The practise of child marriage is still at the stage of rampancy even though there are laws in place for nearly 90 years. There has been a gradual movement from no recognition to recognition of the problem to greater recognition. This is reflected in the ways laws have existed in this area. The problem itself is not just with the way laws are implemented but also the way they are framed. It is important therefore to raise questions and delve deeper into understanding the ways in which laws are drafted and the legislative mindsets that can be gauged from the same. Feminist studies reveal that laws with regard to women and child have somewhere not taken into account their peculiar needs and has therefore devoid them of the opportunity to participate in the decisions that pertain to them. Girls who become victims of this practise have to sometimes face unimaginable mental and physical trauma. This is a less known and much less understood reality when laws are made in the environment of exclusion. This exclusion of voices and experiences, of particular needs, of choices and rights has led to the thriving of this practise for a very long period of time. Even now our law makers are unable to fully appreciate the consequences of these marriages and therefore the same has not been placed at the stature of a priority in the national agenda.

245 Initially the Child Marriage Restraint Act, 1929 followed by the current Prohibition of Child Marriage Act, 2006
246 Reaume and Sagade (n 30); Shalene Negy Hesse-Biber (ed), Feminist Research Practise: A Primer (Sage Publication 2014)
The Prohibition of Child Marriage Act was a build up on the Child Marriage Restraint Act, 1929 which was the British Colonial Law. It is therefore important to inspect the natures of these laws that have been a part of the history of this practise and examine in how far they have helped in diminishing the incidence of the practise.

5.1 Child Marriage Restraint Act, 1929

The Child Marriage Restraint Act, also called the “Sarda Act” as it was sponsored by Rai Sahib Harbilas Sarda was passed by the British Indian Government. The Sarda Bill received the Governor General’s assent on 1st October, 1929. The Act came into force on 1st April 1930. The object of this legislation was prevention of child marriages. This legislation was a result of a social movement that was lead by the organised women’s group of India. It was a first of its kind.

The age of child that was mentioned in the Act went through changes with a passage of time. In the year 1929, the definition of ‘child’ meant a girl who had not completed fourteen years of age and a boy who had not completed eighteen years of age. This underwent changes later and the resultant amendments increased the age to 18 for girls and 21 for boys.

*Table 4.1: Age at which marriage could legally be solemnised under the CMRA, 1929*

<table>
<thead>
<tr>
<th>YEAR</th>
<th>Minimum Age for Marriage under the CMRA, 1929</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>GIRLS</td>
</tr>
<tr>
<td>1929</td>
<td>14</td>
</tr>
<tr>
<td>1949</td>
<td>15</td>
</tr>
<tr>
<td>1978</td>
<td>18</td>
</tr>
</tbody>
</table>
It is pertinent to mention that there has been an apparent discrimination when it has come to setting the age for girls and boys. While we see that girls have been placed at quite a disadvantageous position, the increase in their age has been slow and as soon as they were coming closer to a state of equality, the age of boys was increased to 21 years. Though there is no rationale on why the same exits even today, there have been no attempts formally by the law makers to change the same and bring it in harmony with the notions of equality. Further the Committee on the Status of Women under CEDAW has criticized the fact that certain countries provide for different ages of marriage for boys and girls as follows:

“Some countries provide for different ages for marriage for men and women. As such provisions assume incorrectly that women have a different rate of intellectual development from men, or that their stage of physical and intellectual development at marriage is immaterial, these provisions should be abolished. In other countries, the betrothal of girls or undertakings by family members on their behalf is permitted. Such measures contravene not only the Convention, but also a woman's right freely to choose her partner.”

The different ages prescribed creates understates the experiences that women particularly face. It does not take into account a girl’s equal willingness to acquire education beyond school. It also expresses the cultural norm of the bride in India always being younger than the groom. There are noticeable undercurrents of presumptions that led to the creation of such discriminatory laws.

Another aspect of the Child Marriage Restraint Act, 1929 was that it did not prescribe for heavy penalties. There was not much weight given to the

247 General Comment No.38, General Recommendation No. 21 (13th session, 1994)
gravity of the issue and because it was an accepted cultural norm there was a resistance to even change the same through definite action. Although penalties underwent slight changes in the year 1949 but nevertheless they were unable to possess as much strength to deter the incidence of the practise.

*Table 4.2: Penalties under the CMRA, 1929*

<table>
<thead>
<tr>
<th>Offender</th>
<th>Punishments laid out in the CMRA</th>
<th>1929</th>
<th>1949</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bridegroom— 18-21yrs. of age</td>
<td>Fine upto Rs.1000</td>
<td>Simple Imprisonment up to 3 months and/or Fine</td>
<td></td>
</tr>
<tr>
<td>Bridegroom- above the age of 21 years</td>
<td>Simple Imprisonment up to one month and/or fine up to Rs. 1000</td>
<td>Simple imprisonment up to three months and/or fine (amount not mentioned)</td>
<td></td>
</tr>
<tr>
<td>One who performs, conducts or directs a child marriage</td>
<td>Simple Imprisonment up to one month and/or fine up to Rs. 1000</td>
<td>Simple imprisonment up to three months and/or fine (amount not mentioned)</td>
<td></td>
</tr>
<tr>
<td>Guardian or a person in charge of a minor, who promotes, permits or negligently fails to prevent child marriage</td>
<td>Simple Imprisonment up to one month and/or fine up to Rs. 1000</td>
<td>Simple imprisonment up to three months and/or fine (amount not mentioned)</td>
<td></td>
</tr>
<tr>
<td>One who violates the injunction issued to prohibit a proposed child marriage</td>
<td>Simple imprisonment up to three months and/or fine (amount not mentioned)</td>
<td>No change</td>
<td></td>
</tr>
</tbody>
</table>
Another problem that the CMRA suffered from was that it did not recognise the offence under it as cognizable.\textsuperscript{248} This remained so despite the various amendments that took place within the provisions of the act with respect to age of the child as well the penalties upon contravention. This yet again highlights the seriousness that was attributed to the offence. It was argued against the same on the ground that family was considered to be a private and personal affair and that the State interference must be minimal in matters relating to marriage and the like. There was also an apparent fear of being harassed by the police in case the offence was made cognizable. The argument that police harass the people was also examined through the lens of popular belief and prevailing circumstances. Even if considered to be correct, it was still a case wherein one had to closely examine that should police harassment be given so more emphasis than the rights violation of the child who is at the threat of getting married. B. Sivaramayya\textsuperscript{249} also noted and was of the opinion that police harassment was a lesser evil than the greater evil of child marriage. He took the support of a report of a Committee that was set up by the then Gujarat Government in the year 1962. The report was meant to investigate into the high rate of suicide amongst young married girls. One of the causes that were stated in that report was child marriage.\textsuperscript{250} In view of the said report the Gujarat Government initiated a State Amendment and made the offence of child marriage cognizable. On attention being drawn regarding this Amendment to the Central Government by the Committee on the Status of Women (CSW) it was recommended that there must be a similar amendment to the central legislation. This led to the amendment of the CMRA in 1978 and all offences under the CMRA were declared cognizable only for certain purposes. The limitation

