

# Promote Prevention, Question Criminalisation

## Reframing Responses to Child Marriage

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A Closed Dialogue Between Members of the South Asian Feminist  
Inquiries into Rights and Equality (FIRE) Consortium with  
CEDAW and CRC Committee Members.



This report is an outcome of the country presentations from Bangladesh, India, Nepal, Pakistan and Sri Lanka made in a closed dialogue with committee members of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)/Convention on the Rights of the Child (CRC), including an overview of the common concerns that emerged from these country presentations.

The partners of the Feminist Inquiries into Rights and Equality (FIRE), South Asia level consortium, are:

- Aahung, Pakistan
- Bangladesh Legal Aid Services Trust (BLAST), Bangladesh
- International Women's Rights Action Watch-Asia Pacific (IWRAW-AP), Malaysia
- Partners for Law in Development (PLD), India
- Social Scientists' Association (SSA), Sri Lanka
- Women's Rehabilitation Centre (WOREC), Nepal

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## PREPARATORY PROCESS LEADING TOWARDS THE CEDAW-CRC DIALOGUE

Project lead, research guidance and mentoring - *Madhu Mehra*  
Expert inputs - *Sara Hossain* and *Audrey Lee*  
Overall coordination - *Mrinalini Ravindranath*  
Nodal persons - *Laxmi Aryal*, *Nusrat Nasim Meraji*,  
*Thiagi Piyadasa*, *Sheena Hadi*  
Technical support for Zoom workshops - *BLAST*  
Moderation of Zoom workshops - *Udita Chakrabarti*  
Interpreters for weekly online workshops and meetings (June to August 2020)  
- *Deena Nargis* for Bangla, *Elawati KC* for Nepali

## ORGANIZATIONAL TEAM MEMBERS

**BLAST** - *Titir Abdullah*, *Taqbir Huda*, *Mahbuba Akhter*, *Farjana Fatema*, *Taposhi Rabaya*, *Sharmin Akhter Setu*, *Ananya Chakraborty*, *Nasima Khanam*, *Shamima Akhter Jahan*, *Samina Begum*,  
*Sipra Goswami*, *Sifat-e-Nur Khanam*, *Asma Ul Hosna*  
**IWRAW-AP** - *Nadia Mohd Rasidi*  
**Legal Aid Society** - *Maliha Zia*  
**PLD** - *Surbhi Karwa*, *Udita Chakrabarti*  
**SSA** - *Tehani Ariyaratne*, *Waruni Karunarathne*, *Shashik Dhanushka*  
**WOREC** - *Lubharaj Neupane*, *Jyotsna Maskay*, *Goma Bhandari*, *Jayakala Chaudhary*, *Sushma Chhinal*,  
*Anita Chaudhary*

## PAPER WRITING & PRESENTATION AT THE CEDAW-CRC DIALOGUE

**Bangladesh** - *Taqbir Huda* with research assistance from *Nusrat Nasim Meraji* and *Tasmiah Juthi*  
& comments from *Sara Hossain* and *Dr. Sajeda Amin*  
**India** - Paper by *Madhu Mehra* and *Mrinalini Ravindranath*; presentation by *Enakshi Ganguly*  
**Nepal** - *Binita Pandey*  
**Pakistan** - Paper by *Maliha Zia* and *Sheena Hadi*; presentation by *Maliha Zia*  
**Sri Lanka** - Paper by *Thiagi Piyadasa* with inputs from *Chulani Kodikara*; presentation  
by *Tehani Ariyaratne*  
Reraming perspectives on rights approaches to combating early marriage - *Madhu Mehra*

## AT THE ZOOM DIALOGUE WITH CEDAW - CRC ON 14TH SEPTEMBER, 2020

Participation and comments from CEDAW and CRC Committee Members

CEDAW - *Hilary Gbedemah (Chair), Bandana Rana, Esther Eghobamien, Hiroko Akizuki*

CRC - *Velina Todorova (Vice-Chair), Ann Skelton, Mikiko Otani, Renate Winter*

Coordination with Treaty Body Experts - *Audrey Lee, Nadia Mohd Rasidi*

Interpreters in Bangla, Nepali, French, Spanish - *Deena Nargis, Elawati KC, Maud Blachier, Jimena Sarmiento*

Moderation - *Sara Hossain*

Technical support - *IWRAW-AP*

## PREPARATION OF THIS REPORT

Merging webinar presentations into papers - *Mrinalini Ravindranath* with inputs from *Surbhi Karwa*

Overall review - *Madhu Mehra*

Copyediting - *Rimli Borooh*

Layout and design - *Udita Chakrabarti*

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# ABOUT THE PROJECT

# 1

## *Reframing approaches to child and early marriage*

South Asia has been witnessing a push towards stringent laws to combat child and early marriage since 2016. New enactments in Nepal, Bangladesh and parts of India signal a decisive shift towards punitive approaches, as do the proposals for further changes in India. Even as broader questions arise about the over-reliance on legislative solutions for addressing a phenomenon rooted in poverty, insecurity and gendered social norms relating to female sexuality, these are accompanied by concerns about the harmful impact of punitive approaches on the young people the laws seek to protect.

These questions compel a closer look at the lived realities of adolescent populations most affected by child marriage in the region. They also call for a critical review of how far the law in its formal and operational levels realizes the principles enshrined in the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the United Nations Convention on the Rights of the Child (CRC).

These, among other related concerns, led to a collaborative South Asian initiative called **Feminist Inquiries into Rights and Equality (FIRE)**. Through the course of 18 months, the constituent organizations of FIRE mapped the impact of punitive child marriage laws, simultaneously identifying preventive approaches that empower adolescents from vulnerable populations within their domestic contexts. Applying context-specific methodologies, the consortium partners harvested rich findings to reframe approaches to child marriage.

The process was led by **PLD** whose work in India contrasted the harm of the punitive aspects of the laws against their preventive potential. It explored how, even as nuanced aspects of the laws have bolstered the efforts of frontline workers towards delaying marriages and supporting girls' choices at the community level, the legal prosecutions overwhelmingly target elopements rather than forced or arranged marriage, exposing consenting couples to statutory rape prosecutions.

In Bangladesh, **BLAST** identified concerns regarding the law's criminalization of minors, exacerbated by exception clauses (relating to both child marriage and marital rape), while emphasizing its preventive potential within communities. In Nepal, **WOREC's** documentation demonstrated the combined harmful effect of no-exception laws and an increased minimum age of marriage at 20 years

on the young in self-initiated marriages, and called instead for the law to distinguish between different trends and contexts within early marriage.

**Aahung and Legal Aid Society** in Pakistan pointed to severe deficits in the sexual and reproductive health rights at *de jure* and *de facto* levels in the country, which undermined the efforts to empower girls towards eliminating early marriage. In relation to Sri Lanka, **SSA** demonstrated that access to education and employment opportunities, not the law, was the reason for negligible numbers of child marriage in the country; it noted that tackling its prevalence in minority ethnic and religious communities requires engaging with intersections of religious law, poverty and majoritarianism, simultaneously.

The formal law, as the mapping exercise under the FIRE initiative found, takes many punitive forms. This includes increasing the minimum age of marriage into early adulthood and denial of legal recognition to underage marriages – without distinguishing between self-initiated, forced and arranged marriages (or indeed, the occurrence of fraud, trafficking or kidnapping) – and failure to distinguish between older and younger adolescents. Punitive sanctions against minors, as well as denial of the minor’s right to be heard in legal processes, are also serious concerns. Although laws are scarcely implemented across most of the region, they are selectively deployed against elopements, incarcerating young husbands and consigning minor wives to shelter homes.

Further, the focus on child marriage laws without equal attention to the discriminatory provisions of religious family law that prevail in most of these countries – relating to divorce, custody, guardianship, property and sexual violence against wives – proves to be ineffective in preventing the marital exploitation of girls and women.

The socio-legal taboo against adolescent sexuality is a serious cross-cutting concern, obstructing access to and availability of sexual and reproductive health information and services (including for contraception, abortion and institutional deliveries). The issue of child early and forced marriage blends into concerns relating to honour crimes, sexual shaming and retributive use of law by parents.

Human rights standards in the context of adolescents are fraught, with inconsistent recognition of their evolving capacities, specificities and rights. Even as CRC recognizes the sexuality of adolescents and their rights – to sexual and reproductive health information and services, to protection from criminalization, and to be heard in line with their evolving capacities – these distinctions are missing in relation to approaches towards child and early marriage. CEDAW, despite its emphasis on equality of outcomes, has yet to fully consider unintended harm of no-exception child marriage laws on adolescents from vulnerable populations. Meanwhile, the renewed efforts to attain Sustainable Development Goals (SDGs), including the target of eliminating child and early marriage, have witnessed a misplaced prioritizing of punitive laws over transformatory and preventive approaches, which impacts older adolescents hardest.

The Joint General Recommendation 31 of CEDAW/General Comment 14 of CRC in 2014 deals with a range of harmful practices including child marriage, along with cross-cutting concerns relating to honour crimes and polygamy. In its original 2014 version, the joint recommendation factored in evolving capacities of older adolescents, as well as context-specific unintended harm, to allow exceptions and a calibrated response to child marriage. However, this exception proviso was subsequently redacted.

In May 2019, the Committee Members of CEDAW and CRC voted to expunge the following text from the Joint General Recommendation 31/General Comment 14 on ‘Harmful Practices’:

*'As a matter of respecting the child's evolving capacities and autonomy in making decisions that affect her or his life, in exceptional circumstances a marriage of a mature, capable child below the age of 18 may be allowed provided that the child is at least 16 years old and that such decisions are made by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity without deference to cultures and traditions.'*

It was therefore necessary for the FIRE initiative to engage the human rights treaty body experts on the unintended harm of punitive child marriage and related laws on young lives. Accordingly, FIRE held a dialogue with CEDAW and CRC on child marriage on 14th September 2020. This report is a compilation of the country presentations from Bangladesh, India, Nepal, Pakistan and Sri Lanka, and an overview of the common concerns that emerge from these country presentations. The presentations caution against no-exception punitive approaches, as well as laws and policy-making processes that silence young voices in matters impacting their life. They advocate, instead, preventive, empowering and calibrated responses towards adolescents vulnerable to and caught within the diverse realities of underage marriage.

