



Child marriage and the shortcomings of international human rights law, as reflected in the example of India



This report is based on Gabriela Johannen's Master thesis handed in for the LL.M. Public International Law at Utrecht University in 2021, which is titled "Child marriage and the shortcomings of international law: an analysis of how the international human rights framework contributes to the failure of eliminating early marriage".

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List of Abbreviations

ACHR	American Convention on Human Rights
ACRWC	African Charter on the Rights and Welfare of the Child
Arab Charter	Arab Charter on Human Rights
CCM	Convention on Consent to Marriage
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
EU Charter	Charter of Fundamental Rights of the European Union
ICCPR	International Covenant on Civil and Political Rights
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
OHCHR	UN High Commissioner for Human Rights
PCMA	The Prohibition of Child Marriage Act
SAARC Conventio	SAARC Convention on Preventing and Combating trafficking in Women and Children for Prostitution
SAARC Social Charter	South Asian Association for Regional Cooperation Social Charter
UDH	Universal Declaration of Human Rights

Introduction



Source: Pikwizard, date unknown

UNICEF estimates that more than 650 million women alive today were married before the age of 18.¹ In fact, 1 in 5 girls are married before turning 18 years of age.² That is 23 girls every minute and nearly 1 girl every 3 seconds.³ While the practice is most prevalent in places such as Sub-Saharan Africa and South Asia, it should be noted that child marriage is not exclusively limited to the developing world, but also occurs in certain communities of the Western world, including the United States and the United Kingdom.⁴ While it is not uncommon for boys to be married off before the age of 18, the practice primarily affects girls, which is why this report will focus on girls as the main victims of early marriage.⁵ Child marriage is commonly understood to be a marriage in which one or both spouses are under the age of 18.⁶ While this definition sounds straightforward, its derivation is not an easy

1. UNICEF Data, "Child marriage: latest trends and future prospects", July 2018, <https://data.unicef.org/resources/child-marriage-latest-trends-and-future-prospects/> last accessed 27 October 2021.
2. Girls not brides, "Key facts", <https://www.girlsnotbrides.org/about-child-marriage/where-child-marriage-happens/> last accessed 27 October 2021.
3. Girls not brides, "About child marriage", <https://www.girlsnotbrides.org/about-child-marriage/> last accessed 27 October 2021.
4. UNFPA, "Child marriage – frequently asked questions", January 2020, <https://www.unfpa.org/child-marriage-frequently-asked-questions#where%20does%20child%20marriage%20happen> last accessed 27 October 2021.
5. World Vision, "Child marriage: facts, FAQs, and how to help end it", 25 July 2018, <https://www.worldvision.org/child-protection-news-stories/child-marriage-facts> last accessed 27 October 2021; Girls not Brides, Understanding the scale of child marriage, 31 October 2014, <https://beta.girlsnotbrides.org/learning-resources/resource-centre/understanding-scale-child-marriage/#resource-downloads> last accessed 27 October 2021, p. 2.
6. UNFPA (n4).

task. As a starting point, the Office of the UN High Commissioner for Human Rights (OHCHR) defines child marriage as a marriage in which at least one of the parties is a child.⁷ The definition, however, leaves room for interpretation as to who exactly is considered a child. In that respect, a more specific definition is found in the Convention on the Rights of the Child (CRC),⁸ which defines a child as “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”.⁹ Moreover, it is crucial that not only formal marriages, but also informal unions fall under this definition,¹⁰ especially considering that many individuals who solemnise an informal marriage live together in the same manner as they would in a formal union. The effects of child marriage on an individual thus remain the same, regardless of its legal recognition.

Despite international efforts to eliminate the practice through wide discussions on its harmfulness, formulation of action plans, and addressing the issue in international human rights conventions, it is still predominant. This raises the question as to whether the current international human rights framework is sufficient to eliminate the practice, or whether international law could do more in this regard, which is precisely the question this report seeks to answer. After identifying the consequences early marriage has on a child, international human rights law applicable to child marriage will be delineated and its weaknesses will be examined. In order to analyse how the identified weaknesses on the international level impact the implementation of the State's legal obligations, the domestic law of India will be looked at – a country that has battled with the harmful practice for decades. This approach emphasises the consequences an insufficient international legal framework has on the domestic level of a country. The report will then conclude with recommendations for amendments to the legal framework.

7. UN General Assembly, “Preventing and eliminating child, early, and forced marriage”, Report of the office of the UN High Commissioner for human rights, 2 April 2014, A/HRC/26/22, para. 4.

8. Convention on the Rights of the Child, adopted 20 November 1989, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> last accessed 27 October 2021.

9. Article 1 CRC.

10. Girls not brides, “The law and child marriage”, <https://www.girlsnotbrides.org/about-child-marriage/law-and-child-marriage/> last accessed 27 October 2021.

The consequences of early marriage for children



Children on their way to school in Cambodia. Source: Kristen Sturdivant / Unsplash, 2017

The consequences child marriage has on the individuals affected by the practice are devastating and include, but are not limited to, both physical and psychological health deterioration.¹¹ Early marriage is a key driver of adolescent pregnancies, as it regularly leads to girls having sexual intercourse before they are physically and emotionally ready.¹² Such intercourse not only increases the risk of contracting sexually transmitted infections, since male spouses are on average 10 years older than the girls and usually already sexually experienced, but early pregnancy can also lead to serious health complications, as the body of a young girl is not yet ready for pregnancy and childbirth.¹³ In fact, pregnancy-related deaths are the leading cause of mortality for girls aged 15-19 worldwide.¹⁴ Moreover, due to the common age gap between husband and wife in early marriages, girls frequently experience gender-based violence and are at risk of being abused and controlled by their spouses.¹⁵ In this context, sexual and domestic violence are not uncommon, as rape, beatings, and other forms of violence are common experiences for young girls in child marriages.¹⁶ Furthermore, as a result of the frequently occurring age gap between spouses, girls are likely to be widowed at a young age and, therefore, left without any means to financially support themselves and their children after the death of their husbands.¹⁷ Besides its physical and psychological effects, child marriage is also a significant obstacle to education, as female education usually terminates upon marriage.¹⁸ In fact, data from African countries indicate that child marriage accounts for 12 to 20% of school dropouts among girls.¹⁹ Taking into account the devastating consequences early marriage has on the individual, it is no surprise that the physical and mental effects that follow frequently lead to self-harm and suicide among the victims.²⁰

11. Marcy J. Robles, "Child marriage and the failure of international law: a comparison of American, Indian, and Canadian domestic policies", ICLR, Vol. 18, No. 1, 2018, p. 109.