\textsuperscript{248} Cognizable offences are those offences of which Police can act upon even without receipt of a formal complaint. The Police are allowed to carry out action against the accused on its own volition. The police also have the authority to arrest in the case of a cognizable offence and do not have to wait for an arrest warrant to be issued by the Magistrate.


\textsuperscript{250} Government of Gujarat, Report of the Suicide Inquiry Committee (1964) 63
placed was that the offence was cognizable only to the arena of investigation. This meant that the police was empowered to investigate a complaint that it received by a person with regards to a child marriage about to take place or one that had already taken place. However, the police was neither empowered to arrest nor stop the child marriage from being solemnized. Upon investigating the police was required to first obtain an arrest warrant from the Magistrate. The Magistrate also in turn was required to give notice to the accused along with an opportunity to be heard before issuing the said arrest warrant. This entire process was lengthy enough for the marriage to take place conveniently. As the law stands even today, upon the solemnization of the marriage, it stands as a perfectly valid marriage. The Child Marriage Restraint Act, 1929 was also not only unable to provide for the cognizance of the offence committed under the same but it further provided that cognizance of the offence could be taken only for one year from the day on which the marriage took place. After the lapse of one year, the law itself decriminalised the child marriage. This was also in view of the fact that the punishment under the Act was quite weak and it was not commensurate to the gravity of the rights violation.

The CMRA, 1929 also suffered from the lacuna of not providing for compulsory registration of marriages. Compulsory registration of marriage makes it possible for child marriages to reduce. Although registration of child marriage has itself been in a debatable zone, nevertheless, compulsory registration of marriages had itself laid in the shadows at the time that the CMRA was in force.

Judicial approach on the issue also remained quite varied when this Act was in force. Some High Courts played a more proactive role in giving judgments that would impede the occurrence of these marriages. These judgements were however later overturned and the prevalent thought process of recognising child marriages remained. For instance, in a case brought before the
Patna High Court challenging the validity of a marriage wherein a widowed mother had given her 7 year old daughter to a man who was over 24 years of age. The Court however upheld the validity of this marriage.\textsuperscript{251} Other High Courts like Allahabad High Court also opined similarly.\textsuperscript{252} The Orissa\textsuperscript{253} and Madras\textsuperscript{254} High Courts also upheld the validity of the child marriage. The Andhra Pradesh High Court departed in its ruling from the prevalent views of upholding the validity of child marriages and held on the contrary. The Division Bench in its exceptional decision declared that marriages not fulfilling the legal age prescribed under law will be void ab-initio.\textsuperscript{255} The court however did not decide based on the CMRA, 1929 and instead decided upon the validity of the marriage based on the Hindu Marriage Act, 1955 citing that a marriage in contravention to Section 5(iii) would be void ab initio as the legislative intent behind prescribing minimum age for marriages was to curb and fight the evil of child marriages. This decision however was overruled by a full bench of the same High Court on the ground that it was erroneous with regards to holding child marriages as either void or invalid and that the legislative intent wasn’t so in the Hindu Marriage Act, 1955.\textsuperscript{256} It is pertinent to mention here that it is noticeable that the Courts often relied upon the personal laws rather than the Central legislation to decide upon the validity of the child marriage. This has led to many cases being decided on the basis of the Personal laws an often in total ignorance of the Child Marriage Restraint Act, 1929. The Act also failed to provide any special consideration to children who became victims to trafficking in the name of marriage.

\textsuperscript{251} Mt.Jalsi Kaur vs. Emperor AIR 1933 Patna 471  
\textsuperscript{252} Ram Baran vs. Sital Pathak AIR 1939 All 34  
\textsuperscript{253} Birupakshya Das vs. Kunju Behari AIR 1961 Orissa 104  
\textsuperscript{254} Sivanandty vs. Bhagavathyamma AIR 1962 Mad 400  
\textsuperscript{255} Panchireddi Appala Suramma vs. Gadela Ganapatlu AIR 1975 AP 193  
\textsuperscript{256} Vankataramana vs. State AIR 1977 AP 193
5.2 Prohibition of Child Marriage Act, 2006

In another attempt to curb the menace of child marriage and to cure the defects contained in the Child Marriage Restraint Act, 1929, the Government enacted the Prohibition of Child Marriage Act, 2006. This Act was an improvement on the earlier CMRA, 1929 and could definitely be said to be a positive step towards fighting this serious rights violation against children.

