CHAPTER - 6

CONTRADICTIONS TO CONSISTENCY: A REVIEW OF LAWS, JUDICIAL PRECEDENTS AND RECENT DEVELOPMENTS TO ADDRESS THE ISSUE OF CHILD MARRIAGE

“The childhood of a person is precious. On the child attaining the age of majority, anything may be given to it like the job, house, husband/wife; but what cannot be got back is its precious childhood. What is therefore of paramount importance is that the child should fully enjoy his/her childhood before entering the wedlock. More often than not, it is the girl’s happy childhood that would ensure a happy wifehood and happy motherhood. In whatever form it is, the child marriage is a gross violation of human rights of a girl or boy.”

Child marriage is not alone a social evil but a heinous cause that adds to the misery of many women who become victims to it as young girls. It is a human rights violation and a clear disregard to the safe and happy childhood of many children. They’re forced to live lives which they have seen the adults of the house live and at an age when they haven’t even understood their own selves. It is also a form of gender based violence because girls are usually the ones that fall prey to it compared to boys.

Law itself has undertaken a great journey with respect to this practise. From the Rukhmabai and Phulmonee cases to the enactment of the very first law against child marriage i.e. The Child Marriage Restraint Act, 1929 leading to further development and amendments resulting in the subsequent enactment of The Prohibition of Child Marriage Act, 2006. The journey that has been

312 Seema Begaum vs. State of Karnataka [ILR 2013 KARNATAKA 1659]
travelled has seen the changes in attitudes, the transformation in legislative intent, the growth of understanding of peculiar issues faced by child brides and finally an acknowledgement of the same. The recent Independent Thought judgement\textsuperscript{313} among many others is a testament to this acknowledgment. This judgement is unique for many reasons, one of which is that it has been pronounced by the Supreme Court of India.

Despite the development in law with respect to child marriage, there is scope for much more work that needs to be done for bringing this practise to a complete end. There are gaps that still need attention. There are other laws pertaining to women and children that need to be discussed within the narrow context of child marriages. There is a definite need to harmonise laws that directly or indirectly relate to this practise for its complete elimination.

6.1 Child Marriage and Constitution of India

The Constitution of India guarantees fundamental rights to all citizens of India. They are basic human rights that every citizen enjoys. These citizens include girls and women too. However, the practise of child marriage itself acts to violate the rights that are fundamental to girls and women. It amounts to gender discrimination, denial of dignity and liberty and the resultant chain of harm that is met with including violence and reproductive health risks. It violates the following rights that are enshrined within the Constitution:

a) Right to life and personal liberty;

b) Non-discrimination and Equality;

c) Free and Compulsory education between ages 6 to 14 years; and

d) Freedom from Forced Labour and Exploitation.

Right to Life and Personal liberty as enshrined in Article 21 of the Constitution is very broad and far reaching and the courts in India have from

\textsuperscript{313} \textit{Independent Thought vs. Union of India} [2017(12)SCALE621]
time to time attempted to bring more rights under its umbrella shelter. The ones that protect against child marriage and fall within the ambit of Article 21 include:

— right of children to protection from abuse;\(^{314}\)
— right to freedom from torture and cruel, inhuman, and degrading treatment;\(^{315}\)
— right to health,\(^{316}\) reproductive health, and survival of pregnancy and child birth;\(^{317}\)
— right to autonomy, dignity, and reproductive rights;\(^{318}\) and
— right to privacy, which encompasses protection of the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing.\(^{319}\)

When we see child marriage from the constitutional lens, a picture of blatant violations is visible. One can see that all these rights listed above are violated in the case of a child marriage. It is clear from facts, figures and all available data that girls are more often victims to this practise and therefore they are not treated equally to boys of their own age. The girls are devoid of their right to pursue education, live with dignity and integrity. Upon being married as a child, they lose the autonomy over their bodies as well as their reproductive health. They are the worst receivers because of a cycle of constant pregnancies for want of a male child to please the family. Right to health is heavily compromised on that account and there are higher rates of infant mortality in women who give birth on account of early pregnancies. Studies also show that

\(^{314}\) Francis Coralie Mullin v. The Administrator, Union Territory of Delhi [(1981) 2 SCR 516]
\(^{315}\) ibid
\(^{316}\) Paschim Bangal Khet Mazdoor Samity & Others v. State of West Bengal & Ors. [(1996) 4 SCC 37]
\(^{318}\) Suchitra Srivastava & Anr. v. Chandigarh Administration [(2009) 11 SCC 409]
child brides are more likely to experience domestic violence, torture, cruel as well as inhuman treatment because they are much more vulnerable that women who get married in adulthood.

In 2015, the Madras High Court in one of its judgements recognised that child marriage is inconsistent with girls’ interests as protected under the constitutional rights to life and equality and non-discrimination as well as the Directive Principles of State Policy.320

In the recent report321 (2017) published jointly by the organisation Young Lives and National Commission for the Protection of Children, it is stated:

“Looking at the impact of early marriage from rights perspective, it can be said that the key concerns are denial of childhood and adolescence, curtailment of personal freedom, deprivation of opportunities to develop a full sense of selfhood and denial of psychosocial and emotional well-being, reproductive health and educational opportunity along with consequences described earlier.”322

6.2 Child Marriage and Juvenile Justice (Care and Protection of Children) Act, 2015

The recent Juvenile Justice Act 2015 also has established mechanism under it that are procedural in nature and which aid in providing legal protection and remedies in the case of child marriage. For the purpose of care, protection, treatment, development and rehabilitation of children recognised as “children in need of care and protection” and to ensure their basic needs and protection, the Act mandates the State Governments to establish Child Welfare Committees

