

CRITICAL CHILD MARRIAGE: ANALYSIS OF PRESENT LEGAL FRAMEWORK IN INDIA

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I. Introduction

“If every girl is valued and given the same opportunities as boys; if she is free from not only child marriage, but from all forms of violence and discrimination, amazing things can happen – not only for the girl whose life is changed forever but for the whole world which becomes safer, happier and more balanced.”

Yasmeen Hassan, Global Director, Equality Now

Birth, marriage and death are the yardstick trio of key proceedings in most people’s life. Of these, marriage is a matter of option. Deciding when and who to marry is one of life’s most important decisions. No one else, apart from the one who choose to marry, has the right to make that decision. Such a choice to marry should be a freely made, knowledgeable decision that is taken without panic, intimidation, or excessive strain. It is a mature resolution and a verdict that should be made, when ready, as an adult. On that virtually all countries agree.

II. Child marriage

The term “child marriage” is used to describe a legal or customary union between two people, of whom one or both spouses is below the age of 18.² Child marriage is frequently referred to as “premature” and/or “compulsory” marriage since children, given their age, are not able to give free, prior and informed approval to their marriage partners or to the timing of their marriage.³ Children may readily agree to marriage as their fixed destiny. A factor of bullying may also be implicated if families affect societal or emotional stress or push for marriage for fiscal reasons, or further advocate marriage in the (injudicious) conviction that such a union will

¹ Advocate, Supreme Court of India.

² Article 1 of the Convention on the Rights of the Child establishes that a child is any human being under the age of 18 unless, under state law, majority is attained earlier.

³ United Nations Population Fund, ‘Marrying Too Young End Child Marriage’ UNFPA, New York, (2012).

remain their children, especially, daughters safe.⁴ This, on the other hand, involves either one or both spouses being children and may take place with or without formal registration, and under civil, religious or customary laws. In many societies in developing countries, child marriages are used to build or strengthen alliances between families. Sometimes this may even include the betrothals of young children or babies.⁵

Child marriage infringes girls' privileges and it does so in several ways. It in actual fact brings a girl's early days and teenage years to a premature and abnormal end by compelling adult roles and responsibilities previous to she is physically, emotionally and spiritually prepared⁶. It is not exceptional for marriage to oblige social separation on girls bringing unnecessary separation from their friends and relatives. Frequently child marriage brings an ending to a girl's likelihood of continued schooling. Girls may be disconnected from school for numerous reasons. Many studies imply that falling out of school is less possible to be a direct consequence of child marriage than of poverty, the low status given to women, and societal norms that escort parents to discount the value of investing in girls and their education⁷. But under these circumstances, when girls drop out of school, they become even more helpless to child marriage⁸.

Women who marry while in their teens are two-thirds more likely to divorce within 15 years of their wedding compared with women who postpone marriage. In addition, women who marry in their teens tend to have more children and to have those children earlier. Teenage marriage is also associated with much lower education levels; women who marry before the age of 19 are 50% more likely to drop out of high school and four times less likely to graduate from college.⁹ Attaining puberty should score the foundation of a slow changeover to a dynamic and fruitful adulthood. Instead, for numerous girls, puberty results a hastening trail into discrimination. Child marriage is a crucial source of this, restricting a

⁴ E.M Karei,. and A. Erulker, *Building Programs to Address Child Marriage: The Berhane Hewan experience in Ethiopia*, Population Council, New York (2010).

⁵ International Planned Parenthood Federation and the Forum on Marriage and the Rights of Women and Girls, '*Ending child marriage: A guide for global policy action*' London (2010).

⁶ Anita Raj, "Changes in Prevalence of Girl Child Marriage in South Asia"19 *Journal of American Medical Association* 307 (2012).

⁷ UNICEF 2009, *Early Marriage in South Asia: A Discussion Paper*. Rep. UNICEF ROSA, 2009.

⁸ T. Mussweiler, "Comparison Processes in Social Judgment: Mechanisms and Consequences." *Psychological Review* 110 (2010).

⁹ D. Kalmuss and P. Namerow. "Subsequent Childbearing Among Teenage Mothers: The Determinants of a Closely Spaced Second Birth." 26 *Family Planning Perspectives* 149-53 (1994).

decisive epoch for growth, education, individuality development and experimentation; each of which is indispensable if maturation into entirely curved human beings is to be unimpeded¹⁰.