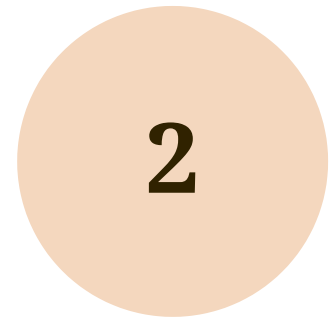
**Madhu Mehra**

**Lead: FIRE initiative on child and early marriage**

**Executive Director: Partners for Law in Development (PLD), India**



# PRIORITIZE PREVENTION AND PROTECTION, NOT PROSECUTION



## Revisiting child marriage laws in Bangladesh

Bangladesh Legal Aid And Services Trust \*

### A brief context

Despite rapid economic growth in Bangladesh, child marriage remains a pressing concern with over 50% of women in their mid-20s married before the age of 18 and nearly 18% married below 15.<sup>1</sup> The Bangladesh government has targeted reducing these figures to 10% and 0% respectively by 2030 as part of its National Priority Indicators (NIPs) for achieving Sustainable Development Goal (SDG) 5.<sup>2</sup>

Of the eight administrative divisions in Bangladesh, child marriage rates are highest in Dhaka, Chattogram, Rajshahi and Khulna divisions.<sup>3</sup> At the district level, child marriage rates are highest in Chapai Nawabganj, Narail, Naogaon, Rajshahi and Bagerhat districts.<sup>4</sup> Three of these districts are in Rajshahi division and the remaining two in Khulna division.

Educational incentives for girls include the Secondary School Stipend Programme with coverage<sup>5</sup> across the country since the early 1990s. However, female dropout rates at the secondary school level remain high and are overwhelmingly associated with child marriage.<sup>6</sup> Of grave concern is the fact that one in three girls become mothers before 18.<sup>7</sup> Another highly disturbing aspect is that marriage remains a very violent institution for most women and girls in Bangladesh, and they are seldom able to seek help or legal action for such violence. For instance, while 72.6% married women faced partner violence, only 2.6% took legal action.<sup>8</sup>

As found in 2017 **over 50% and nearly 18%** of women in their mid-20s married before the age of 18 and the age of 15 respectively, in Bangladesh.

\*This paper was prepared by Taqbir Huda of BLAST.

1 - UN Children's Fund (UNICEF) and Bangladesh Bureau of Statistics, *A Scoping Analysis of Budget Allocation for Ending Child Marriage in Bangladesh* (2017), at 13, 18, available at <https://uni.cf/349uQ1p>. See also UNICEF, *Ending Child Marriage: A Profile of Progress in Bangladesh* (2020), available at <https://uni.cf/3k9YrNL>.

2 - SDG Working Committee, Bangladesh Bureau of Statistics, 39+1 Indicators: National Priority Indicators 14-15 for Sustainable Development Goal 5, available at <https://www.sdgs.gov.bd/page/indicator-wise/5437/3/0#1>.

3 - UNICEF, *Ending Child Marriage* (2020), at 5.

4 - *Ibid.*, at 6.

5 - UNICEF and Bangladesh Bureau of Statistics, *A Scoping Analysis of Budget Allocation*, at 22.

6 - *Ibid.*, at 20.

7 - *Ibid.*, at 18.

8 - Bangladesh Bureau of Statistics, Report on Violence Against Women Survey 2015, Ministry of Planning, Government of People's Republic of Bangladesh (2016), at 15, 35, available at <https://bit.ly/31gQRK4>.

## Legal framework relating to child marriage

The Child Marriage Restraint Act 2017 (CMRA) retains the minimum ages of marriage for females at 18 and males at 21, as set by the older, now repealed, Child Marriage Restraint Act 1929.

Importantly, CMRA, like its predecessor, does not invalidate a marriage contract where one (or more parties) to the contract is a minor. It criminalizes acts relating to child marriage, while the marriage contract itself remains perfectly valid.

The decision to keep the marriage contract valid could be twofold. First, under most religion-based personal laws, marriages where the parties are below the minimum age of marriage as set by CMRA are valid. Second, invalidating the marriage contract could actually render inapplicable certain legal safeguards that the child bride could use to her benefit, as those are conditional upon a valid marriage contract being in existence. For instance, under the Domestic Violence (Prevention and Protection) Act 2010, courts can only issue orders of protection, compensation, residence and custody if there is a valid marriage contract in the first place. Additionally, spousal maintenance and the legitimacy, maintenance and inheritance rights of the child born out of marriage are protected only if the marriage is valid.

Under Muslim family law, a woman whose parent or guardian had contracted her into marriage before they reached the age of 18 may dissolve her marriage contract by exercising ‘the option of puberty’, but only after turning 18 and before reaching the age of 19, provided the marriage has not been consummated.<sup>9</sup>

### Preventive aspects of the law

The law provides for preventive measures at four levels.

- First, it prescribes the establishment of Child Marriage Prevention Committees at various administrative levels to raise awareness against child marriage and mobilize efforts to prevent it.<sup>10</sup>
- Second, it accords certain government officials and local government representatives (such as the Sub-district Women Affairs Officer, Education Officer and so on) general powers to stop an impending child marriage.<sup>11</sup>
- Third, the law empowers courts to issue injunctions to stop a child marriage *suo moto* or on the basis of complaints made to it.<sup>12</sup>
- Fourth, before issuing a marriage certificate, Marriage Registrars are now required to scrutinize a higher set of documentary evidence, such as the birth certificate or national identity card, to determine that contracting parties have reached the minimum age of marriage reached.<sup>13</sup>

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<sup>9</sup> - Section 2(vii), Dissolution of Muslim Marriages Act 1939.

<sup>10</sup> - Section 3, CMRA.

<sup>11</sup> - Section 4, CMRA.

<sup>12</sup> - Section 5, CMRA.

<sup>13</sup> - Section 12, CMRA.

## Punitive aspects of the law

CMRA covers the following offences relating to child marriage.

- It penalizes a parent or guardian's decision to arrange or promote child marriage and even their negligent failure to prevent it from taking place.<sup>14</sup>
- Any person who arranges, registers or solemnizes an underage marriage is penalized; Registrars who register an underage marriage are also liable to have their license cancelled.<sup>15</sup>
- The law also penalizes those who breach a court injunction on an impending child marriage.<sup>16</sup>
- Anyone making a false allegation of child marriage is liable for punishment.<sup>17</sup>
- An adult contracting a child marriage is penalized.<sup>18</sup>
- Most alarmingly, CMRA criminalizes the action of minors who decide to contract themselves into marriage.<sup>19</sup>

Notably, under Bangladesh's rape legislation, the age of sexual consent is 16 in general but in case of spousal intercourse, it is 13.<sup>20</sup> This is because there exists a marital rape exemption clause within the definition of rape, which excludes marital rape of females above the age of 13 from the offence of rape.<sup>21</sup>

One positive aspect of the increased penalization in the new law is the fact that all fines recovered from offences under the law must be given to the affected minor as compensation.<sup>22</sup>

## The notorious exception clause in CMRA

Section 19 of CMRA embodies the notorious 'exception clause' which allows a child marriage to take place in 'special circumstances' without it being treated as an offence. Parties who wish to utilize the exception clause are required to apply to the court, which will forward it to a Verification Committee, which will submit a report either recommending or discouraging the marriage. Importantly, the Committee cannot recommend a child marriage if there is evidence of forced marriage, rape or abduction, or any pending cases in this regard.<sup>23</sup>

The exception clause appears to have four conditions attached to it:

- Parental or guardians' consent
- Existence of 'special circumstances'
- Recommendation by the Verification Committee
- Only if the marriage would be in the 'best interests' of the child

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<sup>14</sup> - Section 8, CMRA.

<sup>15</sup> - Sections 9 and 11, CMRA.

<sup>16</sup> - Section 5(3), CMRA.

<sup>17</sup> - Section 6, CMRA.

<sup>18</sup> - Section 7(1), CMRA.

<sup>19</sup> - Section 7(2), CMRA.

<sup>20</sup> - Section 9, Nari-o-Shishu Nirjatan Daman Ain 2000 (Women and Children Repression Prevention Act 2000) read with section 375, Penal Code 1860.

<sup>21</sup> - Section 375, Bangladesh Penal Code 1860.

<sup>22</sup> - Section 13, CMRA.

<sup>23</sup> - Rule 17(3)(c), Child Marriage Restraint Rules 2018 (CMRR).

The special circumstances, however, are not enunciated and, ultimately, it is the court that makes the final determination of whether any particular child marriage would be in the ‘best interests’ of the minor, and accordingly pass an order to grant or reject the application.<sup>24</sup>

## Non-recognition of adolescent sexuality

CMRA does not recognize the evolving capacities of adolescents (aged 16–18) to contract marriage, which is arguably the only ground on which child marriages ought to be allowed as an exception. Adolescents have no say in determining their own best interests under the exception clause of CMRA, which every other stakeholder – the Court, their parents or guardians and the Verification Committee – does.

Non-recognition of the evolving capacities of adolescents is a critical gap, as Bangladesh is a conservative country where marriage acts as the only means to legitimize sexual intercourse for many adolescents. Therefore, those adolescents who wish to exercise their right in personal law to marry a partner of their choice, below the minimum age of marriage under CMRA and against parental will (as is often the case), are liable to face prosecution and punishment. They are precluded from utilizing the exception clause as it appears to treat the parents’ or guardians’ consent – rather than that of the minor being contracted in child marriage – as an overarching requirement. Moreover, in cases of elopements or romantic relationships between adolescents, where parents are likely to file retributive cases of abduction or rape against their daughter’s partner, the couple is precluded from utilizing the exception clause in CMRA because a pending rape or abduction case would automatically compel the Verification Committee to submit a report discouraging the child marriage.

## Looking ahead: Prioritizing prevention and protection

- The key drivers for child marriage have been identified as lack of or poor education, poverty, natural disasters and climate change, harassment and intimidation, and social pressures by the Government of Bangladesh itself.<sup>25</sup> Therefore, prosecution of offences under CMRA should only occur in extreme cases, not only given the costs of trial and incarceration but also since prosecution does not in any way **address the key drivers of child marriage**. If these root causes of child marriage are to be addressed, then preventive and protective measures – rather than costly and unfeasible prosecution for child marriage-related offences – must be prioritized.
  - Child Marriage Prevention Committees should be activated at all the administrative levels.
  - Information and education on sexual and reproductive health rights (SRHRs) must be provided in schools.
  - The State must be galvanized to prevent female dropouts in secondary schools.
  - Skill building and employment opportunities which create alternatives to child marriage for

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<sup>24</sup> - Rule 17(4), CMRR.

<sup>25</sup> - Bangladesh Planning Commission, *Sustainable Development Goals: Bangladesh Progress Report 2018*, at 72, available at <https://bit.ly/2HtuNYi>. (Download)

young girls and foster active participation – such as the Kishori (Girls’) Clubs – must be expanded.