12. Girls not brides, "Child marriage and health", <https://www.girlsnotbrides.org/learning-resources/child-marriage-and-health/> last accessed 27 October 2021.

13. Ruth Gaffney-Rhys, "International law and child marriage", Springer Nature Singapore Pte Ltd., 2019, p. 349; Robles (n11) p. 109; UN CEDAW Committee, CRC Committee, "Joint general comment No. 31 of the CEDAW Committee and No. 18 of the CRC Committee on harmful practices", 4 November 2014, CEDAW/C/GC/31-CRC/C/GC/18, para. 21.

14. UN CEDAW Committee, CRC Committee, "Joint general comment" (n13) para 21.

15. Gaffney-Rhys (n13); Elizabeth Warner, "Behind the wedding veil: child marriage as a form of trafficking in girls", *Journal of Gender, Social Policy & the Law*, Vol. 12, No. 2, 2004, p. 240.

16. Warner (n15).

17. Warner (n15) p. 241.

18. *Ibid.*, p. 240.

19. Robles (n11) p. 110.

20. UN CEDAW Committee, CRC Committee, "Joint general comment" (n13) para. 21.

International human rights law on child marriage and its shortcomings

Despite the ongoing prevalence of child marriage in many places around the world, most of the provisions contained in international treaties and conventions relate to marriage in general, rather than specifically addressing the harmful practice.

1.1 Article 16(2) CEDAW

As the only international provision to prohibit early marriage, Article 16(2) of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)²¹ does something that most other provisions fail to do: explicitly outlawing child marriage by stipulating that “the betrothal and the marriage of a child shall have no legal effect”.²² Moreover, it establishes that States shall “make the registration of marriages in an official registry compulsory”.²³ The lack of marriage registration is a significant obstacle for States in combating child marriage, as it undermines the evaluation of the girl's age at marriage and therefore circumvents the actual establishment of early marriage. The fact that Article 16(2) CEDAW is the only provision to acknowledge this issue by emphasising the necessity of compulsory marriage registrations for States is favourable and a notable strength of the norm.

The provision, however, neither establishes nor suggests a minimum age for marriage, let alone defines the term “child”, making it unclear which marriages are actually forbidden. By stipulating that “all necessary action, including legislation, shall be taken to specify a minimum age for marriage”,²⁴ it is left up to States to decide on such an age and enact national legislation accordingly. This, however, does not ensure the protection of children regardless of the customs and traditions in their home countries, which would be achieved through the establishment of a minimum age for marriage on the international level.²⁵ Instead, States will most likely adopt national legislation that values their own traditions, making the level of protection against early marriage dependent on the country the children reside in, which is a non-desirable outcome. Moreover, it bears the risk of States having divergent interpretations of the minimum age for marriage, which results in it being more difficult to determine what constitutes a child marriage globally.

21. CEDAW, adopted 18 December 1979, <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx> last accessed 27 October 2021.

22. Article 16(2) CEDAW.

23. Ibid.

24. Ibid.

25. Warner (n15) p. 254.

The case of Allison Bonilla Vásquez



Source: [Mateus Bragança de Carvalho / Unsplash, 2021](https://www.unsplash.com/photo-1518611860892-101111111111)

Furthermore, seeking guidance in other international provisions or UN resolutions and recommendations does not help overcome the lack of establishing a minimum age for marriage. This is because the UN recommendation on the minimum age for marriage and the definition of a child contained in the CRC conflict.²⁶ While the CRC defines a child as everyone below the age of eighteen, the UN recommendation of 1965 establishes fifteen as the minimum age for marriage.²⁷ Given that the CEDAW was enacted in 1979, after the UN recommendation, it is possible to conclude that the former confirms the latter.²⁸ It is, however, possible to infer from this that the minimum age is to be found in the CRC, as the most recent guideline in this regard, having been adopted in 1989. A look at the work of the CEDAW Committee seems to suggest this, as it states that the minimum age for marriage is considered to be eighteen for both men and women.²⁹ While this interpretation ultimately appears to lead to the establishment of eighteen as the minimum age, it is not made clear when looking solely at the wording of Article 17(2) CEDAW. As a result, the scope of the prohibition on child marriage is unclear and bears the risk of States having different understandings of the term “minimum age for marriage”, which may ultimately undermine international efforts to combat child marriage.³⁰

26. Gaffney-Rhys, “International law as an instrument to combat child marriage”, *The international journal of human rights*, March 2011, p. 14.

27. UN General Assembly resolution 2018 of 1 November 1965, “Recommendation on consent to marriage, minimum age for marriage and registration of marriages”, Principle II, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RecommendationOnConsentToMarriage.aspx> last accessed 27 October 2021; Article 1 CRC.

28. Gaffney-Rhys (n13) p. 352.

29. UN CEDAW Committee, General recommendation No. 21, 1994, para. 36.

30. Gaffney-Rhys (n13) p. 353.

Moreover, while the drafters of the CEDAW had the right intention to stipulate consent as a prerequisite for marriage in Article 16(1)(b) CEDAW, the provision does not acknowledge that the consent of a child in the context of marriage can easily be coerced or influenced by adults.³¹ Therefore, sole reference to consent does not take the special vulnerability of children into account.³²

Overall, although the strength of the provision lies in the explicit outlawing of child marriage, as well as in stressing the necessity of compulsory marriage registrations for States, it is not able to live up to the standards necessary for combating early marriage. This is because it neither defines a minimum age for marriage, nor acknowledges the fact that the consent of a child can easily be coerced in the context of marriage.

1.1 Provisions in the UDHR, ICCPR, ECHR, ACHR, EU Charter, and Arab Charter applicable to child marriage

Unlike Article 16(2) CEDAW, the Universal Declaration of Human Rights (UDHR),³³ International Covenant on Civil and Political Rights (ICCPR),³⁴ European Convention on Human Rights (ECHR),³⁵ American Convention on Human Rights (ACHR),³⁶ Charter of Fundamental Rights of the European Union (EU Charter),³⁷ and Arab Charter on Human Rights (Arab Charter)³⁸ are all treaties that solely contain provisions relating to marriage in general. An explicit attempt to outlaw child marriage, and much less a reference to the term, cannot be found. Moreover, the lack of establishing or at least suggesting a minimum age for marriage, which is inherent in Article 16(2) CEDAW, is found in all of the provisions as well, leading to the same problems already discussed. While Article 16(1) UDHR states that “men and women of full age” have the right to marry,³⁹ Article 23(2) ICCPR, Article 12 ECHR, Article 17(2) ACHR, and Article 33(1) Arab Charter contain similar wordings, referring to “men and women of marriageable age”. What is meant by the terms “full age” and “marriageable age”, however, remains open. This could refer to the age at which a female receives her first menstrual cycle or instead the age at which legal majority is reached,⁴⁰ leaving a broad scope of interpretation. Having said that, by looking at the drafting materials of the UDHR, it becomes clear that the drafters intended to use the term “full age” instead of “legal matrimonial age” to counter child marriage, as it was argued that the use of the latter would make child marriage justifiable as long as it would fall under the matrimonial age recognised as legal in the respective country.⁴¹ Without a clear reference to a specific age, however, it remains unclear what precisely is meant by the terms, and, therefore, which marriages are actually prohibited.