III. Causes of child marriage

Regardless of enacting laws by most countries that specify 18 as the least legal age for wedding for girls, child marriage is extensively common¹¹. Most of the marriages are predetermined by parents and regional heads who influence a lot on decision making of child's parents. Many a times, it is done devoid of the sanction of the girl. A multiplicity of factors expose child marriage, including a lofty cost placed on girls' sexuality, gender inequity, breach in national laws, pitiable enforcement of child marriage prevention laws, illiteracy, dipping education, poverty and insecurity due to natural catastrophe and related conflicts. Research shows that if a girl is married before the age of 18, her body may not be fully developed and she is more liable to pass away as a consequence of pregnancy and childbirth, be beaten, raped or infected with HIV by her husband, battered by her in-laws and live deprived. There is likelihood that, she will be wedded to a much older man and her agreeing ability will be limited.¹² And conventional cultural custom of older men marrying young, virginal girls to prove their masculinity continue to drive this behaviour. According to a report by the New York-based charity, 25,000 children worldwide, most of whom are girls under the age of 18, are married every day - with the South Asia region accounting for almost half of all child marriages. The report further states that the parents of child brides are often underprivileged and utilize marriage as a method to offer for their daughter's hope, principally in areas where there are few monetary opportunities for women¹³. The report states 46 percent of women in South Asia between the ages of 20 to 24 report having been married before the age of 18, translating to 24.4 million. This figure is expected to rise to a overwhelming 130

¹⁰ Hotz, V.J., C.H. Mullin, and S.G. Sanders. "Bounding Causal Effects Using Data From a Contaminated Natural Experiment: Analyzing the Effects of Teenage Childbearing." 64 *Review of Economic Studies* 575-603(1997).

¹¹ United Nations Children's Fund (UNICEF). Working towards a common goal: ending child marriage (2012)

¹² Santhya, K.G., and S.J. Jejeebhoy, 'The Sexual and Reproductive Health and Rights of Young People in India, A Review of the Situation'. New Delhi: Population Council (2012).

¹³ Centre for Reproductive Rights, 2013. Child Marriage in South Asia: International and Constitutional Legal Standards and Jurisprudence for Promoting Accountability and Change. Centre for Reproductive Rights, New York, US. Justin Dongbehounde and François Gautho, 'CAGE Project Final Evaluation 2001-2005' (Washington, DC: OECD, 2005),

million by 2030. Some families exercise nuptials to put up and reinforce alliances, to fasten property transaction, reconcile clashes or recompense debts. In some traditions, child marriage is encouraged to amplify the amount of pregnancies and guarantee adequate children live on to maturity to work on family property and sustain elderly kith and kin¹⁴. In South Asia, several families marry off all their daughters at the same time to lessen the expenditure of the nuptial ritual. Chastity is yet foremost ground and many parents desire to ensure their daughters do not have a child outside matrimony. There is countless other ethnic motivation for child marriage¹⁵. In India's southern state of Tamil Nadu, some society has a tough communal dishonour against girls being married subsequent to puberty¹⁶. Likewise, it is reported that some people in Ethiopia's Amhara region believe that menstruation is persuaded by intercourse.¹⁷ Some also fear that if girls obtain good schooling and tutoring, they will not be ready to perform their customary function as wife and mother. The number of child marriages constantly enhance during conflicts or natural disasters, when families try to find safety for their daughters or wealth for themselves.

IV. International Conventions & National legal framework

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 widely recognized as the women's bill of rights – provides explicit clauses on key areas. This includes the issue of consent, and a minimum marriage age of 18 years¹⁸. Articles 2 and 16 are renowned as central part provisions in CEDAW deal with discrimination, marriage and family relations; nevertheless, a few States that have ratified this convention continue to maintain their reservations on these

¹⁴ Justin Dongbehounde and François Gautho, 'CAGE Project Final Evaluation 2001-2005' (Washington, DC: OECD, 2005),

¹⁵ Report of the Consultation on Youth Participation in Implementing the National Youth Policy (NYP) and the National Plan of Action on Gender (NPAG). Consultation held on 4th November 2010 at the Youth Development Fund (YDF) Conference Room Thimphu, Bhutan.

¹⁶ K.G. Santhya et al., "Associations Between Early Marriage and Young Women's Marital and Reproductive Health Outcomes: Evidence From India," 36 *International Perspectives on Sexual and Reproductive Health*, 132-39 (2010).