- Child marriage in Bangladesh has its basis primarily in the country’s **high rates of sexual violence against women and girls**. Parents contract their daughters into child marriage because of fear for their safety, arising out of the ubiquity of sexual violence against women and the impunity with which it occurs. Therefore, if child marriage is to be prevented, communities in which young girls grow up need to be made much safer, such as by ending the prevailing impunity for rape, sexual assault and sexual harassment. Concerted efforts to end impunity for sexual violence must include:
  - Comprehensive trainings on gender sensitivity and sexual consent for justice sector actors.
  - Measures to ensure accountability of and gender parity among public prosecutors.
  - The introduction of an effective victim and witness protection system.<sup>26</sup>

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24 - For a comprehensive list of reforms needed to end impunity for sexual violence, see Rape Law Reform Coalition, *Rape Law Reform Now: 10-Point Demand* (2020), available at: [https://blast.org.bd/content/Rape%20Law%20Reform/RLRN\\_10-POINT-DEMANDS-ENG-FINAL.pdf](https://blast.org.bd/content/Rape%20Law%20Reform/RLRN_10-POINT-DEMANDS-ENG-FINAL.pdf)

# CHILD MARRIAGE IN INDIA

## *Towards approaches that empower girls and mitigate harm*

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Partners for Law in Development \*

### Prevalence and context of child marriage

#### Looking ahead: Prioritizing prevention and protection

About 27% of women in India between 20 and 24 years of age were married under the age of 18. This number has been steadily declining (from 46% in 2005–06), and girls' median age for marriage correspondingly increasing; it went up to 19 years in 2015–16 (up from 17.2 in 2005–06). Marriages of girls under the age of 15 years have also declined.<sup>1</sup>

Trends in underage marriages include arranged and forced marriage by the family, as well as self-arranged ones or elopements. There are also trafficking, kidnapping and purchase for, amongst other reasons, the procurement of unpaid farm labour. A distinction exists between early (involving older adolescents aged 15–18 years) and child marriage

(pre-puberty or early puberty stages). The trend in India is better described as early marriage.

#### Girls' education

There has been a significant improvement in enrollment of girls at the primary and elementary levels, but with a massive drop at the higher secondary level – from about 91% enrollment at the primary level to 31% at the secondary level. The dropout rate for girls is increasing (from 17.8% to 19% in 2015–16), and can be attributed to lack of interest in studies (arising from low learning levels, poor curricula, discrimination and challenges to safety), high costs of education, and the burden of unpaid domestic work in resource-poor families.<sup>2</sup> Early marriage is usually a result, not a cause, of dropping

The number of women between 20-24 years of age that were married under age of 18 declined to 27% in 2015-16 from 46% in 2005-06 in India.

\*This paper was prepared by Madhu Mehra and Mrinalini Ravindranath of PLD

1 - Indian Institute of Population Sciences and Ministry of Health and Family Welfare, Government of India, *National Family Health Survey (NFHS-4), 2015–16 (2017)*, at 156, available at <https://bit.ly/2ZiqjPL>.

2 - National Coalition Advocating for Adolescent Concerns, *Submissions to the Task Force Constituted to Examine Matters Pertaining to Age of Motherhood Among Other Concerns* (2020), available at <https://bit.ly/2Zhl172>. See also Pratham, *Annual Status of Education Report (Rural) 2018 (2019)*, available at <https://bit.ly/3j9iFq9>; Nirantar, *Textbook Regimes: A Feminist Critique of Nation and Identity: An Overall Analysis* (2010); Geeta Nambisan, 'Exclusion and Discrimination in Schools: Experiences of Dalit Children', in S. Thorat and K.S. Newman (eds), *Blocked by Caste: Economic Discrimination and Social Exclusion in Modern India* (2010), at 253–286.

out of education.

## Context

Populations where child marriages occur are marked by marginalization, poverty, poor quality education and lack of opportunities, in resource-poor contexts worsened by conflict, insecurity, migration and lack of safety. Very often, these are Scheduled Castes/Scheduled Tribes populations. The young are forced to bear burdens of early adulthood in terms of housework, low-paid jobs and varying levels of food insecurity; marriage is an aspect of this early adulthood. With post-Covid lockdown and disruption, closure of schools, loss of employment and economic distress, reports indicate a spike in marriages of minor girls.

## Laws pertaining to child marriage and sexual consent

India has several laws that have a bearing on child marriage.

- The **Prohibition of Child Marriage Act 2006 (PCMA)** stipulates the minimum age of marriage at 18 for girls, 21 for boys.<sup>3</sup> The Act allows for preventive measures such as the appointment of a Child Marriage Prohibition Officer, injunctive relief and measures to spread awareness. Underage marriages are legally valid but voidable with exceptions. Only a minor party to marriage can nullify it within two years of majority.<sup>4</sup> In two states, however, amendments to PCMA make such marriages void ab initio. Offspring are considered legitimate and maintenance rights accrue to the wife in the marriage. Punishment for adults involved (either for marrying an underage person or for solemnizing or promoting a child marriage) can be a maximum of two years and/or a fine.
- **Personal laws in the country pertaining to Hindus, Muslims and Christians** recognize underage marriages as valid. The personal laws of the Parsi community do not recognize underage marriage, nor are underage civil marriages solemnized under the Special Marriages Act 1954 regarded as valid.
- The age of sexual consent is set at 18 years by the **Protection Against Child Sexual Offences Act 2012 (POCSO)**, and is the same as the minimum age of marriage for girls. This means that sexuality of adolescents is not recognized at all. Accordingly, the law allows no exceptions to decriminalize non-coercive consensual peer relationships. Sentences for repeated rape of minors (that arise in case of child marriage) are at a minimum of 20 years under POCSO.<sup>5</sup>
- The **Indian Penal Code 1860 (IPC)** too sets 18 years as the age of sexual consent, criminalizing all sexual activity with a person under the age of 18. Statutory rape – sex with a girl under the age of 18 – is punishable with imprisonment of a minimum of 10 years and a fine. IPC categorizes as an

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<sup>3</sup> - Section 2(a), PCMA.

<sup>4</sup> - Section 3, PCMA.

<sup>5</sup> - *Independent Thought v. Union of India* (2017) 10 SCC 800 raised the age within which marital rape could be prosecuted to 18 years within the Indian Penal Code (IPC).

<sup>6</sup> - Section 366, IPC.

offence with punishment of up to 10 years, and a fine, the act of kidnapping in order to compel marriage of a woman against her will. For offences that may be punishable under IPC or POCSO, the higher sentence prevails (in POCSO, as a special law, the law prescribes higher and minimum mandatory sentences).

## Positive aspects of the law

### In principle

The legal responses to child marriage differentiate between the various trends in marriages, invalidating those that involve criminal acts<sup>7</sup> (trafficking, enticement, coercion). Exceptions apart, underage marriages are valid and voidable.

A right to repudiate the marriage vests in the minor party. The right to maintenance for both wife and child, and child's legitimacy, are protected even if the marriage is nullified. Full matrimonial rights prevail during subsistence of marriage.

### In practice

There is widespread awareness of the minimum age of marriage on account of PCMA. Prevention and injunction provisions enable frontline workers to negotiate and persuade local stakeholders, to act to stop impending marriage, nullify marriages through customary systems, and secure waiver of customary penalties – mostly without formal prosecution.<sup>8</sup> While the law strengthens and bolsters interventions by social workers in negotiating with families and the community to stop underage marriage, formal prosecutions are risk laden for reasons outlined below.

## Negative aspects of the law

### In principle

In cases of underage marriage, POCSO applies along with PCMA, as sexual contact with a girl under 18 is statutory rape/child sexual abuse. No exception exists for consensual sexual activity, whether within marriage or not, and the law incarcerates those under 18, increasingly adolescents aged 15-18 and mostly boys.<sup>9</sup>

PCMA is used in conjunction with the stricter penal laws for kidnapping and child sexual abuse in

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7 - Section 12, PCMA.

8 - Partners for Law in Development, *Grassroots Experiences of Using PCMA 2006* (2019), available at <https://bit.ly/2ZioerG>.

9 - From a study of 224 cases, 35% cases related to 'romantic relationships' of those in the 16-18 age group and 94% of such cases ended in acquittal. See UNICEF and HAQ Centre for Child Rights, *Implementation of the POCSO Act: Goals, Gaps and Challenges: Study of Special Courts in Delhi and Mumbai* (2017), at 101, 106, available at <https://bit.ly/3bANLUW>. Similarly, Aarambh India (Prerna) in Mumbai worked on 260 cases under POCSO, where 25% of the cases were consensual; 45% of these cases included girls who were within the 16-18 age group and 71% of the alleged perpetrators were within 16-23 years. See also Centre for Child and Law, NLSIU, *Implementation of the POCSO Act 2012 by Special Courts: Challenges and Issues* (2018), available at <https://bit.ly/3m2tPf6>.



cases of elopements involving underage parties, though rarely when marriages are arranged by parents.<sup>10</sup> These stricter laws carry a minimum sentence of 10 to 20 years in such a case, as against a maximum of two years or a fine for forced or arranged marriage by parents. There is thus a disproportionate and discriminatory impact on eloping couples.

Mandatory reporting is required for offences under POCSO. Healthcare providers who are approached for abortions or other sexual and reproductive health services or information in such cases have to report them, without the consent of the girls, to the police for prosecution for rape. This is a breach of professional confidentiality.

## In practice

Legal prosecutions of parents for arranged or forced marriages are negligible due to the inaction of state functionaries; the police usually supports parents and community stakeholders, making it difficult and even hazardous for girls to register a case. Legal prosecution is often not the first choice for social workers supporting girls seeking help to prevent or exit a marriage. This is on account of backlash against social workers, the girl and even the family for breaking the marriage promise. Social ostracism, high fines levied by community and caste groups, and so on are devastating for families, which the law does not protect against. Instead, social workers draw on the law to garner support of state agencies to negotiate.<sup>11</sup>

Parents have the greatest access to law, girls the least. Studies show that law is primarily used by parents of girls as a retaliatory tool against elopements, for marrying against parental wishes.<sup>12</sup> When elopements occur, they are often a last resort to escape domestic abuse, confinement and burdensome housework; impending forced marriage; or fear of retribution on parental discovery of relationship.<sup>13</sup> Formal prosecutions in elopements have harmful consequences: girls sent to live in shelter homes (either due to a refusal to live with parents or abandonment by natal family), and boys sent to jails or juvenile homes. Both are stigmatized and cut off from opportunities. Since most underage marriages occur within marginalized, poor populations, such communities disproportionately bear the brunt of criminalization.<sup>14</sup>

## Concerns and stakeholders' demands

- **Law must be enabling, rather than punitive**, and it cannot be a primary means of addressing underage marriage in a situation where availability, accessibility and affordability of health, education and food are fraught for the poor, and where lack of safety closes opportunities beyond marriage for girls. Yet, in this context the Indian government is considering increasing the

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10 - ANANDI India documented 731 cases of 'missing girls' aged 14–18 filed as abduction cases. Of these, 46% cases were instituted because of elopements and marriage of the girls, with parents of the girls as complainants. See Sejal Dand and Arundhati Sridhar, 'Criminalising Choice: Cases Studies from Gujarat', ARROW For Change 25(1) (2019), available at <https://bit.ly/2Zkz2SW>.

