

## CHILD MARRIAGE UNDER HINDU PERSONAL LAW: *FACTUM VALET* OR AN ISSUE FOR PROTECTION OF HUMAN RIGHTS OF WOMEN

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### Abstract

Child marriage is a gross violation of human rights of children. Though it destroys the right to wholesome development of both sexes but the repercussions are more seriously detrimental for the girl children involved. Child marriage is both a cause and consequence of gender violence thus forming a vicious circle of perpetual inequalities. It results in violation of human rights with grave unwarranted consequences like early spousal cohabitation resulting in premature sexual relations, early pregnancies, malnutrition, infant and maternal mortalities, deprivation of educational and employment opportunities etc. There is a legislative confusion inherent in provisions of various legislations which provide for penal consequences on one hand and uphold the validity of child marriage on the other hand. The judicial decisions are no different in approach and are much dependent on doctrine of *factum valet* that accords validity to the child marriage emphasizing more on the dictates of the Hindu religious scriptures and personal law. The present paper discusses the concept of child marriage, its causes and consequences, legislative and judicial response and its intricate nexuses with the reproductive right of women.

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### I Introduction

MARRIAGE BEFORE the age of majority is a plightful reality of many young women across the globe. It is a matter of extreme shock and concern that even after seventy years of independence, the instances of child marriages in India are still quite rampant. Child

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1Early Marriage: A Harmful Traditional Practice – A Statistical Exploration, UNICEF, 1(2005).

marriage of girls is a comparatively neglected social problem in India and is seldom given due attention by policy makers and law enforcement machinery and academicians.<sup>2</sup> It is despite the fact that child marriage is a stark violation of human rights manifesting itself as a serious form of sexual violence occurring at family level.<sup>3</sup> Child marriage manifests itself as a grave social evil which not only infringes upon the rights of the child cherished by various UN instruments<sup>4</sup> but also violates the Constitutional commitment contained in the directives principles of the *Constitution of India*.<sup>5</sup>

Child marriage compromises the human rights of both sexes of children involved but somehow the patterns of disparity, inequality and discrimination are manifested more severely in case of girl children.<sup>6</sup> Child marriage robs a girl of her childhood time necessary to develop physically, mentally, emotionally and psychologically<sup>7</sup> as it leads to a vicious circle of early pregnancy, malnutrition and maternal mortality. Child marriage not only denies the girl child her reproductive rights but also hampers her educational and employment probabilities drastically which further affects her development detrimentally. In early maternity, there are grave chances of foetal deformities in case of its survival and high risk is posed to lives of baby as well as the mother. Thus, the health and development of two generations of children – the child mother and the new born baby, suffer as a consequence of early pregnancy.<sup>8</sup> At the national level, child marriages contribute to a major extent in population explosion.<sup>9</sup>

## II The definition, incidence and causes

Child marriage means a marriage to which either of the contracting parties is a child.<sup>10</sup> Child means a person who, if a male, has not completed twenty one years of age,

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<sup>2</sup>JayaSagade, *Child Marriage in India*,xxv(2005).

<sup>3</sup>*Preliminary Report submitted by UN Special Rappourteur on Violence Against Women, Its Causes and Consequences*,RadhikaCoomaraswamy, (1994), para 165; Vandana, *Sexual Violence Against Women : Penal Law and Human Rights Perspectives*, 46 (2010) .

<sup>4</sup>Universal Declaration of Human Rights (1948); International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966); UN Conversation on Elimination of All Forms of Discrimination Against Women (1979); UN Convention on the Rights of the Child (1989).

<sup>5</sup>*Constitution of India, 1950*art 39(f):– “The State shall direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditional of freedom and dignity”.

<sup>6</sup>*Child Marriage in India – An Analysis of Available Data*, UNICEF, 7 (2012).

<sup>7</sup>*UN Fact Sheet no.23, Harmful Traditional Practices Affecting the Health of Women and Children*at11.

<sup>8</sup>Vandana, “Abolition of Child Marriage under Hindu Law: A Plea for Protection of Reproductive Rights of the Girl Child” *XXI Delhi Law Review*117- 118 (1999) .

<sup>9</sup>*Commitment to the Child – National Plan of Action for the SAARC Decade of the Girl Child (1991 – 2000)*, Development of Women and Child Development, Government of India (1992), reprinted in 2 (1996) .

<sup>10</sup>*The Prohibition of Child Marriage Act, 2006*,s. 2(b),

and if a female, has not completed eighteen years of age.<sup>11</sup> Many a times, in discussions and discourses, terms like ‘early marriages’ or ‘forced marriages’ are also used to describe child marriages. ‘Early marriage’ describes a marriage that occurs prior to the age of marriage recognised by law and the term ‘forced marriage’ highlights the lack or incapacity to give consent on the part of child contracting party to marriage, due to minority.<sup>12</sup>

Despite the evil consequences which child marriage entails for the individuals and society at large, its occurrence is widely prevalent in India, particularly in the States of Rajasthan, M.P., Gujarat and Karnataka. In these States, thousands of children are married off on auspicious days like AkshayaTritiya<sup>13</sup> and in few cases, marriages are even reported to be made while the contracting child party was in the womb<sup>14</sup>.

The main official government sources providing data on child marriage are the surveys conducted by NFHS (National Family Health Survey) and DLHS (District Level Household and Facility Survey). According to these surveys, approximately, twenty three million girls in India face the reality of child marriage<sup>15</sup>. While the country is growing at an average of 8% a year, child marriage is decreasing at less than 1% a year.<sup>16</sup> While the practice concerns on an average one in two women, aged twenty to twenty five, the prevalence is even higher among disadvantaged groups, the poorest among the poor families and in rural areas.<sup>17</sup>

The NFHS findings further revealed that 16% of women, aged 15 to 19 years, were already mothers or pregnant at the time of survey.<sup>18</sup> It was also found out that more than half of Indian women were married before the legal minimum age of 18 years as compared to 16% men, aged 20 to 49 years, who were married by age of 18 years. The NFHS findings did

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<sup>11</sup>*Id.*, s. 2(a).

<sup>12</sup>*Supra* note 2 at xxvi to xxvii.

<sup>13</sup>‘A Day of Child Marriages in Rajasthan’, *Hindu* May 12, 97; ‘A Tale of Baby Bride in Bayana’, *Statesman* Sep. 23, 98; ‘A New Look at Child Marriages in Rajasthan’, *Hindu* Aug. 4, 97; ‘7000 Children Married Off in M.P.’, *Telegraph* May 11, 97; ‘Brides at Ten to Tribals Defy Law’, *Indian Express* 10.03.97; ‘Child Brides’, *Deccan Herald* (12.10.97).

<sup>14</sup>‘Here Marriages are made in the Womb’, *Deccan Herald*, (12.10.97).

<sup>15</sup>*Supra* n-6 at 7.

<sup>16</sup>*Ibid.* The NFHS surveys conducted in 29 States of India over a period of 1998 to 2005 provide information on fertility, infant and child mortality, reproductive health, malnutrition, anaemia, family planning services etc. These surveys are conducted by the International Institute for Population Sciences, under the stewardship of the Ministry of Health and Family Welfare, India.

