

## **PROHIBITION OF CHILD MARRIAGES IN INDIA: LOOPHOLES AND RECOMMENDATIONS**

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### **ABSTRACT-**

Child marriages in India are a growing concern for various reasons. A critical analysis shall be done regarding the legislations covering the concerns by pointing out loopholes and suggesting recommendations for the same. The Prohibition of Child Marriages Act was implemented in the year 2006 to curb all the discrepancies found in the Child Marriage Restraint Act, 1929. This new Act is armed with enabling provisions to prohibit for child marriage, protect and provide relief to victim and enhance punishment for those who abet, promote or solemnize such marriage. This Act also calls appointment of Child Marriage Prohibition Officer for implementing this Act. The Act consists of 21 Sections and extends to all over India except Jammu and Kashmir and all those who reject local laws and accept French laws in the Union Territory of Pondicherry. However, it is evident that certain provisions in this Act are contradictory to other laws such as the Indian Penal Code, 1860. According to Indian laws, a marriage is said to be that of a child marriage if the Bridegroom is below the age of 21 or if the Bride is below the age of 18. Child Marriages are voidable as per the Indian laws and are not void ab initio. The objective of this research paper is to elaborate this issue by mentioning the loopholes and shortcomings found in the Prohibition of Child Marriage Act. A detailed analysis of the Prohibition of Child Marriages Act, 2006, its amendments by the Karnataka State Legislature and the 205<sup>th</sup> Law Commission Report shall also be done. Finally, this research paper shall produce various recommendations by suggesting certain changes be made to the legislatures and policies regarding child marriages in India.

**KEY WORDS-** Child Marriage, Loopholes, Recommendations, Prohibition of Child Marriage Act

## CHAPTER I- CHILD MARRIAGE: CAUSE AND HINDRANCE

UNICEF defines child marriage as marriage before 18 years of age and considers this practice as violation of human right. Child marriage has been an issue in India for a long time, because of its root in traditional, cultural and religious protection it has been hard battle to fight. According to 2001 census there are 1.5 million of girls in India under the age of 15 years already married. Some of the harmful consequences of such child marriage are that, child loses opportunities for education and segregation from family and friends, sexual exploitation, early pregnancy and health risks, child more vulnerable to domestic violence, higher infant mortality rate, low weight babies, pre-mature birth etc.<sup>1</sup> Child marriage is a violation of child rights, and has a negative impact on physical growth, health, mental and emotional development, and education opportunities. It also affects society as a whole since child marriage reinforces a cycle of poverty and perpetuates gender discrimination, illiteracy and malnutrition as well as high infant and maternal mortality rates.

According to the UNICEF, some of the major reasons for child marriage are:

- Limited education opportunities, low quality of education, inadequate infrastructure, lack of transport and therefore concerns about girls' safety while travelling to school significantly contribute to keeping girls out of school and therefore tend to favour child marriage.
- Although there is widespread awareness of the Prohibition of Child Marriage Act 2006 (PCMA) and the illegality of child marriage, individually people feel that the traditions and norms are stronger than the law and the institutions and rarely report cases. On top of this, there is limited capacity among officials and lack of willingness to go against community decisions, since officials are themselves part of the community.
- Girls are often seen as a liability with limited economic role. Women's work is confined to the household and is not valued. In addition, there is the problem of dowry. Despite the fact that dowry has been prohibited for five decades (Dowry Prohibition Act, 1961), it is still common for parents of girls in India to give gifts to the groom and /or his family either in cash kind. The dowry amount increases with the age and the education level of the girl. Hence, the "incentive" of the system of dowry perpetuates child marriage.

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<sup>1</sup> Government of India, Census- 2001.

- Law enforcement to prohibit child marriage is relatively weak. Limited detailed knowledge on how to apply laws and little understanding of the consequences of the laws, as well as limited trust in institutions enforcing them, undermines the implementation of the PCMA.
- The families and girls who might benefit from social protection programmes are not always aware of them and these schemes are often limited to providing cash transfers without the accompanying messages to address the multi-dimensional nature of child marriage. The fallout of this is that cash transfers tend to perpetuate dowry, since parents use the grant for that purpose as soon as the girl turns 18 years old.<sup>2</sup>