11 - PLD, *Grassroots Experiences of Using PCMA 2006* (2019), available at <https://bit.ly/38L4X9i>.

12 - Partners for Law in Development, *Who Uses the PCMA Most and Why? Findings from Case Law Analysis (2008-17)* (2020), available at <https://bit.ly/2F9hEzZ>.

13 - Partners for Law in Development, *Why Girls Run Away to Marry* (2019), available at <https://bit.ly/2FjEYzu>.

14 - See PLD, *Grassroots Experiences of Using PCMA 2006* (2019); and Dand and Sridhar, 'Criminalising Choice'.

minimum age of marriage for girls to 21 years (to address the issue of Maternal Mortality Rate/Infant Mortality Rate), and making underage marriages void without exception.

- **Increasing age to 21 years will harm girls.** The age of majority is 18 for voting, entering into contract and decision-making independent of the guardian. Increasing the minimum age of marriage denies young women the right to make decisions about personal matters, and extends the time period for parents to file retaliatory cases against elopements. It will obstruct the judiciary in protecting girls from honour-based retaliatory parental actions.
- **There are harmful unintended consequences of making underage marriages void ab initio.** Such a move denies eloping couples the defence that the law currently provides against retributive criminal prosecutions by parents; it will expose girls to domestic abuse and push them into forced marriages, or poorly managed shelter homes.
- **The law punishes girls** by denying them legal status of wife, or matrimonial rights, even as they continue in conjugal cohabitation. Further, it allows husbands to desert and remarry without any legal consequences. The social impact for girls is a life of near destitution and social stigma.
- **Stringent laws do not address underlying conditions** that push girls to early marriage, nor do they prevent such marriages.
- **Young people desire that policymakers speak to them, rather than decide for them.** A national network of adolescents from rural and peri-urban contexts, the Young Voices,<sup>15</sup> have come out strongly with this demand. They seek quality education, employment, safety, mobility and the freedom to choose if, when and who to marry. The girls say delaying marriage is not enough. They want to be free from the compulsion of marrying for social and economic survival. They reject punitive laws that shame them for sexuality. They seek instead that the focus shifts from delaying marriage to empowering girls from disadvantaged rural contexts through adequate resourcing and opportunities.
- Stakeholders' demands for mitigating unintended harms of criminalization and addressing early marriage in India include:
  - **The age of sexual consent must be decreased** to decriminalize consensual, non-coercive relations between peers. Criminalization of adolescent sexuality harms children and the young – through incarceration and denial of safe, confidential sexual and reproductive health information and services.
  - **Legal responses to underage marriages must be differentiated** based on whether they are forced, parentally arranged, self-arranged, or involve older or younger adolescents. The present law is acceptable in that it treats underage marriage as voidable. The minor party's views in relation to repudiation of marriage must be considered, as part of the principles of evolving capacities and

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<sup>15</sup> - National Working Group, *Young Voices, National Report: Submissions to the Task Force Examining Age of Marriage and Other Concerns* (2020), available at <https://bit.ly/2UZEZSi>.

the right to be heard.

- **The State must bear the onus of guaranteeing schooling for girls**, right up to vocational studies for those from disadvantaged populations who are most vulnerable to early marriage. These must have linkages to livelihood opportunities as part of the government's commitment to not just end child marriage, but allow women the choice of if, when and who to marry.

# RETHINKING THE LAWS ON CHILD MARRIAGE IN NEPAL

## 4

Women's Rehabilitation Centre \*

### Context: Prevalence and trends of child marriage in Nepal

Nepal has the second highest rate of child marriage in South Asia after Bangladesh.<sup>1</sup> Of the women aged 20–24, the share of those married under the age of 18 was 59% in Bangladesh, 40% in Nepal and 27% in India.<sup>2</sup> In Nepal, 7% of the same age group of women stated they were married for the first time by the age of 15.<sup>3</sup> The country's median age at marriage of women is 17.9 years and that of men is 21.7 years.<sup>4</sup> Nepal also has a high prevalence of child marriage among boys.<sup>5</sup>

The prevalence of child marriage varies significantly among the country's many ethnic, religious and caste groups, with the rates of child marriage being the highest among marginalized and lower-caste communities. A 2012 study found that among the disadvantaged Dalit caste, the rate of marriage before the age of 18 is 87% in Nepal's Terai region and 65% in the hilly regions.<sup>6</sup> It also notes that underage marriages less frequent in urban areas, occurs due to family pressure and the need for support in household chores. Recently attention has been drawn to the fact that LGBTI children are more vulnerable to child marriage by parents at an early age when they start to show their sexual orientation through the clothes they wear or their friendship with peers.

While, traditionally, child marriages were arranged by families, an increasing number of underage couples run away together. The National Child Rights Council noted that of the child marriages that took place in 2019, only 38% were forced; 62% involved underage persons getting married of their own

In 2019 the National Child Right Council noted that of all the child marriages taking place, 62% were where underage persons married by their own decision.

\*This paper was prepared by by Binita Pandey of WOREC.

1 - J. Leigh, et al., *Child Marriage in Humanitarian Settings in South Asia: Study Results from Bangladesh and Nepal* (UNFPA APRO and UNICEF ROSA, 2020), at 3, available at <https://uni.cf/36SM6r3>.

2 - UNICEF, 'Percentage of Women Aged 20-24 Years who were married or are in union before age 18' (April, 2020) available as a spreadsheet at <https://bit.ly/3mqqxVr>.

3 - Ministry of Health, New Era and ICF, *Nepal Demographic and Health Survey 2016* (2017), at 83, available at <https://bit.ly/2HkfcHM>.

4 - *Ibid.*, at 77.

5 - UNICEF, 'Press Release: Nepal among top 10 countries for prevalence of child marriage among boys' (7 June 2019), available at <https://uni.cf/3dJZDVE>. See note 3, at 81.

6 - Save the Children, World Vision International and Plan International, *Child Marriage in Nepal: Research Report* (2012), at 22, available at <https://bit.ly/37saYbN>.

volition.<sup>7</sup>

In 2016, the government endorsed a national strategy that provides an overarching framework to end child marriage by 2030 by focusing on empowering girls (including economic empowerment), providing girls with equality education for girls, and mobilizing families and communities to change social norms.

## Laws pertaining to child marriage

In Nepal there is a constitutional guarantee to protect a child from child marriage.<sup>8</sup> While there is no specific law to address child marriage in Nepal, there are three legislations that address the minimum age of marriage and the legal consequences of underage marriage: the State Civil Code 2017, the State Criminal Code 2017, and the Act Relating to Children 2018 ('Children Act'). The major features of the legal regime are as follows.

### Age of marriage

Both the State civil and criminal codes set the minimum age of marriage at the age of 20 years. Marriages of individuals below this age are considered *void ab initio*, as consent (required as per law) given to such a marriage is seen as not valid. The Children Act defines a child as under the age of 18 years and determines consequences of marriage up to this age.

### Consequences of underage marriage and rights arising from marriage

The Children Act provides for a wide range of protections to those impacted by child marriage and allows for, where necessary, temporary protection services, rescue, health examination, admittance to rehabilitation centres, and compensation.

As all underage marriages are treated as *void ab initio*, no marital rights and protections accrue to an underage wife. However, the Civil Code 2017 provides that children born of an underage marriage are entitled to a birth registration certificate, and are considered legitimate children who are entitled to a share of property apart from right to inheritance. Protection for the wife against statutory or marital rape may also be extended within the criminal justice system.

### Punitive consequences of underage marriage

Both the Criminal Code and the Children Act prescribe punishment for the offence of underage/child marriage. Any person fixing, performing, causing or entering into marriage with those under 20 years and 18 years respectively is punishable with an imprisonment of up to three years and a fine.

Most significantly, a minor party to a child marriage, or those marrying between the age of 18 to 20 years, may also be prosecuted as juveniles or within the criminal justice system.

Under the Criminal Code, a case of underage marriage can be brought within three months of knowledge of the marriage, while under the Children Act, it can be brought at any time within one year

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7 - National Child Rights Council, Government of Nepal, *State of Children in Nepal* (2019), at 30, available at <https://bit.ly/3jRPacm>.

8 - Article 39(5) on Rights of the Child, Constitution of Nepal, 2015.

after knowledge of the marriage or after the child attains 18 years of age.

## Positive aspects of the law

The law has the scope to deter family members from arranging marriages of their children during minority and encouraging them to delay marriage to beyond the age of majority. It has aided in the sensitization and general awareness of the negative consequences of child marriage and its impact on the health and development of the girl child. It has also enabled local governments to begin formulating supportive measures to address the issue of child marriage.

Under the Children Act, the victims of child marriages are seen as children in need of special protection, to be provided services and protection by the State. These include provision of alternative care such as children's care homes, facilitation of family reunion, rehabilitation and social reintegration, and monitoring and reporting by the State.

The legal rights of a child born out of child marriage are not affected by legal consequences to the child marriage.

## Negative aspects of the law

### In principle

- **The definition of the element of 'consent' in marriage ignores consent provided by adolescents to marriage.** The law of Nepal regards consent as one of the important elements for solemnizing a marriage. However, since child marriage is viewed as a 'forced' form of marriage, it treats those under the legal age of marriage as being unable to give 'fully informed consent' for marriage. The principle of consent is thus negated for those under 20 years of age.
- **The law criminalizes all child marriage without exception.** Various trends in child marriage exist in Nepal, including self-initiated marriages, elopement and arranged marriages; these need to be differentiated from forced marriages. The law ignores these nuances and fully criminalizes all such circumstances without exception. As most underage marriages involve older adolescents, the strict criminalization of child marriage has made the adolescents involved, particularly boys, vulnerable to criminal punishment.
- **The possibility of interlinkage of child marriage with other crimes is ignored.** In addition to the offence of child marriage, a variety of other cases – of child labour, statutory rape, human trafficking, domestic violence, hostage taking or bride kidnapping – can also be applicable and may be filed. Consequently, the addition of other offences with additional and sometimes higher consequences of imprisonment or fines exacerbates the vulnerability of older adolescents (more so than adults who perform or solemnize the underage marriage) to harm through law.
- **The laws are inconsistent in addressing child marriage.** The three laws dealing with child marriage vary significantly on the minimum age of a child (the Children Act only provides redressal for

those under 18), the time frame within which a complaint may be brought, and the rights of the child/underage person under each of the laws. Access to rights for girls is especially fraught in such a situation of lack of convergence of laws.

