CHAPTER VII
Child Marriage Restraint Act:

Procedure and Penal Policy

Every legislation is really followed by a procedure for its effective enforcement. Without proper procedural measures, substantive law would be worthless and ineffective. Usually a criminal case is initiated either by lodging a complaint before a Magistrate or by giving information about the commission of the crime to the police. A complaint plays a significant role as it is the first step towards the commencement of the criminal proceedings. A complaint means any allegation made orally or in writing to a Magistrate with a view to his taking action under the Criminal Procedure Code, that some person known or unknown has committed an offence, but does not include a police report.\(^1\) After getting a complaint the magistrate may either look into the matter or direct the police for investigation.

**Lodging a Complaint – Indispensable in Child Marriage Case?**

We know that countless number of child marriages are quite often being arranged and performed, but the law remains ineffective in almost all instances, except in a few wherein somebody files a complaint as

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\(^1\) See section 2(d) of Cr.P.C. 1973.
prescribed under the Act. Rathbone criticized this practice of vesting the responsibility to initiate legal proceedings against child marriage wholly on private individuals. The onus of taking action was placed exclusively on private citizen. However, by the amendment in 1938 the Magistrate can suo moto initiate proceedings with respect to the child marriages without getting a complaint. Usually a child marriage takes place with the blessings of the members of the family of both the bride and the bridegroom. Therefore it is foolish to think that the members or relatives of the family will come forward with a complaint. Anybody, including social organizations, or any public spirited person can make a complaint either to the police or before the Magistrate. It is true that generally people are reluctant to complain. They often think it an unnecessary interference in the personal matters of another. Most of them are in fact unwilling to face the displeasure of both the families. Religious compulsion and other pressures may also force the people not to complain against child marriages.

3 See The Child Marriage Restraint (Second Amendment) Act XIX, 1938.
The empirical study reveals that religious, socio economic and educational reasons are the root causes for the reluctance to complain. Apart from this, other factors like lack of social response, selfishness, poor civic sense, fear of neighbour’s displeasure and the feeling of unnecessarily interfering with the family affairs of others, emerged out of the study.

In practice, it is observed that even public spirited persons are reluctant to complain. The socio religious pressures are very high which even prevent the people from complaining. The fate of Bhanvari Devi in Rajasthan, a grass root worker, who reported the solemnization of a child marriage to her senior officer remains to be a threatening example for those who are willing to complain. These types of bitter experiences from the

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4 Seventy five percentage of the judges, eighty percentage of advocates, academicians and social workers opined that religious pressure is one of the reasons for not complaining against child marriages. See Appendix I.

5 Eighty percentage of the judges and eighty eight percentage of the advocates, academicians and social workers are of view that social reasons are of the another reason for the reluctancy to complain.

6 Most of the judges considered (88) illiteracy or lack of education was the major cause for child marriage. Ninety five percentage of the advocates and academicians also were of the same view.

7 As a part of her duty she reported the solemnization of child marriage. The villagers reacted refusing her water and milk. Everybody, even the family members were against her. Besides, she was raped by a gang of five persons with an intention to take revenge for reporting the child marriage. Medical examination was conducted 52 hours after the rape incident. After two years the trial began. Finally as usual, the accused were found not guilty. The power and pelf of the accused defeated her fight for justice. See Pinki Viram “Long Wait for Justice”, The Hindu Magazine 4 March 2001, pp.10,11.
society coupled with lack of courage may be one among the many causes of reluctance of the people to complain against child marriages.

**Preliminary enquiry – Mandatory?**

When a complaint is referred to a Magistrate, the usual practice of criminal procedure is to take cognizance of the offence. The first step is to examine the complainant on oath under section 200.\(^8\) The object of such examination is to ascertain whether there is a prima facie case against the person accused of the offence in the complaint and to prevent the issue of processes on a complaint which is either false or vexatious or intended only to harass such a person. If no prima facie case is made out, the complaint can be dismissed by recording the reasons for doing so.

Section 10 of the Act reads: “Any court, on receipt of a complaint of an offence of which it is authorized to take cognizance, shall, unless it dismisses the complaint under section 203 of the Code of Criminal Procedure, 1973 (2 of 1974), either itself make an enquiry under section 202 of the Code or direct a Magistrate subordinate to it to make such enquiry”.

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\(^8\) Section 200 of Cr.P.C, 1973 reads, “A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the magistrate.”
The Magistrate has to examine the complainant on oath in order to find out whether there is a prima facie case. With the evidence before him he can dismiss the case or conduct enquiry by himself or direct a magistrate subordinate to him to make such an enquiry. If the Magistrate is of opinion to proceed with the case by compelling the appearance of the accused by issuing summons, it is mandatory to make an enquiry as envisaged under section 10 of the Act. The object of section 10 is that no one should be harassed by a prosecution under the Act, until a magistrate has satisfied himself on enquiry that there is sufficient grounds for proceeding against the accused.\(^9\) Whether preliminary enquiry is mandatory or not is a matter of judicial concern. Judiciary has affirmed the mandatory nature of the preliminary enquiry through various decisions.

In *Mangal v. Kalu*\(^{10}\), a complaint was lodged against the accused for the solemnization of child marriage. The Magistrate without making an enquiry, directed the issue of process against the accused. Justice Tapp held that the court taking cognizance of an offence under the Act is bound to hold a preliminary enquiry before taking further action unless it

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9. This enquiry is mandatory under section 10 of the Act while the enquiry under section 202 Cr.P.C. is discretionary because the word used in the former is ‘shall’ while it is ‘may’ in the latter.