Child marriage continues to be a reality for many of the world's girls because of a variety of factors. These include poverty, lack of education and job opportunities, insecurity in the face of war and conflict, and the force of custom and tradition. Globally, forced child marriage is much more common in poorer countries and regions, and within those countries, it tends to be concentrated among the poorest households. For example, a girl from a poor household in Senegal is four times more likely to marry as a child than a girl from a rich household. In impoverished situations, parents see few alternatives for their daughters, aside from early marriage.<sup>3</sup>

## **CHAPTER II- LEGISLATIONS PASSED ON THE PREVENTION OF CHILD MARRIAGE**

### **1. CHILD MARRIAGE RESTRAINT ACT, 1929**

*Child Marriage Restraint Act 1929* passed on 28 September 1929 in the British India Legislature of India, fixed the age of marriage for girls at 14 years and boys at 18 years which was later amended to 18 for girls and 21 for boys. It came into effect six months later on April 1, 1930 and it applies to all of British India, not just to Hindus. It was a result of social reform movement in India. Despite strong opposition from the British authorities, the legislation was

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<sup>2</sup> UNICEF INDIA, <http://unicef.in/Whatwedo/30/Child-Marriage>.

<sup>3</sup> Tom Henderson, *New Insights on Preventing Child Marriage: A Global Analysis of Factors and Programs*, International Center for Research on Women (ICRW), 2007, <http://www.icrw.org/publications/new-insightspreventing-child-marriage>.

passed by the British Indian Government which had a majority of Indians. However, it lacked implementation from the British Indian government, largely due to the fear of British authorities losing support from their loyal Hindu and Muslim communalist groups.<sup>4</sup>

The Child Marriage Restraint Act was the result of sustained pressure by social reform groups and individuals who felt deeply about the adverse consequences of child marriage. The minimum age of marriage was upwardly revised on several occasions due to social pressure and increased from 10 years to 16 years. In 1940 the age of consent for married and unmarried girls was 15 though the minimum age of marriage became 16.

The Child Marriage Restraint Act, however, remained ineffective for a variety of reasons. In a study by UNICEF in 2001 it was found that the number of prosecutions did not exceed 89 in any one year.<sup>5</sup> According to the National Crime Bureau Records 2005, 122 incidences were reported in the country under the Child Marriage Restraint Act in 2005, compared to the 93 cases that were reported in 2004.<sup>6</sup>

A recent judgment of the Delhi High Court reiterated that marriages solemnized in contravention of age prescribed under Section 5(iii) of the Hindu Marriage Act, 1955 are neither void nor voidable<sup>7</sup>. The view that child marriages were valid was upheld in many other judgements like *Durga Bai v. Kedarmal Sharma*<sup>8</sup>, *Shankerappa v. Sushilabai*<sup>9</sup>, *Smt. Lila Gupta v. Laxmi Narain and others*<sup>10</sup>, *Rabindra Prasad v. Sita Dass*<sup>11</sup>, *William Rebello v. Angelo Vaz*<sup>12</sup> and *Neetu Singh v. State & others*<sup>13</sup>. However, this Act provided for various loopholes and shortcomings. Thus, it was repealed in the year 2006 and a new legislation was passed.

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<sup>4</sup> Child Marriage Restraint Act, 1929, No. 19, Acts of Parliament, 1929.

<sup>5</sup> Maggie Black, Early Marriage, Child Spouses, UNICEF, Innocenti Research Centre, Digest no.7 (2001), p.10.

<sup>6</sup> National Crime Records Bureau, Crime in India 2005.

<sup>7</sup> *Manish Singh v. State Govt. of NCT. And Ors.*, 2006(1) HLR 303.

<sup>8</sup> *Durga Bai v. Kedarmal Sharma*, 1980(Vol. VI) HLR 166.

<sup>9</sup> *Shankerappa v. Sushilabai*, AIR 1984 Kar 112.

<sup>10</sup> *Smt. Lila Gupta v. Laxmi Narain and others*, 1978 SCC (3) 258.

<sup>11</sup> *Rabindra Prasad v. Sita Dass*, AIR 1986 Pat 128.

<sup>12</sup> *William Rebello v. Angelo Vaz*, AIR 1996 Bom 204.

<sup>13</sup> *Neetu Singh v. State & others*, 1999(1) Vol. 39 HLR 466.