## In practice

- **Criminalization enhances the vulnerability of certain caste/class populations, particularly in the case of self-initiated marriages, and leads to human rights violation of young people.** As self-initiated marriages or those arising from elopements are usually inter-caste and inter-community, the 'lower' caste/class party often bears the brunt. If the girl, she is exposed to discrimination in the marital home; if the boy, to criminal prosecution by the family of the girl driven by notions of honour and looking to punish the boy. Girls in such cases are pressurized to file complaints against the boys they eloped with, by parents or public authorities. The criminalization aspect of child marriage legislation is thus often misused by the more powerful castes/classes as a tool to suppress the weaker sections. In such cases the 'child bride' is also likely to suffer from basic child rights and human rights violations. The family of the girl will often force separation from the boy, as a result of which the girl is sent to a 'safe shelter'. If pregnant, forced abortions are common. Displaced from their natural surroundings and deprived of support in the stigmatized environment of the shelter home, girls undergo depression, feel guilt for the punishment to the boy, and even attempt self-harm.
- **The nullity/invalidity of a child marriage does not exempt those involved from marriage obligations.** After an underage marriage occurs, many underage persons cohabit with their spouses in their marital homes and are likely to have children within the first year of marriage. The girl is particularly vulnerable to violence or being deprived of access to resources and rights. Since the law does not recognize the marriage, she cannot enforce her civil and economic rights to marriage otherwise guaranteed, such as registration of marriage, citizenship or seek protection under family law against polygamy or in case of divorce. Moreover, if the marriage ends, girls are blamed and stigmatized, and they remain vulnerable to domestic violence.
- **Underage persons are often left unprotected from further victimization.** Children impacted by child marriage do not receive adequate protection from the State in terms of rehabilitation in family or society, or alternate care in society. Of the three relevant legislations, the Children Act is the only relevant one in this aspect though it is not adequate to meet their needs. Moreover, as criminal law is the redressal mechanism that is most common, the marital or spousal rights of married girls and their need for protection are largely ignored by the State mechanisms. So in many cases, the children suffer from a continuum of harms after the marriage; in some cases, after escaping from one marriage, they are married off again while still underage.

- Though the Children Act provides for protection of child rights in an underage marriage, on the ground, the police and prosecutors make use only of the criminal law to determine the consequences when such a marriage occurs. The inconsistencies in rights affirmed for those under 18 compared to the remedies available to adults between 18 and 20 years old have meant that the minimum age for the 18–20 age group is rarely enforced, therefore not protecting such adults married against their will.

## Concerns and stakeholders' demands

Nepal's national strategy to end child marriage by 2030 has so far proved to be less than effective. In times of Covid-19, additional vulnerability of girls and increased incidences of child marriage need to be swiftly countered.

- **The legal scenario relating to child marriage is unnecessarily complex at present, and the crucial need is to enact a comprehensive law on child marriage** such that it is separated from the criminal code and is rights-affirming. A vital consideration is that the law cannot eliminate child marriage completely but should be able to effectively regulate it.
  - Criminalization: Diverse trends – forced marriage of a child to an adult or between two minors, arranged marriage between individuals underage by law, self-initiated marriage by adolescents, etc. – should be borne in mind to determine which forms of child marriage are to be punished.
  - Child marriage and its links with the criminal justice mechanism: The law should meticulously determine the overlap of child marriage with other criminal offences – such as child labour, statutory rape, human trafficking, domestic violence, bride kidnapping – and frame the procedure for criminal prosecution or litigation.
  - Legality of child marriage: Depending upon the form of child marriage, the law should determine the status of such marriages as 'void' (in cases of exploitative or forced marriages for trafficking, for example) or 'voidable' (for marriages arranged with consent or self-initiated).
- **Absolute criminalization of child marriage and the achievement of sexual and reproductive health rights (SRHRs) targets are not complementary.** Essential interventions as part of a comprehensive approach to SRHRs to be carried out by the government of Nepal include: comprehensive sexuality education (in and out of school); counselling and services for a range of modern contraceptives; prevention of, detection of, immediate services for and referrals for cases of sexual and gender-based violence; information, counselling and services for sexual health and well-being; equal participation of boys in awareness programmes.
- **There is a paucity of policies and programmes to address the root causes of child marriage; the State needs to adopt a preventive approach to the issue.** In keeping with the 2016 strategy for ending child marriage developed by the government, the vision should be that law or a punitive approach cannot effectively address the social problem of child marriage. The underlying causes



causes include poverty, social customs and beliefs, the issue of dowry, social stigma involved in girls talking to boys or having a relationship, lack of guardianship for orphans escaping from violence (physical, sexual) at home, and so on. Keeping the child as the rights holder, and acknowledging the capacity and agencies of adolescents, the State should focus on preventive measures such as:

- Awareness campaigns and advocacy to address the root causes of child marriage.
- Adolescent-targeted programmes relating to the continuity of education, reproductive and sexual health, income-generating skills and activities, gender equality within marriage and preventing domestic violence.
- **Existing State mechanisms for prevention, protection and response relating to child marriage are ineffective in their functioning.** The various ministries – health ministry, education ministry, women, children and senior citizen ministry – need to work in coordination with all three level of governments to prevent child marriage or curb its negative consequences. The National Child Rights Council, formed in 2018, can play an effective role in surveillance and monitoring. Also, the government should work together with Civil Society Organizations (CSOs) at the grassroots or community level, allocating funds for awareness raising and other measures.
- **Data and information on various aspects of child marriage in Nepal are inadequate.** There needs to be more research on the effect of the laws of child marriage, linkages between child marriage and other crimes, impact of early marriage on the girls and boys involved. It is essential to improve the collection of statistics to record the nature and changing trends of child marriage among the population. More research is to be done to unpack the subject of honour in marriage and on why youth are opting for marriage at an early age.

# THE IMPORTANCE OF RECOGNIZING GIRLS' SEXUAL AND REPRODUCTIVE HEALTH RIGHTS IN COMBATING CHILD MARRIAGE IN PAKISTAN

5

Aahung and Legal Aid Society \*

## Prevalence and trends in child marriage

Child marriage is highly prevalent in Pakistan, which has the sixth highest number of child brides across the world; 18% of women are married before 18 and 4% before 15 amongst those aged 20-24.<sup>1</sup> It should be borne in mind that statistical accuracy is low as only 42% of births are registered and only 36% of children have birth certificates.<sup>2</sup>

The impacts of this include high ratios of early pregnancy and maternal mortality. The rate of early pregnancy is 7%.<sup>3</sup> Pakistan's maternal mortality rate was 178 per 100,000 in 2019.<sup>4</sup>

The high incidence of child marriage is mainly because of the prevailing patriarchal norms that govern the ownership and control of women and girls' bodies. This stems from the notion that 'honour' resides in their bodies and honour must not be sullied. Thus, girls are married off young before they are 'tarnished', also allowing for greater child-bearing years.

While 18% of women in Pakistan were married before the age of 18 years, statistical accuracy is low as only 42% of births are registered and less than that have birth certificates.

It is also seen as avoiding the undesired scenario of a woman choosing her own life partner.

Supporting this, customs and traditions such as *watta satta* result in girls being bartered off between families, many being promised even before birth. Girls are considered ready for marriage at the age of puberty. Additionally, sex is a taboo topic, with no scope for the discussion of sex education and health.

The economic factor is also a major contributor to child marriage. Traditionally, girls are expected to be homemakers and not breadwinners, leading to limited resources spent on their education and training. Therefore, while there is 70% enrollment of girls in primary school, the figure drops to less

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\*This paper was prepared by Maliha Zia from Legal Aid Society and Sheena Hadi from Aahung.

1 - An overall 26% of girls were married before the age of 18 among those aged 20-49. See National Institute of Population Studies (NIPS), Pakistan, and ICF, *Pakistan Demographic and Health Survey 2017-18*, at 75, available at <https://dhsprogram.com/pubs/pdf/FR354/FR354.pdf>

2 - *Ibid.*, at 14.

3 - *Ibid.*, at 97.

4 - UNFPA, *State of World Population 2019*, at 155, available at <https://bit.ly/3kdHU5f>

than 13% in secondary school.<sup>5</sup> In addition to their lack of education, the job market is not geared towards women. With restricted mobility or access to public spaces and lack of adequate child care, women remain financially dependent on men.

For girls and women from religious minorities, there is the additional danger of forced conversions, whereby young girls are incited or abducted to marry Muslim men and convert. This is particularly seen in Sindh province.

## Law relating to child marriage

Pakistan has special penal laws on child marriage at the federal and provincial levels, with varying minimum ages for marriage. Under the Child Marriage Restraint Act 1929, the minimum legal age of marriage is set at 16 years for girls and 18 years for boys. In 2013, the Sindh Provincial Assembly passed its own legislation raising the minimum age of marriage to 18 for the girl. There have been two attempts to introduce an increase in minimum age for girls nationally but they have been thwarted. However, courts across the country are known to continue using the concept of ‘age of puberty’ as the determinant of age of consent, based on patriarchal Islamic interpretations.

### Status of underage marriages

The Child Marriage Restraint Act is silent on the validity of underage marriages and the rights of girls in such marriages.

Under Sharia law, such marriage is valid due to the presumption of the girl being of marriageable age post-puberty. However, a girl marrying before the age of 16 may repudiate her marriage before she attains 18 years of age, if the marriage was not consummated.<sup>6</sup> The Hindu Marriage Act 2017, which regulates the registration and solemnization of marriage amongst Hindus, sets the minimum age of marriage at 18 years for both the boy and the girl under Section 4(b). A marriage with at least one underage party is treated as a valid but *voidable* marriage, capable of being annulled at any time. Both Christian and Parsi personal laws in Pakistan require the consent of guardians to a marriage where either party to the marriage is under the age of 21. However, the abrogation of the age requirement is not grounds for nullification of the marriage or divorce.

### Marriage rights

The child marriage law only outlines penal consequences for child marriage and allows for injunctive relief to be sought against a marriage about to occur; personal laws still determine rights arising out of the marriage, annulment or divorce, and also questions of maintenance, inheritance and compensation. Laws on domestic violence at the federal and provincial levels complement this framework.