10. A.I.R 1931 Lah. 56.
dismissed the complaint under section 203\textsuperscript{11} of Cr.P.C. The Court also observed that the non-complainance with the mandatory provision of the Act vitiate the procedure. The order of the District magistrate was set aside and the case was remanded for conducting preliminary enquiry. This ruling was followed by Justice Tek Chand in a similar case namely \textit{Emperor v. Chand Mal Goenka}.\textsuperscript{12} In \textit{Re Jaggu Naidu},\textsuperscript{13} Justice Pandrang Row of Madras High Court set aside the issue of the process which was ordered without holding any preliminary enquiry. He clarified the position with the following words:

"The position is indeed very clear that a preliminary enquiry is absolutely necessary, before the court can take cognizance of an offence under the Act. Section 10 is very clear on the point and the provisions of it are mandatory."\textsuperscript{14}

In \textit{Harihar Thiwari v. Etwari Gop},\textsuperscript{15} the Patna High Court took a different view. According to Justice Agarwala, if a Magistrate finds that

\textsuperscript{11} Section 203 Cr.P.C. reads, "If after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing."

\textsuperscript{12} A.I.R. 1934 Lah. 155.

\textsuperscript{13} A.I.R. 1939 Mad. 530.

\textsuperscript{14} \textit{Ibid.}, p.531.

\textsuperscript{15} A.I.R. 1939 Pat. 525.
there is a prima facie case for establishing the offence, then there is no point in arguing that the conviction must be set aside for the technical reason that no preliminary enquiry was held as required by section 10 of the Act. This does not mean that Magistrates are free to disregard the provision. But where the accused does not object to the trial, later he cannot be benefited by an objection which is entirely technical in its nature.

In a later case Madras High Court in Thipparedigani v. Seem Reddi\(^{16}\), set aside a dismissal order of a case where there has been no enquiry under section 10. It further ordered to conduct an enquiry under section 10 of the Act.

Further in Jagadiesha v. Rajebakiya\(^{17}\), Justice Mudhaliyar pointed out the duty of the Magistrate in conducting an enquiry under section 10 is limited only to the ascertainement of truth or falsehood of the complaint. He cannot adjudicate on the facts in issue.\(^{18}\)

In State of Mysore v. S.S.Indi\(^{19}\), the Magistrate acted upon the sworn statement made by the complainant and directed to issue summons to 3

\(^{16}\) A.I.R. 1954 Mad. 889.
\(^{17}\) 1971 Cri.L.J. 1350
\(^{18}\) Justice Mudhaliyar criticized the Sub Divisional Magistrate when he gave finding that the accused is liable under section 4 of the Act. That is, he went beyond the power rested in him. Ibid., p.1352.
\(^{19}\) 1971 Cri.L.J. 1812.
witnesses. When the case came up in court these witnesses filed an application contending that section 10 of the Act was mandatory and the court could not entertain the complaint without holding the enquiry under section 10. The complainant was given time to file objection and later he submitted to the court that he had no objection. Then the Magistrate proceeded to hold a preliminary enquiry under section 10 and found that there was no prima facie case. Consequently he dismissed the complaint. The Complainant filed a revision petition in the Court of Sessions and the Court of Sessions referred the matter to the High Court. The issue before the Court was whether the Magistrate had the power to reconsider this order directing the issue of summons and to conduct a preliminary enquiry under section 10 and to dismiss the case. Justice Honniah stated that there is nothing in the criminal procedure which forbids the Magistrate to reconsider an order of this kind on sufficient grounds. The Court further stated that under section 10 of the Act read with section 203 of Cr.P.C., a preliminary enquiry is contemplated to find out whether the allegations contained in the complaint are true on the basis of which cognizance can be taken against the accused person and thereafter issue the process. If upon a consideration of evidence from the preliminary enquiry, the Magistrate came to the conclusion that no prima facie case had been made out, he was
well within his rights to dismiss the complaint under section 203 of
Criminal Procedure Code.\textsuperscript{20}

The Kerala High Court in \textit{Moidoo v. Mayan}\textsuperscript{21} strongly emphasized
the mandatory nature of the enquiry under section 10 of the Act. The
observation of Justice U.L.Bhat is relevant to quote.

"Section 10 being a special provision in relation to complaints
in regard to offences under the Act, it has an overriding effect
on the provisions of section 202 of the code which may be in
conflict with it. There is a conflict because under the scheme
of the Chapter XV of the code, it is open to a Magistrate to
issue process even without conducting an enquiry or directing
investigation under section 10 of the Act. The magistrate
cannot issue process unless he himself conducts an enquiry
under section 202 or direct a subordinate Magistrate to make
such an enquiry. To the extent of the conflict, the provisions
of section 10 of the Act will override the provisions of
Chapter XV of the code."\textsuperscript{22}

In a later case \textit{Kunjabdulla v. Kunjahammed}\textsuperscript{23} the Court again
stressed the significance of preliminary enquiry before issuing the process.