320 M. Mohamed Abbas vs. The Chief Secretary, Government of Tamil Nadu and Ors. [MANU/TN/2377/2015]
321 Young Lives (n 9)
322 ibid
These Committees are assigned the task of disposing cases that relate to above stated purposes. The Juvenile Justice Act recognises children who are at “imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnization of such marriage” as children in need of care and protection. The Act does not mention of married girls per se but does recognize the children at risk of abuse, neglect, or exploitation as children in need of care and protection. Under the provisions of the Act, upon receiving information of a child in need of care and protection, the committee members of the Child Welfare Committee is mandated to hold an inquiry and may pass an order to send the child to a children’s home. The child may alternatively be sent to a “fit facility”, or a “fit person” and directions by the CWC may be given with regards to counselling, medical attention, legal aid, skills training, educational services, and other developmental activities. This order is subject to taking into account the right of the child to be heard and participate in the proceedings. The provisions of the Act guaranteeing shelter to children in need of care and protection has been used and cited by many courts for the purpose of dealing with cases wherein married girls wanted to return to their parents’ home. As another option, they were sent to State children’s home. However, the government shelter homes are usually in a deplorable condition lacking basic facilities. Besides, at these shelter homes children are at risk of being exploited, which adds to the court’s reluctance to send girls to these homes.

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323 Juvenile Justice (Care and Protection of Children) Act, 2015, s 28(4)
324 ibid
325 Juvenile Justice (Care and Protection of Children) Act, 2015, s 2(14)
326 ibid
327 Juvenile Justice (Care and Protection of Children) Act, 2015, s 3 and s 37
328 T. Sivakumar v. Inspector of Police [(2011) 4 MLJ (Crl.) 315]
330 Court on its own Motion (Lajja Devi) v. State [MANU/DE/3556/2012]
This leaves no option or lack of viable options except to stay within the confines of the marriage.

6.3 Child Marriage and Protection of Women from Domestic Violence Act, 2005 (PWDVA 2005)

A careful analysis of the law on domestic violence would reveal its inability to protect child brides. If we engage in a careful reading of the provisions of the Protection of Women from Domestic Violence Act, 2005 we would find that the law is inadequately laid out for these children. Delving into the definitions provided by the Protection of Women from Domestic Violence Act, 2005\(^{331}\), it becomes particularly noteworthy to highlight sections 2(a) and 2(b). These two sections starkly bring out the legislative silence on the inclusion of child brides within the ambit of this legislation. Section 2(a) defines “aggrieved person” under the Act.\(^{332}\) The definition is limited in its scope to the extent that it takes into account women and not married girls below the age of 18 years. It is important to reiterate that the Prohibition of Child Marriage Act, 2006 does not make the concluded child marriages void but instead gives them the status of voidable. Therefore they are valid marriages in the eyes of the law unless either party moves to the court to get the same annulled. Section 2(b) defines “child” under the Act.\(^{333}\) It has been careful of including not just a child which is one’s own but also the other categories by which a child receives care and parentage. However, the definition does not include child brides. The girls are minor too when we see from the age of attainment of majority but they cannot be said to fall within the category of own children. Child brides are a separate cohort for they are neither “women” nor “children” as per the

\(^{331}\) Protection of Women from Domestic Violence Act, 2005 (Act 43 of 2005)
\(^{332}\) PWDVA 2005, s 2(a) (“aggrieved person” means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent)
\(^{333}\) PWDVA 2005, s 2(b) (“child” means any person below the age of eighteen years and includes any adopted, step or foster child)
definition in the Act. Now reading the two definitions from the Protection of Women from Domestic Violence Act, 2005 along with the Prohibition of Child Marriage Act, 2006 it would not be incorrect to arrive at a finding that the former does not squarely cover child brides. It is bent towards advocating for women alone and not child brides.

A review of high court judgements further reveals that PWDVA has not been raised in cases relating to child marriage. Moreover, courts have failed to recognise child marriage itself as a form of domestic violence. This is despite the fact that there is enough evidence to show how various forms of violence are linked to child marriage. As a consequence, married girls seeking to avail of protections available under PWDVA in addition to the ones provided under the PCMA face a double burden of substantiating both their age at marriage as well as ongoing violence within such marriages. The absence of a judicial ruling on applicability of PWDVA to cases of child marriage means that the protection mechanisms created under the PWDVA are not available to victims of child marriage. A clear inter-linkage between these two statutes i.e. PWDVA and PCMA is missing and needs to be established.

6.4 Child Marriage and Personal Laws

There is a huge lacuna in the PCMA with respect to non-inclusion of a notwithstanding provision with respect to personal laws. The absence of a pronounced primacy has for a long period created ambiguity in the implementation and applicability of the law. It does not talk about personal laws except the modification of punishments under the Hindu Marriage Act, 1955. The ambiguities have been with regards to minimum age of marriage, status of child marriage, right of married girls to dissolve such a marriage, and the remedies that are available to them. This ambiguity caused some cases to be

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334 CRR and SAIEVAC Regional Secretariat, ‘Ending Impunity for Child Marriage in India’ (not available online)
decided placing the primacy of personal laws over the PCMA but the trend changed in the recent judgements of different high courts pronouncing in favour of the primacy of the PCMA. In 2013, the Karnataka High Court clarified the PCMA over the personal laws including Muslim girls. The court held:

“No Indian citizen on the ground of his belonging to a particular religion can claim immunity from the application of the P.C.M. Act. The Legislature has not left anything to implication or interpretation as far as the application of P.C.M. Act is concerned.”