<sup>17</sup>*Ibid.*

<sup>18</sup>*National Family Health Survey of 2005 – 06 (NFHS-3)*, available at: <http://www.nfhsindia.org> (last visited on Aug. 18, 2017).

not compile data on girls, who were married below the age of 15 years, possibly blissfully assuming that girls are never married off prior to attaining the age of 15 years.<sup>19</sup>

Marriage being a cultural decision and not an individual one is essential for everyone, particularly indispensable for females. Several socio-cultural factors like low status of women and applicability of rule of endogamy<sup>20</sup> in marriage are the compelling precursors for child marriages. The low age of marriage is related with the near universality of marriage in India. The girl child in India is unwanted and is considered a liability on the parental family and the first charge on her life appears to be marriage followed by reproduction. The more mature a girl gets, more are the chances that she will apply her mind in the choice of her partner and might go against the parental authority by not conforming to the traditional norms and rules of the society which is not desirable. To rule out any such embarrassing situations, child marriage provides an easier way-out to the parents.

The Indian society attaches a great value to the virginity and chastity of women. The desire to preserve the purity of girls forms another major cause of marriages at young age. Moreover, the religious scriptures also sanction that a girl can be married with proper rites only when she is a virgin. Among Brahmins, a father who could not marry his daughter before pre-puberty was believed to commit a sin.<sup>21</sup> It is also considered that mature unmarried girls are prone to voluntary and involuntary sexual relations including rape. So to protect the girls from indulging in promiscuity and motherhood before marriage, there appears to be a tendency on the part of the parents to transfer their liability of guarding the girl, to the other family as early as possible by giving her in marriage.

In the lower strata of society, bride price of the girls is taken by her parental family and the groom's family is happy to have an extra pair of hands in return, to earn for the family. Lack of education remains the eternal cause of child marriage as the parents are not in a position to segregate the concepts of puberty and preparedness to have sex and are unable to realize the dire health consequences of early reproduction. Over the last century, there has

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<sup>19</sup>This flaw in government statistics was pointed out way back in 1974 by the Committee on the Status of Women in India, Government of India in their Report *ó Towards Equality* but no improvement has been made to rectify this flaw in the last 43 years.

<sup>20</sup>The rule of endogamy suggests that marriages of individuals belonging to a particular community should be solemnized within that community only.

<sup>21</sup>*Supra* note 20 at 81.

been improvement in the mean age for marriage but its pace is so slow that generations of girls continue to marry young and reproduce early<sup>22</sup>.

### III The historical perspective and the development of law on child marriage

The origin of the custom of child marriage remains obscure and there is uncertainty about the time period in which this social evil manifested itself initially.<sup>23</sup> Under the uncodified Hindu law, as per Mitakshara, the capacity to marriage was attained on the completion of the sixteenth years and as per Dayabhaga, on the completion of fifteenth year.<sup>24</sup> During the British period, the British customs and thoughts inspired the reformist movement against the child marriage. It was in fact the first law commissioners, who drafted the Penal Code in 1846, who had first conceived the idea of making sexual intercourse between the husband and the wife, below 10 years, an offence.<sup>25</sup> After the notorious case of *Queen v. Haree Mohan Mythee*<sup>26</sup> in which an 11 years old girl died due to the injuries received by the sexual intercourse with his 35 years old husband, the movement against child marriage picked up its due velocity. In 1891, the age of consent to sexual intercourse was raised from 10 years to 12 years by the Criminal Law (Amendment) Act, 1891<sup>27</sup> to ensure that female children are protected from immature cohabitation.<sup>28</sup> Towards the end of last century, public attention was increasingly directed towards the improvement of the physique of nation and the reduction of causes for abnormal mortality.<sup>29</sup> As a consequence thereof, in 1929, the Criminal Law (Amendment) Act<sup>30</sup> further raised the age of consent from 12 to 13 years in case of married girls.

In 1927, Hari Singh Gour had introduced a Bill to raise the age of consent to 14 years, in case of married girls. The Age of Consent Committee<sup>31</sup> was appointed to consider the Bill

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<sup>22</sup>Child Marriage is a Violation of Human Rights but is All Too Common, UNICEF, *available at*:<http://data.unicef.org> (last visited on Aug.18, 17).

<sup>23</sup>It is believed that when Aryans first came to India, they were strangers to the concept of child marriage. In the Vedic period, marriages were effected only when the couple reached a mature age. In the smriti period, 8 ó 10 years of age, was considered to be appropriate for girls to enter into matrimony. It is alleged that the custom of child marriage is a development which took place after the muslim invasions as it was conceived that the married women were less prone to being the subject of capture by the invaders. See Report of Age of Consent Committee, Government of India, 92(1929).

<sup>24</sup>*Mayne's Hindu Law and Usage*, revised by Alladi Kuppaswami, J. 186 (14<sup>th</sup>ed.1996).

<sup>25</sup>*Supra* note 20 at 9.

<sup>26</sup>ILR 1891 Cal 49.

<sup>27</sup>Act 10 of 1891.

<sup>28</sup>*Id.*, Statement of Objects and Reasons.

<sup>29</sup>*Supra* note 20 at 10.

<sup>30</sup>Act no. 29 of 1929.

<sup>31</sup>*Supra* note 24.

and to analyse the societal impact, which the earlier amendment had brought about. The committee recommended that the enactment of a law penalising marriages below a certain age<sup>32</sup> and also made a very confusing suggestion that the validity of marriages in contravention to such marriage law should be left unaffected.<sup>33</sup> In the same year, Rai Sahib HarbilasSarda introduced a Bill to restrain the solemnization of child marriages among Hindus, by declaring such marriages invalid when either of the parties was below the prescribed age. The Bill finally culminated into the Child Marriage Restraint Act, 1929<sup>34</sup> which is popularly called 'Sarda Act' an Act named after the person who had introduced the Bill.

#### IV The legislative provisions

##### The Child Marriage Restraint Act, 1929

There are several instances in the world history where the law has been used to bring about social reforms. The Child Marriage Restraint Act, 1929, was also a step towards this direction and applied not only to Hindus but to all citizens of India.<sup>35</sup>The Act purported to restrain the solemnisation of marriage between two individuals when they were below the age limit prescribed in the Act. Initially the age limit was 14 years for girls and 18 years for boys. The age limit for girls was raised to 15 years by an amendment to the Act in 1949.<sup>36</sup> Another important change was brought about in 1978<sup>37</sup> when the age limit for both girls and boys was raised to 18 and 21 years respectively, primarily with a view to check the population growth in the country. It was also envisaged that rise in the age of marriage will lead to better health of the mother and the child.<sup>38</sup>

The Act penalised an adult male for marrying a minor girl. If the adult groom was over 21 years of age,<sup>39</sup> he was liable to be punished with up to 3 months SI with fine and in case, he was between 18 ó 21 years of age,<sup>40</sup>a punishment of a maximum of 15 days SI or a fine upto Rs.1,000/- or both can be imposed on him. No similar provision, however, existed for a female adult who married a minor boy, possibly because of such incidents being rare. A

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<sup>32</sup>*Id.* at 144.

