

OF MAIDENS AND MARRIAGES: AN AUDIT OF THE LAW

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ABSTRACT

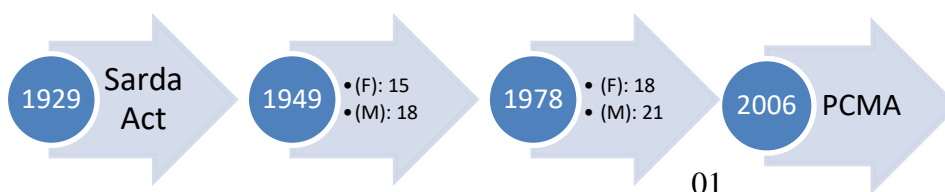
This paper will analyse through the lens of the Social Entropy Theory (SET) the voidability of child marriages per the Prohibition of Child Marriages Act (PCMA) 2006 as opposed to the nullification of such a union right at its initiation. This paper does not advocate the practice of child marriage rather, it will be taken as axiomatic that child marriage as an institution is to be done away with. Furthermore, it is not the purpose of this research to answer whether or not marriage is a contract, but rather to establish the position of the institution of marriage in the Indian legal sphere as a premise for the central argument. A child according to the PCMA 2006 is a female below the age of 18 and a male below the age of 21¹ when either of the contracting parties to a marriage is a child the marriage is voidable, i.e. the marriage is valid until voided by the contracting minor party.² This creates a legal fiction that might be viewed as a lacuna in the legislation defeating the purpose of the Act which one might argue is a systemic risk, hence, it is the purpose of this paper to audit the existence of this legislation's influence on the practice of child marriage per se. Lastly, an attempt will be made to implement feedback based on the SET model prepared.

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Keywords: Social Entropy Theory, PCMA 2006, Legal Fiction, Child Marriages and Contract.

INTRODUCTION

To put into perspective the location of child marriages in the current legislation it is essential to delve briefly into the inception and evolution of this law.



Figure

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¹ The Prohibition of Child Marriage Act, 2006, s 2 (a);

² PCMA, 2006, s 3;

The Child Marriage Restraint Act, popularly known as the Sarda Act after its chief endorser was passed by the Imperial Legislative Council of India in the year 1929. Under this act, a child was a female below the age of 14 and a male below the age of 18, in the year 1949 An amendment was passed in the act increasing the minimum age of marriage for a female to 15 and in 1978 it is raised to 18 for females and 21 for males.³ Mrs. Tahra Begum a Muslim woman filed a writ of habeas corpus in 2012 in the High Court of Delhi for the production of her minor daughter who had eloped with a minor boy. The court upon being presented with the two parties held that since the two minors had eloped and solemnized their marriage the marriage remains valid until either or both the parties choose to make it voidable upon attaining the age of majority.⁴ Thus, it has been opined by the court that The Prohibition of Child Marriages Act 2006 is distinct from the Sarda Act in that it is secular law and overrides all personal laws.⁵

Moreover, marriage as an institution in the Indian socio-legal imagination is not that of a contract, instead, it is that of a union that is entered into for the benefit of the disadvantaged party (who in several cases is the minor bride). It is illustrated in the case of *Fernandes v Gonsalves*⁶ where two fathers enter into a contract to marry their son and daughter to each other, however, the son elopes with another woman. Rose Fernandez brings an action of breach of contract that had been entered into on their behalf by their legal guardians against the boy.

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The Prohibition of Child Marriages (Amendment) Bill 2021 will not be discussed here in great detail because the Bill will lapse along with the dissolution of the 17th Lok Sabha. However, ascertaining the impact of the age variable in the child marriage discourse is imperative and will be discussed elsewhere in this paper.

Having located the legal position of child marriages this paper will postulate a SET model which will then be complemented by comprehensive feedback by drawing a comparative analysis.

