CRYING OUT FOR LEGISLATIVE ATTENTION: THE INADEQUATE CHILD MARRIAGE LAWS OF INDIA

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Abstract

The laws relating to child marriage in India have been ineffective in curbing this rampant social evil. Statistics reveal consistently high levels of child marriage even till today. The previous law on child marriage – the Child Marriage Restraint Act, 1929 – was deferential in its approach and thoroughly unsuccessful in eliminating the practice of child marriage. Consequently, in 2006, the Parliament enacted the Prohibition of Child Marriage Act. Yet, as this Paper argues, the prevailing Act is equally ineffective, since it creates a legal position which is as ambiguous and uncertain as under the previous legislation. Particularly prominent is the issue of validity of child marriages. The current legislation adopts a prohibitive-punitive approach, in that it merely penalizes the solemnization of such marriages and is silent as to their validity. Consequently, the judiciary has found its hands tied, and has been compelled to accord legitimacy to the practice of child marriage. This is detrimental to society and this Paper argues that the legislature must adopt a sterner stance to eliminate the practice. Further, as it stands today, even in its well-

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meaning provisions, the Act betrays non-application of mind on part of the legislature, and raises several pertinent issues that are subsequently discussed. First, the Paper analyzes the specific issue of legitimacy of children borne out of child marriages. The evidently hurried drafting gives rise to inconsistency, both within the Act and between the Act and prevailing Hindu personal law. Secondly, the Paper questions the constitutionality of the legitimacy provision of the Act. It is argued that as per its present wording, the relevant provision is unconstitutional. Further, the legislation is riddled with several inconsistencies and anomalies that hinder its efficacy. This is evidenced by, inter alia, the inequality between genders created by its penal provisions, the confusion generated by its reference to the Indian Majority Act, and its inconsistency with the Indian Penal Code. In light of these flaws, the Paper suggests that the Legislature take immediate remedial action to refine the Statute and give it more teeth to eliminate the social evil of child marriage.

I. INTRODUCTION

A recent UNICEF Report stated that India has the second highest number of child marriages in the world, with 43% of Indian women having been married before the age of 18.[1] Another recent study[2] reported that young

[1]*India has second-highest number of child marriages: UNICEF*, THE HINDU, http://www.thehindu.com/news/international/south-asia/46-of-south-asian-girls-marry-by-18-unicef/article6403721.ece.

women who married before the age of 18 were twice as likely to report being beaten, slapped or threatened by their husbands as girls who married later. They were also three times as likely to report being forced into sexual intercourse without their consent in the previous six months.

These statistics confirm the continuing nature of the social evil of child marriage in India, and only a minuscule portion of its hazards. A retrogressive practice that remains firmly entrenched in Indian society, the problem of child marriages can be traced to the complex matrix of religious traditions, social practices, economic factors and deeply rooted prejudices. The chief amongst the reasons, as per the Law Commission, is poverty and culture, and patriarchal traditions and values.[3] No matter how it is defended, it is indisputable that child marriage is a gross violation of human rights, and akin to child abuse. This is particularly true for females, since in most cases child marriage is the precursor of frequent and unprotected sexual activity leading to serious health consequences such as anaemia, maternal/infant mortality and HIV/AIDS.[4] Further, the rights of young children, particularly in terms of education, are severely hampered by a child marriage.

On the legal side, however, the continued occurrence of child marriages clearly points to shortcomings in the law, and a lack of legislative and political will[5] to eradicate the same. Against this backdrop, the present

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[2]*Child Marriage and Domestic Violence*, ICRW, http://www.icrw.org/files/images/Child-Marriage-Fact-Sheet-Domestic-Violence.pdf.

[3]Law Commission of India, 205th Report, Proposal to Amend the Prohibition of Child Marriage Act, 2006 and other Allied Laws, [hereinafter Law Commission Report], p. 17.

[4]*Id.* at 10.

[5]India has clearly demonstrated a lacklustre approach to the issue of child marriage. For instance, India was recently subjected to intense criticism for not being a co-sponsor to the UN Resolution on Child, Early and Forced Marriage (adopted in Sept. 2013). Indian delegates defended the official stance by issuing official statements to the effect that India is not in a position to eliminate child marriage completely due to high poverty levels. The adoption of such flimsy justifications clearly shows a lack of political will towards the issue and leaves little hope for the eradication of child marriage in India. See, Child Marriage in India: Achievements, Gaps and Challenges, OHCHR,

Paper is an attempt to critique India's laws on child marriage, with particular focus on the statute currently in force, the Prohibition of Child Marriages Act, 2006 [hereinafter referred to as "**PCMA**"]. As subsequent Parts will show, the apparent deference of the Parliament to cultural traditions – evident in its drafting of statutory provisions – and the absence of stringent provisions in the PCMA and earlier statutes have allowed child marriages to continue unchecked.[6]

This paper is divided into 7 Parts. Part II will provide a brief history of child marriage law in India, with reference to the Child Marriage Restraint Act, 1929 [hereinafter referred to as "**CMRA**"] and the Hindu Marriage Act, 1955 [hereinafter referred to as "**HMA**"]. Part III will provide a comprehensive overview of the PCMA itself. Subsequent parts shall critically analyze specific aspects of the legislation which require further scrutiny- Part IV will examine the legal validity of child marriages, while Part V will engage questions related to legitimacy of children begotten of a child marriage. Part VI will scrutinize certain anomalies inherent in the PCMA which urgently require legislative attention. Part VII will offer a brief concluding analysis, and make suggestions to strengthen the prevailing law.

http://www.ohchr.org/documents/issues/women/wrgs/forcedmarriage/ngo/haqcentreforchildrights1.pdf.