5.2.1 Historical Background

In view of the felt ineffectiveness of the Child Marriage Restraint Act, 1929, there was a growing need felt for more strict and stringent laws to be enacted with respect to child marriages. The punishments and penalties within the Act were not sufficient to prevent the menace. In its 1995-1996 Annual Report the National Commission for Women recommended that the Government must appoint the Child Marriage Prevention Officers immediately.\(^{257}\) It further recommended that the offence under the law be made cognizable, marriages performed in contravention of the Act be declared void and the punishments under the Act be made more stringent.\(^{258}\) The National Human Rights Commission in its Annual Report 2001-2002 also made recommendations based on the review of the existing CMRA, 1929.\(^{259}\) Upon consultation with the State Governments and Union Territory Administrations with regards to the above mentioned reports, the Central Government decided to accept almost all the recommendations by repealing and re-enacting an

---

\(^{257}\) Prohibition of Child Marriage Act, 2006 ‘Statement of Objects and Reasons’ <https://books.google.co.in/books?id=uHFLYimaEEgC&pg=PA1&lpg=PA1&dq=national+commission+for+women+annual+report+1995-96&source=bl&ots=SVbSbCZZu8&sig=OJM4akT58s4qvqk_wHRMKIT2HY&hl=en&sa=X&ved=0ahUKEwi5vrCu34bXAhXCPpY8KHUA-AsEQ6AElQzAE#v=onepage&q=national%20commission%20for%20women%20annual%20report%201995-96&f=false> accessed 14 July 2017

\(^{258}\) ibid

improved law. The Prohibition of Child Marriage Bill was a result of this effort. The Bill passed both the Houses of Parliament received the Presidential Assent on 10th January, 2007. This gave birth to the present day Prohibition of Child Marriage Act, 2006.  

5.2.2 Salient Features of the Act

The Prohibition of Child Marriage Act, 2006 (hereinafter called PCMA) was in many ways a stark departure from the former Child Marriage Restraint Act, 1929. Some of the key features of this Act included:

— Child marriage was expressly declared to be voidable at the option of the contracting party/parties who were a minor at the time of the marriage. The CMRA held these marriages to be perfectly valid with no provision of annulling the same. The PCMA didn’t go too far either, as it didn’t declare them void, but it did bring in an option of annulling the marriage that took place between a minor or between minors at either of their options;

— It further provides for the maintenance and custody of the children born out of these marriages which was not the case in CMRA;

— In the case of annulment of the child marriage, the husband or, if he is a minor at the material time, then his guardians are to pay maintenance to the minor girl until the time she gets remarried;

— District Courts have been empowered under the Act to modify, add to or revoke any order relating to maintenance of the female petitioner and her residence as well as with regards to the maintenance and custody of the children etc.;

— Legitimacy of children born from these marriages have also been established i.e. even if the marriage itself undergoes the annulment process, the child born of the wedlock shall be legitimate;
— If a male above the age of majority i.e. 18 years engages in the practise by being a contracting party in a child marriage, shall be punished with rigorous imprisonment which may extend to 2 years or with fine up to Rs. 1 lakh or with both;
— Certain cases have been established wherein the child marriages are declared void. These include where the minor is taken or enticed out of the keeping of his/her lawful guardian, by force compelled, or by deceitful means to go from any place and in the case where the child is sold for the purpose of marriage or married for the purpose of being trafficked and engaged in immoral activities;
— Courts have been empowered under the Act to issue injunctions against the performance of child marriages. Though similar to the CMRA, 1929 the courts have to give an opportunity to be heard to the accused before the injunction is issued against that person, there is an additional provision of an interim injunction that the court can issue where there are situations of emergency.
— Offences under the Act have been made cognizable and non-bailable.
— Punishment has been increased to rigorous imprisonment which may extend to 2 years and fine which may extend to Rs. 1 lakh or both.
— State Governments are required to appoint the Child Marriage Prohibition Officers.
— State Governments are also required to frame rules for effective implementation of the Act.

\[261\] ibid, Section 12
5.3 Critical Analysis of the Prohibition of Child Marriage Act, 2006

The Prohibition of Child Marriage Act has definitely been a positive step in terms of doing away with the old legislation that wasn’t helping enough in curbing the incidence of these marriages. The PCMA is much more liberal in its approach. It has elements that, upon application, can create a big difference in the incidence of this practise.262 The PCMA, 2006 in its intent has been quite a departure from the old Child Marriage Restraint Act, 1929 (CMRA). This is in view of the fact that there is a strong recognition of the fact that child marriages are a grave human rights violation directed at children and that its incidence in India continued to be appalling. According the 2001 Census, there were roughly 1.5 million girls in India who were married before they turned 15 years old.263 Of these girls, about 20% of them were already mothers to at least one child. The National Family Health Survey-3264 data shows that 47.4% of women aged between 20-24 years were married before the age of attaining the legal age of getting married i.e. 18 years. Another MWCD265 and UNICEF Report i.e. Rapid Survey on Children 2013-2014 reveals that 41.7% of total women married in India were married before they attained the legal age of getting married.266 The 2015-2016 NFHS-4 Data shows a stark reduction in the incidence of these marriages. It has reportedly come down to 26.8%.267 These are the number of women age between 20-24 years who got married before attaining the legal age of marriage i.e. 18 years.

---

262 This includes stricter punishment, injunctions, special provision for empowering District Magistrate to intervene on occasions such as Akshay Tritiya when mass marriages are held, maintenance and custody of children issues provided for etc.
265 Ministry of Women and Child Development
While there is enough data to reveal that there has been a reduction, it is still important to consider that these marriages are still taking place. These reductions are due to increase in awareness, increased levels of education. While these are attributable, there can be no denying that because women and girls are more aware they do not at most times reveal the correct information with regards to their marriage. They are sometimes tutored to say that they are 18 years old or more while they may not be that old at all. This was noticed at the time of the present empirical study in the States of Telangana, Rajasthan, Uttar Pradesh and Rajasthan. It was noticed on a number of occasions that girls were hesitant and sometimes even obstinate to reveal their correct age. This creates a situation where correct data isn’t revealed and there is no way to check their correct ages. There are gaps in the implementation of the law because the law itself is not sealed and secured from all corners to ensure that perpetrators do not go scot-free.