In this case, the Magistrate initiated issue of the process before conducting

\textsuperscript{20} \textit{Ibid.}, p.1813.
\textsuperscript{21} 1983 \textit{K.L.T.} 783.
\textsuperscript{22} \textit{Ibid.}, p.784.
\textsuperscript{23} 1988 (1) \textit{K.L.T.} 343.
the preliminary enquiry. On appeal, the High Court quashed the proceeding saying that before issuing the process, preliminary enquiry under section 10 is mandatory. Justice Sankaran Nair rightly pointed out:

"Section 10 is a safeguard to ensure magisterial muster before an allegation breathes into life as a charge. Private causes cannot be orchestrated into public causes. More than a section 200 enquiry, an enquiry under section 202 is a prelude to charge. Magistracy must guard itself against its instrumentality being converted into persecutionary measures".24

Thus the learned Judge strongly emphasized the need for the preliminary enquiry. According to him the magistrate must reach reasonable degree of subjective satisfaction before issuing the summons.

The object of preliminary enquiry is to find out whether there is a prima facie case and to avoid hardship to innocent persons. But in practice the whole process becomes so complicated and time consuming. Before the completion of the procedure the marriage will be over. Thus this delay in the procedure also block the speedy disposal of the cases under the Act. However this delay is inevitable. Otherwise innocent people may be

24 Ibid., p.343-344.
brought before the Magistrate to answer the charge of child marriage. Therefore to achieve the purpose of the Act it is advisable to enhance the punishment and thereby make the penalty deterrent, as an eye opener to the prospective culprits. If stringent and severe punishment is added to the penal provisions by amendments, the difficulty can be overcome to a great extent.

**Taking cognizance and limitation**

Taking cognizance of an offence is a significant step in the criminal proceeding. The expression has not been defined in the Criminal Procedure Code or in the Act. However the meaning of it is settled by judicial decisions. It denotes the taking of judicial notice of any offence by the Magistrate or the Judge. It does not *ipso facto* mean the commencement of judicial proceeding against the accused. It is not identical with initiation of the proceedings, but rather a condition precedent to the initiation of the proceedings. Taking cognizance does not involve any formal action or indeed action of any kind; but occurs as soon as the magistrate as such applies his mind to the suspected commission of an offence in order to take subsequent steps including enquiry and trial. But when a magistrate

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applies his mind for taking action of some other kind by ordering investigation or issuing search warrant for the purpose of investigation, he cannot be said to have taken cognizance of the offence.\textsuperscript{27}

A limitation period of one year is provided for taking cognizance of the offences under the Act. Section 9 says, “No court shall take cognizance of any offence under the Act after the expiry of one year from the date on which the offence is alleged to have been committed.”\textsuperscript{28}

In Amritrao Kole v. Chandrabhanu Kavley\textsuperscript{29}, the complaint was filed on 13-3-1945 in the Court of the First Class Magistrate and he took cognizance of the case. He transferred the case to another First Class Magistrate, Malavia on 11-4-1945. It was rejected on the ground that it was barred by limitation on the date on which it came to the Magistrate, Malavia. On revision the High Court held that this case could not be affected by the limitation period. The Court had the power to see that the


\textsuperscript{28} Prior to the 1938 Amendment, section 9 reads, “No court shall take cognizance of any offence under the Act save upon a complaint made within one year of the solemnization of marriage in respect of which the offence is alleged to have been committed.” The words ‘save upon the complaint’ have been deleted from the section 9 thereby permitting the court to take proceedings under the Act ‘\textit{suo moto}’ without any complaint. The statement of Objects and Reasons of Amending Act clearly stated that “the proposed amendment would enable the court to proceed upon information obtained privately after taking such steps as it might think necessary, to satisfy the correctness of the information”. Thus the necessity for a formal complaint and the requirement to execute a bond were abolished and the court can \textit{suo moto} take proceedings against a person when he comes to know about the offence.

\textsuperscript{29} A.I.R. 1947 Nag. 79.
that it cannot be said that he takes cognizance only when he directs the issue of the process to the accused."\(^{31}\)

On a reading of Code of Criminal Procedure also, it can be seen that the scheme of the code is arranged in such an order that taking cognizance under section 190 Cr.P.C.\(^{32}\) is a condition precedent for initiating proceedings including the enquiry under section 202 Cr.P.C.\(^{33}\) and the later


\(^{32}\) Section 190 Cr.P.C. reads, "Subject to the provisions of this Chapter, any Magistrate of the First Class, and any Magistrate of the Second Class specially empowered in this behalf under sub-section (2), may take cognizance of any offence—

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed."

\(^{33}\) Section 202 Cr.P.C. reads, "Any Magistrate, on receipt of a complaint of an offence which he is authorized to take cognizance of or which he is authorized to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made—

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200."
proceedings of issuing of process under section 204 Cr.P.C.\textsuperscript{34}

Thus it is clear that taking cognizance undoubtedly occurs as and when the magistrate reads the complaint, and even before he examines the complaint which he is bound to do.\textsuperscript{35} The Kerala High Court also confirmed this view in \textit{Gangadharan v. Rajendran}.\textsuperscript{36} Rajendran filed a complaint against Gangadharan before the First Class Magistrate Court of Kunnamangalam alleging that Gangadharan had committed an offence under sections 4, 5 and 6 of the Act. The alleged marriage took place on 8-12-84 and the complaint was made on 11-3-85. After conducting a preliminary enquiry on 4-3-86 the Magistrate ordered to issue summons to the accused. Gangadharan, the accused filed a petition in the High Court to quash all the proceedings of the Magistrate on the ground that the court took cognizance only after the lapse of one year, the limitation period mentioned in section 9.