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5 - Human Rights Watch, ‘*Shall I Feed My Daughter, or Educate Her?: Barriers to Girls’ Education in Pakistan*, (November 2018), available at <https://bit.ly/32CECZ1>. See Ministry of Federal Education and Professional Training, Government of Pakistan, *Pakistan Education Statistics 2016–17* (March 2018), at 76, available at <https://bit.ly/3k1RLjT>.

6 - Section 2, Dissolution of Muslim Marriage Act 1939.

## Punitive framework

Those punishable under child marriage law include adult male husbands, parents, guardians, lawful or unlawful custodians, and those solemnizing such marriages. Under the general law, punishment is imprisonment for a month or a fine. In 2013, the Sindh amendment to the main law introduced higher punishments: imprisonment for two to three years in addition to a fine. In 2015, the Punjab amendments to the national law also brought in increased penal consequences for the offences with imprisonment of up to six months and a fine. An amendment to the Pakistan Penal Code passed in 2017 to Section 498B on forced marriages added a proviso declaring child marriage of a girl a non-bailable offence, punishable by a minimum imprisonment of five years, going up to ten years.

Looking at the larger framework of sexual and bodily rights and protections of women, it is evident that sexual intercourse is legal only upon marriage. While the age of consent for prosecution for statutory rape is set at 16 years, sex outside of marriage is a crime with different punishments. All sex outside marriage constitutes the punishable offence of fornication with imprisonment of up to five years.<sup>7</sup> If it occurs outside of marriage but involves a married person, i.e. adultery, it constitutes a Zina offence under the Hudood Ordinances;<sup>8</sup> if proven, the punishment is stoning to death.

Rape, including marital rape, is punishable.

## Critical analysis of the law

The positive aspects of the law include the legal recognition of forced child marriages being a criminal offence, and the recognition of a wide array of perpetrators. In Sindh, the law goes further to provide for immediate action of the police, making the offence cognizable, non-bailable and non-compoundable, and with a limited time of 90 days for completion of trial.

The legal framework is deficient on many counts. It seeks to prevent child marriage even as it legalizes female sexuality solely within the parameters of marriage. Not surprisingly, the hold of social norms in relation to female sexuality is reinforced by the law. Additionally, there is weak enforcement of law by the police. The systemic poor registration of births makes attesting age at marriage difficult, further weakening the enforcement of the law. Community-based frontline workers aiming to prevent child marriages from occurring face many challenges given the time-sensitive nature of such interventions and it remains difficult to ascertain where marriages are performed, much less use law to avert it.

In the provinces of Khyber Pankhtuwa, Balochistan, Punjab and the Islamabad territory, the police cannot act upon a complaint of child marriage without the permission of the court, which follows specific procedures. With all of this the marriage remains legal and, if consummated, requires a divorce, which is a stigmatizing process for the girl.

Child marriage is prosecuted tangentially, through criminal laws, under certain circumstances. The law

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7 - Section 496B, Pakistan Penal Code 1860.

8 - The Offence of Zina (Enforcement Of Hudood) Ordinance 1979.

is often used to punish and control girls and women who elope or choose their own life partners; the latter end up being charged with the offence of abduction. The law does not uphold consent consistently or coherently either. For instance, in cases where a girl is forced into marriage, the issue of her consent (or her wishes) is not a requirement by law or given any due when raised as a question for upholding such a marriage. Conversely, in cases of forced conversion of girls from minority communities through marriage, the question of consent is used to attribute willingness (of the girl) to the conversion to avoid prosecution.

At the practical and rights-based level, law is unable to address the issues of force, stigma against female sexuality and consent – and is procedurally very complex. It thus does not adequately respond to concerns of child protection in cases of forced marriages or sexual abuse, and instead is being deployed against elopements as a tool of control by girls' families. The law fails to recognize girls as individuals and rights holders. Given these limitations, it is necessary to focus on education and health-based outcomes for girls towards their empowerment and well-being, and through these, find an effective way of tackling child marriage.

## Concerns and stakeholders' demands

- **The sole focus on age as the determinant of offence** – in deciding whether the offence of child marriage or fornication or rape apply – has led to problems. Focusing on age alone has resulted in complacency of law/policy makers who believe they have done enough. This emphasis fails to take into account the on-ground realities and dynamics of gender, power and control over a women's sexuality and body, including the misuse of laws. The inconsistency of 'age of marriage' between federal and provincial laws and parallel related laws has resulted in confusion in the courts. Exacerbating this is the courts' continuous use of 'age of puberty' as the determining factor instead of assessing the minor's ability or capacity to give true, real, voluntary consent to marriage.
- **Penalization alone has been insufficient or counterproductive.** On the one hand, it has failed to deter child marriages or decrease social acceptance of it. On the other hand, increasing penalties has resulted in sympathetic judges being reluctant to award penalties. For eloping couples there remains a looming threat of being found guilty of fornication, resulting in them choosing to conduct or accept child marriage. The law does not cater for these situations, including where the male might be an eloping adolescent liable to a full-term punishment. There is a lack of acknowledgment or recognition of external factors including the danger of honour killing if victims return home, the stigma of divorce, and the issues of reprisals against community itself in cases of forced conversion. Thus, the increase in penalties and resultant lack of imposition of these have given more power to perpetrators and those seeking to control women and girls by giving them space to misuse the laws.
- **There is a failure to provide effective, holistic protection and welfare systems** that cater long term

to victims of child marriage, particularly rescued girls unable to return home. If victims are nearing 16 or 18, they are sent to women's shelter homes, an environment not suitable for these girls, resulting in reluctance by all sides to take this step. Courts are aware of dangers such as honour killing if they send a child back to her parents, and choose instead to send her with her husband if consent (however unexplored) is seen to be established. However, there is no system of follow-up or protection of the child in her marital home.

- These concerns point towards several measures to be taken with regard to child marriage.
  - All federal and provincial laws on child marriage must be amended to establish one definition of 'child' and remove inconsistencies. 'Age of puberty' must be legally revoked as a determinant of adulthood and consent to marriage.
  - Child marriages must be made voidable, leaving the choice of declaring the marriage void or valid to the victim, instead of the current legal standing.
  - Law must include measures to protect the children involved, such as eloping young adolescents, and interlinked laws such as fornication must be amended to ensure no liability of a child.
  - Consummation should not be made a requisite for dissolution of a child marriage.
  - Birth and marriage registration must be affordable and mandatory.
  - An effective child protection and welfare system must be created to provide immediate as well as long-term support for vulnerable children.
  - There should be system-level initiatives to raise awareness of young people, girls in particular, about their sexual and reproductive health and rights, as well as provide them the skills to better negotiate their rights. Life skills and sexual health education must be imparted to children across the country in primary and secondary schools, in line with their emerging capacity.
  - The awareness of the community about the social and health consequences of child marriage must be enhanced. While this has traditionally been done through attention to negative health consequences, there is also a need to develop greater community support for girls having access to education, mobility and agency through increased dialogue and building the support of community advocates and leaders.
  - The sexual and reproductive health services should be strengthened. There needs to be a strong focus on developing the capacity of community health workers and midwives to support women in accessing contraception and other essential sexual and reproductive health services.

# RECOGNIZING EVOLVING CAPACITIES AND ADOLESCENT SEXUALITY IN THE CONTEXT OF UNDERAGE MARRIAGE AND COHABITATION IN SRI LANKA

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Social Scientists' Association \*

## Prevalence and trends of underage marriage

Sri Lanka has a low prevalence of underage marriage (below 18 years) and teen pregnancy in comparison to other South Asian countries. There is no pattern of child marriage observed dating back to the early 20th century, which indicates it cannot be considered a traditional practice. The rate was 178 per 100,000 in 2019.

### Geographic and ethnicity-based trends

There is a higher prevalence of teen pregnancy and underage marriage in rural and war-affected villages, and communities in the plantation sector and economically deprived areas. Underage marriages have been common in former border villages in Kethigollewa and Maha Vilachchiya Divisional Secretariat Divisions (DSDs) in Anuradhapura district, in conflict-affected communities in the north of Sri Lanka and amongst

Internally Displaced Persons (IDPs) in areas such as the Puttalam district, even in the post-war period.<sup>1</sup> Girls from the Muslim community, especially in the Batticaloa district and areas occupied by IDPs of Muslim ethnicity, are vulnerable to child marriage. Data gathered by activists and social workers indicated that marriages are being arranged by guardians for girls between 14 to 17 years of age, in Batticaloa and Puttalam districts, as well as in pockets in urban communities.<sup>2</sup>

Early marriage was also a more common occurrence in up-country estate/plantation sectors.<sup>3</sup> FOKUS WOMEN observed: 'Adolescent marriage and pregnancies were higher within the estate population in

The 2012 Census in Sri Lanka shows ethnic break up of average age of marriage at 22.7 among Muslims which is the lowest, and the highest at 24.4 for Tamils.

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\*This paper was prepared by Tehani Ariyaratne, and Thiagi Piyadasa of SSA

1 - FOKUS WOMEN, *A Report on the Status of Female Heads of Households and Their Access to Economic, Social and Cultural Rights: Anuradhapura District (Kethigollewa And Mahavilachchiya)* (May 2015), available at <https://bit.ly/3kCGtDZ>. See also FOKUS WOMEN, *Post War Child Marriage In Sri Lanka* (2015), available at <http://docplayer.net/24861265-Post-war-trends-in-child-marriage-sri-lanka.html>; FOKUS WOMEN, *Survey on the Status of Muslim Female Heads of Household and Their Access to Economic, Social and Cultural Rights: Puttalam District* (2015), available at <https://bit.ly/34BCqSR>.

2 - H. Hamin and H.C. Isadeen, *Unequal Citizens: Muslim Women's Struggle for Justice and Equality in Sri Lanka* (October 2016), at 8, available as PDF at <https://bit.ly/2Gdc5JK>.

3 - R.S. Gunawardena, *Evolution of Population Policies In Sri Lanka* (1985), at 155-168.

in comparison to rural and urban adolescent populations.’<sup>4</sup>Further, early marriage was particularly prevalent in communities ‘where teenage pregnancies, suicides of young persons and onset of early menarche are high’.<sup>5</sup>

Some suburban areas around Colombo also indicated trends of underage marriage. A study of the Wellangiriya area states that it often reported many social problems including teenage marriages.<sup>6</sup> Another study in Colombo, Anuradhapura and Batticaloa districts showed ‘a familial tendency for teenage marriages’ which ‘was associated with low level of parental supervision, mother’s employment overseas, heavy alcohol use of the father and lower socioeconomic status’.<sup>7</sup>

The ethnic break-up of average age of marriage for women showed no significant difference between ethnicities, with the lowest being 22.7 years among Sri Lankan Muslims, and the highest being 24.4 for Sri Lankan Tamils, in the 2012 census.