5.3.1 Minimum Age for Marriage

This is one of the things that were carried forward from the previous Child Marriage Restraint Act, 1929. In the year 1978 this Amendment was brought into the CMRA wherein the minimum age of marriage was increased to 18 years for girls from 15 years and that of boys was increased from 18 years to 21 years. There has been no rationale that has been given as to why the ages of both boys and girls wasn’t kept equal. As discussed earlier in the Chapter, this shows an utter ignorance to the needs of the girls. A boy is expected to study beyond school and get a college degree but a girl is expected to only study up till school. The girls who were interviewed during the process of this research work shared that they wanted to pursue higher education but were compelled to get married. Girls today are ambitious. They also wish to study further, make a living and contribute to the household income. When asked about what dreams
they had, some shared that they wanted to become nurses while two others shared that they wanted to become Police officers. This cannot be achieved until the minimum ages of girls for marriage is also increased to 21 years in order to achieve an equal status for both girls and boys. The undercurrent of patriarchy is so strong that it crushes the dreams and visions of many girls. Some are never introduced to school while others who are introduced are almost forced to leave. Many girls who were interviewed shared that if given a choice they would want to resume their studies. Two of them have been able to resume studies after marriage too.

5.3.2 Annulment of Marriage

The status of annulment of child marriages is very weak. One of the primary causes that was noticed during the study was that 90% of the girls didn’t know that there is a provision in this regard under the law. They may be aware that child marriage is an offence but they are not aware of the rights given to them under the law. Besides the age of majority for girls is 18 years and for boys is 21 years under the law. Section 3 provides that annulment of child marriage can be done either before the attainment of majority and up to 2 years from the date of attainment of majority.\(^{268}\) This means that a girl can have her marriage annulled by 20 years of age and the boy has the option to have his marriage annulled till he turns 23 years old. This is a huge disparity and inequality created by law. At 20 years the girl is still too young to take any decision for herself with regards to annulment of her marriage. Besides she is powerless and has no understanding of how she would be able to meet her survival needs in the occasion that she has her marriage annulled. Since 2006, the rate of annulment of marriages has been extremely weak comparing to the incidence. Besides the social sanction attached to it is miserable. In one of the cases reported, when the girl in Rajasthan decided to move the court to have her marriage annulled, the

\(^{268}\) Section 3, PCMA
Panchayat of the village did not support her decision and on the contrary slammed a penalty of Rs. 16 Lakhs on her. In the news report, the victims shared:

*Sarita, victim of child marriage said, "I do not accept child marriage. I want to study and want to make my future. For the annulment of my child marriage, I have filed a petition with help of Kriti Didi. I am hopeful that I will get justice soon."*\(^{269}\)

In another recent clipping it was reported that a girl in Rajasthan was able to get her marriage annulled by proving her child marriage to the court with the help of producing evidence from her husband’s Facebook account.\(^{270}\)

### 5.3.3 Lack of Minimum Punishments

The Prohibition of Child Marriage Act, 2006 has provided for stronger punishments than its earlier counterpart i.e. CMRA, 1929. The punishments include rigorous imprisonment which may extend to 2 years and fine which may extend to 1 lakh rupees. It fails to prescribe any minimum punishment which has lead to its lopsided implementation. Most cases go unreported and those that do get reported and are pursued in the court of law are often not awarded a punishment as high as prescribed within the Act.\(^{271}\)

---

\(^{269}\) TNN, ‘17-year-old fights to annul her child marriage’ (*The Times of India*, 25 June 2017)  
<https://timesofindia.indiatimes.com/city/jaipur/17-yr-old-fights-to-annul-her-child-marriage/articleshow/59304367.cms> accessed 21 July 2017 (She was helped by Saarthi Trust and her marriage was annulled)

\(^{270}\) Agence France-Presse, Rajasthan Teen Used Facebook To Prove She Was Married At 12’ (*NDTV*, 13 October 2017)  

\(^{271}\) Ahmedabad Mirror ‘Nine convicted under Child Marriage Act’ (*Ahmedabad Mirror*, 22 February 2014)  
<http://ahmedabadmirror.indiatimes.com/ahmedabad/cover-story/articleshow/35681420.cms> accessed 15 December 2017 [This is an example of how weak the punishment system is when the law is actually applied. The court granted a punishment of only 1 one month to some of the accused while few were released on a fine of Rs.250 each and those who were senior citizens at the time when the conviction was being announced were granted probation period on a bail amount of Rs.2500. This
113 cases registered in total under the Act and 76 persons were convicted.²⁷² In the year 2012, 169 cases were registered under the Act and 40 persons were convicted under the Act.²⁷³ When we look at the incidence rate, wherein the RSOC²⁷⁴ report of 2013-14 shows that 41.7% of the total married women in India got married before they attained majority, it is extremely upsetting to see the number of cases actually registered. Therefore, it is extremely crucial to set minimum punishments so that there is a huge deterrent created against the performance of these marriages. Where the gap between the maximum punishment and the one that is usually awarded is extremely wide, it warrants the need for prescription of a minimum punishment under the Act.

5.3.4 Weak Implementation due to weak Reporting

There is not a fraction of doubt that the implementation of the law is extremely weak. This is also because the reporting mechanism under the law itself is very weak. The police cannot take *suo moto* cognizance of the offence committed under its jurisdiction. The police has to wait for a report to be received upon which it carries out its investigation. The reporting of these marriages is extremely weak and upon its successful solemnisation it continues to be a valid marriage and police itself takes no action against the same. The socio-cultural environment around the areas in which these marriages take place do not encourage the people who are even aware of the marriage taking place to report. They fear serious repercussions and no protection. They also fear that their identity could get disclosed and that their life could come under threat.