## 2. PROHIBITION OF CHILD MARRIAGE ACT, 2006

The Prohibition of Child Marriage Act, 2006 repealed the Child Marriage Restraint Act, 1929 and attempted to address the previous Act's shortcomings. This Act defined child marriage as the marriage of boys under age 21 and girls under 18. The Act also made positive changes, including extending the maximum length of punishment to two years of imprisonment and/or a fine of up to one lakh rupees. If the marriage is nullified, the Act requires the return of money, valuables, gifts, and ornaments given by each party to the other, and also allows an order of maintenance for the former wife. The Act also provides for government-appointed Child Marriage Prohibition Officers to work to prevent child marriages<sup>14</sup>. While this is good in theory, it is unclear whether they are actually in operation and to what extent. There have been various shortcomings and contradictions within this legislations and other laws such as the Indian Penal Code, 1860<sup>15</sup>.

The Prohibition of Child Marriage Act, 2006 (hereafter PCMA) brings about far reaching changes in the law as under:

1. Section 3 of this Act states that "child marriages shall be voidable at the option of the contracting party who was a child at the time of the marriage." It allows for a petition to be filed to declare the marriage void within 2 years of the child attaining majority. However, since a girl is supposed to attain majority at the age of 18 and a boy at the age of 21, the girl can file a petition till she becomes 20 years of age and a boy till he becomes 23 years of age.
2. The Act also allows for maintenance and residence for the girl till her remarriage from the male contracting party or his parents.
3. It further allows for appropriate orders for custody for any child born from the marriage.
4. All the punishments for contracting a child marriage have been enhanced. The punishment for a male over 18 years of age has been enhanced to rigorous imprisonment of up to 2 years or with a fine up to 1 lakh rupees or both.
5. A similar punishment is prescribed for anyone who performs, conducts, directs or abets any child marriage.

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<sup>14</sup> Prohibition of Child Marriage Act, 2006, No. 06, Acts of Parliament, 2007.

<sup>15</sup> Indian penal Code, 1860, No. 45, Acts of Parliament, 1860.

6. The same punishment is also prescribed for anyone who solemnizes a child marriage including by promoting such a marriage, permitting it to be solemnized or negligently failing to prevent the marriage. No woman can however be punished with imprisonment. The Act also makes all offences cognizable and non-bailable.
7. The Act further allows for injunctions to prohibit child marriages including ex parte interim injunctions. It states that any child marriage solemnized in contravention of an injunction order will be void.<sup>16</sup>

The Act lays emphasis on the prohibition of child marriages by providing for the appointment of Child Marriage Prohibition Officers by the State Governments and gives powers to these Officers to prevent and prosecute solemnization of child marriages and to create awareness on the issue. However, without the required financial allocations these Officers will probably not get appointed. The Act gives the District Magistrate powers to stop and prevent solemnization of mass child marriages by employing appropriate measures and minimum police force apart from giving him all the powers of the Child Marriage Prohibition Officer.

In view of the provisions of PCMA we have to examine whether any further amendments to the law of child marriage are necessary. The present law while making child marriage voidable under a gender-neutral provision has also given a male child the right to get out of a forced marriage. 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. Under the criminal law, however, Section 375 IPC<sup>17</sup> makes it a crime to have a sexual relationship with a child under 15 years of age. A contradiction therefore remains between the PCMA and Section 375 IPC. It is relevant to mention that prior to the new Act a Parliamentary Standing Committee had examined the government Bill on the Prevention of Child Marriage and suggested that child marriages solemnized after the introduction of the new Act should be made void ab initio. The Standing Committee had pointed out that research had shown that a girl child “has to suffer irreparable losses due to biological factors and inability to sustain pressure of marriage at an early age.”<sup>18</sup>

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<sup>16</sup> *Supra* Note 5.

<sup>17</sup> *Supra* Note 6.

<sup>18</sup> Rajya Sabha, Thirteenth Report on the Prevention of Child Marriage Bill, 2004, New Delhi, November 2005, Para 10.4.

It is important therefore, to examine whether the new law on child marriage (PCMA) considers and seeks to redress the disastrous effects of child marriage in a holistic manner. By making a provision for child marriage protection officers and giving powers to Magistrates to stop mass child marriages and by making child marriages both cognizable and non-bailable the new law certainly seeks to prevent child marriages from taking place and sets a machinery in place to do so. Further, by providing that ex-parte interim injunction orders can be given by a Magistrate to stop child marriages the new law is a definite improvement over the old law which stipulated that no interim injunction orders could be passed without notice. The enhancement of punishment in Sections 9, 10 and 11 for the guardian and others who promote or permit or fail to stop a child marriage, for a groom above 18 and for those who perform, conduct or direct any child marriage, up to two years from the earlier three months and the increase in fine up to rupees one hundred thousand are also welcome changes.