## Historical trends

Historically, the age of marriage has risen five to six years on average over the last century. According to data from 1901, the mean age of marriage was 18.3 for females, while the average age of marriage for women among registered marriages was 21.<sup>8</sup> Data from subsequent censuses indicates mean age at marriage was 20.7 in 1946, 24.4 in 1981 and 23.4 in 2012.

While we do not have the data to compute the prevalence of underage marriage as a percentage of the population, according to 2012 census data relating to current married population by age, there were 3204 registered marriages and 326 customary marriages for females below 15 years; 71,837 registered and 13,555 customary marriages were reported for females in the age group 15–19.<sup>9</sup> No males were reported as being married below the age of 15.

## Regional comparison

Comparing Sri Lanka to other South Asian countries, the average age of first marriage for Sri Lankan women in 1981 was 24.4 while for Bangladesh, India, Pakistan, Maldives and Nepal it ranged from 16 to 19.<sup>10</sup> Likewise, the percentage of women of 15–19 years who were never married was 90.1%, while for the other five countries it ranged from 31.2% to 68.9%.<sup>11</sup>

## Contributory factors

Literature suggests that access to free education, free market labour opportunities, raising of the age of

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4 - FOKUS WOMEN, *Post War Child Marriage in Sri Lanka*, at 24.

5 - K.T. Silva, ‘Marriage Transition and Its Impact on Demographic and Reproductive Health Trends in Sri Lanka’, in *ICPD: 15 Years On Sri Lanka: A Review of Progress by 12 Sri Lankan Scholars and Practitioners*, Family Planning Association (2009), at 44.

6 - Udari Samarakoon, ‘Long Term Impact of Induced Displacement and Relocation on Adolescence; with a Focus on Wellangiriya Area, Sri Lanka’, 4th International Conference of Social Sciences, Vol. 4 (2017), at 111–120, available at <https://bit.ly/31XIT8T>.

7 - Dulitha Fernando et al., *Extent, Trends and Determinants of Teenage Pregnancy in Three Districts of Sri Lanka*, UN Population Fund and Ministry of Health (2012), at xi, available at <https://bit.ly/3kJSETH>.

8 - W.I. De Silva, ‘The Ireland of Asia: Trends in Marriage Timing in Sri Lanka’, *Asia-Pacific Population Journal*, Vol. 12(2) (1997), at 3–24, available at <https://bit.ly/34lkHJE>.

9 - Customary marriage data includes all marriages and cohabiting partnerships which are not registered marriages.

10 - *Ibid.*

11 - *Ibid.*, table 2.



marriage to 18 years in 1995, and accessible procedures to register marriages and births contributed to the rising age of marriage; they also resulted in a significant increase in labour force participation.<sup>12</sup> It has been noted that the expansion of mass education was key to the changes in marriage patterns in Sri Lanka, rather than the raising of the minimum age of marriage which happened many decades later.<sup>13</sup> In fact, the 1995 amendments appear to have codified the practice already in existence. State policies have made access to education compulsory for children up to 14 years, and there are up to six public officials at the community level dedicated to implementing these policies.

With access to education and better career prospects, the desirability of an early marriage in search of protection and financial security reduced; and with the advancements in healthcare and reduction in mortality, the previously perceived ‘advantage of early marriage’ diminished ‘as more children are surviving to adulthood’.<sup>14</sup> Therefore, underage marriage has been not commonplace. Access to higher education and socioeconomic developments are also seen as contributing to the low prevalence of teenage pregnancy in Sri Lanka compared to other countries in the South Asian region.

## Cohabitation

A striking feature in Sri Lanka is the trend of cohabitation. With the rise in the age of marriage and delaying of marriage, trends observed included ‘premarital sex, rapid globalization and related development of a youth culture promotive of love and sex and increased opportunities for male and female interaction outside of home’. This has led to adolescents engaged in a romantic or sexual relationships being encouraged to cohabit<sup>15</sup>, which is seen as legitimizing the relationship. This is driven by the need to safeguard dignity and honour, especially of the girl, and particularly in instances of sexual relationships, to prevent pregnancy and elopement. Fieldwork and Key Informant Interviews (KIIs) indicated cohabitation is not stigmatized; in fact, there is an immediate response by community health sector officials to provide young cohabiting couples contraception and reproductive health information (through midwives), regardless of marital status.

## Laws pertaining to child marriage and sexual consent

Marriage in Sri Lanka is governed by three main laws introduced during the British colonial era but amended since: the Marriage Registration Ordinance No. 19 of 1907, popularly referred to as the

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12 - S. Goonasekera and H. Amarasuriya, *Emerging Concerns and Case Studies on Child Marriage in Sri Lanka*, UNICEF (2013), available at <https://bit.ly/37WzwtJ>. See also United Nations, *Marital Status, Country Monograph Series No 4: Population of Sri Lanka* (1976); H.G. Manuratne, ‘විවාහ වයස සහ කන්තාව: ස්ත්රී පුරුෂ සමජබවය හා පවුල [Age of Marriage and Women in Gender and the Family]’ (2004); De Silva, ‘The Ireland of Asia’.

13 - Silva, ‘Marriage Transition’.

14 - Bruce Caldwell, ‘Marriage In Sri Lanka: A Century of Change’, PhD, Reprint, Australian National University (1992), at 89–90, available at <https://bit.ly/3emDf1T>.

15 - Amarasiri de Silva, ‘Desk Review and Basic Field Data on Child Marriages, Statutory Rape and Under Age Sex’, (2009), available at <https://bit.ly/3pxXYrP>.

General Marriage Ordinance (GMO); the **Kandyan Marriage and Divorce Act** of 1952; and the **Muslim Marriage and Divorce Act** of 1951 (MMDA). Those governed by the Kandyan law, a personal law, have the option of marrying under the GMO; however, Muslims are statutorily barred from marriage under the GMO. The GMO therefore applies to all individuals except Muslims.

### **Minimum age of marriage**

The age of marriage is 18 years in Sri Lanka. Both the GMO<sup>16</sup> and the Kandyan Marriage and Divorce Act<sup>17</sup> were amended in 1995 to raise the mandatory minimum age of marriage to 18 years for both male and females. Marriages below this age are considered void. This was in the wake of increasing reports of sexual violence, which led to lobbying by women's rights groups for stronger legislation.<sup>18</sup> The Beijing Platform for Action in 1995, which highlighted the role of the State in advancing women's rights, may have also played a role.

The MMDA does not stipulate a minimum age of marriage. However, for marriage of girls below the age of 12, the approval of the respective *qazi* (cleric) is required before registering the marriage. This suggests a tacit minimum age of 12 years for marriage of Muslim girls. In practice, however, the age of marriage even among Muslims has seen an upward trend, by and large.

### **Statutory age of consent**

In light of international developments at the time such as the adoption of the CRC in 1989, the Age of Majority Ordinance of 1865 was amended in 1989, raising the age of majority to 18 years. Then, in 1995, the same year the age of marriage was raised to 18 years, the Penal Code was amended to raise the age of consent for sexual intercourse to 16 years.

The 1995 amendment also introduced a new offence of statutory rape under Section 363. Accordingly, where a girl under the age of 16 is raped, proof of consent is not necessary; proof of the act of intercourse is sufficient to convict an individual for statutory rape. The exception to this rule is where the woman is the man's wife and she is under the age of 16 but older than 12 (under Muslim personal law). This effectively puts the age for statutory rape of Muslim girls at 12 years. Sex with a child wife who is over 12 years of age is permissible under Muslim law.

The 1995 amendment also introduced Section 364(2), which stipulates an exception to the minimum mandatory prison sentence of 10 years. Where the offender is below the age of 18 years and intercourse is consensual, a lower sentence than 10 years is permissible.

### **Registration of marriage**

While GMO itself does not make registration mandatory, as the only conclusive proof of marriage, marriage registration is the key tool by which underage marriage is checked. In practice, the marriage

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<sup>16</sup> - Section 15, by Act No. 18 of 1995.

<sup>17</sup> - Section 4, by Act No. 19 of 1995.

<sup>18</sup> - Goonasekera and Amarasuriya, *Emerging Concerns*, at 4, 5.

certificate has become an important document in proving marriage for the purpose of school admissions; social security benefits; pension schemes; housing loans; applications for children's passports; and maintenance applications. Social activists also report instances where authorities have demanded production of a marriage certificate to issue birth certificates of offspring, though this is not required by law.

The Muslim community is allowed to register their marriages before a Muslim Registrar. The MMDA stipulates that registration or non-registration alone does not invalidate a marriage.

## Positive aspects of the law

The GMO amendment in 1995 raising the age of marriage to 18 years has contributed towards postponing marriage to some extent, according to many scholars and activists. However, this was only one of many contributing factors, of which access to education has also played a significant role.

There is widespread awareness that the age of marriage is 18 years, and marriage before this age could have negative consequences. There is an equally high level of awareness regarding the need to register marriages when they take place.

The statutory age of consent being 16 years recognizes the evolving capacity of adolescents to consent, and also acknowledges social realities of adolescents engaging in sexual activity.

It is also positive that the law does not prescribe criminal punishment for underage marriage. However, it does criminalize presenting false information to the Registrar; this appears to be used to penalize those concealing underage marriages by misrepresenting the age of the minor. The existence of such cases of misrepresentation of age indicates that despite the prevalence of cohabitation and availability of health services, marriage is sought after as a means of social and legal security.

## Problems with the law

The problems with the law in relation to girls and marriage are not limited to age of marriage, and therefore any discussion on women and girls rights cannot be selective. That is to say, age of marriage intersects with a wide gamut of contemporary concerns relating to marriage laws; the key issues are outlined below.

The personal law for the Muslim community does not stipulate a minimum age of marriage, which makes Muslims girls more vulnerable to sexual and other forms of domestic abuse, including deprivation of educational opportunities and poverty. Muslim law does not make the bride's consent mandatory in solemnization of marriage, provides different grounds of divorce for men and women, and does not allow Muslims opt out of the MMDA and marry under the general law. Under the MMDA, registration of Muslim marriage is mandatory; however, activists have pointed out several instances when registration has not taken place, causing grave prejudice to the woman and children resulting from the marriage. It should also be noted that at present only men are appointed as *qazis*.

This is another demand for reform: that women also be considered for appointment as *qazi*. Substantial changes are required in Muslim law to tackle the discrimination in its letter, with age of marriage being only one of the many concerns.