<sup>33</sup>*Id.* at 181.

<sup>34</sup>Act 19 of 1929.

<sup>35</sup>*Id.*, s.1. Initially the Bill was meant for Hindus only but the Select Committee, which reviewed the Bill, recommended its application to all communities.

<sup>36</sup>Act 41 of 1949.

<sup>37</sup>The Act was amended in 1978 by the Child Marriage Restraint (Amendment) Act (Act 2 of 1978).

<sup>38</sup>*Id.*, Statement of Objects and Reasons.

<sup>39</sup>*Id.*, s. 4.

<sup>40</sup>*Id.*, s.3.

punishment of a maximum of 3 months SI with fine could be imposed on the parents or guardian<sup>41</sup> for promoting or permitting the marriage to be solemnized or negligently failing to prevent it. It is interesting to note that no woman can be punished under the relevant section<sup>42</sup>. Similar punishment can be imposed on a person, who performed, conducted or directed any child marriage to be solemnized.<sup>43</sup>

The Act prescribed two peculiar features ó first ó the limited cognizable nature of the offences. The offences were cognizable for the purposes of investigation, but the police officers could not make any arrest without warrant.<sup>44</sup> Secondly, the court could not take cognizance of any offence under the Act, after expiry of one year from the date of its commission.<sup>45</sup>

The court was empowered under the Act to issue injunction<sup>46</sup> against the people involved in solemnization of child marriage. This power of the court was fettered as prior to the issuance of such an injunction a notice was to be given to the person concerned and an opportunity to show cause against the injunction was to be provided to him.<sup>47</sup> The disobedience of such injunction could entail the maximum of imprisonment of three months SI with fine to men only<sup>48</sup> as no woman could be punished under the section.<sup>49</sup>

The Act, though penalised could not affect the validity of the child marriages<sup>50</sup> and the provisions were drafted in such a manner that true and effective implementation of the Act was rendered extremely difficult due to the socio-cultural set up of Indian society. There were too many procedural lacunae e.g. no cognizable of offence after expiry of 1 year from the date of commission of offence, limited cognizable nature of offences which allowed time to the culprits to stop solemnizing marriage well in time to escape punishment and no

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<sup>41</sup>*Id.*, s.6.

<sup>42</sup>*Id.*, Proviso to s.6(1).

<sup>43</sup>*Id.*, s.5.

<sup>44</sup>*Id.*, s.7.

<sup>45</sup>*Id.*, s. 9. See *Krishna Pillai v. T.A. Rajendran* (1990 Supp. SCC 121).

<sup>46</sup>*Id.*, s.12.

<sup>47</sup>*Id.*, s.12(2).

<sup>48</sup>*Id.*, s.12(5).

<sup>49</sup>*Id.*, Proviso to s. 12(5).

<sup>50</sup>*Ram Baran Upadhiya v. Sital Pathak* (AIR 1939 All 340); *Sivanandy v. Bhagsvathyamma* (AIR 1862 Mad 400); *William Rebello v. Jose Agnelovaz* (AIR 1996 Bom 204); *Gajara Naran Bhura v. Kanbi Kunverbai Parbat* (AIR 1997 Guj. 185).

punishment to women etc. For the toothless provisions of the Act, it is also referred as an illustration of a non-performing piece of legislation.<sup>51</sup>

### **The Hindu Marriage Act, 1955 (HMA)**

The Act constitutes the major marriage law in India as it applies to the majority of citizens who are Hindus. The Act lays down certain conditions for solemnization of valid marriages among Hindus. The clause (iii) of section 5 requires that the bridegroom should have completed 21 years of age and the bride, the age of 18 years at the time of marriage. Initially the ages prescribed for the bride and the groom were 15 years and 18 years respectively. Before 1978, marriage below the prescribed ages could be solemnized with the consent of the guardian.<sup>52</sup> With the Amendment Act, this provision became infructuous as the age for marriage was raised and the guardianship is not required in case of a person aged 18 years. So, the clause was deleted by the Amendment Act.

Apart from a valid marriage or the one which is solemnized in compliance with all the requirements as laid down in section 5 of the HMA, the Act contemplates void marriages<sup>53</sup>(void ab initio) and voidable marriages<sup>54</sup> (which can be declared null and void at the instance of the aggrieved party). A marriage solemnized in contravention of section 5 is either void or voidable depending upon the contravention of specific clauses of section 5.

It is quite peculiar that in the provisions of the Act, no particular fate has been assigned to the marriage which contravenes the requirement of age as laid down in section 5(iii). Thus, on a plain reading of the Act, the child marriage is neither void nor voidable as it is not covered by either of the categories.<sup>55</sup> This omission to take care of the violation of this provision appears to be deliberate on the parts of the legislation.<sup>56</sup> However, the Act contemplates penal consequences for the children whose marriage is solemnized. The punishment can extend to 2 years SI or with fine which can go upto Rs.1,00,000/- or both<sup>57</sup>.

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<sup>51</sup>Manu N. Kulkarni, *Child Marriages and the State*, (1994) 29 EPW 1884.

<sup>52</sup>Repealed clause (vi) of s. 5. This clause was repealed by the Child Marriage Restraint (Amendment) Act, 1978 (Act 2 of 1978).

<sup>53</sup>The Hindu Marriage Act, 1955, s.11.

<sup>54</sup>*Id.*, s. 12.

<sup>55</sup>Contravention of clauses (i), (iv) and (v) of s.5 is accounted in s.11 dealing with void marriage whereas non-compliance of clause (ii) is one of the grounds contained in s.12 dealing with voidable marriage. There is no mention of non-compliance of clause (iii) of s.5 in either of the provision.

<sup>56</sup>*Supra* note 25 at 186.

<sup>57</sup>*Supra* note 54, s.18, as amended by Amendment Act 6 of 2007. Prior to the amendment, the section stood as follows or (a) in the case of contravention of the condition specified in clause (iii) of s. 5, with simple

### **The Prohibition of Child Marriage Act, 2006 (PCMA)**

Amidst the silent confusions of the Hindu Marriage Act, 1955, and the toothless provisions of The Child Marriage Restraint Act, 1929, the Indian society witnessed a growing demand for making the law on child marriage more effective with stringent punishments so as to eradicate or effectively prevent the evil practice of child marriages. Pursuant to the efforts of National Commission for Women,<sup>58</sup> the National Human Rights Commission undertook a comprehensive review of the 1929 Act and made recommendations for comprehensive amendments<sup>59</sup>. The Central Government, after consulting the State Governments and the UTs on the recommendations of NCW and NHRC, decided to accept all recommendations and give effect to them by repealing and re-enacting the *Child Marriage Restraint Act, 1929*.<sup>60</sup> Consequently, The Prohibition of Child Marriage Act, 2006<sup>61</sup> came into being on January 10, 2007.

