

THE DOCTRINE OF FACTUM VALET AND THE ISSUE OF CHILD MARRIAGES

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Abstract

The doctrine of factum valet derives from the Roman maxim 'factum valet quod fieri non debuit,' which states that when an act that should not have been done is done, it becomes legitimate.

The doctrine found its way into Hindu law via the writers of Dayabhanga and is also acknowledged by Mitakshara school adherents.¹ It is founded on the premise that even a hundred documents or laws could not change a fact.

Before the creation and enforcement of the Hindu Marriage Act of 1955, there was no explicit legislation in India that specified criteria about the legitimacy, capacity, ceremonial requirements and more with respect to Hindu weddings. However, they were governed by the ancient Indian text of Dharmasastras. Notably, if there was a contradiction in the text, it was pardoned through the application of the doctrine of factum valet, and any violation of the ancient text's principles could be remedied.²

The issue arising out of the application of the doctrine is that of consent. The doctrine of factum valet is ineffectual in treating acts committed in violation of the material requirements. As a result, if the marriage was once conducted and solemnized, it is lawful even though it was performed without consent. This concept becomes all the more alarming when we consider the prevalent practice of child marriage in Hindu culture.

The doctrine of factum valet, which enables child marriages to be legal in many instances, governs judicial decisions in child marriage cases. Often, the courts emphasize Hindu texts and the directive nature of such scriptures of the faith.

¹ Menon, P.K. (1975) *Hindu Jurisprudence*. dissertation. Available at: <https://scholar.smu.edu/til/vol9/iss1/13> (Accessed: April 18, 2023).

² Rocher, L. (2013) *Jīmūtāvāhana's Dāyabhāga and the Maxim Factum Valet*. Cambridge University Press.

This study examines the link between child marriage and the court's interpretation of the doctrine of factum valet. The study will necessarily include the applicability of the doctrine with respect to the Hindu Marriage Act of 1955 along with an analysis of several case laws, significant orbiter dictum and developments of relevant statutes.

Introduction to the Doctrine of Factum Valet

A theory of law known as the Doctrine of Factum Valet recognises the significance of facts independent of their legal validity. This axiom states that even if an act was not performed in accordance with the law that applied, it must nevertheless be regarded as legitimate and enforceable. The principle also emphasizes that it is best to refrain from questioning an act's legality after it has already occurred because doing so can cause confusion and instability in the legal system.

The Dayabhanga authors were the first to introduce the idea into Hindu law, and followers of the Mitakshara school went on to embrace it.³ Prior to the development and implementation of the Hindu Marriage Act of 1955, there was no formal law in India that outlined standards for Hindu weddings related to their legality, capacity, ceremonial requirements, and more. However, they were guided by the Dharmasastras, an ancient Indian body of jurisprudence in Hinduism. Notably, any infraction of the principles of the ancient text could be remedied, and any discrepancies in the text might be exonerated by applying the doctrine of factum valet.⁴

Background of the Hindu Marriage Act of 1955

In India's history of Hindu marriages, the passage of the Hindu Marriage Act of 1955 marked a critical turning point. There was no unified regulation that controlled Hindu marriages prior to the introduction of the act. It was difficult to implement marriage rules uniformly across the nation because each Hindu sub-sect adhered to its own rituals and practises. The Hindu Marriage Act not only established a common law for all Hindus, but it also modernized the institution of marriage by introducing new standards and ideas. The rights of women in marriage were also

³ Menon, P.K. (1975) *Hindu Jurisprudence*. dissertation. Available at: <https://scholar.smu.edu/til/vol9/iss1/13> (Accessed: April 18, 2023).

⁴ Rocher, L. (2013) *Jīmūtavāhana's Dāyabhāga and the Maxim Factum Valet*. Cambridge University Press.

recognised by its provisions, including the ability to inherit property and seek a divorce on specific grounds. Overall, the Hindu Marriage Act strengthened the notion of gender equality and made considerable reforms to Hindu matrimonial customs in India.