On the ambiguity in various laws and the recognition of these marriages under different laws, the Delhi High Court in *Court on its own Motion (Lajja Devi) v. State* observed:

“Legislative endorsement and acceptance which confers validity to minor's marriage in other statutes definitely destroys the very purpose and object of the PCM Act to restrain and to prevent the solemnization of Child Marriage. These provisions containing legal validity provide an assurance to the parents and guardians that the legal rights of the married minors are secured. The acceptance and acknowledgement of such legal rights itself and providing a validity of Child Marriage defeats the legislative intention to curb the social evil of Child Marriage.”

In the recent landmark judgement of 2017 delivered by the Supreme Court of India, this ambiguity has been resolved wherein the court has held

“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

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335 Seema Begaum vs. State of Karnataka [ILR 2013 KARNATAKA 1659]  
336 MANU/DE/3556/2012  
337 ibid  
338 Independent Thought vs. Union of India [2017(12)SCALE621]
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.”

This pronouncement by the Supreme Court of India is it’s very first and clarifies on this specific aspect which had remained in a grey area for over a decade.

6.5 Child Marriage and Human Trafficking

Child-bride trafficking in India often operates under the trained radars of human rights organizations, both within and outside the country. This is one form of trafficking that is very difficult to crack down. Marriage is considered one of the easiest modes employed by the traffickers to send young girls from one place to another. In the rural village set-up, there is a stigma attached to single women. If she doesn’t get married, it is a cause of great concern as well as embarrassment to the family. Banking upon this helplessness and vulnerability, the traffickers approach the parents of these young girls to negotiate i.e. they bring a marriage proposal and offer a cash reward to them of say Rs. 3,000 or Rs.5000 or more in order to get them to agree for the same. They make it lucrative enough so that the parents do not reject the same. After the wedding the girl is sold and resold till she reaches her final destination. This form of trafficking is usually easier because it protects both the husband as well as the recruiter because they are able to escape the initial accusations of

339 ibid para 19
It is not an unknown reality that a plethora of cases exist on cross border trafficking with marriage as a means. Traffickers give false promises of employment or arrange sham marriages in India or Gulf States and use the same as a means to subject women and girls to sex trafficking. Even within India, the reality is the same.

Commenting on the nature of child marriages as a form of trafficking, Mr. Kailash Satyarthy wrote:

“Child marriage perpetuates the exploitation of health, rights and body of adolescent girls. This treatment of young girls is viewed as separate from human trafficking but in reality, it is a form of trafficking. I say this because child brides have no say in the arrangement and become the property of the man they are married to, who more often than not, makes a trade out of the circumstance and innocence of the young girl.”

The new Anti-trafficking law is soon expected to be passed by the Parliament. It is The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill 2017. The proposed amended law on trafficking serves to provide a working structure to the recently included Section 370 and 370A by way of the Criminal Law (Amendment) Act, 2013. The proposed Bill also adds new offences with respect to aggravated forms of trafficking and makes the punishments severe. The PCMA expressly declares null and void those child marriages that are for the purpose of trafficking.

341 Mr. Kailash Satyarthi is a Nobel Peace Laureate and the founder of Bachpan Bachao Andolan. Also see Kailash Satyarthi, ‘Child marriage is a form of human trafficking’ (Hindustan Times, 09 January 2017) <http://www.hindustantimes.com/opinion/child-marriage-is-a-form-of-human-trafficking/story-ZJ2xagwRLTd3sQe8XwNRSP.html> accessed 16 July 2017
342 PCMA, s 12
6.6 Child Marriage and POCSO, 2012

The Protection of Children from Sexual Offences Act, 2012 is a recent piece of legislation which addresses and protects children who are victimised to sexual abuse. It has been lauded for being comprehensive in nature as well as punitively harsh so that it deters offences against children.

Post the Criminal Law (Amendment) Act, 2013 the age of giving a valid consent for sexual intercourse was increased from 16 years to 18 years. An amendment to the IPC (Indian Penal Code) was effected in its Section 375. However, Exception 2 of this Section was kept intact. The exception states that sexual intercourse or sexual acts by a man with his own wife, the wife not being under 15 years of age, does not constitute rape.\(^\text{343}\) Law created an unfair distinction between girls married and those unmarried between the ages of 15 years to 18 years with no explanation. This discrimination was based only on the premise of being married or not.

There was also an apparent inconsistency in the IPC on this point and POCSO. The POCSO is applicable to all children, who by definition, is anyone who is under the age of 18 years. The Act enforces the rights of all children to safety, security and protection from sexual abuse and exploitation. If we examine Section 5 of the POCSO, it states that whoever in a shared household with the child commits penetrative sexual assault is said to have committed aggravated penetrative sexual assault or rape. Upon a conjoint reading of the provisions under the IPC and POCSO, it is noticeable that POCSO will apply to cases where the victim is below 15 years of age and married. The husband will not be able to claim immunity. However, the 15-18 years age group girls had an undecided fate in the case that they were married. They would otherwise be guaranteed protection, however, with the IPC’s exception, law itself created a

\(^{343}\) IPC, s 375 (Exception 2)
niche for them to be sexually exploited just because they were married as children and therefore had no recourse.

This inconsistency was recently resolved by the Supreme Court verdict (2017) in the Independent Thought judgement.\(^{344}\) The Supreme Court read down the Exception 2 of Section 375 of the Indian Penal Code that created an artificial and unjustifiable distinction in the rights of the girl children between the ages of 15-18 years who were being raped within the confines of marriage. The court essentially recognised marital rape within prohibited child marriages.