[6]Though the PCMA contains several penal provisions aimed at preventing child marriages, conviction rates continue to be dismal. For instance, in 2010, only 111 cases were reported under the PCMA, and only 11 convictions were secured. See, National Crime Records Bureau in UNICEF Information Factsheet on child marriage, November 2011, UNICEF, http://www.unicef.org/india/Child_Marriage_Fact_Sheet_Nov2011_final.pdf.

II. LEGAL HISTORY OF CHILD MARRIAGE

A. Rukhmabai and Phulmonee

While considering the legal history of child marriage law, we may first consider two famous cases that brought the issue into the limelight. The *Rukhmabai* case in Maharashtra and the *Phulmonee* case in Bengal raised significant questions about the age and issue of consent in Hindu marriage, and crystallised public opinion against early marriages.

In *Rukhmabai*,[7] one Dadaji Bhikaji filed a suit for restitution of conjugal rights against Rukhmabai, a 22-year old woman who had been married off to him when she was 11 years old. Since they had never cohabited after their marriage, he sought to compel her to live with him and consummate the marriage. However, Rukhmabai resisted the action on the grounds that she could not be compelled to be tied to a marriage that was conducted when she was of a tender age, and thereby incapable of giving consent. At the time, arguments grounded on consent in respect of marriage were completely novel and unheard of in India. Yet, dismissing the action, Pinhey, J. of the Bombay High Court observed:

> "*It seems to me that it would be a barbarous, a cruel, a revolting thing to do to compel a young lady under those circumstances to go to a man whom she dislikes, in order that he may cohabit with her against her will; and I am of opinion that neither the law nor the practice of our Courts either justified my malting such an order, or even justifies the plaintiff in maintaining the present suit*."[8]

This dismissal was, however, appealed and the case was ultimately settled out of Court. However, Rukhmabai's controversial stance sparked

[7]Dadaji Bhikaji v. Rukhmabai, (1885) 9 ILR Bom 529.
[8]*Id.* at ¶2.

unprecedented public debate, and she went on to become a leading voice against child marriage.[9]

Within the space of a few years, the famous and brutal case of *Phulmonee*[10] saw an 11-year-old girl die of haemorrhages after her 35-year-old husband forcibly had sexual intercourse with her. Unanimous medical opinion found that Phulmonee's injuries were caused by violent sexual penetration which her immature body could not sustain.[11] Though the perpetrator was eventually only charged with grievous hurt and not rape in accordance with colonial law,[12] this case sparked popular demand for raising the age of consent for sexual intercourse and marriage, and galvanized public opinion against child marriage.[13]

Both *Rukhmabai* and *Phulmonee* – cases of the 19th century – were precursors to the subsequent discourse and legal interventions with respect to child marriage in 20th century India, and continue to be invoked in debates regarding child marriage even today.

B. Child Marriages: A Legislative History

The legal history of child marriages in India covers the CMRA (1929), the HMA (1955) and the recently enacted PCMA (2006). The thrust of these laws has been to penalize persons partaking in, abetting and actively encouraging child marriages. The following is an overview of the legislative history of child marriage.

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[9]SUDHIR CHANDRA, ENSLAVED DAUGHTERS: COLONIALISM, LAW AND WOMEN'S RIGHTS 15-41 (Oxford University Press, 1998).
[10]Queen Empress v. Huree Mohan Mythee, (1891) XVIII Indian Law Reporter (Calcutta) 49.
[11]*Child Marriage in South Asia* (Briefing Paper), CPR, http://reproductiverights.org/sites/crr.civicactions.net/files/documents/ChildMarriage_BriefingPaper_Web.singlepage.pdf, at 22.
[12]*Id*. at 23.
[13]Child Marriage in India, *supra* note 5, at 42.

a) Child marriage restraint act, 1929

In 1929, the colonial government first attempted to act against the horrors of child marriage, by way of the CMRA. However, as its provisions show, the CMRA assumed a preventive-punitive approach to this social evil rather than a stringent prohibitive approach, limiting its effectiveness.