The requirements for a lawful Hindu marriage are also outlined in Section 5 of the Hindu Marriage Act of 1955. The provision's subsection (iii) reads, "The bridegroom has completed the age of [twenty-one years] and the bride, the age of [eighteen years] at the time of the marriage."⁵ Additionally, Section 11 states that marriages solemnised in violation of the conditions listed under Section 5 will be rendered void, thereby, outlawing marriages where one or both parties are minors.⁶ The statute places restrictions on such marriages because it recognises that minors are inherently incapable of giving their assent to such marriages. Given that the practice of child marriages was pervasive in the nation and embraced by the Hindu culture, such a provision was pivotal and empowering.

Understanding Child Marriages in India

Child marriage is a practice in which a minor, typically a girl, gets married before the age of 18. Largely, it is considered to be a violation of a child's rights since it denies them the opportunity to fully develop and participate in communal life. The widespread practice of child marriage is a Daedalian subject, and it is influenced by a variety of social, cultural, and economic factors. Child marriage is frequently viewed as a way to ensure financial stability and lessen the burden of poverty in rural and underdeveloped areas where poverty and illiteracy are common. The acceptance of child marriage is also influenced by cultural ideals that place significance on virginity and early marriages, given that it rests on the gendered virtue of "purity."⁷

Notwithstanding strict legal restrictions, child marriages are nonetheless common in many rural areas of India. According to UNICEF research, India has the highest proportion of child brides in the world, with one in three girls getting married before they turn 18.⁸ Negative health outcomes,

⁵ The Hindu Marriage Act, 1955, s.5

⁶ The Hindu Marriage Act, 1955, s.11

⁷ John, M.E. (2021) *Child marriage in an international frame: A Feminist Review from India*. Abingdon, Oxon: Routledge.

⁸ India, UNICEF. *Ending child marriage and adolescent empowerment, UNICEF India*. UNICEF India. Available at: <https://www.unicef.org/india/what-we-do/end-child-marriage> (Accessed: April 20, 2023).

fewer educational opportunities, and the continuation of the poverty cycle constitute some of the detrimental implications of child marriages.⁹

Child brides are frequently coerced to drop out of school, which restricts their options for furthering their education and advancing their careers. Additionally, they are more likely to experience domestic abuse and sexual assault, both of which can negatively impact their long-term physical and mental health. Child brides are also exposed to maternal mortality as well as other complications related to childbirth.¹⁰

A Brief of Legislative Initiatives to Prohibit Child Marriages

As aforementioned, the Hindu Marriage Act played a pivotal role in the prohibition of child marriages through the introduction and enactment of Section 5(iii) read with Section 11. Along with that, the Prohibition of Child Marriage Act of 2006 (POSCO Act) laid down essential laws governing child marriages in India. It entails the definition of child marriage and outlines the penalties, which may include jail time and fines.¹¹ In India, child weddings are likewise prohibited by the Child Marriage Restraint Act of 1929, which was revised in 1978.¹² Such legislation coupled with government initiatives, such as the Conditional Cash Transfer Scheme, have played an important role in inhibiting early marriage and encouraging the education of female children.

However, it is worth noting that efforts to address the underlying causes of this practice, such as poverty, gender inequality, and lack of access to education, must be made in addition to legal reforms like raising the marriage minimum age and toughening sanctions for those who break it. Additionally, it's crucial to involve local stakeholders and communities in the process because they can raise awareness, debunk myths and stereotypes, and offer adequate compensatory and correctional remedies for those who are impacted.

⁹ India, UNICEF. *Ending child marriage and adolescent empowerment, UNICEF India*. UNICEF India. Available at: <https://www.unicef.org/india/what-we-do/end-child-marriage> (Accessed: April 20, 2023).

¹⁰ John, M.E. (2021) *Child marriage in an international frame: A Feminist Review from India*. Abingdon, Oxon: Routledge.