The Supreme Court noted saying:

“Another aspect of the matter is that the POCSO was enacted by Parliament in the year 2012 and it came into force on 14th November, 2012. Certain amendments were made by Criminal Law Amendment Act of 2013, whereby Section 42 and Section 42A, which have been enumerated above, were added. It would be pertinent to note that these amendments in POCSO were brought by the same Amendment Act by which Section 375, Section 376 and other sections of IPC relating to crimes against women were amended. The definition of rape was enlarged and the punishment under Section 375 IPC was made much more severe. Section 42 of POCSO, as mentioned above, makes it clear that where an offence is punishable, both under POCSO and also under IPC, then the offender, if found guilty of such offence, is liable to be punished under that Act, which provides for more severe punishment. This is against the traditional concept of criminal jurisprudence that if two punishments are provided, then the benefit of the lower punishment should be given to the offender. The legislature knowingly introduced Section 42 of POCSO to protect the interests of the child. As the objects and reasons of the POCSO show, this Act was enacted

\(^{344}\) Independent Thought vs. Union of India [2017(12)SCALE621]
as a special provision for protection of children, with a view to ensure that children of tender age are not abused during their childhood and youth. These children were to be protected from exploitation and given facilities to develop in a healthy manner. When a girl is married at the age of 15 years, it is not only her human right of choice, which is violated. She is also deprived of having an education; she is deprived of leading a youthful life. Early marriage and consummation of child marriage affects the health of the girl child. All these ill effects of early marriage have been recognised by the Government of India in its own documents, referred to hereinabove."

Therefore, with this landmark judgement the Supreme Court has brought clarity on the long standing issue of recognising marital rape within prohibited child marriages. What is however still pending is the recognition that child marriage itself is a form of violence against children and therefore a warranted need for it to be declared void ab initio.

### 6.7 Child Marriage and Custody of Married Girls

The issue of custody of the married girls arises in cases of self-initiated child marriages. The parents are usually seen walking the court aisle to seek custody of their daughter being the lawful guardians. The courts have, on the basis of circumstances of each case, have held either of the following:

- that the custody of the girl belongs to her parents irrespective of her wishes as in the case of Pratapa Ram v. State346, or
- have treated her wishes as paramount and therefore allowed her to continue staying with her husband as in the cases of G.Saravanan v. The

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345 ibid
346 RLW2013(1)Raj1
Commissioner of Police\textsuperscript{347}, Bholu Khan v. State of NCT of Delhi\textsuperscript{348} and Sh. Jitender Kumar Sharma v. State and Anr.\textsuperscript{349}, or

- have allowed the couple to stay together but not allowed them to consummate their marriage as in the case of Court On Its Own Motion (Lajja Devi) v. State\textsuperscript{350}, or lastly

- handed over the custody of the girl to a government shelter home irrespective of the wishes of the married girl as in the case of T. Sivakumar v. The Inspector of Police\textsuperscript{351}.

The guardianship and custody of married girls is regulated by the Guardianship and Wards Act (GAWA), applicable to Muslims, Christians and Parsis; and Hindu Minority and Guardianship Act (HMGA) which is applicable to Hindus. Both the legislations are understood to say that the husband is the wife’s guardian even if they are both minors, unless he is pronounced unfit by a court. Both these laws also contradict the PCMA in as much as the latter treats an adult man entering into marriage as a criminal.

Courts have nevertheless considered additional factors in making this determination. In Court On Its Own Motion (Lajja Devi) v. State the decision of the court stated that with respect to girls over the age of 15 years, the court’s decision should depend on a variety of factors that include her level of maturity and her knowledge of understanding the consequences of her actions as well as the attitude of the families or parents. The court went on to say that it would be preferable to order the girl to stay with her parents unless there are “sound and good” reasons in which case the court may direct otherwise. The court further added that the husbands should not be permitted to consummate the marriage with the minor girls, for it goes against the object of the PCMA and says that

\textsuperscript{347} MANU/TN/2649/2011
\textsuperscript{348} MANU/DE/0341/2013
\textsuperscript{349} 171(2010)DLT543
\textsuperscript{350} MANU/DE/3556/2012
\textsuperscript{351} (2011) 4 MLJ (Cr.) 315
children are neither physically nor psychologically ready to get married. Moreover, the court noted that if the girl got pregnant then it would become an impediment in her exercising the choice of annulling her marriage because of heavier socio-economic barriers.\textsuperscript{352} In the cases where the courts have refrained from handing the custody of the girl to the husband, the primary concern has been the consummation of marriage before the girl turns 18 years as well as her valid consent to the marriage. The issue of pregnancy and consequent socio-economic barriers on voiding the marriage have also been considered. The cases in which the marriages have been declared void, the custody of the minor girl has wither been handed over to the parents or to the shelter homes.

The intersection of GAWA, Juvenile Justice Act and PCMA is worth noting at this point. Some courts have used Section 17 and 19 of the GAWA to say that the husband of the girl is her natural guardian, while some have treated the girl as Child in Need of Care and Protection (CNCP) under the Juvenile Justice Act, and yet others have refused to use the JJA where the girls have a fit guardian, irrespective of her wishes. Instances where the girl’s opinion is not considered can lead to situations where they may be returning to their parents place however, that could be an unsafe option over a shelter home.

Therefore there is a lacuna in the JJA in identifying married minor girls as CNCP as well as lack of consistent jurisprudence in applying the JJA to the cases of child marriage despite the risk of violence being inflicted upon these girls within marriages.