The silent features of this legislation are as follows ó

- i. The Act made the child marriage voidable at the option of the contracting party to the marriage, who was a child.<sup>62</sup> However, since a girl is supposed to attain majority at the age of 18 years and a boy at 21 years, the woman can file a petition till she becomes 20 years of age.
- ii. The Act also allows for maintenance and residence for the girl till her remarriage from the male contracting party or his parents<sup>63</sup>.
- iii. All the punishments contemplated under the Act are quite enhanced as compared to the 1929 Act. The punishment for a male adult marrying a girl child has been enhanced to 2 years RI or with a fine upto one lakh rupees or both<sup>64</sup>.

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imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees or with both.ö

<sup>58</sup>The NCW in its Annual Report (1995-96) recommended that (1) the punishment provided under the Act must be made more stringent; (2) marriages performed in contravention of the Act should be made void; and (iii) the offences under the Act must be made cognizable.

<sup>59</sup>Annual Report of NHRC, (2001 ó 2002).

<sup>60</sup>The Statement of Object and Reasons, The Prohibition of Child Marriage Act, 2006.

<sup>61</sup>Act 6 of 2007.

<sup>62</sup>*Id.*, s.3. S-3(1) reads as follows ó Every child marriage, whether solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party, who was a child at the time of the marriage.

Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the District Court only by a contracting party to the marriage, who was a child at the time of the marriage.

(2) If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend alongwith the Child Marriage Prohibition Officer.

<sup>63</sup>*Id.*, s.4.

<sup>64</sup>*Id.*, s.9. S. 9 reads as follows ó Whoever, being a male adult above eighteen years of age, contracts a child marriage shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both.

- iv. Similar punishments are prescribed for anyone who performs, conducts, directs or abets any child marriage.<sup>65</sup> The same punishment is also prescribed for anyone who gets the child marriage solemnised or promotes the solemnization of such marriage or permits it to be solemnized or negligently fails to prevent such marriage<sup>66</sup> and the guardian of such minor party to the marriage is also held responsible<sup>67</sup>.
- v. However, no woman can be punished under the Act<sup>68</sup> which may not be a welcome step under all circumstances.
- vi. All offences under the Act have been made as cognizable and non-bailable<sup>69</sup>.
- vii. The Act further allows for injunctions to prohibit child marriages including ex-parte injunctions and also makes any child marriage solemnized in contravention of an injunction order as void<sup>70</sup>.
- viii. Perhaps the most important change introduced by the Act is the provision which declares child marriage to be null and void under certain circumstances involving kidnapping, abduction or trafficking of the minor<sup>71</sup>.

Although the 2006 Act gives a three pronged formula regarding the validity of child marriage, the legislative confusion regarding the validity of child marriage is manifested in other legislations as well as the judicial decisions.

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<sup>65</sup>*Id.*, s.10. S.10 reads as follows ó Whoever performs, conducts or directs or abets any child marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees unless he proves that he had reasons to believe that the marriage was not a child marriage.

<sup>66</sup>*Id.*, s.11. S.11(1) reads as follows ó Where a child contracts a child marriage, any person having charge of the child, whether as parents or guardian or any other person or in any other capacity, lawful or unlawful, including any member of an organisation or association of persons, who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnised, including attending or participating in a child marriage, shall be punishable with rigorous imprisonment which may extend to two years and shall also be liable to fine which may extend upto one lakh rupees :  
Provided that no woman shall be punishable with imprisonment.

<sup>67</sup>*Id.*, s. 11(2). S.11(2) reads as follows ó For the purpose of this section, it shall be presumed, unless and until the contrary is proved, that where a minor child has contracted a marriage, the person having charge of such minor child has negligently failed to prevent the marriage from being solemnized.

<sup>68</sup>*Id.*, proviso to s. 11(1). *Supra* note 67.

<sup>69</sup>*Id.*, s.15.

<sup>70</sup>*Id.*, s.13.

<sup>71</sup>*Id.*, s. 12. The section reads as follows ó Marriage of a minor child to be void in certain circumstances – Where a child, being a minor ó

- (a) is taken or enticed out of the keeping of the lawful guardian; or
- (b) by force compelled, or by any deceitful means induced to go from any place; or
- (c) is sold for the purpose of marriage; and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes, such marriage shall be null and void.

## V Issues of validity of child marriage

It is noted that the legislature as well as the judiciary recognize the validity of child marriage.

### The legislative endorsement

It is distressing to note that while on the one hand, the law provides for penal consequences for solemnization of child marriage, on the other hand, a number of legislative enactments contain provisions, which in essence incorporate and endorse the notion of validity of child marriage. A few glimpses of such provisions are as follows.

The Hindu Marriage Act, 1955, contains a provision<sup>72</sup> pertaining to a special ground of divorce for a girl, who gets married before attaining 15 years of age and who repudiates the marriage between 15-18 years. It is immaterial whether the marriage is consummated or not. The existence of such provision relating to divorce is clearly indicative of the fact that the legislators have clearly accepted the validity of child marriage as only then they could have contemplated divorce in such a case. It is pertinent to point out that if the child bride does not exercise the option of puberty before she completes 18 years of age, her marriage could be valid.<sup>73</sup> It remains a debatable issue whether the right to repudiate the marriage can be exercised by the child bride at all as it is nearly impossible that she can exercise her choice in a socio-cultural milieu that does not even acknowledge the need of her consent to the marriage, in the very first place.

Another legal anomaly is created, in this context, by operation of section 9 of the HMA. The position of the child bride is further worsened by the fact that in case of her withdrawal from the matrimonial relationship, her husband is legally entitled to claim restitution of conjugal rights against her and it would be no excuse that she was minor at the time of solemnization of marriage.<sup>74</sup>

The preamble to the Indian Majority Act, 1875, contains the objective of attaining uniformity and certainty with respect to the age of majority. The Act lays down 18 years as the age of majority, but the non-obstante clause<sup>75</sup> which saves certain matters from the applicability of the Act, paves the way for lots of ambiguities. The clause saves the matters of great importance in an individual's life like marriage, adoption, divorce and dower from

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<sup>72</sup>HMA, 1955, S. 13(2)(iv).

<sup>73</sup>*Luxmi Devi v. Ajit Singh* 1995(2) HLR 299 (P&H).

<sup>74</sup>*Mohinder Kaur v. Major Singh* (AIR 1972 P&H 184).

<sup>75</sup>Indian Majority Act, 1875, s. 2: reads ó Nothing in this Act affects - 1. The capacity of a person to act in the following matters ó marriage, divorce, dower and adoption.

the operation of the Act and consequently the age of majority of an individual in these matters is governed by the personal law to which he is a subject.