\textsuperscript{34} Section 204 Cr.P.C. reads, "If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be --
(a) a summons-case, he shall issue his summons for the attendance of the accused, or
(b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction."

\textsuperscript{35} \textit{Har Narayana Bhikam Chand v. Govindram Agyaram}, A.I.R. 1940 Nag.245.

\textsuperscript{36} 1987 Cri.L.J. 1765.
The Kerala High Court rejected this contention saying that the complaint on 11-3-85 was registered by the Magistrate and the enquiry was conducted after applying his judicial mind. When he applied his judicial mind to the complaint, he had taken cognizance of the offence from that moment. This was done within one year of the marriage as contemplated by section 9 of the Act and issuing process in every subsequent step. Justice K. Sreedharan stresses the point with the following observation.

“Cognizance is taken when the Magistrate applies his mind to the facts alleged in the complaint. Cognizance is of the offence and not the offender. Once the Magistrate takes cognizance of an offence, it is his duty to find out whether he should proceed further in that matter, by issuing process to the offender. That depends on his satisfaction as to whether the complaint is vexatious, frivolous, or one to harass the accused. For arriving at that satisfaction, he may either enquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit. All these are for the purpose of deciding whether or not there is sufficient mind for the proceeding. In other words the enquiry contemplated by section 10 of the Act, or that under section 202 of the code, is one conducted by the Magistrate, after he had taken cognizance of the complaint.”37

In the next year, Justice Sankaran Nair of Kerala High Court discussed the same matter in *Kunjabulla v. Kunjahammed.* According to him every act of the Magistrate in regard to a complaint does not amount to cognizance. The application of the judicial mind to the averments of the complaint constitutes cognizance. That could be inferred from the fact of issue of process. Thus, his Lordship is of the opinion that when a Magistrate issues summons he takes cognizance which conflicts with the observation of Justice Sreedharan in *Gangodharan v. Rajendran.*

However, in *Krishna Pilla v. Rajendran,* the Supreme Court held that it cannot be justified on the ground that the complaint was filed before the court within one year from the date of commission of the offence. The date of filing of complaint cannot be treated as the date of taking cognizance. According to the apex court taking cognizance is different from filing complaint.

However the interpretation given by the Supreme Court is a bit confusing. In the above case the Magistrate received the complaint and registered it within one year. When he applies his mind to the facts of the case and decides to issue process, from that moment cognizance is effected.

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38 See *supra,* n.23.
39 See *supra,* n.36.
40 (1990) SCC (Sup) 121.
Generally penal statutes do not prescribe limitation period.\textsuperscript{41} It is a fact that the law of limitation and criminal law rarely keep company. In exceptional cases statute expressly provides a time limit for the commencement of the proceedings and section 9 of the Act is an example.

The peculiar feature of the section 9 is that if a person can evade the discovery of his offence for a period of one year; he need not fear about the penal consequence. If he conceals the matter for one year he can escape from the hands of law.

An empirical study conducted on this matter gave the following results reflecting the attitude of the judiciary and academic persons. Eighty four percent of the judges expressed the view to alter the limitation period where as fifty four percent of the academicians shared the view of the judges. Those who were in favour of altering the limitation period (42 percent) suggested ‘unlimited period’ for taking cognizance of the offence and 58 percent is of the opinion that the period of limitation should be increased upto the attainment of the minimum age limit of the spouses. According to those who stand in favour of unlimited period, the present provision does not serve to promote the policy and purpose of the Act.

\textsuperscript{41} Cr.P.C. 1973 contains limitation period in Chapter XXXVI (Sections 467 to 473). There was no provision for limitation under the original code. And these provisions found place in the statute only after the amendment in 1973.
They all agree to the opinion expressed by Prof. Sivaramayya. "It is better that the Democles’ Sword of prosecution is allowed to hang for long duration on the heads of those who solemnized child marriage."42

Is the offence ‘Cognizable’?

While considering the procedure and enforcement, the question whether the offence under the Act is cognizable43 or not is an important one. Originally the offence under the Act was a non cognizable one. In 1978, section 744 was inserted which declares that for certain purposes an offence under the Act shall be a cognizable offence.45 Section 7 reads,

“The Code of Criminal Procedure, 1973 shall apply to offences under the Act as if they were cognizable offences.

(a) for the purpose of investigation of such offences and

(b) for the purpose of matters other than (i) matters referred to in section 42 of that Code and (ii) arrest of a person without a warrant, or without an order of Magistrate”.

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43 Section 2(c) of Cr.P.C. reads: “cognizable offence means an offence for which, and cognizable case means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant.”

44 Section 7 omitted by Act 41 of 1949 – See section 5 of the Child Marriage Restraint (Amendment) Act 1949.

The section states that offences under the Act is cognizable for certain purposes only. In the matter of investigation it is a cognizable offence. It does not empower the police to arrest a person without the order of the Magistrate with the intention of preventing child marriages. Making the offence cognizable only for a limited purpose is a half hearted approach to such a grave offence. It also gives an impression to the enforcing authority that offences under the Act are of less gravity.