\textbf{6.8 Judicial Trend- Contradictions to Consistency}

Rukhmabai’s case, as discussed in the earlier chapter, was the stir that led to the emergence of the thought that child marriage could be an offence. Marriage was considered to be a one-sided decision making process with little

\textsuperscript{352} MANU/DE/3556/2012
or no involvement of the woman’s interest. Rukhmabai became the first lady who at a tender age refuted to go and stay with her husband to whom she was married when she was 11 years old.\(^{353}\) To the Privy Council too, this was a very bold and unheard proposition where she spoke about the fact that she did not consent to the wedding. Although the case was settled out of court, it became a starting point for debate with many people supporting Rukhmabai too. This was followed by Phulmonee’s case wherein forced sexual intercourse with a little girl Phulmonee by her husband caused irreparable injuries and she bled to death. These cases backed by activism for rights of the children led to the enactment of the first law on child marriage i.e. The Child Marriage Restraint Act, 1929.

The Child Marriage Restraint Act, 1929 was also an empty letter. It did not contribute in any considerable way in the reduction of child marriages. There were very few convictions under the CMRA too. The courts were seemingly reluctant to find adults guilty under the Act. Under the CMRA, child marriage was upheld to be valid in many judgements like:

- **Durga Bai vs. Kedarmal Sharma**\(^{354}\),
- **Shankerappa v. Sushilaba**\(^{355}\),
- **Smt. Lila Gupta v. Lakshmi Narain and others**\(^{356}\),
- **Rabindra Prasad v. Sita Das**\(^{357}\),
- **William Rebello v. Angelo Vaz**\(^{358}\),
- **Neetu Singh v. State and others**\(^{359}\), and


\(^{354}\) 1980(Vol. VI) HLR 166

\(^{355}\) AIR 1984 Karnataka 112

\(^{356}\) (1978)3 SCC 258

\(^{357}\) AIR 1986 Pat 128

\(^{358}\) AIR 1996 Bom 204

\(^{359}\) 1999 ( 49 ) DRJ 70
The old CMRA further prohibited complaints after a year of marriage which made the prosecutions under the Act very difficult. Though the law itself was present but it failed to have an impact that it should have had. The Act also created a difference in age of girls and boys when defining age of majority for the purpose of marriage. The threshold for boys was always kept higher than girls. This inequality has been heavily debated to be rooted in gender stereotypes and which further perpetrates the occurrence of these marriages. Sadly this difference has continued to exist in defining majority for boys and girls.

The Prohibition of Child Marriage Act, 2006 was a big sigh of relief. The Act was able to amend the shortfalls that existed in the former CMRA. The PCMA increased the penalties and punishments which was a welcome step. There were also certain categories introduced wherein the marriage was declared null and void. Child marriages by themselves have still continued to retain their nature and status of voidable under the law. The minor who is married has the right to have his/her marriage annulled till he/she attains majority and an additional period of 2 years post attaining majority. Besides these, there are other provisions too that were inserted in favour of the girl child, example, maintenance etc.

Despite these efforts, child marriages have continued to plague the Indian society. The reasons for the same have been multi-fold and multi-dimensional. The PCMA has also had its own set of failures. One of the most arguable points has been that it makes child marriage voidable and not void ab initio. It has also been criticized for not inserting a section on its primacy over the Personal laws. The law also does not provide for compulsory registration of marriages which

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360 (Delhi) 2006 (1) RCR (Criminal) 41]
can be a contributor for this practise to be eliminated. To cure the same, in *Seema vs. Ashwini Kumar*\(^{361}\) the Supreme Court noted:

“If the record of marriage is kept, to a large extent, the dispute concerning solemnization of marriages between two persons is avoided. As rightly contended by the National Commission, in most cases non registration of marriages affects the women to a great measure. If the marriage is registered it also provides evidence of the marriage having taken place and would provide a rebuttable presumption of the marriage having taken place. Though, the registration itself cannot be a proof of valid marriage per se, and would not be the determinative factor regarding validity of a marriage, yet it has a great evidentiary value in the matters of custody of children, right of children born from the wedlock of the two persons whose marriage is registered and the age of parties to the marriage. That being so, it would be in the interest of the society if marriages are made compulsorily registrable.

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.”\(^{362}\)

The court thereby gave a direction to the Central and State government to make rules and notify them for making registration of marriages compulsory. This however, even after a decade of the judgement, has not been implemented in full. The Central bill on Compulsory registration of marriages has not yet been passed. This Bill was introduced in order to amend the Registration of Births and Deaths Act, 1969 to provide for compulsory

\(^{361}\) (2006) 2 SCC 578

\(^{362}\) ibid
registration of marriages irrespective of the religious backgrounds that the parties to the marriage.363

According to the Law Commission 270th Report:

“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.”364

The Legislative Department based on the earlier Bill thereupon prepared a fresh draft Bill on the Registration of Birth and Death (Amendment) Bill, 2015.365 This bill is due to be legislated upon.