The Indian Penal Code, 1860, contains another stark illustration of legislative endorsement and sanction to the child marriage in section 375 which defines rape. The exception to this section clearly lays down that the sexual intercourse of a man with his wife, the wife not being under 15 years of age is not rape, thus ruling out the possibility of marital rape when the wife is over 15 years. The law presumes the man's right to have sexual relationship with his wife under all circumstances, even when she is a girl child of 15 years of age<sup>76</sup> and does accord any immunity to her from the forcible intercourse by her husband. By keeping a lower age of consent for marital intercourse, the legislature has legitimized the concept of the child marriage. Incidentally, the husband is beyond the zone of all punity in such cases after the 2013 amendment to Indian Penal Code, 1860 whereas under the unamended s-376 IPC a special relaxation was given to the husband who raped his wife, when she happened to be between 12 ó 15 years and a meagre punishment of a maximum of two years or fine or both could be imposed.<sup>77</sup> The rape provisions in the penal code not only approve the husband's authority over the body of his wife but also give relaxation to the husband when he rapes his wife who may be as young as 15 years of age.

In this context, it is relevant to point out the laudable provisions of the Protection of Children from Sexual Offences Act, 2012 which afford better protection to the girl children and make no discrimination among them on the basis of their marital status. Yet another instance of legislative endorsement of child marriage is contained in the Hindu Minority and Guardianship Act, 1956, that explicitly declares that in case of a minor married girl, her husband is her natural guardian.<sup>78</sup> The section does not contemplate the consequences when her husband of such minor girl also happens to be a minor herself.

The Dowry Prohibition Act, 1961, also incorporates the validity of occurrence of child marriage and provides that the dowry of a minor wife shall be held in trust for her benefits by

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<sup>76</sup>It may be noted that as per s. 375 IPC, the age of consent in other than marital cases is 18 years so the sexual intercourse with an unmarried girl below 18 years of age amounts to rape.

<sup>77</sup>Unamended -376(1) IPC. A special relaxation in penalty was given to the husband, who raped his wife when she happened to be between 15-16 years of age as there was a stark discrepancy between the Exception (2) attached to s. 375 IPC and the clause (i) to s. 376(2) IPC, which made the rape of a woman below 16 years as an aggravated form of rape punishable with a mandatory minimum punishment of 10 years. However, after the amendment of 2013 to the IPC, the husband goes scott free in all cases of marital rape where the wife happens to be over 15 years of age.

S. 376(2) IPC. It may be noted that the minimum mandatory punishment, which can be imposed under this section for raping a girl under 16 years, is 10 years, which can be extended upto life. See Act no. 32 of 2012. Various provisions of POCSO defining sexual assault, aggravated penetrative sexual assault etc. do not make any exceptions on the basis of marital status of girl children.

<sup>78</sup>The Hindu Minority and Guardianship Act, 1956, s. 6(c).

any person who receives it and it shall be transferred to her within one year after she attains 18 years of age.<sup>79</sup>The Criminal Procedure Code, 1973, makes it obligatory for the father of the minor bride to provide maintenance to her in case her husband lacks the sufficient means to maintain her.<sup>80</sup>

The above analysis of a few legislative provisions is only illustrative and not exhaustive. Such legislative endorsement and acceptance of occurrence of child marriage certainly diminishes the loud mandate of the Prohibition of Child Marriage Act, 2006 to discourage the solemnization of child marriages. The various above mentioned provisions provide an assurance to the parents and guardians that the legal rights of the minors are secured. Acknowledging such legal rights itself and leaving the validity of child marriage intact defeats the legislative desire to curb the social evil of child marriage.

### **The judicial response**

The spirit of legislative policy of leaving the validity of the child marriage intact is kept alive by the judicial decisions also. Barring a few exceptional decisions, the judiciary has by and large put its seal of approval on the validity of child marriage. The High Court of Madras, way back in 1891, in *Venkatacharyulu v. Rangacharyulu*,<sup>81</sup> while upholding the validity of child marriage observed:<sup>82</sup>

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

The position was further clarified by the court in *Sivanandy v. Bhagwathyamm*,<sup>83</sup> where it was pointed out that a child marriage though prohibited by CMRA

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<sup>79</sup>The Dowry Prohibition Act, 1961, s. 6(1)(c).

<sup>80</sup>The Code of Criminal Procedure, 1973, proviso to s. 125(1)(d).

<sup>81</sup>(1891) IRL 14 Mad. 316.

<sup>82</sup>*Id.* at 318.

<sup>83</sup>AIR 1962 Mad. 400.

is not rendered invalid by any provision therein and the contravention of the provisions of the Act does not render the marriage invalid as the validity of the marriage is a subject beyond the scope of the Act. It was observed in that case:<sup>84</sup>

A marriage under the Hindu Law by a minor male is valid even though the marriage was not brought about on his behalf by his natural or lawful guardian. The marriage under Hindu Law is a sacrament and not a contract. The minority of an individual may operate as a bar to his or her incurring contractual obligations. But it cannot be impediment in the matter of performing a necessary ःsamskarsø A minorø marriage without the consent of the guardian can be held to be valid also on the application of the doctrine of *factum valet*

The doctrine of *factum valet* is quite well known and is duly acknowledged by the Hindu text writers. The relevant Sanskrit quotation is:<sup>85</sup>

ई . a fact cannot be altered by a hundred texts. The doctrine in the case of a minor was the factum of marriage, which was solemnized, could not be undone by reason of a large number of legal prohibitions to the contrary

In *Naumi v. Narottam*,<sup>86</sup> the High Court of Himachal Pradesh held that the child marriage is valid as it is neither void nor voidable. In *MohinderKaur v. Major Singh*<sup>87</sup> upholding the validity of child marriage on the same logic, the P&H High Court observed that the solemnization of child marriage is no defence to the claim of restitution of conjugal rights. However, in *Budhan v. Mamraj*,<sup>88</sup> the court preferred the diametrically opposite approach and remarked while considering the issue of restitution of conjugal rights that a marriage may not be valid if performed in contravention of age requirement, but invalidity cannot be pleaded as an answer to a petition of restitution of conjugal right.<sup>89</sup> Such a judicial interpretation was in sharp contrast to the earlier judicial trend and the general mass opinion in the society. This case was discussed in the 59<sup>th</sup> Report of the Law Commission<sup>90</sup> and the

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<sup>84</sup>*Ibid.*

<sup>85</sup>*Ibid.*

<sup>86</sup>AIR 1963 HP 15.

<sup>87</sup>*Supra* note 75.

<sup>88</sup>1970 PLR 102.

<sup>89</sup>*Id.* at 104.

<sup>90</sup>Law Commission of India 6 59<sup>th</sup> Report on *Hindu Marriage Act, 1955*, and *Special Marriage Act, 1954*, Ministry of Law, Justice and Company Affairs, Government of India, (1974).

commission tried to do away with the ambiguity created by this judgment by stressing that the general understanding was that the child marriage is valid marriage<sup>91</sup>. The same approach was adopted by the High Court of Punjab and Haryana in *Krishni Devi v. Tulsan*<sup>92</sup> also and the validity of child marriage was not recognised. The High Court of Andhra Pradesh decision in *P.A. Sarramma v. G. Ganpatalu*<sup>93</sup> is considered to be a landmark and revolutionary decision as it was explicitly ruled by the court that a child marriage is *void ab initio* and in such event, the parties need not go to the court for getting it declared null and void.