However, there are some criticisms of the new Act made by Women's and Human Rights Groups and other concerned individuals. One of the main criticisms of the new Act has been that it does not invalidate a marriage even below a certain age. Thus, a child of 10,11,12 or 13 years of age can be married and subjected to sexual and other forms of abuse which normally have lasting and irreversible mental and physical consequences. Merely giving a girl child an option to end the marriage after the age of 15 years may not be sufficient. Also, though under the criminal law sexual intercourse with a wife under 15 years is punishable, the marriage is still held to be valid under the new Act. It has been proposed by some that the age of consent under the rape laws should be the same as the minimum age of marriage and all marriages below this age should be held void. Some others have proposed that in special circumstances a marriage may be allowed between over 16 years (hereinafter called the relaxed age of marriage) and the age for consent to sexual intercourse and the relaxed age of marriage should be the same and marriages below the age of 16 should be void.<sup>19</sup>

The new Act like the old Child Marriage Restraint Act, 1929 continues to stipulate different minimum age for a girl and a boy to get married. This provision has been criticized by some as

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<sup>19</sup> 205<sup>th</sup> Law Commission Report, Chapter IV.

being discriminatory, biased and based on patriarchal notions of marriage.<sup>20</sup> This has been criticised so as even though the male child reaches puberty in age only after the female child does, by the time both genders reach the age of 18, they both are said to be mature both physically and intellectually, and to have attained the age of puberty.

### **3. THE PROHIBITION OF CHILD MARRIAGE (KARNATAKA AMENDMENT) ACT, 2016<sup>21</sup>**

The statement and objects of reasons of this Amendment are “The Core Committee in its report submitted to the Government has recommended consequential amendments to the Prohibition of Child Marriage Act, 2006, (central Act 6 of 2007) in its application to State of Karnataka and State Government has accepted the report of the core committee, for enabling concerned the police officer to take notice or an offence suo-motto and prescribe a period of minimum year imprisonment for offences under section 9,10 and 11, therefore, it is considered necessary to amend sections 3, 9, 10 and 11 of the Prohibition of Child Marriage Act, 2006 to provide for,- (a) declaring every child marriage void ab-initio; (b) to enhance the penalty under sections 9,10,11 and 13; and (c) for enabling concerned the police officer to take notice of an offence suo-motto.”<sup>22</sup>

Thus, Karnataka became the first State to declare Child Marriage as void ab-initio. This legislature should be set as an example for States all over the country to slowly amend the Act in the State Legislature to curb this taboo. The Parliament should also use this as a stepping stone to pass a new amendment stating that Child Marriage should be void ab-initio all over the country.

### **CHAPTER III- RECOMMENDATIONS**

An increasing number of studies have highlighted the extremely harmful and traumatic effects of child marriage. Child marriage below a certain age is blatant child abuse. The Indian Penal Code considers any sexual intercourse with a minor wife below 15 years of age rape. But, not

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<sup>20</sup> Jaya Sagade, *Child Marriage in India*, Oxford University Press, 2005.

<sup>21</sup> Prohibition of Child Marriage (Karnataka Amendment) Act, 2016, No. 29, Act of Legislature, 2017.

<sup>22</sup> In Re. 21.



the age gap between 15 and 21. This is a major concern of contradiction between the IPC and the Prohibition of Child Marriage Act, 2006. The Child Marriage Act, in fact lays the foundation for such an abuse by not invalidating any child marriage. Research has further shown how the child bride is more liable to suffer from pregnancy related problems and how high both maternal and infant mortality is in the case of child marriages. Apart from this child marriage deprives all girl children of their basic fundamental human rights to develop in a natural, healthy environment. It deprives girls of their right to education and to physical and mental and psychological development. It isolates girls from their environment and infringes on their fundamental right to liberty, speech, movement.

Some recommendations can be-

1. Child marriage has yet to receive the attention it deserves as a violation of human rights of children. For example, the fact that even within the government of India, child marriage is dealt with under the umbrella of women's welfare and not the section dealing with children, shows lack of its recognition as child rights issue. This is true of initiatives by civil society too. As a result, child marriage or early marriage is addressed primarily as a health issue and interventions and programmes are implemented largely to address it as such under the umbrella of reproductive and sexual health initiatives. It is time that child marriage is seen to be a violation of the right to protection of children. It must be recognized that it leads to the denial of right to childhood, education etc. and makes them vulnerable to abuse and exploitation, apart from the long-term health implications.<sup>23</sup>
2. There is very strong need for law change. The laws as they exist send out contradictory messages. This has even led to courts giving different interpretations of the provisions of the Prohibition of Child Marriage Act, 2006 (PCMA). As long as these anomalies exist, child marriage will continue. Despite India having adopted the definition of child as person up to the age of 18 years in most laws and policies concerning children, the child in the PCMA has differential definitions for boys (up to 21 years and girls 18 years). There is a need to correct this anomaly and define both boys and girls as persons up to 18 years.

