it is equally necessary to mention the need to mention the following for deepening and sustaining holistic community interventions that help tackle root causes of child marriage.

7. CONSULTATION WITH CIVIL SOCIETY IN FINALISING THE RULES

Even as we welcome the call for inputs and comments from stakeholders to the draft Rules by the Director, Mahila Kalyan, notification dated November 30, 2021 - we urge the government to hold online consultation with stakeholders in UP and elsewhere, to discuss and finalise the Rules with participation of the civil society.

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