Unfortunately, the full bench of the same high court dissented from its earlier decisions in *P.Venkataramana v. State of Andhra Pradesh*<sup>94</sup> and upheld the validity of child marriage fearing that declaring such marriage null and void will render the innocent children of such marriages bastards<sup>95</sup> as the HMA confers legitimacy to children<sup>96</sup> born of void and voidable marriages only. The Patna, Calcutta and High Court of Punjab and Haryana<sup>97</sup> have followed this decision of High Court of Andhra Pradesh in their recent decisions. However, the High Court of Andhra Pradesh has again deviated from the settled trend of holding child marriage valid, in *KatariSubbaRao v. KatariSeethaMahalakshmi*<sup>98</sup> and held that if there is a marriage of a girl, who is below 12 years, it is a void marriage and cannot be treated as a marriage at all.<sup>99</sup>

Few aberrate high court decisions, in which the validity of child marriage has not been upheld, have created ripples in the more or less consistent judicial approach that the child marriage is a valid marriage. It is noteworthy that while upholding the validity of child marriage, the tendency of the courts is to recognise its evil effects and recommend harsher punishment for the commission of this offence so that it might generate the deterrent impact.<sup>100</sup> The Supreme Court in *Lila Gupta v. Laxmi*<sup>101</sup> has made a reference to child marriage while dealing with the issue of validity of second marriage solemnized before the

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<sup>91</sup>*Id.* at 50.

<sup>92</sup>AIR 1972 P&H 305.

<sup>93</sup>AIR 1975 AP 193.

<sup>94</sup>AIR 1977 AP 43.

<sup>95</sup>*Id.* at 47.

<sup>96</sup>HMA, 1955, s.16,

<sup>97</sup>*Rabindra Prasad v. Sita Devi*, AIR 1986 Pat.128; *Biswanath Das v. Maya Das* (AIR 1994 N.O.C. 356 (Cal.); *HarvinderKaur v. Gursewak Singh* (1998 AIHC 1013).

<sup>98</sup>AIR 1994 AP 364.

<sup>99</sup>*Id.* at 366.

<sup>100</sup>*HarvinderKaur v. Gursewak Singh*, AIR 198 NOC 356 (Cal.).

<sup>101</sup>AIR 1978 SC 1351.

period prescribed under the HMA<sup>102</sup> which should expire after the divorce. Taking example of child marriage, the Court remarked on the scheme of the Act that certain instances of marriage though punishable are not void under the Act.<sup>103</sup> The court further observed that being below the prescribed age is a personal incapacity for a period as the person grows every day and would acquire the necessary capacity some day.<sup>104</sup> It is pertinent to point out that the Supreme Court has given an *obiter* only and the ratio of the case is not on the validity of child marriage, but the proposition cannot be challenged that in the absence of a Supreme Court decision specifically deciding the fate of child marriage the *obiter* retains the due force.

In *Neetu Singh v. State*,<sup>105</sup> the division bench was called upon to test the validity of an order passed by the lower court, directing the minor girl to go to NariNaketan. The said order was quashed while observing that the minor girl's marriage in contravention with section 5 (iii), HMA, was neither void nor voidable and the only sanction which was provided under section 18, HMA, was a sentence of 15 days SI and a fine upto Rs.1,000/-. Similar decisions were followed in *Manish Singh v. State Govt. of NCT*<sup>106</sup>; *Sunil Kumar v. State of NCT of Delhi*;<sup>107</sup> *Ravi Kumar v. The State*,<sup>108</sup> and *Phoola Devi v. The State*.<sup>109</sup>

The full bench of Delhi High Court in *Lajja Devi v. State*<sup>110</sup> noted that there is a great departure from the position of HMA with the passing of Prohibition of Child Marriage Act, 2006.<sup>111</sup> The court, while noting the *voidable* status of child marriage, observed that 'the Parliament has intended to allow PCM Act to override the provisions of HMA to the extent of inconsistencies between these two enactments.... PCM Act will override the personal law'.<sup>112</sup> It was further observed:<sup>113</sup>

... the PCM Act, 2006, does not render such a marriage as void but only declares it as voidable though it leads to an anomalous situation where on the one hand child marriage is treated an offence which is punishable under law

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<sup>102</sup>HMA, 1955, s.1.

<sup>103</sup>*Supra* note 101 at 1354.

<sup>104</sup>*Ibid.*

<sup>105</sup>1999(1) JCC (Delhi) 170.

<sup>106</sup>2006 (1) CCC (HC) 208.

<sup>107</sup>2007 (2) LRC 56 (Del) (DB).

<sup>108</sup>2005 124) DLI.

<sup>109</sup>2005 VIII AD Delhi 256.

<sup>110</sup>(2013) 2 ICC 409 (Del.) FB.

<sup>111</sup>*Supra* note 62.

<sup>112</sup>*Supra* note 111 at 240.

<sup>113</sup>*Id.* at 251.

and on the other hand, it still treats the marriage as valid, i.e., voidable till it is declared as void.

In *Jitender Kumar Sharma v. State*<sup>114</sup> and *Association for Social Justice & Research v. U.O.I.*,<sup>115</sup> the court noted that PCM Act is of secular character and has an overriding effect on HMA. But even after passing of PCM Act, 2006, certain loopholes still remain as the legislation is still weak as it does not actually prohibit child marriage. It can be said that though the practice of child marriage has been discouraged by the legislation but it has not been completely banned.

A similar essence on PCM Act, being a special enactment for the purpose of preventing the evil practice of solemnization of child marriage, is gathered from the judgment of Madras High Court in *T. Sivakumar v. Inspector of Police, Thiruvallur, Town Police Station, Thiruvallur*.<sup>116</sup>

Thus, whereas the legislative endorsement and the judicial recognition of the validity of child marriage made it extremely difficult to effectuate the loud mandate of the CMR Act, 1929 and the penal provisions of the HMA, 1955, loopholes still remain even after the passing of new Act of 2006.

## VI Child marriage and reproductive rights

The marriage of a girl in childhood severely infringes upon her reproductive rights and profusely damages her reproductive health. The 1994 International Conference on Population and Development spelled out the contents of sexual and reproductive rights:<sup>117</sup>

Reproductive rights ... rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children ... It also includes the right of all to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights documents.

All human beings have a right to exercise reproductive self-determination, which involves the right to marry voluntarily and to form a family and to be free from sexual violence and coercion.<sup>118</sup>The Universal Declaration of Human Rights (1948) and the

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<sup>114</sup>(2010) 95 AIC 428 (Del.).

<sup>115</sup>(2010) SCC Online Del. 1964.

<sup>116</sup>(2011) 5 CTC 689 (FB).

<sup>117</sup>Programme of Action of The 1994 International Conference on Population and Development (1994), para 7.3.

<sup>118</sup>The State of World Population of The Right to Choose: Reproductive Rights and Reproductive Health, UNFPA, 36 (1997).