POSITIVE POSITION

³ Leela Gulati, "Age of Marriage of Women and Population Growth: The Kerala Experience", (*Economic and Political Weekly*, August 1976). 1225;

⁴ Mrs. Tahra Begum Vs State of Delhi & Ors W.P. (CRL) 446/2012, CrI. M.A. 3701/201, paras 4-11;

⁵ *Independent Thought v. Union of India & Anr*, W.P. Cr 382 of 2013, S.C.C, India para. 19 (Justice Deepak Gupta), 11 Oct, 2017;

⁶ *Rose Fernandes vs Joseph Gonsalves*, (1924) ILR 48BOM673;

In theory, the marriage of a minor being void ab initio seems to be a situation conducive to low social entropy. Based on the discussions above, voidability without contention creates a legal lacuna and is representative of greater unpredictability.

NORMATIVE POSITION

A SET model needs to be isomorphic to society and hence should not disregard subjective responses to the postulation in favour of empirical data.⁷ To determine the normative position in a successful SET model the following question was presented to 41 law students,

According to you should a marriage between minors or a marriage where one of the parties is a minor be void ab initio or voidable?

41 responses

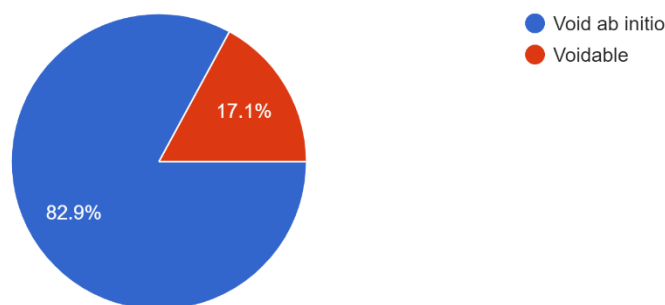


Figure 02

34 students voted for void ab initio and 7 for voidable.

However, concluding that the discourse on the status of the legislation is of a lower social entropy based on the responses received above would be ignorantly hasty. A feedback method involving an elaborate discourse would be adopted to determine whether either of the situations of voidability or void creates a systemic risk.

DETERRENCE AND LAW

The concept of deterrence as a function of law is simply that the presence of an institutionalized disincentive leads to the omission of a criminal act. There is a universal consensus that law has been capable of inhibiting criminal acts by inducing apprehension of prosecution however, the

⁷ Kenneth D. Bailey, *Social Entropy Theory*, (State University of New York Press, 1990), pg 1;

evidence supporting the extent of such an effect is a little flimsy.⁸ It is thus, safe to say that legal sanction has been capable of curbing criminal acts in enough instances that qualifies deterrence as an effective function of law.

However, one must first determine whether a particular legislation (The PCMA 2006) has any influence on the object (Child Marriages) it legislates to establish deterrence as an effective function of law for this research. The next section adumbrates the state of child marriages in Karnataka and any possible effect the changing of the status of child marriages from voidable to void ab initio might have brought.

KARNATAKA: A BRIEF CASE STUDY

To determine the positive position in the SET model regarding the legal status of child marriages, one must consider empirical data and material facts to establish an objective postulation. Haryana and Karnataka are the only other states that have amended the Centre's Act via the state legislature. However, to draw a comparative analysis between the recording of child marriage occurrences between the two periods of 2015-2016 (Before the enactment of the 2016 bill) and 2019-2020 (post the passage of the amendment which renders child marriages in the state void ab initio) and between Karnataka and a state where no amendment has been made to the union law, Karnataka is better suited for this purpose. Since Haryana passed the PCMA amendment bill only in 2021, reliable data indicating any variation in the trends of child marriage occurrences is unlikely to be found.