31. Warner (n15) p. 247.

32. Ibid.

33. UDHR, adopted 10 December 1948, <https://www.un.org/en/about-us/universal-declaration-of-human-rights> last accessed 27 October 2021.

34. ICCPR, adopted 16 December 1966, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> last accessed 27 October 2021.

35. ECHR, adopted 4 November 1950, https://www.echr.coe.int/documents/convention_eng.pdf last accessed 27 October 2021.

36. ACHR, adopted 22 November 1969, <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm> last accessed 27 October 2021.

37. EU Charter, adopted 2 October 2000, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012P%2FTXT> last accessed 27 October 2021.

38. Arab Charter, adopted 22 May 2004,

<https://digitallibrary.un.org/record/551368?ln=en> last accessed 27 October 2021.

39. Article 16(1) UDHR.

40. Robles (n11) p. 112; Gaffney-Rhys (n32) p. 8.

41. William Schabas, “The universal declaration of human rights: the travaux préparatoires”, 2013, Cambridge University Press, pp. 2469ff.



Mother and son, India. Source: [Raju GPK / Unsplash, 2018](#)

The same issue is inherent in Article 9 EU Charter, which solely stipulates that “the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights”.⁴² Remarkably, the provision does not refer to “men and women”, deliberately departing from the wording of similar provisions in the conventions adopted previously. This, however, is not to be understood as permitting child marriage, which becomes clear when looking at the explanations relating to the EU Charter. Instead, the wording was deliberately chosen to “cover cases in which national legislation recognizes arrangements other than marriage for founding a family”.⁴³ In other words, the provision aims to cover same-sex marriages in the same way it covers traditional marriages. While this is undoubtedly favourable, the lack of establishing a minimum age for marriage remains.

Hence, none of the provisions examined suggest a marriageable age, failing to give clear guidance to States. Instead, the actual meaning of the terms “full age” and “marriageable age”, as well as “men and women”, is ultimately left open to interpretation.

42. Article 9 EU Charter.

43. “Explanations relating to the Charter of Fundamental Rights”, Official Journal of the EU, 2007/C 303/02, 14 December 2007, Explanation of Article 9, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007X1214%2801%29> last accessed October 2021.

The Convention on Consent to Marriage

The Convention on Consent to Marriage (CCM),⁴⁴ which entered into force in 1964, was enacted to ensure that marriages are only performed with the consent of the intending spouses. Unfortunately, the convention is rather short with ten articles in total, and countries with a high prevalence of child marriage such as, inter alia, India and Namibia, have not ratified the CCM, making its actual impact questionable. Moreover, it is yet another convention that does not establish a minimum age for marriage. Instead, it requires States to specify such an age in their domestic laws without giving any suggestions or guidance.⁴⁵ When it comes to allowing certain exceptions to the age limit, Article 2 CCM gives a “competent authority” the right to grant “a dispensation as to age, for serious reasons, in the interest of the intending spouses”,⁴⁶ without mentioning which reasons are to be considered serious. Their determination is thus completely left in the hands of competent national authorities, without defining what the term actually means, ultimately leading to legal uncertainty.

When it comes to consent, the Convention contains a slightly more detailed provision compared to the ones previously examined. Article 1 CCM not only states that the full and free consent of both parties is needed for the solemnisation of the wedding, but also that such consent is “to be expressed by them in person after due publicity and in the presence of the authority competent to solemnise the marriage and of witnesses, as prescribed by law”.⁴⁷ Still, although this wording cannot fully counteract the reality that the consent of the child may be coerced by adults, it does give more guidance when it comes to the shape and form such consent shall entail.

Overall, it can be said that although a convention dealing with consent to marriage is highly favourable, the CCM does not go far enough. Although child marriage is mentioned in the preamble, considering the harmfulness of the practice and the special role consent plays in it, it would have been desirable to include a provision prohibiting this practice in the Convention. Moreover, what is meant by consent should have been specified, e.g., by establishing at what age consent can be given or by at least suggesting a minimum age for marriage. At the same time, it would have been helpful to concretize circumstances that fall under “serious reasons” to allow transparent exceptions to the age limit. By failing to do so, the CCM unfortunately does not live up to the standards necessary for the protection of children against the practice of early marriage.

44. CCM, adopted 10 December 1962, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/MinimumAgeForMarriage.aspx> last accessed 27 October 2021.

45. Article 2 CCM.

46. Ibid.

47. Article 1 CCM.

Convention on the Rights of the Child

The CRC is the only treaty that focuses solely on the rights of the child. However, it does not contain any provisions on child marriage specifically, let alone marriage in general. This is alarming considering the harmfulness of the practice and the serious effects it has on the physical and psychological wellbeing of a child. Article 24(3) CRC stipulates that States Parties shall take measures to abolish “traditional practices prejudicial to the health of children” and may, therefore, be the most fitting clause to invoke against early marriage given the health risks that may occur if a girl's body is not ready for pregnancy and childbirth.⁴⁸ Still, it would have been highly preferable to specifically prohibit child marriage and thus raise awareness of early marriage and grant the most vulnerable individuals of society the highest protection possible.

Article VII(6) SAARC Social Charter

Unlike the CRC, Article VII(6) South Asian Association for Regional Cooperation Social Charter (SAARC Social Charter)⁴⁹ obligates State Parties to undertake steps for the “elimination of child/early marriage”.⁵⁰ While it is favourable that the issue of child marriage is directly addressed, no further regulation can be found in this regard. The charter neither suggests a minimum age for marriage, nor does it refer to the role of national legislation. As a consequence, the meaning of the term child/early marriage remains completely open to interpretation. However, when looking at the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (SAARC Convention on Preventing and Combating Trafficking),⁵¹ which was adopted prior to the SAARC Social Charter,⁵² some guidance can be found. The former defines the term “child” as a “person who has not attained the age of 18 years”.⁵³ It can, therefore, be suggested that the SAARC Social Charter understands the term in the same way. Considering, however, that South Asia has the highest rates of early marriage in the world, with almost half (45%) of all women aged 20-24 years being married before the age of 18,⁵⁴ the lack of regulation of marriage in the SAARC Social Charter itself seems alarming. It is thus, once again, not able to live up to the standards necessary for effectively combating early marriage.