Apart from the main general and personal laws that regulate marriage, Sri Lankan customary law also recognizes customary marriages where the couple have performed accepted religious or cultural rites and accords them rights arising from marriage. The law creates an evidentiary presumption in favour of the validity of the marriage, which may be rebutted if the parties did not possess the capacity to marry, including if either was not of minimum age to marry. However, there appear to be no reported cases related to customary marriages in recent times. Data from the census, literature and KIIs suggest it is the practice of cohabitation, rather than customary marriage, that is growing.

There is some confusion as to whether the law, within this framework, recognizes cohabitation, which is increasingly prevalent among adolescents. Case law suggests that long cohabitation can be used as evidence to prove a marriage according to the general law. Even if this does create an evidentiary presumption that a legal marriage was to be solemnized, it may not secure matrimonial rights and protections as with customary marriages. As Prof. Goonesekere points out, ‘Sri Lankan law and policy does not recognize that merely living together or cohabiting together creates a legal relationship that is accepted as marriage.’<sup>19</sup> Therefore, the law does not recognize cohabitation, and thus there is no legal recognition of spousal rights for cohabiting couples, adolescent or older (as well as couples in same sex relationships), including property rights.

The silence of the law on youth aged 16 to 18, who are legally able to consent to sexual intercourse but too young to get married, has led to much social debate. The law does not recognize consenting cohabiting relationships where the girl is under the age of 16, though this is an existing reality in cases of teen romances and elopements. In these cases, the man is charged with statutory rape. There may be judicial discretion if the partner is of similar age and consent is established.

## Larger concerns and stakeholders’ demands

- The issues surrounding age of marriage are rooted primarily in societal understandings of sexuality, consent and sexual agency. Morality and social respectability are key factors in how sexuality among youth is policed. There is little understanding of adolescence and related struggles, and support.
- Cohabitation is seen as an acceptable solution by service providers (especially from the health sector, robust in Sri Lanka) and families to address the gap between the age of consent and age of marriage. In some cases adolescents engaged in a romantic or sexual relationship may be coerced or pressured into cohabitation to legitimize the relationship. This creates a situation where youth are not able to make free and informed decisions about relationships. Cohabitation has impacts on

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19 - S. Goonesekere, ‘Some Reflections on Solemnisation of Marriage in the General Law of Sri Lanka’, *Mooter Law Journal*, Vol. 1 (1984), at 24.

education, health, well-being and future employment, particularly for girls: dropping out of school, early pregnancy and lack of career prospects.

- State support comes primarily from the health sector, which takes a public health approach and is concerned with addressing teenage/underage pregnancy, maternal mortality and ensuring adolescent health.
- There is an urgent need for state intervention to ensure compulsory comprehensive sexuality education in school, to reflect the realities of adolescents in Sri Lanka and to ensure they are able to make informed decisions. Bringing in reforms to curricula has been an advocacy point for many years.

Interestingly, while Sri Lanka has ratified the International Conference on Population and Development (ICPD) which commits to sexual and reproductive health rights for all, and has a fairly robust health system, there is a constant battle between the health and education ministries in relation to comprehensive sexual health and relationship education. In our own discussions with a group of teachers, they were also torn about whether there should be comprehensive sex education in schools. They feared it might ‘corrupt’ the minds of children, despite their own admission that children as young as 10 do engage in – or rather, experiment with – sexual relations. This resistance to providing comprehensive information to children is the biggest hurdle faced by the activist community advocating for comprehensive sex education in schools. Ironically, due to the health ministry’s programmes and international commitments, a pharmacist is required to sell condoms even to teenagers, if they seek to purchase one.

- Many activists feel that criminalization or even a legal approach is not the best way to address child/early marriage, and comprehensive sexuality education is needed, while also addressing the moral panic and social conservatism around young people expressing sexual agency. However, so far as the MMDA is concerned, there is an urgent need to close the legal loophole on age of marriage to ensure Muslim women are afforded equal protection of the law. However, so far as the MMDA is concerned, there is an urgent need to close the legal loophole on age of marriage to ensure Muslim women are afforded equal protection of the law.
- The socio-political space for reform in marriage laws with regard to the Muslim community is quite complex and conflicted, as evident from the two broad concerns.
  - One is the strong pushback from conservative factions of the community regarding reforms to the Muslim personal law, such as stipulating a minimum age of marriage. Activists seek 18 years as the mandatory minimum age of marriage with no exceptions, bringing the Muslim personal law on par with the general law applicable to all other Sri Lankan communities in this respect.
  - The second is the growing attention towards the Muslim personal law over the last three or four

years by non-Muslims, and the push to reform and even repeal the personal law. In a context where Muslim minorities are vulnerable and have faced much discrimination and violence in the post-war era, the apprehension is that this support for reform and push to repeal the law arises not from concern for the rights of Muslim girls and women, but as an attempt at erasure of Muslim social and cultural identity.

# CONCLUSION

## *Reframing perspectives on rights approaches to combating early marriage in South Asia*

7

**Madhu Mehra**

All the member organizations of the FIRE initiative have contributed towards successive country reviews by treaty bodies including CEDAW and CRC, as well as the Universal Periodic Review (UPR). The members hold up CEDAW and CRC standards in country-level work and advocacy with equal vigour. This dialogue with CEDAW and CRC on child marriage, then, arises as much from grappling with the implications of the joint General Recommendation 31 of CEDAW and General Comment 18 of CRC on harmful practices, as revised in 2019, as it is an extension of our continuing engagement with the UN human rights system.

The critical takeaways from the discussion are summarized below.

1. The phenomenon of underage marriage across the region is situated largely along the fault lines of poverty, deprivation, social and economic marginalization. While it has linkages with girls dropping out of school, dropouts are not necessarily an outcome of early marriage as is assumed.
2. The minimum age of marriage in law varies – ranging from none, to puberty, to 16, 18, 20 and 21 years. The move to increase the minimum age into early adulthood – 20 and 21 years – not only erodes the legal capacity of young people to make decisions about their personal lives, but also reinforces parental controls over them. By all accounts the increase in age, not backed by educational and employment guarantees for young, cannot serve a girls' empowerment agenda.
3. The lack of safety, opportunities and avenues outside of marriage – with high levels of stigma around adolescent and female sexuality in law as in society – makes marriage almost compulsory for women in most of South Asia. An empowerment agenda for girls must address the underlying social and economic vulnerabilities, instead of focusing on age and delaying of marriage.
4. The mean ages of marriage in South Asia have been gradually increasing without the help of strong laws, or indeed of any law. In Sri Lanka, historically as in current times, underage marriage has not been a significant concern, even in the absence of a law (which came much later). The rest of the region has witnessed an increase in age of marriage under softer non-punitive laws. The current trend in underage marriages predominantly involves adolescents, the larger proportion being older

adolescents. This gradual increase in age of marriage is indicative of the contributory factors that shape marriage trends, which need greater attention than they have received so far.

5. The law has been salutary in helping counter social norms around age of marriage, and is successfully used by social workers and barefoot lawyers to prevent marriages and to negotiate with parents and communities. The immense value of law as a preventive and enabling mechanism is severely compromised when it is strengthened to either push up the minimum age beyond adulthood or treat age as the only determinant to render all marriages void without exception.
6. In India, the law allows the minor parties to marriage the right to repudiate the marriage within two years of attaining majority, irrespective of consummation. This provision has enabled judicial discretion to shield eloping couples. The right to repudiation rests only with the minor, in accordance with the principle of the child's right to be heard, and the courts are under obligation to consider it. Such enabling clauses, in our view, must be part of tackling underage marriage.
7. A discernible trend across South Asia is that of elopements with one or both parties being underage. While it may not be the most common form of underage marriage, it has the distinction of being the most prosecuted in law.
8. A critical concern arising in relation to the law is its punitive impact, not just through criminal prosecutions but also in treating underage marriages as void without exceptions. The denial of validity to such marriages, in regions where such laws exist, has not prevented marriages from occurring. Instead, it has denied underage wives the right to matrimonial property, inheritance, domicile and pension, even as it has freed the husbands from legal consequences for remarrying. These *de facto* wives carry all attendant marital responsibilities but without legal status. This situation potentially legalizes polygamy/bigamy.
9. Legal prosecutions of underage marriage are most often initiated by parents against eloping daughters and their spouses. In India, with the age of consent being the same as age of marriage for girls, the husbands face disproportionately severe sentences for statutory rape; in Pakistan, the parents use the draconian fornication laws. Stricter child marriage laws, when operating in conjunction with laws that criminalize adolescent sexuality or non-marital sex, are invariably weaponized by parents for honour-related retribution.
10. Finally, girls caught within the cross hairs of law may not be returned to their natal homes for various reasons, and are consigned to shelter homes. Not only are such shelters inadequate in number, their abysmal conditions make them unfit sites of refuge. Girls in elopement cases often refuse to return to parents, experience trauma and are known to inflict self-harm.

Given the complexity and intersectional nature of concerns that drive child marriage, law cannot be the primary means of addressing it. The value of a law has to be ascertained as much by its stated objectives as by its unintended outcomes for the beneficiary populations. An ideal law might offer



enabling, preventive and empowering provisions for minors, taking into account the minors' views on decisions affecting their lives. It might consider the evolving capacities of older adolescents within their circumstances, and arrive at a balance of the less than optimal options afforded within their context. It might obligate the State to provide welfare and necessary support that minimizes vulnerability to harm.

Criminalization is relevant when calibrated to target offences intersecting with underage marriage – such as use of force, coercion, trafficking and so on. But its blunt use, including by rendering all underage marriages void, inflicts immense unintended harm on the very population the law and the State seek to protect. Since underage marriages occur largely in contexts of socioeconomic marginalization, criminalization hurts the poor the most.

The findings of FIRE caution against an over-reliance on the law. Stringent laws create an illusion of State action, whereas the implementation of law – as already evident – is mostly against eloping couples rather than arranged or forced marriage. Such laws deny agency and voice to the minor girl in decisions relating to her life. Most importantly, excessive dependence on the law detracts attention from resource allocation for girls from disadvantaged contexts. It allows State parties to neglect their primary obligations towards guaranteeing education, healthcare and equal opportunities in employment for women and girls by evading investments necessary to bring about equality of outcomes for girls.

With the immense economic setbacks under Covid-19, which have deepened existing social and economic divisions, and caused domestic violence and underage marriages to spike, girls are more vulnerable than ever. These post-Covid times compel us to turn towards holistic responses that capacitate and empower the young in marginalized populations, rather than subject them to well-intentioned but exacting laws that victimize.