¹¹ The Prohibition of Child Marriage Act, 2006

¹² The Child Marriage Restraint Act, 1929

Analysing the Relationship between the Doctrine of Factum Valet and Child Marriages in India

This doctrine in law is a concept that transformed with time and is now a fundamental component of legal systems across the world. The Doctrine of Factum Valet is a principle which provides that when an act that should not have been done is done, it becomes legitimate. In other words, the idea states that once a fact has been established, it cannot be disproved or invalidated in its totality. While Section 11 of the Hindu Marriage Act expressly prohibits child marriage, the Doctrine of Factum Valet shields the validity of such marriages if they were solemnised with the parties' consent. This renders the concept controversial and potentially dangerous by dismissing the statutes that accept minors' inability to provide their consent to marriages in the first place.

It is distressing to observe that while on the one hand, the law imposes penalties for the solemnization of child marriages, on the other hand, numerous legislative enactments and court rulings effectively incorporate and support the notion that child marriages are, in fact, valid.

A provision of the Hindu Marriage Act of 1955 relates to a unique basis of divorce for a girl who marries before turning 15 and repudiates the marriage between the ages of 15 and 18.¹³ Whether or not the marriage is consummated is irrelevant. The fact that such a divorce clause exists undoubtedly demonstrates that the legislators accepted the legality of child marriage considering only afterwards could they have considered divorce in a circumstance such as this.

Additionally, the application of section 9 of the Hindu Marriage Act, in this case, results in yet another legal anomaly. The predicament of the child bride is rendered even worse by the legal right of her husband to seek the Restitution of Conjugal Rights against her in the event that she decides to withdraw herself from the marriage.¹⁴

¹³ The Hindu Marriage Act, 1955, s. 13(2)(iv)

¹⁴ The Hindu Marriage Act, 1955, s.9

Examining the Response of the Judiciary

Although the Supreme Court of India has clarified that the Doctrine of Factum Valet does not apply in cases where a child is married but the marriage is not consummated until they are adults, the Indian judiciary has largely upheld the validity of child marriages.

While upholding the validity of child marriage in *Venkatacharyulu v. Rangacharyulu*¹⁵ in the year 1891, the High Court of Madras observed:

“There can be no doubt that a Hindu marriage is a religious ceremony. According to all the texts, it is a samskaram or sacrament, the only one prescribed for a woman and one of the principal religious ties prescribed for the purification of the soul. It is binding for life because the marriage rite completed by saptapadi ... creates a religious tie when once created, cannot be untied. It is not a mere contract in which a consenting mind is indispensable. The person married may be minor or even of unsound mind and yet if the marriage rite is duly solemnized, there is a valid marriage.”

In *Sivanandy v. Bhagwathyamm*¹⁶, the court exacerbated the predicament by highlighting that child marriages, while prohibited by the CMRA, are not rendered invalid by any provisions therein and that breaking the Act's rules does not make a marriage invalid since the validity of a marriage is a subject outside the purview of the Act. The Court ruled:

“A marriage under the Hindu Law by a minor male is valid even though the marriage was not brought about on his behalf by his natural or lawful guardian. The marriage under Hindu Law is a sacrament and not a contract. The minority of an individual may operate as a bar to his or her incurring contractual obligations. But it cannot be impediment in the matter of performing a necessary ‘samskars’. A minor’s marriage without the consent of the guardian can be held to be valid also on the application of the doctrine of factum valet. The doctrine of factum valet is quite well known and is duly acknowledged by the Hindu text writers. The relevant Sanskrit quotation is a fact cannot be altered by a hundred texts. The doctrine in the case of a minor was the

¹⁵ Venkatacharyulu v. Rangacharyulu And Anr. (1891) IRL 14 Mad. 316.

¹⁶ B. Sivanandy v. P. Bhagavathy Amma (1961) AIR 1962 Mad 400

factum of marriage, which was solemnized, could not be undone by reason of a large number of legal prohibitions to the contrary”

Based on such precedence, several courts have ruled in favour of child marriages. For instance, the High Court of Himachal Pradesh ruled in *Naumi v. Narottam*¹⁷ that child marriage is legitimate since it is neither void nor voidable.