Under the CMRA, the marriages were often held perfectly valid. The judiciary took mixed views when implementing the PCMA. While one approach was to treat the marriage as void as in the cases of Pratapa Ram v. State366 and Amnider Kaur v. State of Punjab and Others367, the other approach was “valid though voidable” as held in the cases of G.Saravanan v. The Commissioner of Police368 and Bholu Khan v. State of NCT of Delhi and Others369. Another approach which is a more constrained view of “voidable but

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365 ibid
366 RLW2013(1)Raj1
367 MANU/PH/1115/2009
368 MANU/TN/2649/2011
369 MANU/DE/0341/2013
not valid” was taken in *T. Sivakumar v. Inspector of Police*\(^{370}\) wherein the Madras High Court held:

“The marriage contracted by a person with a female of less than 18 years is voidable and the same shall be subsisting until it is annulled by a competent Court under Section 3 of the Prohibition of Child Marriage Act. The said marriage is not a “valid marriage” strict sensu as per the classification but it is “not invalid”. The male contracting party shall not enjoin all the rights which would otherwise emanate from a valid marriage stricto sensu, instead he will enjoin only limited rights.”\(^{371}\)

During the last decade of the PCMA, many decisions of different courts were rooted in the recognition that child marriage is a gross human rights violation. The purpose of the enactment of the PCMA has been discussed in the judgement rendered by the Delhi High Court in *Association for Social Justice & Research v. Union of India & others*\(^{372}\), the Court has discussed the arguments put forth by Sociologists on the issue in the following words:

“Sociologists even argue that for variety of reasons, child marriages are prevalent in many parts of this country and the reality is more complex than what it seems to be. The surprising thing is that almost all communities where this practice is prevalent are well aware of the fact that marrying child is illegal, nay, it is even punishable under the law. NGOs as well as the Government agencies have been working for decades to root out this evil. Yet, the reality is that the evil continues to survive. Again, sociologists attribute these phenomenon of child marriage to a variety of reasons. The foremost amongst these reasons are poverty, culture, tradition and values based on patriarchal norms. Other reasons are: low-level of

\(^{370}\) (2011) 4 MLJ (Crl.) 315
\(^{371}\) ibid
\(^{372}\) MANU/DE/4335/2010
education of girls, lower status given to the girls and considering them as financial burden and social customs and traditions. In many cases, the mixture of these causes results in the imprisonment of children in marriage without their consent.

The present case is a telling example, which proves the sociologists correct.

The purpose and rationale behind the Prohibition of Child Marriage Act, 2006 is that there should not be a marriage of a child at a tender age as he/she is neither psychologically nor physically fit to get married. There could be various psychological and other implications of such marriage, particularly if the child happens to be a girl. In actuality, child marriage is a violation of human rights, compromising the development of girls and often resulting in early pregnancy and social isolation, with little education and poor vocational training reinforcing the gendered nature of poverty. Young married girls are a unique, though often invisible, group. Required to perform heavy amounts of domestic work, under pressure to demonstrate fertility, and responsible for raising children while still children themselves, married girls and child mothers face constrained decision making and reduced life choices. Boys are also affected by child marriage but the issue impacts girls in far larger numbers and with more intensity. Where a girl lives with a man and takes on the role of caregiver for him, the assumption is often that she has become an adult woman, even if she has not yet reached the age of 18. Some of the ill-effects of child marriage can be summarized as under:

(i) Girls who get married at an early age are often more susceptible to the health risks associated with early sexual initiation and childbearing, including HIV and obstetric fistula.
(ii) Young girls who lack status, power and maturity are often subjected to domestic violence, sexual abuse and social isolation.

(iii) Early marriage almost always deprives girls of their education or meaningful work, which contributes to persistent poverty.

(iv) Child Marriage perpetuates an unrelenting cycle of gender inequality, sickness and poverty.

(v) Getting the girls married at an early age when they are not physically mature, leads to highest rates of maternal and child mortality.

Young mothers face higher risks during pregnancies including complications such as heavy bleeding, fistula, infection, anaemia, and eclampsia which contribute to higher mortality rates of both mother and child. At a young age a girl has not developed fully and her body may strain under the effort of child birth, which can result in obstructed labour and obstetric fistula. Obstetric fistula can also be caused by the early sexual relations associated with child marriage, which take place sometimes even before menarche. Child marriage also has considerable implications for the social development of child brides, in terms of low levels of education, poor health and lack of agency and personal autonomy.

The Forum on Marriage and the Rights of Women and Girls explains that „where these elements are linked with gender inequities and biases for the majority of young girls... their socialization which grooms them to be mothers and submissive wives, limits their development to only reproductive roles. A lack of education also means that young brides often lack knowledge about sexual relations, their bodies and reproduction, exacerbated by the cultural silence surrounding these subjects. This denies the girl the ability to make informed decisions about sexual relations, planning a family, and her health, yet another example of their lives in which they have no control. Women who marry early are more likely to
suffer abuse and violence, with inevitable psychological as well as physical consequences. Studies indicate that women who marry at young ages are more likely to believe that it is sometimes acceptable for a husband to beat his wife, and are therefore more likely to experience domestic violence themselves. Violent behaviour can take the form of physical harm, physical harm, psychological attacks, threatening behaviour and forced sexual acts including rape. Abuse is sometimes perpetrated by the husband’s family as well as the husband himself, and girls that enter families as a bride often become domestic slaves for the in-laws. Early marriage has also been linked to wife abandonment and increased levels of divorce or separation and child brides also face the risk of being widowed by their husbands who are often considerably older. In these instances, the wife is likely to suffer additional discrimination as in many cultures divorced, abandoned or widowed women suffer a loss of status, and may be ostracized by society and denied property rights.

The Prohibition of Child Marriage Act has been enacted keeping in view the aforesaid considerations in mind."373

The year 2017 saw some phenomenal changes taking place around the issue of child marriage. The Independent Thought v. Union of India judgement passed by the Supreme Court of India, which shall be discussed henceforth, is the first judgement by the highest court in deciding some of the key issues pertaining around the issue of child marriage. Some of the key ingredients of this judgement include the recognition of marital rape within prohibited child marriages as well as an establishment of primacy of the PCMA over all religion based personal laws.