Prof. Sivaramayya rightly observed that the non-cognizable nature of the offence is one of the major obstacles in the enforcement of the Act.\(^{46}\) According to him, “police harassment is a lesser evil as compared to the monstrous evil of child marriage”.\(^{47}\)

While discussing the problem of child marriage, the Committee on Status of Women authoritatively expressed that “the non cognizable nature of the offence is a serious hindrance to the effective enforcement of this law. The Committee recommended that all the offences under the Act should be made cognizable.\(^{48}\) The National Commission for Women

\(^{46}\) _Supra_, n.42.

\(^{47}\) _Ibid._

recently made a strong recommendation to make the offence cognizable for all purposes.\textsuperscript{49}

Majority of the judges (75 percent) interviewed emphatically stressed the need for making the offence cognizable for the effective functioning of the Act. Sixty percent of the advocates and academicians share the same view expressed by the judges. Only twenty eight percent disapproved of making the offence cognizable and twelve percent was silent about the matter.

All the police officers interviewed strongly advocated for making the offence cognizable.\textsuperscript{50} According to them as the offence is a non-cognizable one, they have no role in preventing the child marriage. When a complaint on child marriage is received they have two options (1) to inform the Judicial Magistrate of the first class about the offence and (2) to advise the complainant to approach the Court of Judicial Magistrate of the first class. On receiving a complaint or getting an information on child marriage, the magistrate has to conduct a preliminary enquiry either by himself or by a magistrate subordinate to him, to find out whether there is a prima facie case or not. If he is satisfied about the complaint he can issue an order to

\begin{footnotesize}
\textsuperscript{49} See the news report, “NHRC Takes up Cudgels against Child Marriage” – \textit{Statesman} 9 October 1995.
\end{footnotesize}
the police to investigate the matter. The whole process is time consuming and the delay in the procedure may help the accused to escape from the clutches of law. According to the police officers if the offence is made cognizable, they can directly interfere in the case avoiding the delay in the procedures. It is also to be noted that the number of cases registered in the Courts of Kerala is very few. Only one case, registered at Edakara Police Station as per the direction of the Court, was identified during the study.51

**Enforcement Machinery – Satisfactory?**

The experience of the enforcement procedure under the Act during the 73 years of enactment reveals a casual and half hearted approach. The administrative machinery in every state is busy with other ‘important’ matters neglecting the significant issue connected with child marriage, which even affects the future of human race. The Government even forgets the importance of raising the age of marriage in the fight against the alarming population growth.

Another vital matter is that the Act does not provide wide powers to the enforcement machinery. It is weak and does not serve to promote the policy and purpose of the Act. A proper enforcement machinery should consist of a well defined procedure with an administrative machinery to

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50 See Appendix A(2).
enforce it. The main drawback of the Act is that it has lacked such a machinery since the beginning itself. The power to set the law in motion was conferred exclusively on a private person in the original Act, who on initiation of the proceeding against child marriage was made to feel the bitter and thankless nature of the task. The most humiliating aspect is that to substantiate his *bona fides* in making the complaint he had to undergo the indignity of executing a security bond. Fortunately the Child Marriage Restraint (Second Amendment) Act, 1938 partially removed the penalizing effect of this provision by requiring the complainant to execute a bond in special cases, and when the court required such bond it had to record its reasons for doing so. Mercifully, the Child Marriage Restraint (Amendment) Act, 1949 deleted the entire provision and empowered the magistrate to take action against child marriage.

Non cognizable nature of the offence also creates hurdles in the proper enforcement of the Act. Actually, as revealed by the police authorities, they have no role in the enforcement of the Act. The Act does not authorize any other agency to implement the provisions of the Act. Thus the weak enforcement machinery defeats the very object and purpose of the Act. Considering the opinions that emerged from the empirical study

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51 Crime No.32/2000 of the Edakara Police Station.
among judicial officers and academic persons, the major drawback of the Act is the inefficient enforcement machinery. The indifferent attitude of the State Governments is yet another hurdle in the way of effective enforcement. Newspaper reports show that in keeping with the age old tradition, over 3000 child marriages are said to have been performed in 1021 villages dominated by Baiga and Marrar tribes in Karwardha District of Chatisgarh in April 2002\textsuperscript{52} and it is shocking to hear that the villagers defend the marriages\textsuperscript{53} for some reason or the other. No preventive actions against these marriages are reported to have been taken. Even teachers, MLAs, village sarpanch and patwaris participate with great enthusiasm.\textsuperscript{54} Who cares for the law prohibiting child marriage?

However, in 1978, the Parliament amended the Act to make the offence cognizable for certain purposes. Making the offence cognizable for certain purposes is, to put in a mild way, a half-hearted approach to a grave,  


\textsuperscript{53} “Daring to Fight the Custom”, \textit{The Hindu} 29 April 2002, p.12.

\textsuperscript{54} \textit{Ibid.}
heinous crime like child marriage. It gives an impression to the enforcing authorities that the offence under the Act is less serious in nature.

The State of Gujarat introduced certain effective amendments to make the implementation and enforcement of the Act more effective. Section 3 of the Child Marriage Restraint (Gujarat Amendment) Act 1964 says:

"Notwithstanding anything contained in the Code of Criminal Procedure 1898, an offence punishable under the Act shall be deemed to be cognizable offence within the meaning of that code".

Thus the state of Gujarat made a bold step by declaring the offences under the Act cognizable.