²⁷³ ibid
²⁷⁴ RSOC (n 22)
Rituparna\textsuperscript{275} who is 15 years old and stays in Gonda District of Uttar Pradesh shared on the day of her interview how she and her family knew that there was a child marriage was being organised close to her home but they could not go and report the same since they feared repercussions. She went on to the extent to share that the local police is also aware of these marriages taking place but does nothing to stop the same.

The number of cases registered under the Act in total is alarming:

<table>
<thead>
<tr>
<th>Year</th>
<th>Total No. of Cases of Child Marriage Registered under the PCMA, 2006</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>113</td>
</tr>
<tr>
<td>2012</td>
<td>169</td>
</tr>
<tr>
<td>2013</td>
<td>222</td>
</tr>
<tr>
<td>2014</td>
<td>280</td>
</tr>
<tr>
<td>2015</td>
<td>293</td>
</tr>
</tbody>
</table>

Information Source: Press Information Bureau
http://pib.nic.in/newsite/PrintRelease.aspx?relid=154251

Therefore the Police need to be trained adequately as well as empowered under the Act to take \textit{suo moto} cognizance of the offence committed under the Act.

5.3.5 \textbf{Child Marriage is Voidable in Nature}

The PCMA, 2006 has made the child marriages voidable in nature. Though this is a stark departure from the status\textsuperscript{276} of these marriages under the CMRA, 1929, it is still questionable as to why these marriages must be voidable

\textsuperscript{275} Name changed for anonymity
\textsuperscript{276} Marriages were perfectly valid without an option of annulment
in nature and not void *ab-initio*. The paradoxical situation that arises here again is that solemnizing a child marriage is an offence but once done successfully, it is a perfectly valid marriage unless one of the parties to the marriage moves the court for its annulment. Child marriage is a form of forced marriage. The girl involved is a minor. She is not capable of giving free and informed consent under law. If we look into the provisions of the Indian Contract Act, 1872, it is aptly clear on this point.\(^{277}\) Marriages in Muslims are purely contractual in nature. Hindu marriages are also no longer purely sacramental. They were purely sacramental for 3 reasons:

1. Permanent in nature i.e. once you marry you couldn’t dissolve the same;
2. Eternal i.e. valid for not the current lifetime alone but for lifetimes ahead;
3. Ceremonial i.e. performance of religious ceremonies was essential.\(^{278}\)

Hindu marriages are no longer permanent in nature. They are open to dissolution and parties to the marriage can take the assistance of the court in having their marriage dissolved under the Hindu Marriage Act, 1955. There are also provisions of void and voidable marriages under the HMA, 1955. These terminologies are traditionally used to define contracts and contractual relationships. However they are not purely contractual because there is no consideration involved. Also the widows can now remarry which in a way nullifies the second point.\(^{279}\) The third point on ceremonies remains intact and is an essential for a Hindu marriage. Therefore, Hindu marriages are now a

\(^{277}\) Indian Contract Act, 1872, s 10 (It provides that those agreements are contracts which are entered into by the free consent of parties who are competent to contract and Section 11 of the Indian Contract Act, 1872 provides for “who are competent to contract”. In the section it is clearly set out that one is competent to contract only when one has attained the age of majority according to the law to which he is subject.)


\(^{279}\) Hindu Marriage Act, 1955, s 15
semblance of sacrament and contract. They are neither purely sacramental nor purely contractual in nature. The Hindu Marriage Act also sets out age of majority for girls at 18 years and boys at 21 years.

Christian marriages are also open to divorces and are governed by the Indian Divorce (Amendment) Act, 2001. If we look at the background of the former Act i.e. Indian Divorce Act 1869, we can see the clear transition from sacramental status to dissoluble contracts. Age of majority for both boys and girls for the purpose of marriage, under the Indian Christian Marriage Act, 1872, is uniformly set at 21 years of age.

Without currently delving in the aspect of minimum ages, it is absolutely clear from the above discussion, that marriages under these major Personal laws are either purely or partly contractual in nature. When we understand this in the light of the Indian Contract Act, 1872 it is perfectly plausible to say that a minor is not competent to give a free and valid consent for getting married.

The other aspect of these marriages being voidable and not void is that girls are often staying in an atmosphere of complete domination over them. The societal pressures are very strong. They do not know the law in most cases and when we review it either in the rural set-up or the slum areas of bigger cities or

---

280 HMA (n 278)
281 Basanth Tirunagar, ‘Enabling Justice to Christian Women in India – the issue of divorce’ <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?id=59a6ae72-53e3-4cd8-a620-38c292a1c6ee&txtsearch=Subject:%20Family%20Law> accessed on 15 December 2017 [“Christians in India belong to three different traditions i.e. (i) Roman Catholics, (ii) Protestants who are the followers of Church of South India (CSI) and Church of North India (CNI), and (iii) Syrian Christians, who are the followers of Greek Orthodox Churches. Apart from these, there are large numbers of Christians among various tribes in the North East region whose customs and traditions are protected by the Constitution. Among the three traditions, only the Roman Catholic Church considers marriage to be a sacrament and subscribes to the doctrine of indissolubility of marriage. The other two Churches namely the Protestant Churches as well as the Orthodox Churches do not have doctrinaire objection to divorce. The early Christian Church (the Eastern Orthodox Church of Syria, Greece etc.) permitted divorce. The theory of indissolubility was evolved later. By 12th century, the Roman Church formulated the Canon law regulating marriages and divorce among Christians in Europe. During the industrial era, the Protestant Reformists broke away from the Roman Catholic traditions. The French Revolution led to the separation of State and Church in France. In 1800 the French Civil Code (Napoleonic Code) changed marriages from a sacramental status to dissoluble contracts. The doctrine of separation of State and Church and marriages as dissoluble contracts spread all over Europe”]
the lower strata of society, these girls are not empowered to take vital decisions for their own lives. They’re taught from an early age to attune themselves according to what their husband’s want after getting married and that they must never think of leaving him. The girls are caught firmly in the web of these marriages once they start giving birth to children. They know that nobody would accept them if they thought of escaping the marriage on their own accord and with their children being born, they are susceptible even more to no acceptance and a life filled with no means of survival.