373 ibid Para 6,7,9 and 10
The court while commenting on the pro-child legislations that currently exist noted that:

“It is obvious from a brief survey of the various statutes referred to above that a child is a person below 18 years of age who is entitled to the protection of her human rights including the right to live with dignity; if she is unfortunately married while a child, she is protected from domestic violence, both physical and mental, as well as from physical and sexual abuse; if she is unfortunately married while a child, her marriage is in violation of the law and therefore an offence and such a marriage is voidable at her instance and the person marrying her is committing a punishable offence; the husband of the girl child would be committing aggravated penetrative sexual assault when he has sexual intercourse with her and is thereby committing a punishable offence under the POCSO Act. The only jarring note in this scheme of the pro-child legislations is to be found in Exception 2 to Section 375 of the IPC which provides that sexual intercourse with a girl child between 15 and 18 years of age is not rape if the sexual intercourse is between the girl child and her husband. Therefore, the question of punishing the husband simply does not arise. A girl child placed in such circumstances is a child in need of care and protection and needs to be cared for, protected and appropriately rehabilitated or restored to society. All these ‘child-friendly statutes’ are essential for the well-being of the girl child (whether married or not) and are protected by Article 15(3) of the Constitution. These child-friendly statutes also link child marriages and sexual intercourse with a girl child and draw attention to the adverse consequences of both.”

The court further emphasized on the need to protect the bodily integrity as well as reproductive choices of the girl child who is left to her miserable fate.

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374 Independent thought v. Union of India, Para 52
of an early marriage. The court took the support of various judgements including State of Maharashtra v. Madhukar Narayan Mardikar\textsuperscript{375}, Suchitra Srivastava v. Chandigarh Administration\textsuperscript{376} and Devika Biswas v. Union of India\textsuperscript{377} to throw light on the point of reproductive rights of women including special emphasis on the girl child who has little or practically no say in reproduction after a child marriage. The Supreme Court noted saying:

“The discussion on the bodily integrity of a girl child and the reproductive choices available to her is important only to highlight that she cannot be treated as a commodity having no say over her body or someone who has no right to deny sexual intercourse to her husband. The human rights of a girl child are very much alive and kicking whether she is married or not and deserve recognition and acceptance.”\textsuperscript{378}

Recognising that sexual violence has a damaging impact not just on the body of a girl but also leaves deep psychological wounds on the mind of the victim, the court cited and put emphasis on the decision of State of Karnataka v. Krishnappa\textsuperscript{379} wherein it was held:

“Sexual violence apart from being a dehumanising act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity - it degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience.”\textsuperscript{380}

\textsuperscript{375} AIR 1991 SC 207 (It was held that no one has the right to violate the person of anyone else including that of an unchaste woman)
\textsuperscript{376} (2009) 11 SCC 409 (In this case the right to make a reproductive choice was equated with personal liberty as enshrined under Article 21 of the Constitution, privacy, dignity and bodily integrity)
\textsuperscript{377} (2016) 10 SCC 726 (It was observed in this case that over time there has been a recognition of need to protect as well as respect the reproductive rights as well as the reproductive health of a person)
\textsuperscript{378} Independent thought v. Union of India, Para 64
\textsuperscript{379} AIR 2000 SC 1470 (In this case an 8 years old girl was raped)
\textsuperscript{380} ibid para 15
The Supreme Court went on to say in this regard that:

“If such is the traumatic impact that rape could and does have on an adult victim, we can only guess what impact it could have on a girl child – and yet it is not a criminal offence in the terms of Exception 2 to Section 375 of the IPC but is an offence under the POCSO Act only. An anomalous state of affairs exists on a combined reading of the IPC and the POCSO Act. An unmarried girl below 18 years of age could be a victim of rape under the IPC and a victim of penetrative sexual assault under the POCSO Act. Such a victim might have the solace (if we may say so) of prosecuting the rapist. A married girl between 15 and 18 years of age could be a victim of aggravated penetrative sexual assault under the POCSO Act, but she cannot be a victim of rape under the IPC if the rapist is her husband since the IPC does not recognize such penetrative sexual assault as rape. Therefore such a girl child has no recourse to law under the provisions of the IPC notwithstanding that the marital rape could degrade and humiliate her, destroy her entire psychology pushing her into a deep emotional crisis and dwarf and destroy her whole personality and degrade her very soul. However, such a victim could prosecute the rapist under the POCSO Act. We see no rationale for such an artificial distinction.”

Upon the Union’s argument that recognising marital rape within child marriages may lead to destroying the institution of marriage, the Supreme Court clarified in the most direct way saying:

“The view that marital rape of a girl child has the potential of destroying the institution of marriage cannot be accepted. Marriage is not institutional but personal – nothing can destroy the ‘institution’ of marriage except a statute that makes marriage illegal and punishable. A divorce may destroy

381 Independent Thought v. Union of India Para 70
a marriage but does it have the potential of destroying the ‘institution’ of marriage? A judicial separation may dent a marital relationship but does it have the potential of destroying the ‘institution’ of marriage or even the marriage? Can it be said that no divorce should be permitted or that judicial separation should be prohibited? The answer is quite obvious.

Looked at from another perspective, the PCMA actually makes child marriages voidable and makes the parties to a child marriage (other than the girl child) punishable for an offence under the said Act. For someone who supports the institution of marriage, nothing could be more destructive of the institution of marriage than the PCMA which makes a child marriage voidable and punishable on the one hand and on the other, it otherwise collaterally legitimizes the pernicious practice of child marriages. It is doubtful if the Parliamentary Standing Committee intended such a situation along with its attendant adverse and detrimental impacts and so we leave it at that.”