To begin with, the CMRA defined a child marriage as one in which the girl is below 14 years of age *or* the boy below 18 years of age,[14] irrespective of the parties' religion. In its effort to discourage such marriages, the Act prescribed a fine of Rs. 1000 for a man between 18 and 21 who married a girl below the age of 14.[15] An enhanced penalty of 30 days of simple imprisonment and/ or a fine of Rs. 1000 was applicable if the man in question was above 21.[16] Corresponding liability would accrue to the parents of the girl,[17] as well as the person solemnizing the marriage.[18]

It is amply clear that the CMRA was only aimed at preventing the *solemnization* of child marriages, and conspicuously avoided declaring such a marriage void or voidable. Unfortunately, this deference to a plainly regressive custom has set the tone for all child marriage legislation in India, including the PCMA.

A subsequent amendment to the CMRA in 1949, increased the minimum age of parties, and enhanced the punishment for violations thereof. The age for girls was increased to 15, while for boys, it was retained at 18. As per the enhanced punishment, a boy between the ages of 18 and 21 marrying a girl below 15 would be punished with 15 days' Simple Imprisonment and/or a fine of Rs. 1000. A man over 21 guilty of the same would be punished with 3 months' Simple Imprisonment and an unspecified fine. The same

[14]Child Marriage Restraint Act, 1929, No. 19, Acts of Parliament, 1929 (India), §3.
[15]*Id*.
[16]*Id*. at § 4.
[17]*Id*. at § 5.
[18]*Id*. at § 6.

penalty would be applicable to the parents, custodian or guardian of the girl as well as the person solemnizing the marriage. The CMRA was amended again in 1978, further increasing the ages of parties –18 for girls and 21 for boys. This corresponds to the current minimum age for marriage under the HMA. With the advent of the PCMA in 2006, the CMRA was repealed.

b) Hindu Marriage Act, 1955

Section 5 (iii) of the HMA establishes the minimum age for marriage for Hindus at 18 and 21 for females and males respectively, in conformity with the 1978 amendment to the CMRA. The penalty for contravention thereof, applicable to both parties to the marriage, is 2 years' Rigorous Imprisonment and or/ fine upto Rs. 1 lakh.[19]

III. THE PROHIBITION OF CHILD MARRIAGE ACT, 2006: OVERVIEW AND KEY PROVISIONS

The Preamble of the PCMA states that it is "*An Act to provide for the prohibition of solemnization of child marriages and for matters connected therewith or incidental thereto*". To this end, the Act provides for the appointment of Child Marriage Prohibition Officers by the State Governments and empowers them to prevent and prosecute the solemnization of child marriages. Additionally, they are mandated to create awareness as to the evils of the practice of child marriage.

As per the definitions provided in the Act, a child is 'a person who, if male, has not completed twenty-one years of age, and if female, has not completed eighteen years of age".[20] Further, a child marriage is quite simply "a

[19]The Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955 (India), §18(a).
[20]Prohibition of Child Marriage Act, 2006, No. 6, Acts of Parliament, 2006, § 2(a).

marriage to which either of the contracting parties is a child".[21] It is additionally prescribed that the interpretation of minor, wherever it is used in the Act, is in accordance with the Indian Majority Act, 1875.[22]

The other operative parts of the Act, which form its crux, penalize child marriages, determine the status of certain child marriages and the rights and duties of the parties to such a marriage. A child marriage solemnized before or after the commencement of the Act is voidable at the option of the contracting party who is a child at the time of the marriage.[23] This petition for annulment should be filed before the child completes two years of attaining majority.[24] The effect of such a decree does not extend to a child begotten or conceived of the marriage before the annulment: these children are legitimate for all purposes.[25]

A male adult above the age of 18 is liable to rigorous imprisonment for up to 2 years and a fine up to Rs. 1 lakh for knowingly contracting a child marriage.[26] Apart from Section 3, certain specific circumstances affect the validity of a child marriage. S. 12 provides that a child marriage is void when the child in question is taken or enticed out of the keeping of the lawful guardian, is compelled or deceitfully induced to go from some place or is sold or trafficked or used for immoral purposes.[27] The Act further provides that an injunction order may be passed to prevent the solemnization of a child marriage.[28] A marriage which is solemnized in contravention of such injunction order is also void.[29]

[21] *Id.*, § 2(b).
[22] *Id.*, § 2(f).
[23] *Id.*, § 3(1).
[24] *Id.*, § 3(3).
[25] *Id.*, § 6.
[26] *Id.*, § 9.
[27] *Id.*, § 12.
[28] *Id.*, § 13.
[29] *Id.*, § 14.

The next Parts deal with certain obstacles to the success of the PCMA. The first of these issues establishes that the legislation does not have enough teeth, since it merely penalizes the vice that it seeks to curtail. The second deals with the sensitive topic of legitimacy, which has social and economic ramifications. Thereafter, the Paper deals with some of the anomalous situations created by the Act, which hinder its implementation.