“I know that my husband has affairs outside our marriage. But what can I do? I don’t want to remain in this marriage but who would accept me? My parents will never take me back. I have two children. Who will take care of them? My husband does not allow me to work despite repeated requests. I wanted to support the Anganwadi workers but he does not want me to work. He hits me and tortures me.”

The Parliament Standing Committee in its report submitted prior to the enactment of the Prohibition of Child Marriage Act on the Prohibition of Child Marriage Bill had pointed that some of the researches and studies had shown that a girl child “has to suffer irreparable losses due to biological factors and inability to sustain pressure of marriage at an early age.” The Committee therefore was of the opinion and recommended that child marriages must be void ab initio. The Committee also pointed towards the major Conventions to reach this conclusion. They included the CEDAW and CRC. The convention document of the CEDAW explicitly says that the marriage of a child will have no legal effect. The CRC also besides

282 Original account of Shanta (name changed) from Jaipur, Rajasthan
284 ibid
285 CEDAW, Article 16(2)
prescribing age of a child i.e. 18 years goes further to provide that the child must be protected from all forms of physical and mental violence as well as sexual exploitation and abuse of any form.\textsuperscript{286} Since child marriages do, in many cases, lead to domestic violence it is undoubted that it is a form of child abuse as the girl involved as a contracting party to the marriage is a child. Health consequences of these marriages are detrimental to the girl’s health. Due to early motherhood, she herself along with her offspring becomes vulnerable to various health issues. It is for these reasons too that these marriages warrant a void \textit{ab initio} status.

5.3.6 \textit{Primacy of the PCMA over Personal Laws}

The PCMA does not explicitly provide in letter of its primacy over the Personal laws. This had led to a huge ambiguity being created and different courts took different views. Some applied the PCMA which makes child marriage voidable, while some decided cases based on the personal laws which hold the child marriages as completely valid and not voidable. People also chose freely the law they wanted to be governed by. Some of the State High Courts did in the recent past express in their judgements that PCMA would have primacy over the Personal laws. However, the Supreme Court thus far had not explicitly said in any of its judgments that PCMA would have primacy over the Personal laws. It is only recently in the \textit{Independent Thought} judgment that the Supreme Court has categorically mentioned that PCMA being a secular law would have primacy over the Personal Laws.\textsuperscript{287} In the words of Justice Lokur,

\begin{itemize}
\item Convention on the Rights of the Child (n 12)
\end{itemize}
“It is obvious that while making amendments to various laws, some laws are forgotten and consequential amendments are not made in those laws. After the PCMA was enacted both the Hindu Marriage Act, 1955 and the Dissolution of Muslim Marriages and Divorce Act, 1939 also should have been suitably amended, but this has not been done. In my opinion, the PCMA is a secular Act applicable to all. It being a special Act dealing with children, the provisions of this Act will prevail over the provisions of both the Hindu Marriage Act and the Muslim Marriages and Divorce Act, in so far as children are concerned.”

The Supreme Court in the landmark judgment has noted of the need to harmonize the personal laws with the PCMA which is a secular law. In the last decade, India has seen emergence of strong pro-child laws but not an amendment which is pro-child in the personal laws. Therefore, despite the Supreme Court’s decision as well as clarification of primacy of the PCMA over the Personal Laws, this lacuna of harmony is required to be cured.

5.3.7 Compulsory Registration of Marriage

The PCMA is silent on the registration of marriages which itself is a big flaw. When it makes these marriages voidable in nature i.e. valid until moved for annulment, it has loose ends when it comes to securing the proof of the marriage per se. It makes women vulnerable to abandonment with husbands claiming that their marriage never took place.

While ratifying the CEDAW, 1979, the Indian government had entered with two declaratory statements and one reservation. Of the two declaratory statements the second one pertained to compulsory registration of marriages.

---

288 Ibid para 19
which is contained in Article 16(2) of the Convention. Article 16(2) of the Convention says:

“2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”

The Declaratory statement reads as follows:

“With regard to Article 16(2) of the Convention, the Government of the Republic of India declares that though in principle it fully supports the principle of compulsory registration of marriage, it is not practical in a vast country like India with its variety of customs, religions and level of literacy.”

Compulsory registration of marriages in India is still in the state of unrest. There are efforts that have been made for registrations to become compulsory at State level. There is nevertheless no specific Central legislation which takes care of compulsory registration of marriages across the country.

In the year 2006, the landmark judgement of Seema vs. Ashwini Kumar delivered by the Supreme Court of India was an important step towards making marriages compulsory registrable in India. This was in the backdrop of light being thrown upon the fact that in many cases some unscrupulous people were denying the existence of their marriage itself and in the absence of any proof, it was extremely difficult to prove the same.

While pointing at List III of the Seventh Schedule in the Constitution of India, 1950 and specifically on entry 5 and entry 30, the Supreme Court

---

289 CEDAW, Article 16(2)
291 2006 (2) SCC 578
clarified that “the registration of marriages would come within the ambit of the expression ‘vital statistics’”. It further noted that “except four statutes applicable to States of Maharashtra, Gujarat, Karnataka, Himachal Pradesh and Andhra Pradesh registration of marriages is not compulsory in any of the other States”. The court also noted that there were Rules made by State Governments for the registration of marriages.