The court while deciding the petition also mentioned that:

“Law cannot be hidebound and static. It has to evolve and change with the needs of the society. Recognising these factors, the Parliament increased the minimum age for marriage. The Parliament also increased the minimum age of consent but the inaction in raising the age in Exception 2 is by itself an arbitrary non-exercise of power. When the age was being raised in all other laws, the age under Exception 2 should also have been raised to bring it in line with the evolving laws especially the laws to protect women and the girl child aged below 18 years. Therefore, I have no hesitation in holding that the Exception 2, in so far as it relates to the girl child below eighteen years, is unreasonable, unjust, unfair and violative of

382 ibid Para 90 and 91
the rights of the girl child. To that extent the same is arbitrary and liable to be set aside.”

“75. There can be no dispute that a law can be set aside if it is discriminatory. Some elements of discrimination have already been dealt with while dealing with the issue of arbitrariness. However, there are certain other aspects which make Exception 2 to Section 375 IPC in so far as it deals with the girl child totally discriminatory. The law discriminates between a girl child aged less than 18 years, who may be educated and has sexual intercourse with her consent and a girl child who may be married even before the age of 15 years, but her marriage has been consummated after 15 years even against her consent. This is invidious discrimination which is writ large. The discrimination is between a consenting girl child, who is almost an adult and non-consenting child bride. To give an example, if a girl aged 15 years is married off by her parents without her consent and the marriage is consummated against her consent, then also this girl child cannot file a criminal case against her husband. The State is talking of the reality of the child marriages. What about the reality of the rights of the girl child? Can this helpless, underprivileged girl be deprived of her rights to say ‘yes’ or ‘no’ to marriage? Can she be deprived of her right to say ‘yes’ or ‘no’ to having sex with her husband, even if she has consented for the marriage? In my view, there is only one answer to this and the answer must be a resounding “NO”. While interpreting such a law the interpretation which must be preferred is the one which protects the human rights of the child, which protects the fundamental rights of the child, the one which ensures the good health of the child and not the one

383 ibid
which tries to say that though the practice is “evil” but since it is going on for a long time, such “criminal” acts should be decriminalised.”\textsuperscript{384}

It can accordingly be seen that the Supreme Court has taken a very open-minded approach in deciding the case and therefore read down Exception 2 to Section 375 on the following mentioned grounds:

“Since this Court has not dealt with the wider issue of “marital rape”, Exception 2 to Section 375 IPC should be read down to bring it within the four corners of law and make it consistent with the Constitution of India.

In view of the above discussion, I am clearly of the opinion that Exception 2 to Section 375 IPC in so far as it relates to a girl child below 18 years is liable to be struck down on the following grounds:–

(i) it is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Article 14, 15 and 21 of the Constitution of India;

(ii) it is discriminatory and violative of Article 14 of the Constitution of India and;

(iii) it is inconsistent with the provisions of POCSO, which must prevail.

Therefore, Exception 2 to Section 375 IPC is read down as follows:

“Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape”.\textsuperscript{385}

It is, however, made clear that this judgment will have prospective effect.”

This judgement has therefore been a resolution to some of the legal lacunas that existed with respect to child marriages. The recognition of marital rape within child marriages must act as a deterrent to the further perpetuation of

\textsuperscript{384} ibid Para 74
\textsuperscript{385} ibid Para 87 and 88
the practise. This recognition is a stepping stone towards the elimination of child marriages.

6.9 **Highlighting Gaps**

The Independent Thought judgement has cured one of the key lacunas with respect to rape within child marriages. However, there are still lacunas in laws that need attention. While they have been discussed above, they are summed up as:

- The analysis of the Independent Thought judgement clearly establishes that sexual intercourse by a husband with his own wife, who is below 18 years of age is rape. POCSO also says that this shall amount to aggravated penetrative sexual assault. However, the prosecution can happen only once a complaint in this regard is made within one year.\(^{386}\) Our country’s socio-economic as well as political environments do not promote child brides to go and complain at all. This therefore means that a defined crime continues unabated every day on the child bride and there is absolutely nothing that the State can do about it until it is reported. This lacuna or problem itself is the backbone for the need of child marriages being declared void *ab initio*.

- The Supreme Court has established primacy of the PCMA over the various Personal laws. There is an urgent need to bring all the laws in harmony with the PCMA so that the implementation mechanisms for preventing child marriages are strengthened.

- There is a need to recognise child marriage as a form of domestic violence for the various ill-effects it has on the lives of minors who fall victim to the same.

• Child brides who are married must be included within the category of Child in Need of Care and Protection under the Juvenile Justice Act. There also need to be sound rules established with respect to the custody of married minor girl child.

• With recognition of rape within child marriage, there is a need to declare the same void *ab initio* by way of an amendment, like the Karnataka amendment to the PCMA.

• It is also imperative that the features of this judgement are communicated or reach the masses where the incidence of child marriage is high. Girls need to be made aware of their rights.

6.10 Conclusion

The recent judgement plus the Karnataka Amendment to the PCMA has set in rhythm the course towards achieving complete elimination of the practice of child marriage. It would be extremely profitable if child marriages are made void *ab initio*. It is also necessary that marriages be made compulsorily registrable in order to keep a check on the issue. The legal lacunas are important to be cured so that with their aid proper mechanisms can be put into place for the implementation of the laws. So long as laws remain weak with respect to child marriages, the problem will remain unresolved. Strong laws are indispensable at this stage to fight this menace. Once an agreement at all levels of governance is achieved about the ill-effects of child marriage through proper dissemination of information and reports as well as effective communication strategies, the elimination of the practise will be achieved much faster.

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