NFHS (2015-16)

Women aged 20-24 years married before age 18 years (%)	21.4
Men aged 25-29 years married before age 21 years (%)	9.1
Women aged 15-19 years who were already mothers or pregnant at the time of the survey (%)	1.8
Adolescent fertility rate for women aged 15-19 years	7.8

Table 01⁹

⁸ Jeremy Bentham, *The Principles of Morals and Legislation* (Prometheus Books 1988) (1789); Cesare Beccaria, *On Crimes and Punishments* (Henry Paolucci trans., Macmillan 1986) (1764);

⁹ National Family Health Survey-5, State Fact Sheet Karnataka, (Ministry of Health and Family Welfare, International Institute for Population Sciences, 2019-20) 2;

NFHS (2019-20)

Women aged 20-24 years married before age 18 years (%)	21.3
Men aged 25-29 years married before age 21 years (%)	6.1
Women aged 15-19 years who were already mothers or pregnant at the time of the survey (%)	1.7
Adolescent fertility rate for women aged 15-19 years	5.4

Table 02¹⁰

The data above is from a district-wise door-to-door state-wide survey in Karnataka. It is thus data collected in retrospect, i.e. data collected after the minors party to a child marriage have attained majority and it remains unknown whether upon attaining the age of majority, they exercised their right under the PCMA 2006 to make their marriages void. However, the trends to be noted in the comparative study are (i) Percentage of females marrying before attaining the age of majority is greater than that of men, (ii) minor girls pregnant at the time of the survey.

The first trend establishes that females are more susceptible to enter into child marriages, and the second trend establishes that maternity need not equal marriage.¹¹ Overall, the data does not provide much insight into the fact that change in legislation was a causal factor for the occurrence of child marriages in the state.

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State-wise details of child marriages registered under PCMA 2006/ No. of cases recorded

State	2017	2018	2019	2020	2021
Karnataka	65	73	111	184	273
Assam	58	88	115	138	155
West Bengal	49	70	68	98	105
Rajasthan	6	11	19	3	11

Table 03¹²

The reasons for choosing Assam, West Bengal and Rajasthan for a comparative analysis with Karnataka are as follows-

¹⁰ NFHS- 5, State Fact Sheet Karnataka, 2;

¹¹ Coming back to the PCMA (Amendment) Bill 2021, raising the female marriageable age to 21 was not of much significance since the age of consent remained 18 according to the Indian Majority Act 1875.

¹² The National Crime Records Bureau, India, "Crime In India"

- (i) The Prohibition of Child Marriages Act, 2006 remains unamended in these states;
- (ii) On 23rd February 2024 the Assam cabinet decided to repeal the Assam Marriages & Divorce Registration Act, but the PCMA, 2006 remains untouched, instead under section 12 of the latter a statewide crackdown on child marriages was announced by Chief Minister Himanta Biswa Sarma on January 23rd under which 3,015 arrests were made in two phases. Several men arrested under the crackdown had wives who had already attained majority or had attained motherhood; hence the move may not have been a ‘crackdown on child marriage itself but the exhibitionist certainty of punishment has been proven to be a deterrent to criminal acts as discussed at the beginning of this paper;
- (iii) West Bengal has emerged as one of the foremost burden bearers of the national percentage of child marriages, a contributor of 15.2% to the national percentage in a study conducted by Lancet in December 2023;¹³
- (iv) Rajasthan has been chosen for the socio-economic facets that play a definitively causal role in the occurrence of child marriages.

Furthermore, it is important to note that the number of child marriages recorded under the PCMA 2006 is not indicative of actual occurrences of child marriages. However, it would not be an ambitious leap of logic to say that an increase in the recorded cases of child marriages is indicative of an increase in societal awareness leading to recognition and subsequent reporting of a now void ipso jure marriage (in Karnataka).

The data gathered can be construed and appropriated in both ways, it can be reasonably gathered that Karnataka has had a significant rise in the reporting of child marriages which can be seen as a positive trend taking into consideration the variables that prevent a minor from reporting the marriage.

¹³ Jewel Gausman, Rockli Kim, Akhil Kumar, Shamika Ravi, S V Subramanian, Lancet Global Health 2024 (12: e271–81, December 15, 2023)
<chromeextension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.thelancet.com/pdfs/journals/langlo/PIIS2214-109X(23)00470-9.pdf > Accessed April 3, 2024

VOID OR VOIDABLE?