Certain other changes are also incorporated in the Act through the amendment in 1964. Section 10 dealing with preliminary inquiry is deleted and section 13 is introduced. Section 13 provides for the appointment of Child Marriage Prevention Officers whose main duty is to prevent child marriage and collection of evidence for effective prosecution of persons solemnizing child marriages.\(^{55}\) The amendment contains a specific

\(^{55}\) Section 13(1) (2) reads: "(1) The State Government may, by notification in the Official Gazette, appoint for the whole state or for such part thereof as may be specified in that notification an officer to be known as Child Marriage Prevention Officer.

(2) It shall be the duty of the Child Marriage Prevention Officer –

(i) to prevent marriages being performed in contravention of the provisions of this Act by taking such action under this Act as he deems fit;
provision to secure the co-operation of voluntary agencies in extirpating this evil system of child marriage. Accordingly each Child Marriage Prevention Officer is associated with non-official advisory body of the social workers of the area within the jurisdiction of such officer for assisting him in his duties. The officer is deemed to be a public servant and invested with powers of police officer with limitation and instructions specified in the notification of Government. The amendment also confers power on the State Government to make rules and regulations for the proper functioning of the Act.

The experience in Gujarat after the amendment shows a considerable decrease in the number of child marriages in the State. The Social Defence

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56 Section 13(4) reads, "The State Government may associate with each Child Marriage Prevention Officer a non-official advisory body consisting of not more than five social welfare workers, of whom at least two shall be women workers known in the area within the jurisdiction of the Officer for the purposes of advising and assisting him in the performance of his functions under this Act."

57 Section 13A reads: "The Child Marriage Prevention Officer appointed under section 13 shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code."

58 Section 13(3) reads: "The State Government may, by notification in the Official Gazette, invest the Child Marriage Prevention Officer with such powers of a Police Officer as may be specified in the notification and the Child Marriage Prevention Officer shall exercise his powers subject to such limitations and conditions as may be specified in the notification."
Department of Gujarat has a special cell with a Child Marriage Prevention Officer. The work under the cell in various districts of Gujarat in association with voluntary agencies reveals a decline in child marriage.\(^{59}\) The work of voluntary agencies\(^{60}\) play a key role in fighting this social evil. They visit the villages, marriage spots and check the details of the cases, then report the matter to the police station and create awareness about the problem through education and other means. They have played a significant role in creating a desire among the people to prevent this evil.

The amendment which was incorporated in 1964, indicated the determination of the State of Gujarat in preventing child marriage. No other state has made any such amendment. So far, the experiment in Gujarat has proved to be successful in preventing the evil. However, at the operational level the working of the system shows some deficiencies which need correction. Firstly the officers are not provided with necessary infrastructures to avoid the delay in preventing child marriage. Secondly the officers are saddled with other responsibilities unconnected with the


\(^{60}\) Jyothi Sangh, a voluntary organization working in Gujarat had done a considerable work in preventing child marriages. They had prevented many child marriages – The rescue application to the office of the Jyothi Sangh reveals that appreciable work is being done by the agency. Apart from this, group meetings in small scale with parents and community leaders are held, explaining the evil effects of child marriage. Ibid., p.114.
prevention of child marriage. Lastly, there are complaints of political interference in discharging the duties of the officer.

All the judges interviewed strongly recommend the appointment of Child Marriage Prevention Officers. Seven percent were against it saying that it may be misused. Ten percent were silent about the matter.

The Committee on Status of Women also recommended the appointment of Child Marriage Prevention Officers for the effective enforcement of the Act.\textsuperscript{61} It was suggested that all the State Governments should be requested to amend the existing law and to incorporate a provision for the appointment of Child Marriage Prevention Officers.\textsuperscript{62} The Central Government is attempting to propose an amendment to the Act which incorporates the same.

**Penal Policy**

Punishment\textsuperscript{63} is regarded as one of the oldest methods of controlling crime and criminality. It is the sanction imposed on an offender for violation of established norms of the society. The main aim and object of punishment is to prevent the offender from committing the crime, to bring


\textsuperscript{63} It is defined as infliction of ill suffered for ill done. Philip Bean, \textit{The Punishment} (1981), p.4.
about the reformation of the offender and to prevent the other persons from committing the crime. The concept of penal policy is changing in the modern developing world and it is to be noted that punishment should have a re-educative effect rather than being a bare tormenting process. Besides, it has a resocialisation effect.

It is doubtful how far the theories of punishment\textsuperscript{64} are adopted in prescribing the punishment for the offences under the Act. The maximum punishment provided under the Act is an imprisonment of three months along with a fine.\textsuperscript{65} The most interesting thing is that the women are excluded from the punishment of imprisonment. The punishment clearly indicates how the Government looks at the particular offence, and it is the true reflection of Government policy. It is indeed surprising to note that only simple imprisonment is prescribed for such a grave offence like child marriage which has far-reaching consequences affecting the future of human race. Even after five amendments, the punishment remains to be a very mild one and it is neither deterrent, retributive, nor reformative.

\textsuperscript{64} Retributive, deterrent and reformative are the main theories of punishment.
\textsuperscript{65} The punishment provided under section 3 of the Act is simple imprisonment of fifteen days and a fine of one thousand rupees. The punishment provided under sections 4, 5 and 6 is simple imprisonment of three months and fine whereas section 12 of the same Act provides punishment for the disobedience to injunction order prohibiting child marriage is imprisonment of either description which may extent to 3 months and fine.
It is often seen that people are ready to bear the mild punishment which are not deterrent enough. The punishment provided must be proportionate to the gravity of the offence.66 The Act provides a very trivial punishment compared to the intensity of the offence. The grave consequence like the risk to future generation was not at all considered by the legislature even at the time of the enactment of the Act and the amendments. Thus penal policy under the Act is quite inadequate and insufficient in achieving the goal of the legislation.