International Covenant on Civil and Political Rights (1966) spell out clearly the right to marry and found a family<sup>119</sup> and emphasise that no marriage shall be entered into without the free and full consent of the intending spouse.<sup>120</sup>The Convention on the Elimination of All Forms of Discrimination Against Women (1979) further makes it obligatory for the state parties to ensure that the same right to choose a spouse to enter into marriage only with free and full consent and to decide freely and responsibly on the number of spacing of children is available to men and women both.<sup>121</sup>

The practice of child marriage and the validity accorded to it by the legal system extinguishes the reproductive rights of the children involved, particularly that of the girl child. The child bride is exposed to serious consequences of child marriage like marital rape and sexual abuse by the husband, thereupon consequent undesirable pregnancies and early maternity. The plightful situation of the child bride is quite opposed to the notion of human rights enshrined in various human rights instruments.

It is relevant to recall that the Fourth World Conference on Women in Beijing in 1995 explicitly declared that the human rights of the women include their right to have control over and to decide freely and responsibly the matter relating to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.<sup>122</sup> The child marriage deprives the girl not only of her reproductive decision making but also nullifies her right to have the capacity to exercise control over her body.<sup>123</sup> The child bride who has been brought up in a culture where numerous social restrains operate on female children and who has been given in marriage by her near and dear ones is hardly left with any choice but to succumb to the consummation of marriage. Early marriage and child bearing impede the girl's educational and employment opportunities drastically.<sup>124</sup> Sometimes child marriage can be used as a disguise and may culminate into trafficking of the girl child across the national borders for prostitution.<sup>125</sup> The practice of child marriage violates the human rights of the girl child by hampering her development as a whole.

To protect the welfare of the children, the human rights mainstream called for the declaration of a minimum age for marriage when the Convention on Consent to Marriage,

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<sup>119</sup>Universal Declaration on Human Rights (1948), art 16.

<sup>120</sup>International Covenant on Civil and Political Rights,(1966) art 23.

<sup>121</sup>Convention on Elimination of All Forms of Discrimination Against Women (1979), art 16.

<sup>122</sup>*Platform for Action*. Fourth World Conference on Women (4 ó 15 Sep. 1995), para 96.

<sup>123</sup>Reed Boland, *Promoting Reproductive Rights – A Global Mandate*, 14 (1997).

<sup>124</sup>Fourth World Conference on Women, Beijing 1995 ó Country Report, Government of India, Department of Women and Child Development, Ministry of Human Resources Development , 19 (1995), para 9.1 .

<sup>125</sup>The Best Interests of Child Towards A Synthesis of Rights and Cultural Values, UNICEF, 19 (1996) .

Minimum age for marriage and registration of marriage (1962) was opened for signature on 10<sup>th</sup> November, 1962.<sup>126</sup> The Convention contemplates full and free consent of the parties to the marriage<sup>127</sup> and requires the State Parties to take legislative action to specify a minimum age for marriage<sup>128</sup> which will not be less than 15 years.<sup>129</sup> No legal status shall be accorded to a marriage solemnized in contravention of the specified age limit. The convention emphasises on the importance of the registration of marriage and recommends it to be made compulsory in all cases.<sup>130</sup> It is significant to note that India has neither signed nor ratified this convention. Explaining the position of India on ratification, the Indian delegate stated ó òthe Convention would impose an obligation to introduce a legislation and since that might not be feasible at the present time, he must reserve his government's position on the question of ratification.ö<sup>131</sup> It is amazing to note that more than 50 years have passed but the Indian Government is adhering to the same stand. By not signing this convention, the Indian Government is faltering in its obligation, which it has already undertaken under Cairo and Beijing instruments, CEDAW and CRC, which protect the rights of girls and mother.<sup>132</sup>

However, it will be pertinent to point out that although India has ratified the CEDAW Convention on July 9, 1993 but has expressed one reservation and two declarations to it. The declarations make it very clear that the Government of India would not like to interfere in the personal affairs of any community without its initiative and consent. The government further made it very clear that òin policy it fully supports the principle of compulsory registration of marriage, it is not practical in a vast country like India with its variety of customs, religions and level of literacyö.

The United Nations Committee on CEDAW and CRC in its report in 2013, has urged that the Indian government must take proactive measures to effectively implement the law to eradicate child marriages. The Committee has recommended that the state party take comprehensive, effective and stringent measures aimed at deterrence of those engaged in child marriages, the elimination of such practices and the protection of human rights of the

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<sup>126</sup>There are 17 signatories and 49 parties to the convention.

<sup>127</sup>Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, 1(1962).

<sup>128</sup>*Id.* at 2.

<sup>129</sup>Recommendation on the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (1965), principle 2.

<sup>130</sup>*Id.* at 3.

<sup>131</sup>UN Doc. A/C3/SR.1148 (1961) quoted in *supra* note 14 at 115.

<sup>132</sup>Convention on the Rights of the Child (1989) at 24. Declarations of Government of India with regard to arts 5(a), 16(1) and 16(2) of CEDAW. UN CEDAW and CRC Recommendations on Minimum Age of Marriage Laws around the World (Nov 2013) *available at*: [http://www.equalitynow.org/sites/default/files/UN\\_Committee\\_Recommendations\\_on\\_Minimum\\_Age\\_of\\_Marriage\\_Laws.pdf](http://www.equalitynow.org/sites/default/files/UN_Committee_Recommendations_on_Minimum_Age_of_Marriage_Laws.pdf) last visited on Aug. 30, 2017.

girl child. It is further recommended by the United Nations committee that the state party must take proactive measures to speedily enact legislation to require compulsory registration of all marriages, implement such legislation and to consider withdrawing its reservation to art 16(2) of CEDAW.

Human rights activists have long argued that the governments must be held accountable for violations of reproductive rights<sup>133</sup> as they are under an obligation to protect the human rights of the inhabitants of their states. The duty of the Government of India to eliminate coercive practices which go against the welfare of the children is long overdue, particularly in the light of the various national policies for children under which the Government has undertaken to provide for adequate services to all children for their full physical, mental and social development.

### **VII Conclusion and suggestions**

Child marriage is a grave social evil which violates the reproductive rights that form the major chunk of human rights of the girl child. Early marriage and early motherhood infringe upon the girl's right to have control over her own body and curtails her opportunities for education and employment apart from causing lots of problem to her and her progeny. Thus, the human rights of the girl child are violated at that stage of her life when they need to be protected the most.

Child marriage creates a complex legal anomaly that despite there being penal sanctions for the commission of offence, the marriage so solemnized retains the validity in the eyes of law.<sup>134</sup> On the one hand, there are penal provisions enacted to curb this menace, while on the other hand, the other legislative enactments and judiciary recognize and endorse the factum of validity of child marriage. That is how child marriage remains a criminal offence ó a phenomenon which is both illegal and punishable but still valid.

A strange proposition of law<sup>135</sup> is contained in the HMA that the children are entitled to punishment for the child marriage, which is solemnized by their parents and guardians. It is pertinent to point out that even the civil law relating to contracts requires that the

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<sup>133</sup>Women – *The Right to Reproductive and Sexual Health*. UN Paper, UN Department of Public Information (1997).