48. Warner (n15) p. 252; see Chapter 2.

49. SAARC Social Charter, adopted 4 January 2004, <https://www.refworld.org/pdfid/595c933c4.pdf> last accessed 27 October 2021.

50. Article VII(6) SAARC Social Charter.

51. SAARC Convention on Preventing and Combating Trafficking, adopted 5 January 2002, <https://evaw-global-database.unwomen.org/-/media/files/un%20women/vaw/full%20text/asia/south%20asian%20association%20for%20regional%20cooperation/saarc%20convention%20on%20preventing%20and%20combat%20trafficking%20in%20women%20and%20children%20for%20prostitution.pdf?vs=3701> last accessed 27 October 2021.

52. While the SAARC Social Charter got adopted on 04 January 2004, the SAARC Convention on Preventing and Combating Trafficking got adopted on 05 January 2002.

53. Article 1(1) SAARC Convention on Preventing and Combating Trafficking.

54. UNICEF, “Child marriage”, <https://www.unicef.org/rosa/what-we-do/child-protection/child-marriage> last accessed 27 October 2021.



Two girls in Darfur, Sudan. Source: Unamid/flickr, 2012

Article 21(2) ACRWC and Article 6 Maputo Protocol

Unlike the other international and regional conventions that have so far been examined, the African Charter on the Rights and Welfare of the Child (ACRWC)⁵⁵ is the first instrument that not only prohibits child marriage but also expressly specifies “the minimum age of marriage to be 18 years”.⁵⁶ It is, therefore, the most explicit provision of any of the treaties, giving no exception to cultural practices and, most importantly, not leaving the decision of establishing the marriageable age in the hands of national legislators. Moreover, it is noteworthy that the ACRWC enjoys wide acceptance, with 49 out of 55 African countries having ratified it as of 2022.⁵⁷

Article 6(b) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)⁵⁸ contains the same desirable concreteness by providing that “the minimum age of marriage for women shall be 18 years”.⁵⁹ With regard to marriage, this provision goes further than all other provisions previously discussed, taking into account topics such as, inter alia, monogamy, the right of a woman to acquire property, as well as the right to retain her nationality.⁶⁰ As a result, it provides rules for different kinds of conflict that could arise regarding marriage in general, but especially regarding early marriage, as a child is even more at risk of experiencing suppression. Moreover, it is noteworthy that Article 6(d) Maputo Protocol not only provides for compulsory marriage registrations, it also stipulates that

55. ACRWC, adopted 11 July 1990, <https://au.int/sites/default/files/documents/30913-doc-acrwc-en.pdf> last accessed 27 October 2021.

56. Article 21(2) ACRWC.

57. List of countries which have signed, ratified/acceded to the ACRWC, 28 June 2019, <https://au.int/sites/default/files/treaties/36804-sl-AFRICAN%20CHARTER%20ON%20THE%20RIGHTS%20AND%20WELFARE%20OF%20THE%20CHILD.pdf> last accessed 27 October 2021.

58. Maputo Protocol, adopted 11 July 2003, <https://www.ohchr.org/Documents/Issues/Women/WG/ProtocolontheRightsofWomen.pdf> last accessed 27 October 2021.

59. Article 6(b) Maputo Protocol.

60. Article 6 Maputo Protocol.

such a registration is necessary for the marriage “to be legally recognized”.⁶¹ This goes further than all other provisions acknowledging the need for marriage registrations, as it also contains the reverse meaning that marriages without such registrations are not able to be legally recognised and as a consequence, have no legal effect. Like the ACRWC, the Maputo Protocol enjoys similar acceptance with 42 out of 55 African countries having ratified it and 49 signatories.⁶²

Although the establishment of a minimum age for marriage in the African instruments is highly favourable, it should be noted that the law in several African jurisdictions violates the provisions discussed. This is for instance the case regarding Niger, where the minimum age for marriage is 15 years of age.⁶³ Although a law has been proposed to change the minimum age to 18 years old, it has not been adopted as of now.⁶⁴ This is not to say that steps are not being taken to bring national law in line with international provisions.⁶⁵ A positive example in this regard is the case of Malawi, where the Constitution initially permitted the marriage of children aged 15 onwards, up until its amendment in February 2017.⁶⁶ The amendment aligned the Constitution with Malawi's international and regional obligations, and raised the marriageable age to 18 years for both boys and girls.⁶⁷ This demonstrates the positive effect that international and regional law can have on domestic law, and shows that change is possible as long as international provisions give clear guidance.⁶⁸

Conclusion

Overall, it has been demonstrated that the current international human rights framework applicable to child marriage contains numerous weaknesses that undermine international efforts to effectively combat early marriage. While the main point of concern is that most international provisions do not suggest a minimum age for marriage, it is furthermore worrisome that relevant terms such as “consent” for marriage or “competent authority” are not defined by law, leaving a wide margin of interpretation. Moreover, a clear prohibition of the practice is only stipulated by Article 16(2) CEDAW, whereas all other provisions relate to marriage in general. In contrast, the African instruments are much more explicit when it comes to the establishment of a minimum age for marriage, as well as other relevant issues in the context of marriage that could potentially become a source of concern.

61. Article 6(d) Maputo Protocol.

62. List of countries which have signed, ratified/acceded to the Maputo Protocol, 16 October 2019, <https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf> last accessed 27 October 2021.

63. Gaffney-Rhys (n13) p. 353.

64. “Early marriage – from rural custom to local business”, 16 January 2009, The New Humanitarian, <https://www.thenewhumanitarian.org/feature/2009/01/16/early-marriage--rural-custom-urban-business> last accessed 27 October 2021; Save the Children, “Child marriage in Niger”, <https://www.savethechildren.org.uk/content/dam/global/reports/advocacy/child-marriage-niger.pdf> last accessed 27 October 2021.

65. Gaffney-Rhys (n13) p. 353.

66. *Ibid.*, pp. 353-354.

67. UN Women, “Malawi parliament adopts amendment to end child marriage”, 22 February 2017, <https://www.unwomen.org/en/news/stories/2017/2/news-malawi-parliament-adopts-amendment-to-end-child-marriage> last accessed 27 October 2021.