Professor Lotika Sarkar in a Seminar on Child Marriage and Law emphasized that ‘the punishment should be deterrent so that people are not encouraged to continue the practice of child marriage.’67

The data of empirical study reveal that most of the judicial officers (90 percent) interviewed vehemently argued for stringent punishments. Majority of the advocates and academicians (85 percent) acknowledged the inadequacy of the present punishment in preventing child marriage and preferred a harsher punishment. The total police officials also shared the

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view expressed by the Judges and the advocates. They strongly recommended stringent punishment as a measure to curb this evil. Academic and social workers were also of the view that only drastic punishment could prevent this evil.

The majority opinion is in favour of imposing drastic punishment to an offender under the Act. Those who are not in favour of stringent punishment, suggested that as child marriage is a delicate personal issue, different treatment should be given and according to them compulsory community work was recommended as a mode of punishment.

The penal policy of the Act seems to be quite inadequate to provide a deterrent, preventive or reformative effect. All the theories of punishment are directed to a common goal, the protection of society from crime and criminals. Thus punishment has become an instrument of social defence. It should serve as a measure of social defence with enough elasticity to mould itself with the changing needs of time and place. The penal system should be so devised as to cope with the development of social morals and social discipline among the citizens. It should be concerned with human conduct which varies according to the changing circumstances. As it reflects the social reaction to crime, the object behind punishment may largely depend upon the social structure, accepted norms and values of a society. In this
context it is to be noted that the penal policy of the Act fails to achieve its object of preventing and restraining child marriages.\textsuperscript{68}

**Minimum Punishment**

When the penal policy has been framed for a particular offence, the legislature prescribes punishments with an object to prevent it. Judges are given wide discretion to impose punishment within the statutory limits. However, in the case of social legislations, mandatory minimum punishment has been provided depending upon the impact of the offence on society. In such cases the court has to limit its discretion to provide minimum punishment prescribed under the statute.

Minimum sentence is universal and not a new concept in India. The Indian Penal Code\textsuperscript{69} and social legislations contain provisions for minimum punishments.

Despite the stringent punishments, the offences relating to dowry and rape are on the increase, in alarming proportion. Though a minimum punishment is provided for these offences, statistics show that they are on

\textsuperscript{68} The crime statistics of the reported cases on child marriage in 1999 shows that an increase of 3.6 percent over the previous year. It is to be noted that the unreported cases may be higher in number: See National Crime Records Bureau, *Crime in India 1999*, p.219.

\textsuperscript{69} See for instance sections 121, 302, 304 B, 376 (1) and (2) of Indian Penal Code and sections 3, 4, 7 and 8 of the Suppression of Immoral Traffic in Women and Girls Amendment Act 1978 and 1986. See also sections 3, 4, 4A and 6 of the Dowry Prohibition (Amendment) Act, 1984.
the increase. Why? It seems that most of the cases are unreported or the prosecution fails even in filing the charge. The lengthy trial, depending upon the witnesses and the negligence of the investigating and prosecuting authorities are the main causes for the failure of the law. Thus the goal of these deterrent laws are still far away from achieving the end.\textsuperscript{70} An effective prosecuting machinery is an essential requirement for the proper implementation of punishments.

The contemporary trend is to provide mandatory minimum punishment for an offence under social legislation. Professor Sivaramayya strongly recommended the imposition of minimum punishment for the offenders under the Act. According to him, “Even though the Report Committee on Status of Women contain no specific provision for minimum punishment for offences under the Act, it would be within the spirit and intendment of the recommendations.”\textsuperscript{71}

The data from the empirical study also emphasize the need for minimum punishment. Sixty three percent of the judges and seventy percent of the academicians, advocates and social workers are in favour of minimum punishment. Those who disapproved (thirty percent) opined that


\textsuperscript{71} \textit{Supra}, n.42 at p.391.
it would fetter the judiciary from exercising its discretion. They pointed out that the circumstances and motives leading to child marriage may be different in each case and the punishment prescribed should be in such a manner as to allow the judges to exercise their discretion. Otherwise it will not serve the purpose of punishment. Fifty percent of the police officers are of the view that minimum punishment should be provided to the offenders coming under the Act.

Majority of the Judges, academicians and Police are in favour of mandatory minimum punishment for the offences under the Act. Sixty percent of the persons who are in favour of imposing minimum punishment suggested that it should be for one year.

**Exclusion of Women from imprisonment**

Women are exempted from the punishment of imprisonment. Majority of the judicial officers, academicians and advocates hold the view that this is unjustifiable. Only very few justified it. Those who disapprove of the exclusion of women observed that in the male dominating society the role of mothers or women, in marriage of the children is negligible. But there may be circumstances under which a mother or a woman having charge of a minor child is fully responsible for the marriage of that minor. In such a situation the exclusion of women from imprisonment will not
meet the ends of justice. However the Report of the Committee on Status of Women is silent on this aspect. Prof. Lotika Sarkar strongly protested against this. She rightly commented,

"In my opinion this is certainly a case where it is a question of conflict between the interest of women and the interest of the child. It would be worthwhile to consider whether the father is the natural guardian or whether there is another legal guardian. But if the former is dead and the mother is the natural guardian and she gets the minor daughter married, why should she not be punished, because, there is a clear case of interest of mother going against the interest of child".