<sup>134</sup>J. Duncan M. Derreft, *Essays in Classical and Modern Hindu Law – Current Problems and Legacy of the Past*, vol. Iv (1978) at 109.

<sup>135</sup>HMA. 1955, s.18.

contracting party must be of age or the transaction entered by him is no contract at all<sup>136</sup>. When it comes to marriage under Hindu law the legal approach changes and unlike in the case of a contract, the consent of the children to their marriage is presumed and they are held liable for the penal consequences. To this extent, the legislature has treated child marriage as an offence of strict liability as far as culpability of children is concerned. The situation was somehow better under the Child Marriage Restraint Act, 1929, as it did not penalise the children but others who are responsible for the solemnization of child marriage. Similar approach is exhibited in the provisions of PCM Act, 2006.

In fact, the most effective approach to tackle this menace will be to abolish the concept of validity of child marriage and to render such marriages *void ab initio*.<sup>137</sup> It is true that some unfortunate girls will suffer as a consequence but the parents and guardians will soon learn a salutary lesson.<sup>138</sup> After a few shocks, the parents/guardians will desist from marrying off their children at early age.<sup>139</sup> The 59<sup>th</sup> Law Commission considered whether an unconsummated child marriage should be rendered voidable at the instance of the underage party, within one year from the date of marriage. The commission felt that the change was desirable but at that time, in 1974, India was not ready for such a change as it might create serious difficulties in practice.<sup>140</sup> Even after 43 years, the legal position in this context remains the same. It is high time that the legislative changes abolishing the child marriage must be brought about<sup>141</sup> and perhaps law can be used to infuse social changes.

As a void marriage entails no marital rights, the courts should be prohibited from granting any legal relief in respect of a marriage solemnized in violation of the age requirement. Regarding the legitimacy of off springs born of child marriages, which have already been solemnized, it is suggested that the remedy can be obtained from the Special Marriage Act, 1954.<sup>142</sup> When a marriage celebrated in any form is registered under this Act and the certificate of the marriage is entered into the marriage certificate book, the names of

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<sup>136</sup>The Indian Contract Act, 1872, s.11

<sup>137</sup>P.M. Bakshi, *Age of Marriage in Hindu Law*, in Indira Jasing, (ed) Justice for Women Personal Laws, Women's Rights and Law Reform, 106 (1996); V. Venkat Kanna, *Myth and Reality of Child Marriage – A Historical Perspective of Legislation and Implementation* 1992 (2): 69 AnLT 52 at 58: *Supra* note 10 at 113.

<sup>138</sup>Vasudha Dhagamwar, *Common Tale of Aameena, Chotu and Countless Other Children*, 31 (50) MAINSTREAM, 25 at 26 (1993).

<sup>139</sup>Vasudha Dhagamwar, *Marital Rights and Wrongs*, HINDU, 2.3.97.

<sup>140</sup>*Supra* note 91, para 3.23.

<sup>141</sup>It may be noted that under the Special Marriage Act, 1954, a marriage solemnized in contravention of age requirement is void. It is desired that a similar provision must be inserted in the *Hindu Marriage Act, 1955*.

<sup>142</sup>Act no.43 of 1954.

the children who are born after the first ceremony of marriage are also entered into the book and they are considered to be the legitimate children.<sup>143</sup>

Another measure that can go a long way in eradicating the practice of child marriage is the compulsory registration of births and marriages, the registration not being allowed in the cases of child marriage. The fact of registration should be considered a pre-requisite for deciding the validity of the marriage. The efforts of the National Commission for Women in drafting the Marriage Bill, 1994, are to be appreciated and admired.<sup>144</sup> The Bill provided for the compulsory registration of marriages among adults, on the lines of the convention on the Consent to Marriage; Age of Marriage and Registration of Marriage, and sought the repeal of personal laws of all communities. The government did, however, not accept the Bill as it sought to interfere in the personal and religious matters of the minorities.<sup>145</sup> It is suggested that the government should seriously consider the ratification of the Convention on Age of Marriage and to incorporate the required infrastructural changes in the legal system to make registration of marriages compulsory. A recent report of Law Commission of India on Laws on Registration of Marriage and Divorce<sup>146</sup> has recommended the enactment of a central legislation on compulsory registration of marriages.

The legislative enactments that sanctify the marriage of children and recognize the legal rights flowing from it, need to be amended. For instance, the penal law in India does not recognise marital rape and the relevant provision on rape in the Indian Penal Code, 1860 clearly excepts the sexual intercourse between the husband and wife from its ambit.<sup>147</sup> In child marriages, there is simply no remedy to stop cohabitation with the husband and the consequent marital rape as no punishment is prescribed for him for raping the wife when she is over 15 years of age. This traumatic situation of girls married at an early age requires immediate legislative attention. The Law Commission of India, in its 205<sup>th</sup> Report,<sup>148</sup> has recommended the abolition of marital rape exception.<sup>149</sup>

Generating public awareness regarding the evil consequences of child marriage and the consequent legal repercussions constitutes an important preventive measure. The

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<sup>143</sup>*Id.*, s.18.

<sup>144</sup>The NHRC, in its annual report, demanded prompt action on this Bill as it would help in checking human rights violation. See NHRC Notice to Rajasthan Chief Secretary on Child Marriages, *Times of India*, 19.6.68.

<sup>145</sup>Government Reject Draft Bill on Curbing Child Marriage, *Indian Express*, Sep. 1996.

<sup>146</sup>21<sup>st</sup> Report on Laws on Registration of Marriage and Divorce - A Proposal for Consolidation and Reform, Law Commission of India, Government of India, (Oct., 2008).

<sup>147</sup>Exception (2) to s.375, IPC.

<sup>148</sup>205<sup>th</sup> Report on Proposal to Amend the Prohibition of Child Marriage Act, 2006 and Allied Laws, Law Commission of India (Feb, 2008).

<sup>149</sup>*Id.* at 44.

Government should recognise its obligation to make people aware of the grave consequences, which are caused by child marriages and there should be an effort to raise the general literacy rate in the country, as ignorance remains the root cause of all social evils. This role of NGOs and the statutory institutions like the NHRC and NCW can be of great importance in helping the government to realise its agenda of eradicating the occurrence of child marriage.

The vast prevalence of the practice of child marriage has intricate nexus with the low status of women in permissive Indian society, which tolerates and encourages the discriminatory practices violative of human rights of women. Over a century, there have been a number of reformist endeavours by the social and political activists to have the legal age for marriage raised. Unfortunately, in due course of time, the initial focus on the health and status of girls has got shifted to the issues of secondary nature, which constitute immediate evils, like population growth in the country. Favouring a later age of marriage does not necessarily mean commitment to modifying the social position of women<sup>150</sup>. Unless the precursor of a social evil is removed, its synthesis cannot be stopped. For the abolition of child marriage, apart from the legislative changes, attitudinal reforms are needed and a healthy social environment is necessary where the reproductive rights of women are respected and not violated.

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<sup>150</sup>Geraldine H. Forbes, Women and Modernity: The Issue of Child Marriage in India, *Women's Studies International Quarterly* 407(1979).