68. Gaffney-Rhys (n13) p. 354.

Relevant legislation of India regarding child marriage and its shortcomings



Boy holding sparkler, Marga, Indonesia. Source: Artem Beliaikin/flickr, 2018

Child marriage in India

India has one of the highest child marriage rates in the world. Although the numbers vary significantly depending on the source, it is estimated that each year at least 1.5 million girls under the age of 18 are married in India, which accounts for a third of the global total.⁶⁹ And while it can be said that early marriage rates in the country have declined from 47% to 27% in the last couple of years, which is a favourable development, there are States like Rajasthan, West Bengal, and Bihar, where the practice still makes up almost 40% of all marriages.⁷⁰ Unfortunately, the positive trends that have been emerging in the country over the last decade were not able to continue since the Covid-19 pandemic broke out in 2020.⁷¹ Although its full impact is still uncertain, and might not even become visible for some years, the State of Telangana alone witnessed a 27% increase in early marriages in just one year.⁷² Analysing India as a whole, a report by the National Crime Records Bureau (NCRB) suggests that there has been a 50% rise in the cases of child marriages in 2020, as compared to 2019.⁷³ Furthermore, India is not the only country at risk; it is estimated that over the next decade, up to 10 million more girls will face early marriage as a result of the pandemic.⁷⁴

69. UNICEF, "Ending child marriage and adolescent empowerment", <https://www.unicef.org/india/what-we-do/end-child-marriage> last accessed 27 October 2021.

70. Ibid., "Child marriage widespread in Bihar, Rajasthan and Bengal: UNICEF report", *India Today*, 12 February 2019, <https://www.indiatoday.in/india/story/child-marriages-widespread-in-bihar-rajasthan-and-bengal-unicef-report-1454035-2019-02-12> last accessed 27 October 2021.

71. UNICEF, "Covid-19: a threat to progress against child marriage", March 2021, <https://data.unicef.org/resources/covid-19-a-threat-to-progress-against-child-marriage/> last accessed 27 October 2021.

72. Ridhima Gupta, "Covid pandemic led to 27% increase in child marriages", 10 April 2021, <https://www.newindianexpress.com/states/telangana/2021/apr/10/covid-pandemic-led-to-27-rise-in-child-marriages-2288264.html> last accessed 27 October 2021.

73. The quint, "We have no choice: Covid-19 is worsening Marathwada's child marriage problem", Himanshi Dahiya, 01 October 2021, <https://www.thequint.com/news/india/coronavirus-child-marriages-maharashtra-marathwada-region#read-more> last accessed 27 October 2021.

74. UNICEF, "Covid-19" (n23).

Setting the standard: India's international obligations regarding child marriage

Three of the most important international treaties relating to child marriage were ratified by India, namely the CEDAW, ICCPR, and CRC. In addition, the country is a member State to SAARC with the consequence that the SAARC Social Charter applies to it as well.⁷⁵ Having ratified four of the instruments geographically relevant to India, it could be argued that the country shares the general consensus of the international community, regarding child marriage as a human rights violation. Concerning the CEDAW, India has, however, entered several reservations upon its ratification that leave its actual effect within the country questionable. Although Article 16(1) CEDAW emphasises the State's obligation to eliminate cultural practices that discriminate against women, the government has declared its inability to do so without the consent and initiative of individual communities.⁷⁶ Moreover, concerning Article 16(2) CEDAW, India declared its inability to establish a system for marriage registrations due to the vastness of the country,⁷⁷ although marriage registrations play the most crucial role when it comes to combating early marriage. Thus, the impact of Article 16(2) CEDAW remains limited with regard to India.

It is furthermore noteworthy that India has not ratified any of the Optional Protocols providing for individual communication procedures to the CRC, CEDAW, or ICCPR. Without the possibility to file a complaint, victims of human rights violations in the country are not able to claim their rights.

Introducing India's national legal system

The dominant feature of India's legal system is its legal pluralism, meaning that rights and obligations within specific contexts of the law are governed in both general laws that apply to the entire population, and religion-based personal status laws that apply only to specific communities.⁷⁸ This plural legal system, which is common in postcolonial states, also applies to family law, where personal laws provide for rules that apply to a specific class or group of people based on their religion, faith, and culture.⁷⁹ However, tension arises when general and personal laws govern the same matter in opposing ways. This is because personal laws frequently undermine national legislation intended to prohibit early marriage by establishing weaker legal standards,⁸⁰ which will be demonstrated in the following sections.

75. "SAARC Social Charter Indian Country Report 2018", Government of India, foreword p. 2.

76. India's reservation to Article 16(1) CEDAW: "With regard to Article 16(1) CEDAW, the Government of the Republic of India declares that it shall abide by and ensure this provision in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent." UN Treaty Collection, CEDAW, Chapter IV, 18 December 1979, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4#EndDec last accessed 27 October 2021; IWRAP Asia Pacific, "The validity of reservations and declarations to CEDAW: the Indian experience", 2005, p. 12.

77. India's reservation to Article 16(2) CEDAW: "With regard to Article 16(2) CEDAW, the Government of the Republic of India declares that though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy." UN Treaty Collection, CEDAW, Chapter IV, 18 December 1979, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4#EndDec last accessed 27 October 2021.

78. "Ending impunity for child marriage in India: normative and implementation gaps", Policy brief, Center for reproductive rights, 2018, p. 16; Poppy Kemp, "Legal pluralism in India - divisive and discriminatory?", <https://www.culs.org.uk/per-incuriam/legal-pluralism-in-india-divisive-and-discriminatory> last accessed 27 October 2021.

79. Subramanian (n39) p. 4; "Principles sources of Indian law - personal law", <https://www.toppr.com/guides/business-laws-cs/introduction-to-law/principle-sources-of-indian-law-personal-law/> last accessed 27 October 2021.

80. "Child marriage and personal laws in South Asia - international standards requiring governments to end human rights violations based on religious norms", Center for reproductive rights, 2014, p. 2.



Girl with baby, 2011. Source: Sam Nasim/flickr, 2011

General laws of India relevant to child marriage and their shortcomings

As the most important legal instrument within the country, the Constitution of India⁸¹ does not contain any provision explicitly mentioning the issue of child marriage. Instead, it establishes legal norms to provide children the opportunity “to develop in a healthy manner and in conditions of freedom and dignity”.⁸² Although a specific reference to the subject of child marriage is missing in the Constitution, the aforementioned principle is particularly significant for early marriage due to the catastrophic effects it has on the child's health.