The Supreme Court also quoted the National Commission for Women which stated in its Affidavit that there must be a law on compulsory registration of marriages. The language contained within the affidavit was:

“That the Commission is of the opinion that non-registration of marriages affects the most and hence has since its inception supported the proposal for legislation on compulsory registration of marriages. Such a law would be of critical importance to various women related issues such as:

- prevention of child marriages and to ensure minimum age of marriage;
- prevention of marriages without the consent of the parties;
- Check illegal bigamy/polygamy;
- Enabling married women to claim their right to live in the matrimonial house, maintenance, etc.;
- Enabling widows to claim their inheritance rights and other benefits and privileges which they are entitled to after the death of their husband;
- Deterring men from deserting women after marriage;

292 ibid para 5
293 ibid para 15
• *Deterring parents/guardians from selling daughters/young girls to any person including a foreigner, under the garb of marriage.*”

The Supreme Court noting the above made a clear observation that “it would be in the interest of the society if marriages are made compulsorily registrable”

The court held that:

“Accordingly, we are of the view that marriages of all persons who are citizens of India belonging to various religions should be made compulsorily registrable in their respective States, where the marriage is solemnized.”

With this landmark judgement delivered by the Supreme Court, the States were spurred into action to enact their own compulsory registration of marriage laws and rules. What is however regretful is that the PCMA was not amended to bring it in harmony with the change in law.

The role of the Law Commission cannot be overlooked in attempting to push the same. Beginning from the year 2008, the 18th Law Commission of India in its 205th Report relating to proposed amendments that should be made in Prohibition of Child Marriage Act, 2006 recommended that registration of marriages within a stipulated period of all communities should be made mandatory by the Central Government.

Law Commission in its 211th Report again in the year 2008 based on the *Seema vs. Ashwini* judgement recommended the enactment of a “Marriage and Divorce Registration Act” which must be made applicable in the whole of India.

---

294 ibid para 13
295 ibid para 15
296 ibid para 17
and to all citizens irrespective of their religion and personal law and without any exceptions or exemptions. It also noted that:

“The administrative machinery for registration of marriages is not regulated everywhere by one and the same law. In different parts of the country it is regulated either by one of the three central laws – the Births, Deaths and Marriages Registration Act, 1886, the Registration Act, 1908 and Registration of Births and Deaths Act, 1969 – or by a local law, or a combination of both. This creates a lot of confusion with registration officials as well as people wanting or required to register their marriages. There was a tremendous diversity of laws relating to registration of marriages making it complicated and confusing.”

As noted by Law Commission in its recent 270th Report on compulsory registration of marriages, many States post the Supreme Court judgment enacted their own Compulsory Marriage Registration Laws.

These states include Punjab, Delhi, Haryana, Meghalaya, Uttarakhand, Rajasthan, Mizoram, Tamil Nadu among a few others.

---


299 ibid


301 ibid (The Punjab Compulsory Registration of Marriages Act, 2012 provides for compulsory registration of marriages solemnised within the State under any law governing the parties irrespective of their religion, caste, creed or nationality.)

302 ibid (The Delhi (Compulsory Registration of Marriage) Order, 2014 extends to all marriages solemnised in Delhi irrespective of cast creed and religion professed by the parties to the marriage.

303 ibid (The Haryana Compulsory Registration of Marriages Act 2008 provides for compulsory registration of marriages solemnised within the State, irrespective of caste, religion and creed and for matters connected therewith or incidental thereto)

304 ibid (The Meghalaya Compulsory Registration of Marriages Act 2012 provides for compulsory registration of marriages solemnised in the State of Meghalaya and for matters connected therewith; amended by the Meghalaya Compulsory Registration of Marriages (Amendment) Act, 2015)

305 ibid (The Uttarakhand Compulsory Registration of Marriage Act, 2010 provides for the compulsory registration of all marriages solemnised in the State of Uttarakhand so as to prevent child
There was a proposed amendment of 2012 to the Registration of Births and Deaths Act, 1969 to provide for compulsory registration of marriages. The Law Commission its report noted:

“In 2012, another Bill was prepared and thereafter tabled in the Parliament in view of the observations made by the Supreme Court in the aforementioned case. This Bill\(^{309}\) was introduced to amend the Registration of Births and Deaths Act, 1969 to provide for compulsory registration of Marriages irrespective of religious denominations of the parties.

The Amendment Bill of 2012 was passed by Rajya Sabha on 13.08.2013. However, the said Bill could not be taken up for consideration in the Lok Sabha and lapsed on the dissolution of the Fifteenth Lok Sabha on the 21st February, 2014. While considering the Bill on a reference from the Rajya Sabha, the Standing Committee hoped that the Bill would act as a milestone to protect women in matters of maintenance and property rights in addition to putting an effective check on bigamous relationships.”

---

\(^{306}\) ibid (The **Rajasthan Compulsory Registration of Marriages Act,2009**, wherein it is provided for Compulsory Registration of Marriages of citizens of India solemnised in the State.)

\(^{307}\) ibid (The **Mizoram Compulsory Registration of Marriages Act, 2007** provides for compulsory registration of marriages solemnised in the State of Mizoram, "marriage" includes all the marriages contracted by persons belonging to any caste, tribe or religion, and the marriages contracted as per any custom, practice or tradition, and also includes re-marriages.)

\(^{308}\) ibid (The **Tamil Nadu Registration Of Marriages Act,2009** :“Marriage” includes all marriages solemnised by persons belonging to any caste or religion under any law for the time being in force, or as per any custom or usage in any form or manner and also includes remarriage. Section 3 of the Act makes marriages compulsorily registrable.)

The Legislative Department, based on the earlier Bill, prepared a fresh Bill that is still on draft stage, on the Registration of Birth and Death (Amendment) Bill, 2015. This bill is due to be legislated upon.

5.4 Prohibition of Child Marriage (Karnataka Amendment) Act, 2016

There has been a recent State amendment to the PCMA which has been initiated by the state of Karnataka. It has elements which have been the need of the hour. The very forward looking as well as a revolutionary Act has been applauded for many reasons. These include:

1. It makes the child marriages void *ab initio*.
2. It provides for minimum punishment of one year of rigorous imprisonment for an offence committed under the Act.
3. Every Police Officer shall take suo moto cognizance of the offence committed under this Act in his jurisdiction. [New Section added]

It effectively cures the apparent defects in the parent Act which is the Prohibition of Child Marriage Act, 2006. It is however important to delve into understanding the implications of the various amendments that have taken place under the Act. Though there are going to be significant ways in which the Act would have the capacity to move the practise towards being abolished, however, there are still loose ends that haven’t been tightly secured. Once those are secured in a harmonious way, it is only then that this Act would be able to display its true potential.