IV. THE ISSUE OF VALIDITY: THE PRINCIPLE BARRIER TO THE ERADICATION OF CHILD MARRIAGE

Child marriage laws in India have consistently been perceived as thoroughly inadequate. In this respect, the efforts of the legislature appear to be deferential, and seek to *discourage* child marriages rather than take decisive steps to ban them. This line of critique is most apt in terms of the validity of child marriages, a controversial question of law that has caused outrage amongst women and child activists[30] and distinct judicial discomfort.[31]

Historically, child marriages have been considered legally valid. From the outset, the legislative intention appears to have been to make participation in a child marriage punishable, without disturbing the actual validity of the marriage. This position has been consistently upheld by the judiciary. For instance, in the pre-CMRA (1891) judgment of,[32] the Madras High Court indicated that the minority of the parties would not affect the validity of the marriage.[33] This position was accorded legislative sanction with the

[30]Sana Shakil, *Child Marriage not Void, but Voidable*, THE TIMES OF INDIA, http://timesofindia.indiatimes.com/city/delhi/Child-marriage-not-void-but-voidable-Court/articleshow/25141870.cms.

[31]Court on its own Motion (Lajja Devi) v. State, (2013) CriLJ 3458, where the Court acknowledged its inability to declare certain child marriages invalid.

[32]Venkatacharyula v. Rangacharyula, (1891) ILR Madras 316.

[33]In this case, the marriage of a girl was solemnized without the consent of her father, after her mother had falsely informed the priest that the father's consent had been obtained. The

enactment of the CMRA in 1929. Though the punishments were made more rigorous over time, the Act remained silent on the validity of a child marriage, implying that irrespective of the punishment of the concerned persons, a marriage contracted in violation of its provisions would remain valid. This conclusion received judicial recognition on a number of occasions. In *Munshi Ram* v. *Emperor*,[34] commenting on the CMRA, the Court noted that:

> "*The Act aims at and deals restraint of the performance of the marriage. It has nothing to do with the validity or invalidity of the marriage. The question of validity and invalidity of the marriage is beyond the scope of the Child Marriage Restraint Act, 1929*".

Similarly, *Moti* v. *Beni*[35] was a case involving the custody of a girl of 13 years, who was married to one Moti. The District Magistrate had ordered that since the girl was only 13, she could not be legally married and the proper custodian was her mother, and not her husband. The High Court, however, reversed this order, and, while criticizing the lower Court for acting without jurisdiction, remarked:

> "*It is true that celebration of this marriage may have contravened the provisions of the Child Marriage Restraint Act, 1929; but marriage of a child is not declared by the Child Marriage Restraint Act, 1929 to be an invalid marriage. The Act merely imposes certain penalties on persons bringing about such marriages*".

This position was reiterated by the Orissa High Court in 1961,[36] with the Court categorically stating that the CMRA does not invalidate a marriage despite its being solemnized in contravention with the provisions of the Act.

Court, however, held that if all the relevant ceremonies had been duly conducted, it would be a valid marriage, notwithstanding the minority or other incapacitation of the parties.

[34]Munshi Ram v. Emperor, (1936) AIR All 111.

[35]Moti v. Beni, (1936) AIR All 852.

[36]Birupakshya Das v. Khajubehare, (1961) AIR Ori 104.

The enactment of the Hindu Marriage Act, 1955 did little to impugn the validity of child marriages. Though S. 5(iii) prescribes the age limit for a valid marriage, a marriage solemnized in contravention of the same is neither void under S.11,[37] nor voidable under S.12.[38] The only legal consequence for the violation of S. 5(iii) is punishment under S. 18(a) of the Act.[39]

The validity of child marriages under the HMA has been repeatedly recognized by Courts.[40] Judges have constantly reiterated that the legislature, in its wisdom, has omitted incorporating any provision dealing with the invalidity of child marriages, and it is not the duty of the Court to fill the legislative gap.[41] The validity of child marriages has been recognized in other proceedings as well. For instance, in a bigamy proceeding under S. 494 of the Indian Penal Code, the defendant pleaded before the Full Bench of the Andhra Pradesh High Court[42] that his first marriage was a nullity since it had been contracted when he and his wife were 13 and 9 years of age respectively. Considering the scheme of the HMA, the Court observed that neither S. 11 nor S. 12 makes any reference to the violation of the age rule. Consequently, it held that the silence of the legislature about the legal effect of the violation of S. 5(iii), save for punishment under S. 18, clearly indicates the absence of legislative intent to nullify child marriages. The validity of a child marriage with respect to the HMA was subsequently recognized by the Apex Court in *Smt. Lila Gupta* v. *Laxmi Narain & Ors*,[43]

[37]As per § 11 of the HMA, only those marriages solemnized in contravention with §§5(i), 5(iv) or 5(v) are declared to be void.

[38]§12, HMA refers to a number of grounds, relating inter alia to impotency and mental capacity. However, it does not mention the age criterion.

[39]§18(a), HMA prescribes for "every person who procures a marriage for himself or herself" in contravention of § 5(iii) a punishment of rigorous imprisonment of upto 2 years, or fine upto Rs. 1 lakh, or both.