¹⁷ ICRW, *New Insights on Preventing Child Marriage* (Washington, DC: ICRW, 2013).

¹⁸ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.

articles. Even though the CRC (Convention on the Rights of the Child)¹⁹ does not specifically address early marriage, it provides a number of norms and protective measures for children which provide an enabling framework for tackling child marriage. They include the following: non discrimination (article 2), best interest of the child (article 3), right to life (article 6), right to be registered after birth (article 7), right of the child not to be separated from parents against his/her own will (article 9), right to express his/her views (article 12), right to health and to be protected from harmful practices (article 24), right to education, (articles 28 and 29), right to freedom from abuse and exploitation (articles 19, 34, 35,36 and 39). The CRC Committee has called on states parties to review the age of majority if it is set below 18 and to increase the level of protection for all children under 18. The Human Rights Committee (HRC) also stated that the obligation of special protection continues until the age of 18, regardless of any lower age of majority set forth in domestic laws. India has ratified the CRC, however many girls are even today married well before the legal age; tragically some before 15 years of age. The irony is national laws are often designed such that the legal age of consent for marriage for girls is lower than the same for boys. Child marriage laws in India establish a minimum age of marriage of 18 for girls, while it is 21 for boys.

IV.I. Indian Legislations

The principle of gender equality is protected in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles. Further there are special laws such as the Prohibition of Child Marriage Act, 2006 that came into effect after repealing the Child Marriage Restraint Act of 1929. Further, there is Protection of Children from Sexual Offences Act, 2012 that defines children as all persons below 18 and therefore punishes sexual intercourse below this age. The National Plan of Action for Children of 2005 also includes goals on eradicating child marriage. The National Plan of Action for the Girl Child (1991-2000) was aimed to ensure survival, protection and development of the girl child with the ultimate objective of building up a better future for the girl child. Further, the latest Criminal Law (Amendment) Act, 2013²⁰ addresses sexual violence against adult women, but does not recognize marital rape. Only sexual assault of girls below the age of 15 years within marriage is

¹⁹ Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49

²⁰ The Criminal Law (Amendment) Act, 2013 is an Indian legislation passed by the Lok Sabha on 19 March 2013, and by the Rajya Sabha on 21 March 2013, which provides for amendment of Indian Penal Code, Indian Evidence Act, and Code of Criminal Procedure, 1973 on laws related to sexual offences

considered a crime under the Indian Penal Code (IPC). This amendment has also risen the age of consent for sexual acts from 16 to 18years.

IV.II. Loopholes in Legislation

Despite these laws, efforts to enforce them have at best been lackadaisical. It has also been found that in most countries, minimum age for marriage do exist but are often not enforced. India has started a process of registering births and marriages but in remote areas these laws are constantly flaunted. In many countries with a high prevalence of child marriage, marriages are sanctioned by the state, or under customary or religious law. Many national constitutions recognize these personal or family laws in situations where they do not contradict the constitution or existing legislation. For example in India, there exist both the civil and the personal law which means children under 18 can and do marry. In addition, the *Shariat Law* defines puberty/menstruation for girls and facial hair for boys to signify the time when they can get married. The co-existence of all these and a lack of awareness make the situation even more complicated. Most of the marriages are predetermined by parents and regional heads who influence a lot on decision making of child's parents. Many a times, it is done devoid of the sanction of the girl. A multiplicity of factors expose child marriage, including a lofty cost placed on girls' sexuality, gender inequity, breach in national laws, pitiable enforcement of child marriage prevention laws, illiteracy, dipping education, poverty and insecurity due to natural catastrophe and related conflicts. So there is a need for allocation of sufficient resources from national and state budgets to ensure quality education at all levels for girls. Likewise, it is necessary to promote the re-enrolment of girls who have dropped out of school so that they can continue and complete at least their secondary education. There should be a provision in law to form local monitoring groups in all districts to report and prevent cases of child marriage.