The Prohibition of Child Marriage Act (PCMA),⁸³ on the other hand, takes a far more direct approach to the issue, as the name suggests, by providing definitions relevant to the harmful practice.⁸⁴ However, due to loopholes and inadequacies in the legal framework, the PCMA has only had limited influence on eradicating the destructive practice, despite being a statute that entirely focuses on the ban of child marriage.⁸⁵ While it is commendable that the PCMA prohibits marriages between minors under the age of 18, putting it in accordance with the international definition of a “child” under the CRC, the introduction of a lower marriageable age for girls than for boys must be challenged. Having 18 as the marriageable age for girls and 21 as the marriageable age for boys creates discriminatory stereotypes and mistakenly assumes that women develop at a different rate than men.⁸⁶ Furthermore, it disadvantages girls by removing their right to invalidate a marriage after the age of 20, although boys can do so until the age of 23, potentially limiting girls' capacity to leave a marriage.⁸⁷

81. The Constitution of India, adopted 26 November 1949, https://legislative.gov.in/sites/default/files/COI_1.pdf last accessed 27 October 2021.

82. Article 39(f) Constitution of India.

83. Prohibition of Child Marriage Act, adopted 10 January 2007, <https://legislative.gov.in/sites/default/files/A2007-06.pdf> last accessed 27 October 2021.

84. It begins by defining terms like “child marriage” as a “marriage where either of the contracting parties is a child”. A child is, moreover, defined as “a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age”, see Section 2(a)(b) PCMA.

85. Center for reproductive rights (n78) p. 16.

86. *Ibid.*, p. 17.

87. *Ibid.*

The issue of dowry payments is another factor to consider when it comes to early marriage. This is because the potential of lower dowry payments often motivates parents to marry off their daughters early - the younger the bride, the smaller the dowry payment.⁸⁸ The Dowry Prohibition Act⁸⁹ tries to counteract this practice, but it is rarely enforced due to flaws in the legislation.⁹⁰ The term "dowry" is not defined in the law. Moreover, the law penalises the girl's parents for giving dowry which leads to the girls' families refraining from reporting dowry demands out of fear of being penalised themselves.⁹¹ This is an issue of concern, as it ignores the reality that the bride's family is unable to deny the expected dowry payment because it ensures the daughter's safety and well-being in her matrimonial household.⁹²

Although birth registrations are mandatory under the Registration of Births and Deaths Act,⁹³ there is no national law mandating marriage registrations. This is despite the fact that they are critical in discovering early marriage,⁹⁴ as the age of the spouses at time of marriage cannot be determined without them. In this light, it is encouraging to see that India's Supreme Court has recognized the importance of marriage registrations in preventing early marriage. However, despite the fact that many Indian states have begun to design legislation to make marriage registrations mandatory, several states – all of which have a high frequency of child marriage – have yet to do so.⁹⁵ As a result of the lack of national laws, the issue is regulated in a wide variety of personal laws, as well as State laws, making the process complicated and confusing.⁹⁶

Personal laws of India relevant to child marriage and their shortcomings

Because Hinduism is practised by approximately 80% of India's population, the Hindu Marriage Act⁹⁷ is the most important instrument when it comes to personal laws pertaining to child marriage. It applies to Hindus, Buddhists, Jains, Sikhs, and any other person domiciled in the territory who is not a Muslim, Christian, Parsi, or Jew.⁹⁸ The law establishes 18 years as the minimum marriageable age for girls and 21 years as the minimum marriageable age for boys, and it is thus consistent with the PCMA's age requirements.⁹⁹ In the Hindu Marriage Act, consent to marriage is not required for the validity of a marriage.¹⁰⁰ However, parties to a marriage should not be unable to consent due to "unsound mind," "mental disorder," or "insanity." Since the PCMA does not require consent as a condition for a valid marriage, the Hindu Marriage Act is in accordance with the general laws of India.¹⁰⁰

88. Ibid., p. 26.

89. Dowry Prohibition Act, adopted 1 May 1961, <https://wcd.nic.in/act/dowry-prohibition-act-1961> last accessed 27 October 2021.

90. Center for reproductive rights (n78) p. 26.

91. Ibid.

92. Ibid.

93. Chapter III Registration of Births and Deaths Act, https://www.indiacode.nic.in/bitstream/123456789/11674/1/the_registration_of_births_and_deaths_act%2C_1969.pdf last accessed 27 October 2021.

94. Smt. Seema v Ashwani Kumar, Supreme Court of India, Judgment, 14 February 2006.

95. Center for reproductive rights (n78) p. 28.

96. Ibid.; Law Commission of India, "Compulsory registration of marriages", Report No. 270, July 2017, para. 5.3.

97. Hindu Marriage Act, adopted 18 May 1955, https://highcourtchd.gov.in/hclsc/subpages/pdf_files/4.pdf last accessed 27 October 2021.

98. Section 2 Hindu Marriage Act.

99. Section 5(iii) Hindu Marriage Act.

100. Center for reproductive rights (n78) p. 21.

101. Ibid.; Section 5(a)(b) Hindu Marriage Act.



The henna tattooed hands of an Indian bride before her wedding. Source: Daniel Lloyd Blunk-Fernández /

Despite being uncodified, Muslim law concerning child marriage follows the rules of the Quran and Sharia.¹⁰² It establishes puberty as the minimum age for marriage, which is assumed to be 15 years of age.¹⁰³ As a result, once a child reaches the age of 15, he or she is legally capable of marrying. It should be noted, however, that parents can arrange legal and valid marriages for girls under the age of 15.¹⁰⁴ If this is the case, the girl has the right to obtain a divorce decree, if she challenges the marriage before the age of 18, and if the marriage has not yet been consummated.¹⁰⁵ As a result, Muslim law does not conform to the PCMA's age requirements but instead provides for a significantly lower marriageable age. However, unlike Hindu personal laws, girls over the age of 15 must consent to the marriage with the consequence that Muslim law regarding early marriage goes beyond the rules stipulated in the PCMA, which do not establish consent as a requirement for the validity of a marriage.¹⁰⁶ If the girl is under the age of 15, her parents can give consent on her behalf.¹⁰⁷ Moreover, it is noteworthy that marriages among Indian Muslims are solemnised by religious officials known as kazi, who stock printed forms of each marriage agreement containing personal information of the intending spouses.¹⁰⁸ Those documents usually serve as proof of marriage for the purpose of registering Muslim marriages.¹⁰⁹

102. Jeremiah J. Bowden, "Marriageable age in Islam: a study on marriageable age laws and reforms in Islamic law", LUX: a journal of transdisciplinary writing and research from Claremont Graduate University, Vol. 2, Issue 1, Article 5, p. 8; Center for reproductive rights (n80) p. 3.