[40]Kalawati v. Devi Ram, (1961) AIR HP 1; Ma Hari v. Director of Consolidation, (1969) AIR All 623.

[41]Premi v. Dayaran, (1965) AIR HP 15.

[42]Venkata Ramana v. State, (1977) AIR AP 43.

[43]Smt. Lila Gupta v. Laxmi Narain & Ors, (1978) 3 SCC 258.

and more recently, by the Delhi High Court,[44] which stated that its judgment was based on public policy, and that the legislature was conscious of the fact that if marriages performed in contravention of the age restriction are made void or voidable, it could lead to serious consequences and exploitation of women.

The enactment of the PCMA certainly raised hopes of a more aggressive legislative stance towards child marriages. In a significant departure from the earlier position, a child marriage has been made voidable at the option of the child contracting party.[45] However, it is clear from the scheme of the Act that the legislature has limited itself to voidability and has stopped short of declaring child marriages void.[46] The implication is that a child marriage, once solemnized, shall remain valid, subject to the acquiescence of the child party. This legal position has been expressly recognized by the Law Commission, which observed in respect of the PCMA:

> "*The law, however, does not make a marriage invalid whether it is performed when the child is an infant or later at puberty or adolescence*."[47]

Though this new approach certainly constitutes progress from the prior legal position, it is fraught with problems of its own. Primarily, it allows for a child "*…of 10, 11, 12, or 13 years (to be) married and subjected to sexual and other forms of abuse which normally have lasting and irreversible mental and physical consequences*."[48] Further, in declaring only voidability of such marriages, the legislature has effectively placed the burden of eradicating child marriage upon child parties. Though S. 3(2) provides in the

[44]Manish Singh v. Govt. of NCT of Delhi & Ors., (2006) 1 HLR 303.
[45]Prohibition of Child Marriage Act, 2006, No. 6, Acts of Parliament, 2006, § 3(1).
[46]There is, however, a limited set of circumstances under which a child marriage shall be void. S. 12 of the PCMA prescribes that if a child, being a minor, is (inter alia) sold for the purpose of marriage or married in the course of trafficking and so on, such marriage shall be null and void.
[47]Child Marriage in India, *supra* note 5, at 13.
[48]*Id*. at 25.

case of a minor child party that a petition may be presented by the child's guardian or next friend along with the Child Marriage Prohibition Officer, it is clear that the initial burden is upon the child to not only be aware of his or her right, but also to come forward with the intention to exercise the same. In light of the rampant illiteracy and poor socio-economic conditions prevalent in India, the viability of such a mechanism does not inspire confidence. Subjecting the validity of child marriages to the acquiescence of the child party is rendered meaningless if one conceives of a scenario in which both families involved are in favour of the marriage and consequently neglect or actively suppress the child's wishes. In such a situation, it is impractical and patently unfair to expect the child to possess the means and capacity to approach the Court.

V. PROVISIONS REGARDING LEGITIMACY OF CHILDREN BORNE OUT OF A CHILD MARRIAGE: INCONSISTENT AND POTENTIALLY UNCONSTITUTIONAL

The PCMA envisages a blanket protection for all children borne out of child marriages[49] as far as their welfare and financial stability is concerned. Under S. 5, the district court seized of the matter is given unbridled power to pass an order regarding the custody of children borne out of child marriages. The only guiding principle for the court at the time of passing such an order is the best interest of the child.[50] The same holds true for determining the biological parents' access to their child.[51]

However, this blanket protection is restricted to issues of custody and maintenance. With respect to matters of legitimacy and inheritance, the PCMA creates great confusion, as it accords differential protection to

[49]Prohibition of Child Marriage Act, 2006, No. 6, Acts of Parliament, 2006, § 5.
[50]*Id*. at § 5(2).
[51]*Id*. at § 5(3).

children begotten of child marriages that are void (under Sections 12 and 14) and those borne of voidable marriages (under S. 3). While children borne of marriages that are voidable at the option of either *child-parent* party are legitimate under the Act, the legislation is silent as to the legitimacy of children borne out of void marriages. This is one of several instances wherein the Act betrays non-application of mind on part of the legislature.

A. Inconsistency Within the Act

Section 3 of the PCMA renders a child marriage voidable at the option of the child party. However, this is not the only provision that contemplates the termination of a child marriage. Under S. 12, a child marriage is null and void when the child (a) is taken or enticed out of the keeping of the lawful guardian; (b) is induced to from any place by force or deceitful means; or (c) is sold for the purpose of marriage or is sold, trafficked or used for immoral purposes after the marriage. Further, under S. 14, any child marriage which is solemnized in contravention of an injunction order prohibiting the solemnization of such a marriage is *void ab initio*. Thus, under the PCMA, a child marriage stands terminated by the operation of three provisions: Sections 3, 12 and 14. However, S. 6, which accords legitimacy to children begotten of a child marriage, makes direct reference only to S. 3. This creates a disparity between the children begotten out of voidable marriages which are subsequently annulled and those borne out marriages that are *void ab initio*. There appears to be no rational basis for this difference.