5.4.1 Child Marriages are Void *ab initio*

Through the amendment, one of the major requirements of the parent Act has been fulfilled. There had been a long standing demand to make these marriages void *ab initio*. The reasons behind the same included:

---

310 It is still at draft stage and not finalised. Draft not available currently
• Marriages under the PCMA were voidable, which meant that they could be declared void only upon the victims moving to court for the purpose of having them annulled. These marriages were held perfectly valid upon being solemnized successfully. The girls involved as contracting parties have always been the weaker counterpart in the arrangement as they aren’t allowed to choose for themselves a life partner let alone even the thought of having their marriage annulled. The social pressures surrounding victims is very strong and therefore leads to very few marriages being annulled;

• The girls themselves lack the ability to take decisions in the absence of education as well as support from near and dear ones. The societal conditions and atmospheres are not conducive to their growth even if they opt to step out of their marriage;

• The time given under the PCMA to have the marriage annulled is minority and upto 2 years upon attaining majority. This time frame is too low. When looked practically, the girls while they are minors hardly have either a say or the maturity to take a decision about whether they want to have their marriage dissolved by way of annulment. The 2 years provision post attaining majority has been criticized for being not just unreasonable but also gender biased. The boys have the option to have their marriage annulled until they turn 23 years old;\footnote{PCMA 2006, s 3(3)}

• Many girls also couldn’t also take the route for annulment as, by the time they attained majority they were mothers to at least one child. With no or little education backed with no source of individual income, the girls are forced to stay in the abusive environment and accept their fate. They know that they outside of
their marriage they lack social and financial security and feel a greater sense of vulnerability.

Making these marriages void \textit{ab initio} means an attempt to secure the futures of all these girls until they attain majority. It saves the girls from being sexually and mentally exploited in the shackles of a marriage which she never chose to be a part of. Giving no legal validity to such marriages is also a step towards India moving in the direction of fulfilling its international commitments under the CEDAW.

There can on the other hand be situations where some people misuse this law. India is a country owns a large part of population that hails from the rural areas. These people are relatively far less informed and aware of the change in laws and are still capable of getting their girls married despite a law that immediately nullifies it or reduces it not happening at all or non-existential. The girls who get trapped in these marriages henceforth in Karnataka may become vulnerable to face a few repercussions:

- The husband can abandon her at any time saying that it was a child marriage and therefore void \textit{ab initio};
- The girl may be pregnant or having children and the husband may choose to abandon her on the pretext of child marriage as it is void \textit{ab initio};
- With the absence of registration of these marriages and with no proof of these marriages, the girls are vulnerable to the social stigmas and effects that she may be met with in the event that her husband decides not to stay with her.
Therefore it is important to secure the loose ends of this clause on void ab initio by providing adequately for the vulnerable girls in the event that situations mentioned above or not yet foreseeable arise.

5.4.2 Minimum Punishment

The amendment to the minimum punishment clause is a huge welcome step as it would ensure that those engaged in perpetuating the practice are seriously deterred from performing the same. A minimum punishment of one year of rigorous imprisonment is very positive to ensure that people understand the magnitude of the offence committed by them. The practise is primarily rooted in unshaken cultural norms and so far the PCMA has not made a huge dent in replacing those cultural norms with the rule of law. The strong amendment to the Karnataka PCMA is a ray of hope in this direction. It surely has the capacity to uproot this regressive social norm and bring into place the rule of law so that nobody who perpetuates this crime goes scot-free. It is important to have a series of cases and examples in society so that the families who participate in this social evil are compelled to become fearsome. A strong minimum punishment is therefore an answer to ensure that the practise is curbed as well as brought to a complete end as soon as possible.

5.4.3 Suo moto cognizance by the Police

The new section added to the Karnataka PCMA on suo moto cognizance by the Police is another very important step towards securing the effective implementation of the Act. The police did not have unfettered power to interfere in these marriages unless they received a report from someone. With this provision they have been empowered to take suo moto cognizance of the offence. This will add to the responsibility of the Police too, to ensure that no girl in their jurisdiction is victimised to this practise.
5.5 Conclusion

The legislative movement against child marriages has been slow. The Child Marriage Restraint Act, 1929 which was a British Colonial law was the first step that was achieved in the pre-independence era towards the ending of this practise. Though ineffective both in letter as well as implementation, it was definitely a very significant step towards the recognition of child marriage as a social problem. The Act inherently created biasness and which has somehow remained to this day when there has been not alone a change in the way the world functions but a change in the century itself that we’re living in. The laws relating to children must be gender neutral to ensure that children are not discriminated and devoid of their basic rights as humans. When law itself created inequality then real equality will only remain a distant dream.

The PCMA has been a positive step in the change of century. The 2006 legislation brought with it some major changes in the legislative view of these marriages. They included making child marriages voidable, increasing the punishment and penalty etc. These positive changes did bring about a change not alone in the law but the incidence rate of these marriages also decreased in the last decade. However, it is debatable whether law was alone the reason for decline in these marriages. While it has contributed in a significant way, other important factors such as education, improved conditions of living, awareness and grass-root efforts have played very important roles. The above discussion has thrown light upon the issues that have still remained unaddressed. Towards the same legislative efforts must be made to amend the parts which are still impediments in the complete end of this practise. The Karnataka Amendment to the PCMA is a model worth being incorporated into the parent Act of the PCMA.
The girls vulnerable today i.e. those who are below the age of 18 years are all born in the 21st century i.e. born in the year 2000 or after. They deserve an India free of this social evil.

*~ *~ *~*