The first and foremost effort should be is to materialize 'Right to Education' the fundamental right to reality. Indian government should make an effort for free and compulsory education to all children of the age of five to sixteen years. Ideally, policy change should be accompanied by trainings and workshops with judges, police, and parliamentarians to ensure that laws are enforced. Empowering the girls, women with information, skills and support network should be the basic motto. In rural India, several families marry off all their daughters at the same time to lessen the expenditure of the nuptial ritual. Chastity is yet foremost ground and many parents desire to ensure their daughters do not have a child outside matrimony. There is

countless other ethnic motivation for child marriage²¹. In India's southern state of Tamil Nadu, some society has a tough communal dishonour against girls being married subsequent to puberty²². Some also fear that if girls obtain good schooling and tutoring, they will not be ready to perform their customary function as wife and mother. The number of child marriages constantly enhance during conflicts or natural disasters, when families try to find safety for their daughters or wealth for themselves. The present legal system does not address these things. For this, the solution is to offer conditional cash transfers or scholarships for secondary education to financially disadvantaged girls to continue their education. Secondly, it is necessary to make schools more attractive to girls and their parents by making schools and surrounding safe, providing secure and clean toilets, having more women teachers and improving overall school quality.

In some cases Government attempts to enforce these laws have been met with hostility by the communities that support and encourage these practices. In Afghanistan a law that aims to eliminate violence against women has been fought repeatedly; it has yet to be ratified by the Parliament, despite being in the works since 2005!²³ Here, what is lacking is the absence of a uniform law establishing a minimum legal age of marriage of at least 18 for girls, lack of awareness and enforcement. It will be impossible to completely eradicate child marriage without changing archaic social values in India. Parliamentarians need to demonstrate political will by championing international measures, such as the United Nations Human Rights Council's procedural resolution to end the practice of child marriage in 2013. Therefore it is the need of the hour to address gaps and inconsistencies in existing laws and, in accordance with international laws, establish a uniform minimum legal age at marriage of at least 18 for girls. There is a need to endorse adolescent girls' admittance to sexual and reproductive health information and services through government as well as NGO schemes. Regional platforms should be created at the community level to educated young boys and girls regarding negative consequences of child marriage and discuss issues and concerns regarding sexuality.

²¹ Report of the Consultation on Youth Participation in Implementing the National Youth Policy (NYP) and the National Plan of Action on Gender (NPAG). Consultation held on 4th November 2010 at the Youth Development Fund (YDF) Conference Room Thimphu, Bhutan.

²² K.G. Santhya et al., "Associations between Early Marriage and Young Women's Marital and Reproductive Health Outcomes: Evidence From India," 36 *International Perspectives on Sexual and Reproductive Health*, 132-39 (2010).

²³ Mathur, S., M. Greene, and A. Malhotra., 'Too young to wed: the lives, rights, and health of young married girls'. *International Center for Research on Women (ICRW)*: Washington, D.C. 2010.

Moreover, it is required to identify and prosecute all parties involved in child marriage so that the law becomes a deterrent. Also, increase penalties in countries where they are currently low. Raising the awareness on law is another challenge. Create awareness among public and duty bearers i.e. government and law enforcement officials on girls' legal rights to be free from child marriage and protected from violations of their reproductive rights and sexual violence resulting from the practice. In addition create/raise awareness among girls on possible legal options for avoiding or leaving a child marriage. Further mandatorily there needs a clause in legal framework to conduct comprehensive training programs. There is a need for Informing law enforcement officials, registrars, judiciary officials and religious leaders about the negative impacts of child marriage especially in high-risk and poverty-stricken areas where child marriage is rampant and their role in its prevention. Need to do amendments so that vital registration systems can be strengthened. Improve the birth and marriage registration systems to better prove a girl's age at marriage. It is important to make people understand the value of birth registration which ensures rights to entitlement for the child in the long run. At the same time birth registration ensures better implementation of the laws including child marriage prevention laws besides providing legal rights to the child.

V. Conclusion

All the countries in South Asia share universal anxiety vis-à-vis child marriage. Therefore, it is crucial that a holistic approach to improving education and learning opportunities could be critical in overcoming it. Emphasizing girls' education by providing them with safe schools and higher learning opportunities, as well as trade and vocational training, will also reduce the chances of them being married off before they reach adulthood. Greater economic opportunities for women will ensure that women have control over the choices they make, and bring an end to the inter-generational nature of this scourge.

The laws should be drafted in such a way that it would entitle children to special protections, including the right to express their views freely in all matters regarding their welfare; the right to education on the basis of equal opportunity; the right to protection from all forms of physical or mental violence, injury or abuse, maltreatment or exploitation; and the right to health and access to health services. Given the right opportunities, girls will be financially independent and become drivers of South Asia's future socio-economic growth