One might argue that this lacuna can be filled by a Court by extending the application of Section 6 to those marriages which are void by operation of Sections 12 and 14. This argument would be founded upon rules of

interpretation applicable to social welfare legislations.[52] However, such a reading would be incorrect as the rule regarding welfare legislations is subservient to the cannon of construction which mandates that no word of the statute should be rendered meaningless.[53] Section 6 specifically refers to voidable marriages. There is no reference to marriages that are *void ab initio*. Thus, to broaden Section 6 to confer legitimacy upon all children, irrespective of the void or voidable nature of their parents' child marriage, would be to supplant the words of the legislature, a practice that is strongly discouraged.

The inability to use beneficial construction and extend the application of Section 6 to marriages that are void under Sections 12 and 14 is accentuated by the principle of *expressio unius est exclusio alterius*. That is to say, the express inclusion of only children borne out of voidable marriages is the exclusion of children borne out of void child marriages. This is reinforced by the fact that while dealing with custody, Section 5 covers children borne out of all child marriages, whereas Section 6 clearly restricts itself to only voidable marriages. Thus, as far as legitimacy is concerned, the PCMA presents an anomalous position.

a) Unconstitutionality Of Section 6 The PCMA.

Under Hindu law, S. 16 of the HMA makes provisions for the legitimacy of children. Prior to the 1976 amendment to the HMA, S. 16 accorded legitimacy only to those children born out of marriages solemnized *after* the HMA came into force. This provision, therefore, created an unfounded distinction between similarly placed children based solely on the point of time of their parents' marriage. However, after the 1976 amendment, this

[52]Employees State Insurance Corporation, Regional Director v. Ramanuja Match Industry, (1985) AIR SC 278; Regional Provident Fund Commissioner v. Shiva Metal Works, (1965) AIR SC 1076.

[53]Harbhajan Singh v. Press Council of India, (2002) AIR SC 1351; Sakshi v. Union of India, (2004) 5 SCC 518.

irregularity was rectified, and all children were accorded legitimacy irrespective of any other consideration.

This state of affairs was noted by the Supreme Court in *Parayankandiyal Eravath* v. *K. Devi.*[54] While considering the post-1976 S. 16, the Court read the non-obstante clause therein to imply that Section 16(1) of the HMA stood delinked from the preceding Section 11. The implications of this dictum are wide and pertinent to the following analogy that the authors seek to draw between S. 16, HMA and S. 6, PCMA.

Since Section 16(1) is completely independent of Section 11, the operation of the HMA with respect to legitimacy is far wider than the grounds for nullifying a marriage under Section 11. Though S. 11 limits the power of the Court to declaring only marriages solemnized *after* the commencement of the Act as void, this distinction does not apply to questions of legitimacy. That is to say, under the HMA, a child is considered legitimate irrespective of the time that his or her parents' marriage was solemnized. This is against the common law principle that the offspring of a marriage which is null and void is *ipso jure* illegitimate. In fact, the 1976 amendment to the HMA has been opined to have clearly superseded the common law doctrine regarding legitimacy.[55] Prior to the amendment, the vice of Section 16 was that it created a distinction between equally placed offspring – between those whose parents had contracted a void marriage before the commencement of the HMA and those whose parents indulged in a void marriage after the commencement of the Act. In *Parayankandiyal Eravath,* the Supreme Court specifically noted that this mischief in the unamended Section 16 would have rendered it unconstitutional. The Court further noted that this vice had been undone by the 1976 amendment to Section 16, in the following words:

> "*…(S. 16, as it is today) stands on its own strength and operates independently of other sections with the result that it is*

[54]Parayankandiyal Eravath v. K. Devi, (1996) DMC 82 (SC).
[55]Ranganath & John D Mayne Misra, Mayne's Hindu Law & Usage, (Bharat Law House, 16th ed., 2008).

> *constitutionally valid as it does not discriminate between illegitimate children similarly circumstanced and classifies them as one group for the conferment of legitimacy*."

Based on the above analysis, it is submitted that a clear analogy lies between the unamended S. 16, HMA and the present S. 6, PCMA, as the latter too creates a discrepancy between equally placed children simply based on whether the marriage of their *child-parents* was void or voided by a decree of the Court. Therefore, a case for the unconstitutionality of S. 6, PCMA is clearly made out. However, until a dispute as to its constitutionality arises in a petition and is determined by the Supreme Court, the provision will remain in force as it is, giving rise to several issues.

b) Inconsistency with the HMA.

The HMA on the other hand *automatically* grants legitimacy to all children irrespective of whether the marriage of their parents was voided by Court or was *void ab initio*.[56] This proposition finds support in the jurisprudence of several Courts.[57] As discussed before, the PCMA confers legitimacy only on a child whose *child-parent* has voided the marriage by an application and is silent on the legitimacy of children borne out of marriage *void ab initio*.