A. VOID AB INITIO

Arguments made in favour of declaring child marriages void ab initio are outlined below-

- (i) Lack of mobility and agency of the minor- The onus to seek a decree of nullity is on the minor, which can only be done once the minor has attained the age of majority. Children are often prevented from reaching the Child Marriage Prohibition Officer (CMPO) and also lack financial autonomy to access the legal system.¹⁴
- (ii) Paltry Maintenance Provision in PCMA- It has been argued that the maintenance provided by the PCMA 2006 to child brides upon the marriage's nullification is minuscule, dissuading the minor from seeking a decree of nullity.¹⁵
- (iii) International Obligations- Article 16 (2) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979, which India has signed and ratified states that “the betrothal and marriage of a child shall have no legal effect...”¹⁶ India has also ratified the UN Convention on the Rights of the Child (UNCRC) 1989¹⁷, which puts an obligation on the states to protect the rights of the child.

It is safe to draw the inference that advocates of amending the legislation to make child marriages void are focusing on a top-down approach.

B. VOIDABLE

The arguments for maintaining the existing legislation do not stem from the acceptability of the practice rather voidability is seen as a relief to bypass legal lacunae appearing otherwise. It favours a bottom-up approach.

¹⁴ Ending Impunity for Child Marriage in India: Normative and Implementation Gaps, Centre for Law and Policy Research, Centre for Reproductive Rights. <chrome-extension://efaidnbmninnibpcjpcglclefindmkaj/https://clpr.org.in/wpcontent/uploads/2018/09/Ending-Impunity-for-Child-marriage_01.19.2017_ForWeb.pdf> Accessed, April 3 2024;

¹⁵ Policy Brief, Ending Impunity for Child Marriage in India: Normative and Implementation Gaps, Centre for Law and Policy Research, Centre for Reproductive Rights.

¹⁶ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979, <https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article16> Accessed 2 April, 2024;

¹⁷ United Nations (2020). "Chapter IV. Human Rights. 11) Convention on the Rights of the Child" in United Nations Treaty Collection. Depository. Status of Treaties <https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=en> Accessed, 1 April 2024;

- (i) Karnataka's experience is often cited as the empirical evidence supporting voidability¹⁸;
- (ii) Further, as a practice, it has witnessed widespread social acceptance. In such a situation, merely declaring child marriages as void will not lead to a cease in the practice, as long as the factors causing the same continue to prevail;
- (iii) In such a situation, it is argued that the legal framework where child marriages are considered void, while the practice continues in society, could prove to have significant adverse consequences for the child bride. In such a situation, brides in such marriages will not even have any of the rights flowing out of the marriage and will be left bereft of any legal protection while having to continue to stay in the marriage.¹⁹

CONCLUSION

The findings have not all been grim, the most recent cross-sectional analysis drawn by Lancet has shown that all states and UTs have seen a decline in child marriages except Manipur. However, one has to factor in that apart from the legislation the execution of it is important as well. Considering the complete discourse one can conclude that there does exist a systemic risk in the legislation which can turn into a systematic one, however, the PCMA 2006 section 19 gives power to states to make rules and amendments in the center's legislation regarding Child Marriages. Hence, there does not exist an institutional deficiency in the law itself rather it is the invariable execution that gives rise to fraught situations.

Thus, the onus is on the policymakers to select the most beneficial approach to address the issue of Child Marriage and no blanket policy across the diverse demographics could eradicate the practice.

Additionally, suppose the PCMA is to be amended and child marriages are to be declared void. In that case, it must be ensured that besides the existing reliefs available under Sections 4-6 of

¹⁸ Saumya Singh, Kriti Jain. "Void or Voidable? On Child Marriages under the PCMA." Law School Policy Review and Kautilya Society. Nov 23, 2020. <https://lawschoolpolicyreview.com/2020/11/23/void-or-voidable-on-child-marriages-under-the-pcma/> Accessed. 18 July, 2024;

¹⁹ Jagriti Chandra, "Should the age of marriage for women be raised to 21?" The Hindu, September 2020 <https://www.thehindu.com/opinion/op-ed/should-the-age-of-marriage-for-women-be-raised-to-21/article62107509.ece> Accessed 3 April, 2024;

the PCMA, some other significant marital rights and protections must also be made applicable to the void marriages under the Act till the child bride remarries, if she does so.