Although the High Court of Andhra Pradesh issued a landmark decision in the case of *P.A. Sarramma v. G. Ganpatalu*¹⁸ declaring child marriages to be *void ab initio*, it was hastily overturned by a full bench of the same Court. In the case of *P. Venkataramana v. State of Andhra Pradesh*¹⁹, the Court affirmed the legitimacy of child marriages on the basis that annulling such marriages would result in the children of such marriages being regarded as “bastards.” Recent judgements passed by the High Courts of Calcutta, Patna, Punjab and Haryana have asserted such rationale and declared child marriages as those which hold legal sanctity.²⁰

In *Association for Social Justice and Research v Union of India*²¹, the court ruled that, while the Prohibition of Child Marriage Act, 2006 comes with some loopholes, the practice of child marriage is not altogether prohibited. This suggests that even after the introduction and enactment of the POSCO Act in 2006, loopholes remain.

Implications of the Applicability of the Doctrine of Factum Valet

Based on the multifarious judgements delivered by courts across the nation, it seems wielding the Indian judiciary places undue and erroneous weight on religious scriptures as a basis for its ratio decidendi. As a result, despite judicial and legislative efforts aimed at tackling the social evil of child marriages, the Doctrine of Factum Valet, in conjunction with religious beliefs, tends

¹⁷ *Naumi v. Narottam* (1963) 86 AIR 1963 HP 15

¹⁸ *Panchireddi Appala Suramma v. Gadela Ganapatlu* (1974) AIR 1975 AP 193

¹⁹ *Pinninti Venkataramana And Anr. v. State* (1976) AIR 1977 AP 43

²⁰ *Rabindra Prasad v. Sita Devi*, AIR 1986 Pat. 128; *Biswanath Das v. Maya Das* (AIR 1994 N.O.C. 356 (Cal.)); *Harvinder Kaur v. Gursewak Singh* (1998 AIHC 1013).

²¹ *Association for Social Justice and Research v Union of India* 5(2010) SCC Online Del. 1964.

to trump such efforts. It might be assumed that several courts intended to support the legal sanctity of such marriages from the inception of the discourse surrounding child marriages.

The Doctrine of Factum Valet offers both benefits as well as drawbacks in relation to child marriages. On one hand, one might contend that this Roman axiom affords a degree of safeguarding for children who have been bludgeoned into marriages against their will or without fully comprehending the repercussions that follow. If such a marriage transpires and the child subsequently realises the precariousness of the situation, the Doctrine of Factum Valet could be employed to legitimise the marriage, thereby providing the child with a sense of security and legal protection.

On the contrary side, the theory could be interpreted as preserving the illegal practice of child marriage in India. By legitimizing such a marriage, the doctrine essentially condones a violation of the law, which could send a dangerous message to would-be offenders that there will be no consequences for breaking the law.

Conclusion

Despite the fact that child marriages are illegal in India, the Doctrine of Factum Valet, a legal principle that legitimises acts that should not have been performed based on the notion that facts cannot be disproved or invalidated, has been used to argue the validity of such marriages. The adoption of this concept results in a legal paradox and controversy since it ignores the fact that minors are incapable of giving their initial assent to marriages. The courts have responded inconsistently to the assumption that child marriages are lawful, despite numerous legislative measures and court judgements to the contrary. Although some courts have ruled that child marriages are *void ab initio*, many others, including the High Court of Madras and Andhra Pradesh, have upheld their legality.

The widespread malpractice of child marriage has a complex relationship with women's low status in Indian society, which tolerates and supports discriminatory practices that violate women's human rights. Unfortunately, over time, attention has shifted from primary concerns about the health and status of young girls. It remains distressing that despite several statistics

suggesting that child marriages are socially, educationally, sexually and wholistically detrimental towards young women, the Indian Judiciary continues to uphold the practice by giving undue and erroneous weight to the doctrine and religious scriptures.

The synthesis of such a social evil cannot be foiled until the precursor is eliminated altogether. Aside from amendments to the law, behavioural reforms and a healthy social environment in which women's reproductive rights are respected and not infringed must exist for the abolition of child marriage.²²

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