103. Ibid.

104. Center for reproductive rights (n78) p. 19.

105. Section 2(vii) The Dissolution of Muslim Marriages Act, adopted 17 March 1939, http://chdsla.gov.in/right_menu/act/pdf/muslim.pdf last accessed 27 October 2021; Center for reproductive rights (n76) p. 19.

106. Ibid., p.21.

107. Ibid.

108. Law Commission of India, "Compulsory registration of marriages", Report No. 270, July 2017, para. 3.5.

109. Ibid.

The Indian Christian Marriage Act¹¹⁰ codifies the relevant Christian law on child marriage. It establishes 18 as the minimum marriageable age for girls and 21 for boys, which is consistent with the PCMA.¹¹¹ In the case of a marriage occurring before the respective age, a preliminary notice from one of the intending spouses must be published at least 14 days before the marriage.¹¹² Individuals under the marriageable age are not permitted to marry before the preliminary notice period has expired unless they have the consent of a parent or guardian.¹¹³ However, once the notice period has passed, no such consent is required, even if the intended spouses have not reached the marriageable age. The requirement of consent is inherent in the preliminary notice required in cases of marriages between minors under the age of 18. However, such a notice must be submitted by only one of the intending spouses, putting the other party at risk of not having given their consent to the marriage.¹¹⁴

Jewish personal laws, like Muslim personal laws, are uncodified. A valid marriage requires the girl to have reached puberty, which is assumed to occur at the age of 12 years.¹¹⁵ Any marriage that occurs after that age is considered legal and valid.¹¹⁶ Furthermore, consent from both parties is required for entering a valid marriage.¹¹⁷ As a result, Jewish law contradicts the PCMA by requiring a significantly lower minimum marriage age, all the while establishing consent as a requirement for a valid marriage – an issue on which the PCMA is silent.

Parsi personal laws relevant to child marriage are laid down in the Parsi Marriage and Divorce Act.¹¹⁸ It establishes 18 as the minimum marriageable age for girls and 21 for boys, which is consistent with the PCMA.¹¹⁹ The Act, however, is silent on the subject of consent.¹²⁰

Conclusion

Although India has international obligations deriving from the CEDAW, ICCPR, and CRC, the international framework applicable to the country in the context of child marriage is not as extensive as it could be. Due to the fact that India entered a reservation regarding Article 16 CEDAW, the provision cannot live up to its full extent in the country. Furthermore, individuals are unable to file individual communications against the country due to a lack of ratifications concerning the Optional Protocols to the treaties to which India is a state party.

110. The Indian Christian Marriage Act, adopted 18 July 1872, http://home.kar.nic.in/download_files/Passport/The_Indian_Christian_Marriage_Act1872.pdf last accessed 27 October 2021.

111. Section 60(1) Indian Christian Marriage Act.

112. Section 12 Indian Christian Marriage Act; Center for reproductive rights (n76) p. 20.

113. Center for reproductive rights (n78) p. 20.

114. Section 12 Indian Christian Marriage Act.

115. Center for reproductive rights (n80) p. 4.

116. Ibid.

117. Misha, "Jewish law of Marriage & Divorce in India", 31 January 2019, <https://www.lawordo.com/jewish-law-of-marriage-divorce/> last accessed 27 October 2021.

118. The Parsi Marriage and Divorce Act, adopted 23 April 1936, <http://bdlaws.minlaw.gov.bd/act-details-168.html> last accessed 27 October 2021.

119. Section 3© The Parsi Marriage and Divorce Act.

120. Center for reproductive rights (n78) p. 20.



Child marriage. Source: Naga rick / flickr, <https://flic.kr/p/6jCEf7>, 2009

When it comes to India's national laws, the PCMA's inherent disparity in the minimum marriageable ages for girls and boys must be challenged. By stipulating 18 years to be the marriageable age for girls in contrast to 21 for boys, discriminatory stereotypes are maintained and girls' capacity to quit a marriage is limited. Another source of concern is the lack of enforcement of the Dowry Prohibition due to loopholes in the law such as the lack of definitions, or the penalisation of parents for giving dowry. Moreover, there is no national law mandating marriage registrations, despite the important role they play in the identification of early marriages. As a result, the issue is regulated in a variety of personal laws and State laws, resulting in confusion for those applying the law.

The variety of legal matrimonial ages that contradict the general laws of the country is the most pressing concern when it comes to India's personal laws applicable to early marriage. While the PCMA suggests a minimum age of 18 for girls and 21 for boys for marriage,¹²¹ only Hindu, Muslim, and Parsi personal laws are in conformity with this. In contrast, Muslim law establishes a legal matrimonial age of 15 years, while Jewish law establishes a legal matrimonial age of 12.¹²² As a result, marriages that are in accordance with personal laws may at the same time violate general laws, resulting in legal uncertainty. Moreover, as the minimum age for marriage on the international level is 18 years, personal laws that establish a lower minimum age violate international law. Additionally, Christian personal laws provide for the possibility of the parents giving their consent to a marriage below the age of 18, which deprives the established age of its effect, as parents are given the opportunity to simply consent to a child's marriage.

121. Section 2(a) PCMA.

122. Center for reproductive rights (n80) pp. 3-4.

When it comes to the requirement of the child's consent as a prerequisite for marriage, Jewish and Muslim laws are the only ones that render a marriage without the consent of the child to be void.¹²³ In Christian law, the requirement of consent is inherent in the preliminary notice required in cases of marriages between minors under the age of 18.¹²⁴ However, such a notice must be submitted by only one of the intended spouses, putting the other party at risk of not having given due consent to the marriage.¹²⁵ Hindu and Parsi laws make no mention of consent as a requirement for marriage validity at all.¹²⁶

The consequences of an insufficient international human rights framework on the domestic level, as reflected in the example of India

When comparing the shortcomings of India's national laws to those previously discovered on the international level, certain parallels emerge that serve as indicators of how national legislation is influenced by the existing international framework.

In terms of suggesting a minimum age for marriage, India is a party to the CEDAW, ICCPR, SAARC, Social Charter, and CRC, all of which do not include definitions of such an age in the legislation. Although Article 1 CRC defines a child as everyone below the age of 18,¹²⁷ this definition is unrelated to the practice of child marriage. Article 16(2) CEDAW defers the decision on a minimum age to national legislators without providing any further guidance, whereas the UN recommendation of 1965 contradicts the CRC by establishing 15 as the minimum age for marriage. As a result, various sources must be checked to obtain clear international guidance, which impedes the uniform application of such an age by States, as demonstrated by the example of India. Respective provisions in the PCMA, Hindu, Christian, and Parsi personal laws indicate that India is aware of 18 being the internationally recognised minimum age for marriage,¹²⁸ as those laws comply with Article 1 CRC. Jewish and Muslim personal laws, however, continue to suggest marriageable ages below that threshold. In this sense, the conflicting CRC definition and the UN recommendation on the acceptable minimum age may have led to the confusion. A clear suggestion of a minimum marriageable age would have provided clearer guidance and ultimately put pressure on States to amend all national laws governing marriage to be in accordance with international obligations.