Enhancement of the quantum of penalty - Advisable?

Enhancement of the quantum of penalty in the penal provision cannot do wonders without a proper implementation scheme. A striking example is the Dowry Prohibition Act, 1961. It originally contained a sentence of imprisonment of 6 months or a fine not exceeding Rupees 5000 only.

Realising the inadequacy of penal provision the legislature has enhanced the punishment in 1984 and 1986 through amendments. Consequently, the

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72 Supra, n.71 at pp.81-82.
73 Ibid
74 Section 3 of the Dowry Prohibition Act, 1961 reads, "If any person......gives or takes or abets the giving or taking of dowry, he shall be punished with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees or with both."
imprisonment is enhanced to 5 years and a fine upto Rs.15,000 or the value of the dowry whichever is more.\textsuperscript{75}

Experience shows an increase in the offences connected with dowry even after making the amendments. Without proper machinery to enforce the enhanced punishment, the amendment became infructuous. The Dowry Prohibition Act shows a failure in implementing and enforcing the provisions even among the educated classes. The same is the case of penal policy connected with the offences under the Act. The Penal Policy under the Act is not so stringent as in Dowry Prohibition Act, 1961. Such stringent punishment does not produce the desired effects. It is distressing to state that the penal policies in these social legislations are not deterrent to prevent social evils. The prevalence of the social evils like dowry and child marriage even in the 21\textsuperscript{st} century reflects the adamant attitude of the society. There is hardly any change in the outlook of society about these social evils.

\textsuperscript{75} Section 3(1) of Amended Dowry Prohibition Act, 1961 reads, "If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment for a term which shall not be less than five years, and with fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry, whichever is more. Provided that the court may, for adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than five years --Act 63 of 1984, Section 3 of The Dowry Prohibition (Amendment) Act, 1984."
The sentencing policy of the Act has to be discussed in the social context prevailing at the time of enactment. Many historical, political, religious and cultural factors might have influenced this process. It is rather a consideration of the socio economic status of the offender. The fear of being labelled as the spokesman of a particular class tempts the judge to adopt a balancing stand. Thus sentencing policy establishes the balancing attitude of the judge with the socio religious interests.\textsuperscript{76}

When dealing with the offences that cause much social concern, unstable and flexible attitude of the judges always defeats the very purpose and aim of the legislation.\textsuperscript{77} The judge is always influenced by the social background. At the time of passing of the Child Marriage Restraint Act, 1929, many of the members of the Legislative Assembly were against it.\textsuperscript{78} Everybody was in favour of child marriage and that favouritism was reflected in the judgements.\textsuperscript{79} The decisions revealed the fact that the


\textsuperscript{78} M.S.S. Aiyankar, B.P. Naidu, M.K. Acharya and Pandit Madan Mohan Malaviya. These were the prominent members who opposed the passing of the Bill in the Assembly. See Appendix D - The Assembly Debates, reported in A.S. Sreenivasa Aiyar, The Child Marriage Restraint Act XX of 1929 (1930), pp.67 to 168.

\textsuperscript{79} It was observed by Eleanor F. Rathbone that the courts seem to have followed the hints given by them by usually imposing lesser punishment. See Eleanor F. Rathbone, \textit{op.cit.}, at p.49.
judges were influenced by the social set up in which they lived. The number of cases tried and convicted under the Act is limited and it is a difficult task to trace the chronological changes.

The attitude of the judge plays a key role in fixing the sentence. The sentencing policy under the Act reveals that the judges seem to follow the hidden hints of the social and official policy and imposed very lenient punishments.

A perusal of the available case laws reveal that there are several instances revealing the fact that judges are quite often not familiar with this particular piece of legislation. In most cases the trial judge was not aware of the exact legal proposition.

It is distressing to note that the judges are either not fully aware of the significance of the sentence provided in the Act or are reluctant to impose the punishments provided in legislation. The case law reveal the fact that judges, specially the lower judiciary, are always lenient. It is also to be noted that this social legislation which can be used against the evil custom was not effectively used by the judges. It is true that there are loopholes in

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81 Ibid
the Act which hinder effective enforcement. But the scope of judicial creativism is not at all utilised in this legislation. Judges have the power to interpret and adopt the law in tune with the values of the society. Judicial creativism is totally absent with respect to this legislation. Within the statutory framework, the judges can exercise their discretion to modify the law in accordance with the existing circumstances which demand necessary change. The social response and creativity are totally absent in the sentencing policy with respect to this legislation. The judges always took a lenient view which led to the failure of effective implementation. Compared to the traditional crimes like murder, grievous hurt, the offences under the Act are considered by them to be a less serious one. But considering the far reaching consequences on the future generation, the gravity of the offence is of a high degree which demands urgent attention and action. In traditional crimes, usually an individual or family is affected. But here in child marriage, the whole society is affected resulting in the deterioration of the future human race. It is an offence much graver than other socio-economic offences as it affects the roots of the human race.
The prevalence of child marriage even in this century reflects the ineffectiveness of the sentencing policy under the Act. Thus it can be concluded that a thorough revision of the sentencing policy under the Act is the urgent need of the time.