Thus, the conflict between HMA and the PCMA is apparent. It is highly likely that in any litigation as to the legitimacy of children begotten through a void child marriage, the Courts will either have to ignore the personal laws of the parties and decide in accordance with the PCMA or consider only the personal laws of the parties. There is no scope for a harmonious interpretation of both legislations.

[56]Prohibition of Child Marriage Act, 2006, No. 6, Acts of Parliament, 2006, §§16(1), 16(2).
[57]Bhogadi Kannababu v. Vuggina Pydama, (2006) AIR SC 2403; Sarojamma v. Neelamma, (2005) AIR NOC 422 (Kant); Sivaraman v. Rajeshwari II, (2005) DMC 581 (Mad).

VI. ANOMALIES CREATED BY THE PCMA

By and large, the PCMA reflects insufficient application of mind by the legislature, for it creates the possibility of a number of anomalies and contradictions with the provisions of other laws in force. This Part, therefore, will examine the prominent anomalies so created.

A. Section 9: Penalty for the Male Contracting Party and Allied Issues

To begin with, the PCMA retains the punitive-prohibitive thrust of the CMRA. In this respect, S. 9 of the Act punishes a male adult above the age of 18 who contracts a child marriage with rigorous imprisonment of up to 2 years and/or a fine up to Rs. 1 lakh. Notably, there is no parallel provision punishing a female adult party who contracts a child marriage. Therefore, the effect of S. 9 is that *only* the adult male party shall be punishable under the PCMA. This provision creates a fair bit of confusion, for the following reasons.

First, S. 9 imposes a penalty on a male contracting party above the age of *18.* Going by the definition under the PCMA,[58] a male remains a child up to the age of 21. This implies that a male of 19, who approaches the Court to have his marriage dissolved, may be granted a decree *and at the same time,* may be punishable under the Act despite his statutory status as a child. The legislature could have easily avoided this anomaly by preventing a clash between the statutory concepts of "child" and "majority." That is to say, if, consistent with the definition of a child, S. 9 imposed a penalty on an adult male above 21 years, then a child would at the very least not be liable to punishment while approaching the Court to correct the error of the child marriage! Alternatively, if the definition of *child* was harmonized with the Indian Majority Act, 1875, then a male party above 18 approaching the

[58]Prohibition of Child Marriage Act, 2006, No. 6, Acts of Parliament, 2006, §2(a) reads, "(a) 'child' means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age".

Court would no longer be a child, and would therefore be validly liable to punishment.

Secondly, the penalty under S. 9 must be evaluated in light of the aforementioned object of the PCMA[59] and its secular nature. Though a female contracting party cannot be punished under the PCMA, a remedy against a *Hindu* female contracting party is available under S. 18 of the HMA, which is gender neutral in its imposition of punishment for contravention of S. 5(iii). The absence of punishment for females under the PCMA, which is a secular legislation, makes the punishment that may be incurred – and the consequent deterrent effect – specific to the religion of the concerned party. For example, as per Muslim Personal Law, 15 is deemed to be the acceptable age for females to marry.[60] Therefore, a Hindu female of 15 may incur punishment under S. 18 of the HMA, but a Muslim female of 15 will not, in light of the PCMA and personal law. This dichotomy defeats the purpose of the PCMA, which is to prevent marriages from occurring before the parties have reached a particular age across religions. Even assuming perfect implementation of the Act, this anomaly may lead to the absurd situation in which child marriages are prevented within one religious community but proliferate unchecked within another.

a) Effective Limitation on Approaching the Court

S. 3(1), which makes the marriage voidable at the option of the child party, is certainly an improvement upon the earlier position of law. Yet, the practical application of S. 3(1) is impeded by S. 3(3). As per the latter provision, a petition under S. 3(1) must be presented before the child completes two years of attaining *majority*. "Majority" ordinarily (and with reference to the Indian Majority Act, 1875[61]) means the age of 18 years. This implies that a petition under S. 3(1) must be presented before the

[59]"To prohibit the solemnization of child marriages" as per the Preamble – a broad mandate which is secular in nature.
[60]Tahra Begum v. State of Delhi & Ors., (2013) 1 RCR (Civil) 798, ¶3.
[61]Prohibition of Child Marriage Act, 2006, No. 6, Acts of Parliament, 2006, §2(f).

person completes 20 years. However, the definition of "child" under S. 2(a) of the Act reads:

> "(a*) 'child' means a person* ***who, if a male, has not completed twenty-one years of age****, and if a female, has not completed eighteen years of age*."