123. Misha (n117); Center for reproductive rights (n78) p. 19.

124. Section 12 Indian Christian Marriage Act.

125. Ibid.

126. Center for reproductive rights (n78) pp. 20-21.

127. Article 1 CRC.

128. UN General Assembly resolution 2018 of 1 November 1965, "Recommendation on consent to marriage, minimum age for marriage and registration of marriages", Principle II, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RecommendationOnConsentToMarriage.aspx> last accessed 27 October 2021.



School children in India. Source: Priya Morjaria / flickr, <https://flic.kr/p/BObYKd>, 2017

When it comes to the issue of birth and marriage registrations, the relevant international provisions applicable to India are Article 16(2) CEDAW and Article 24(2) ICCPR. While the former obligates States to make marriage registration mandatory, the latter requires that every child be registered after birth. However, India's reservation to Article 16(2) CEDAW excludes the provision's legal effect when it comes to establishing a system for marriage registrations (see Section 5.1), rendering the norm ineffective in the country. This demonstrates that, even when international law regulates issues concerning child marriage, States have the ability to avoid obligations that would normally arise when bound by a treaty. As a result, even if the ICCPR had included a new provision requiring compulsory marriage registration, India would almost certainly have entered a reservation, as it did with Article 16(2) CEDAW.

Concerning consent, Article 23(3) ICCPR and Article 16(2) UDHR state that no marriage shall be entered into without the consent of the intending spouses, but no further regulation or clarification is provided.¹²⁹ The term "consent" is not defined, and there is no requirement for proof of such consent. As a result, the PCMA places little emphasis on the issue and does not recognize consent as a requirement for a valid marriage.¹³⁰ The same goes for Hindu and Parsi personal laws. Concerning the important role that consent plays in defining child marriage, the law should make marriages without consent void, in order to provide the child with the best possible protection. In this case, a more detailed international regulation would have guided India in such a way to make it clear how national laws should be amended to include all relevant aspects and conditions regarding consent, and to incorporate it as a prerequisite for a valid

129. Article 23(3) ICCPR; Article 16(2) UDHR.

130. Center for reproductive rights (n78) p. 17.

marriage. Instead, not enough emphasis was placed on the issue and as a result, the PCMA lacks any provision that deals with consent in greater detail. While Section 12 PCMA lists compulsion as a reason for divorce, this regulation is insufficient, because the child would have to actively challenge the marriage, even if consent was never given in the first place. Simply declaring the marriage void from the start would have provided the necessary level of protection for the child. As a result, all child marriages would be deemed to be without consent, as a child cannot validly give consent to a marriage.

When it comes to the payment of dowry, there is no provision in the international human rights framework addressing the issue. Nonetheless, India has enacted the Dowry Prohibition Act to combat dowry payment and its negative consequences. However, because the Dowry Prohibition Act contains numerous legal loopholes (see Section 5.2.1), no guidance from international human rights law can be sought in this regard. Given that the practice is not only prevalent in India, but also in other South Asian countries such as Bangladesh, Pakistan, and Sri Lanka, as well as in China and Taiwan in some cases,¹³¹ an international provision dealing with the issue would be beneficial.

131. Anukriti S, Shatanjaya Dasgupta, "Marriage markets in developing countries", IZA discussion papers, No. 10556, IZA, p. 12.

Recommendations

As shown, international human rights law on child marriage lacks specificity in many regards. For the law to address those issues, certain amendments will be proposed, as it is expected that the law would otherwise not be able to provide for sufficient protection.

In this regard, the stipulation of a minimum age for marriage is fundamental - without such an age, what is considered to be an early marriage remains open. Another critical issue is the requirement for mandatory birth and marriage registrations. This is because child marriages cannot be identified without the registration of both data as the child's age at the time of birth would never be verified. Therefore, it is crucial that treaties that already provide for compulsory marriage registrations include the requirement of birth registrations to make the identification of child marriage possible. Lastly, early marriage is a practice that exclusively affects children. Given that a treaty focusing solely on children already exists in the form of the CRC, it is only natural that a prohibition on the practice of child marriage gets incorporated into it. Concerning the issue of consent and the practice of dowry, definitions are to be incorporated into the law to provide precision and clear guidance.



Source: ascaf on / flickr, <https://flic.kr/p/7uhaTs>, 2009

In this light, the proposed amendments are as follows:

- A clear stipulation in international instruments of 18 years being the minimum age of marriage for both girls and boys. Since the CEDAW enjoys wide acceptance in the international community, having been ratified by 189 countries, incorporating such a minimum marriageable age into the convention would have a significant impact;
- Incorporating a reference to child marriage into the CRC, including a provision prohibiting the practice, as the practice exclusively concerns children;
- Incorporating the necessity of birth registrations into the provisions that already provide for compulsory marriage registrations (i.e., Article 16(2) CEDAW, Article 3 CCM, Article 21(2) ACRWC, and Article 6(d) Maputo Protocol) to achieve a comprehensive system that makes the verification of age at the time of marriage possible
- Providing a comprehensive provision of consent, including a definition of the term, and establishing consent of both intending spouses as a prerequisite for a valid marriage in an international convention, preferably in the CEDAW, as it is the only convention to outlaw child marriage;
- And stipulating a prohibition of the practice of dowry in an international convention, including definitions of the term. Penalising the girl's family for providing dowry payment is to be avoided.

Conclusion

An analysis of the international human rights framework applicable to child marriage has demonstrated that the law lacks specificity in many regards, significantly impacting national legislation as shown in the example of India. Since failures of international law concerning early marriage do seem to influence national legislation in cases where no clear guidance is given by the former, it is necessary to amend the international legal framework in a way that the most pressing concerns are covered as demonstrated in this report.

Especially in light of the current COVID-19 pandemic, combating early marriage becomes more relevant than ever, as it is expected that 10 million additional child marriages will occur before the end of the decade. This would have the effect of jeopardising years of progress in reducing the practice.¹³² The establishment of an international human rights framework that adequately addresses and prevents the practice of early marriage is, therefore, of utmost importance.

132. UNICEF, Press release of 07 March 2021, <https://www.unicef.org/press-releases/10-million-additional-girls-risk-child-marriage-due-covid-19> last accessed 27 October 2021.

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