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<sup>23</sup> Enakshi Ganguly Thukral and Bharti Ali, *Child Marriage in India: Achievements, Gaps and Challenges*, Twenty-sixth Session of the Human Rights Council, HAQ: Centre for Child Rights.

3. If child marriage is to be addressed, the PCMA Act must make child marriage illegal. It must over ride all personal laws and all laws dealing with age of consent and rape have to be brought in harmony. A Uniform Civil Code will go a long way in dealing with children equally.<sup>24</sup>
4. Because of the social sanction that child marriage receives, it is yet to be recognized as a crime. This is evident from a very low number of cases that get recorded in the crime data available. There has to be a growing awareness of the criminality of forcing children into marriage.<sup>25</sup>
5. Often people hesitate to report child marriage not just because of reluctance to challenge social norms, but also because of threat to their life. There is a need to establish a protective mechanism for people reporting child marriages.<sup>26</sup>
6. There are several Government as well as civil society initiatives being implemented to prevent child marriage. These must have a commonality of understanding and focus so that the same message is clearly sent out.<sup>27</sup>
7. Measures to curb child marriages have to address the existing power equations of the society. They have to understand and challenge existing patriarchal, social and cultural structures, class, religion, and customary practices. There is thus a need for comprehensive government measures, including measures to provide genuine development opportunities to girl children.<sup>28</sup>
8. The retention of girls in school has emerged as one of the most significant ways of ensuring delay of marriage. However, the current law on right to education only covers children up to the age of 14 years. The Right to Free and Compulsory Education 2009 must be changed so that all children, especially girls can continue in school up to 18 years, and the education must be affordable and accessible.<sup>29</sup>
9. The most crucial is the need to back political commitments with financial commitments. The Government must allocate budgets specifically for child marriage elimination

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<sup>24</sup> *Supra* Note 19.

<sup>25</sup> *Supra* Note 23.

<sup>26</sup> Anju Malhotra, *The Causes, Consequences and Solutions to Forced Child Marriage in the Developing World*, International Centre for Research on Women, 2010.

<sup>27</sup> *In Re. 26.*

<sup>28</sup> Santosh Kumar, *Causes and Consequences of Child Marriage: A Perspective*, International Journal of Scientific and Engineering Research, July 2016.

<sup>29</sup> *In Re. 26.*

programmes. The state cannot abdicate its responsibility by trying to bring in UN agencies and other international organizations to support child marriage initiatives. It must have distinct programmes and schemes of its own to deal with the problem.<sup>30</sup>

10. The most important and neglected area is building evidence on child marriage through both macro and micro level studies and maintain up dated data bases. For instance, on one hand, there is social acceptance of marriage between adolescents amongst the Santhals (Bihar) and Bhils (Madhya Pradesh). On the other hand, there are cases of street children in West Bengal practicing early marriage due to their social context. Among the Konyak tribe in Nagaland, it is possible to reserve an unborn girl for marriage. Not all practices find place in policy or programme interventions.<sup>31</sup>

#### **CHAPTER IV- CONCLUSION**

Child marriages in India remain a growing concern. A critical analysis was done regarding the legislations covering the prevention of Child Marriage by pointing out loopholes and suggesting recommendations for the same.

It was seen that the Prohibition of Child Marriage Act, 2006 repealed the Child Marriage Restraint Act, 1929 to overcome its shortcomings, loopholes and discrepancies. It provided for a much better implementation of the law. However, as discussed in Chapter II, it is evident that even though the legislation provided for a much better law than its predecessor, it was not fool proof as it had its own shortcomings and loopholes as well. Therefore, to answer the first question, the new Act is not as infallible as the first, but it requires certain amendments as mentioned in the recommendations of Chapter III. The main issue with the loopholes and shortcomings of the PCMA is that these are contradictory to the laws of the IPC and are not certain per se. As mentioned earlier, the Exception 2 of Section 375 of the IPC is directly a loophole from the PCMA. However, the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016<sup>32</sup> provides for various changes that are very relevant to