The anomaly created by reading these provisions together is clear. A female ceases to be a child upon attaining the age of majority, that is, 18 years. However, a male between 18 and 21 is legally a major, but a child by statutory definition. Thus, for example, a male of 20-and-a-half would be precluded from presenting a petition under S. 3(1), since 2 years would have elapsed since his attainment of majority. Therefore, S. 3(3) creates a situation where a person who is yet statutorily a child cannot avoid the marriage, thereby defeating the entire purpose underlying the Act.

b) Inconsistency with the Indian Penal Code

Another major contradiction exists between the PCMA and the Indian Penal Code. Under Exception 2 to S. 375 of the IPC, sexual intercourse with a wife not under 15 years is not punishable as rape; implying that a man can carry on sexual relations with his wife, who may be, for example, between 15-18 years of age. Such a wife would still be a *child* under the PCMA. Moreover, as noted by the Law Commission, though sexual activity with a wife under 15 years is punishable under the IPC, a marriage with a girl under 15 would be upheld as valid under the PCMA. As such, the present law of child marriage appears to legitimize sexual activity between an adult and a child that would otherwise be punishable as rape, by according the relationship between them a valid status in the eyes of law. It has, therefore, been suggested that the age of consent under rape laws should be the same

as the minimum age for marriage and all marriages below this age should be void.[62]

Despite the enactment of the PCMA, therefore, various issues related to child marriage – legal as well as practical – still require to be addressed. The legislature, therefore, must urgently consider these anomalies and seek to correct them by harmonizing the law of child marriage with that of majority, personal law and penal law.

VII. CONCLUSION

From the preceding sections, it is amply clear that the PCMA is riddled with confusion and contradictions. Much like the CMRA before it,[63] the provisions of the PCMA, as they stand, may simply not be enough to prevent or check the occurrence of child marriages in India.[64] The present data[65] on the rampancy of child marriages is testimony to the weakness of the law before this social evil. Therefore, it is submitted that the PCMA urgently requires legislative attention.

In its present form, the PCMA tacitly permits child marriage and in fact lays the foundation for child abuse by failing to invalidate such marriages.[66] It is amply clear that the prohibitive-punitive approach that informed the CMRA and has subsequently informed the PCMA has failed to meaningfully tackle, or even engage with, the underlying mischief. Therefore, the authors

[62]*Supra* note 5, at 25.
[63]In a study by UNICEF, it was found that the number of prosecutions did not exceed 89 in any one year. See, Maggie Black, Early Marriage, Child Spouses, UNICEF, INNOCENTI RESEARCH CENTRE, Digest no.7, 2001, p.9.
[64]A recent survey reported that the PCMA had brought about only around 400 convictions in 2012. See, Sana Shakil, *Child Marriage not Void, but Voidable*, THE TIMES OF INDIA, http://timesofindia.indiatimes.com/city/delhi/Child-marriage-not-void-but-voidable-Court/articleshow/25141870.cms.
[65]*Supra* note 1.
[66]*Supra* note 5, at 42.

recommend that *first,* the legislature take a decisive stance by clearly defining what constitutes a child marriage, and subsequently declaring all child marriages void, and not merely voidable.[67] Though such a step would undoubtedly require a considerable amount of political will, it would go a long way in eradicating the *social evil* that is child marriage. *Secondly*, the authors recommend that the conflict between the concepts of "child" and "majority" be reconciled and harmonized. One way to achieve this would be to delete the differential definitions of "child" for male and female and have a uniform definition of "child" as a person who is below the age of 18 years.[68] This would, in turn, resolve the conflict inherent in the PCMA due to its present definition of "child" (for males) and its clash with "majority" as mentioned in various parts of the Act.

Additionally, the authors are of the opinion that in the absence of a uniform civil code, the prevention of child marriage falls into a special category of family law, since it directly relates to the prevention of human rights violations. Consequently, in order to prevent a distorted or religion-specific application of *at least* child marriage law, it is recommended that the age requirement for marriage be harmonized across personal laws. In this respect, we may refer to the laudable judgment of the Delhi High Court in *Court on its own Motion (Lajja Devi)* v. *State*,[69] whereby the Court comprehensively stated that the PCMA shall override all personal laws. It is accordingly submitted that well-thought out and sustained legislative action,

[67]The Law Commission has recommended (at p. 43) that marriages of parties under the age of 16 should be made void, and those between 16 and 18 years of age be made voidable. Considering the present rampancy of child marriages, this is indeed a useful via media for the legislature to consider. However, the authors believe that this would continue to be a half-baked approach, and ultimately that if the age of marriage is to be harmonized with at least the age of majority, the legislature would do well to adopt this approach right from the outset.

[68]"There is no scientific reason for the difference in age of marriage between boys and girls." Law Commission Report, p. 45. This also finds support in Article 1 of the UN Convention on the Rights of the Child [Convention on the Rights of the Child, Art 1, entered into force Sept. 2, 1990, 1577 UNTS 3] as per which a child is defined as any person below the age of 18.

[69]Court on its own Motion (Lajja Devi) v. State, (2013) Cri LJ 3458.

highlighting the need to prevent child marriages irrespective of social or religious differences, would alleviate this problem on the whole rather than in a fragmented manner. *Lastly*, corresponding amendments must be made to the HMA – both to make the age requirement uniform for both genders and to declare marriages solemnized in violation of the same as void – and the IPC, in order that child marriage and related concerns, such as the sexual exploitation of children, can be effectively curbed.