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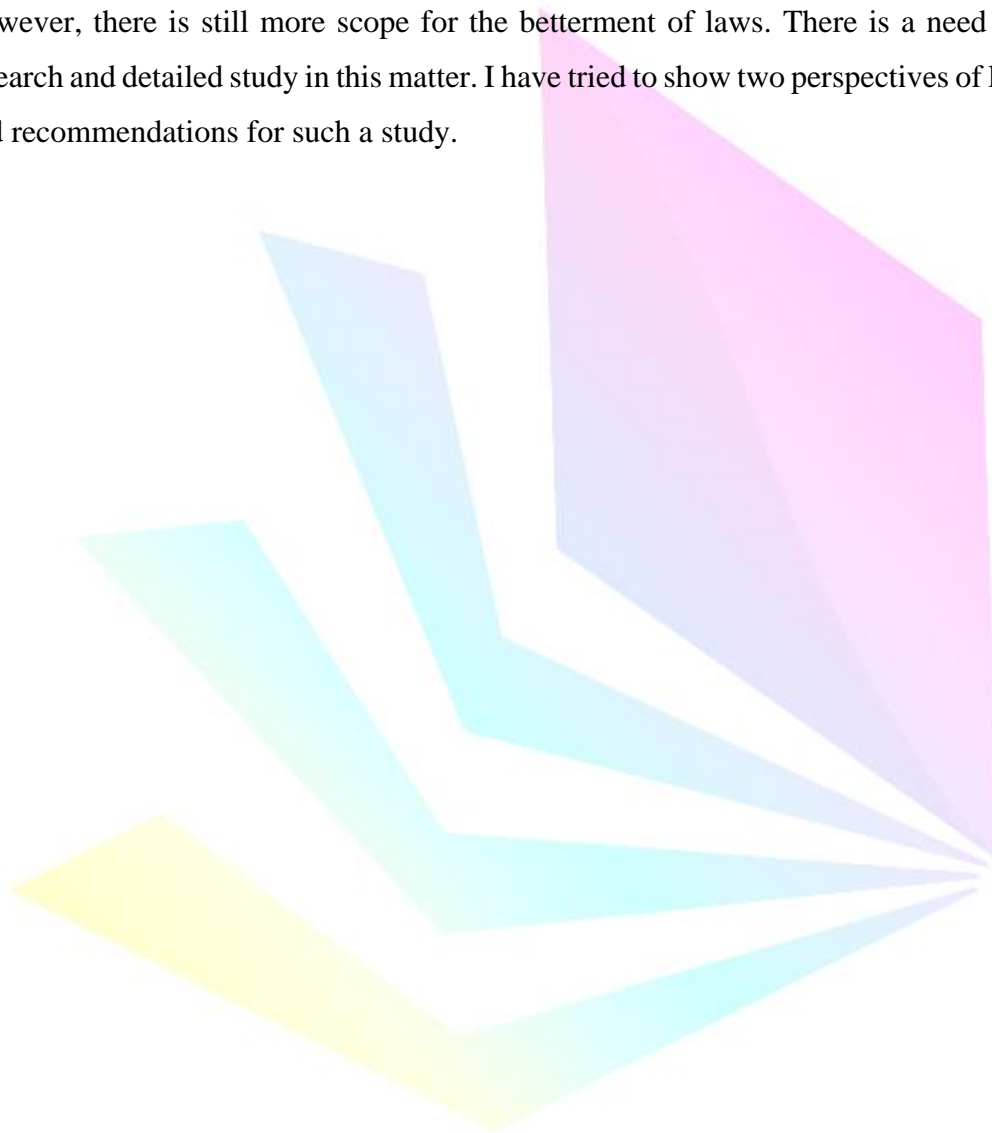
<sup>30</sup> *Supra* Note 28.

<sup>31</sup> *Supra* Note 19.

<sup>32</sup> *Supra* Note 21.

the country as a whole and not just one State. The Central Government must use this Act<sup>33</sup> as an example and must pass a new legislation amending the PCMA. The recommendations mentioned must also be researched into thoroughly to make sure they are infallible too.

India has come a long way since the first Act to prevent child marriage was passed. However, there is still more scope for the betterment of laws. There is a need for more research and detailed study in this matter. I have tried to show two perspectives of loopholes and recommendations for such a study.



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<sup>33</sup> In Re. 32.