

# CHILD MARRIAGE AND THE LAW

LEGISLATIVE REFORM INITIATIVE PAPER SERIES

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# **CHILD MARRIAGE AND THE LAW**

**LEGISLATIVE REFORM INITIATIVE PAPER SERIES**

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**Child marriage and the law**  
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## Executive summary

Child marriage violates the rights of the girl child to be free from all forms of discrimination, inhuman and degrading treatment, and slavery. This paper analyses the different legal frameworks and human rights dimensions of child marriage within a feminist perspective. The value of a rights-based approach as a powerful advocacy tool to monitor child marriage is at the heart of this paper. Further, the paper highlights the interconnectivity between international human rights law, constitutional guarantees of gender equality, and other gender friendly laws in combating child marriage. The main thrust of this paper is that early marriage is a violation of fundamental human rights and that both state and non- state actors must be held accountable under international treaty obligations to combat early child marriage.

What is unique about this paper is that it looks at the legal system as a whole and proposes a set of holistic legal and policy reform. By reviewing the landscape of laws that impact on women and children, we are able to come up with a broader range of policy alternatives and a more sophisticated understanding of how the multiple strands of law and innovative legal strategies can converge to prevent child marriage.

Laws have been traditionally created in the male image. In re-envisioning law and legal strategies it is important to capture the lived experiences of women that are so often excluded in the law. The human rights discourse provides the language and the framework to conceive new laws and revise old laws. Child marriage violates a panoply of interconnected rights, including, the right to equality on grounds of sex and age, the right to marry and found a family, the right to life, the right to the highest attainable standard of health, the right to education and development and the right to be free from slavery that are guaranteed in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

The human rights guarantees legitimize strong penalties for violations of laws and policies preventing child marriage. Locating child marriage as a human rights violation also helps to raise it as a grave public concern rather than a private matter between families. The human rights agenda helps to view child marriage through the lenses of both civil and political rights and economic, social and cultural rights covenants. Most of all, the human rights perspective helps to frame child marriage as a crime against women and the girl child. Child marriage disproportionately affects girls because of their sex and despite facially neutral laws, women and girls are often *de facto* unequal before the law. That is why apart from specific child marriage laws, laws relating to prohibitions against discrimination on the ground of sex and age must be strengthened in an effort to strike out the root causes of child marriage.

## Résumé analytique

Le mariage des enfants viole le droit des filles d'être libres de toutes les formes de discrimination, de traitements inhumains et dégradants et de l'esclavage. Ce document analyse dans une perspective féministe les divers cadres juridiques et les dimensions humanitaires du mariage des enfants. Il est axé sur l'intérêt d'une approche fondée sur les droits, instrument de plaidoyer efficace pour observer le phénomène du mariage des enfants. Ce document met en outre l'accent sur le rôle que l'interconnectivité des lois relatives aux droits humains, des garanties constitutionnelles d'égalité des sexes et des autres lois soucieuses de l'égalité des sexes, peut jouer pour s'opposer au mariage des enfants. L'idée centrale du présent rapport est que le mariage précoce représente une violation des droits humains, et qu'il incombe aux acteurs étatiques et non étatiques, de par les obligations que leur confèrent les traités internationaux, de s'engager dans la lutte contre le mariage des enfants.

Ce qui est unique à ce rapport, c'est qu'il considère le système juridique comme un tout, et propose donc un ensemble holistique de réformes juridiques et politiques. En examinant le paysage juridique qui détermine la situation des femmes et des enfants, nous sommes en mesure de proposer un éventail plus vaste d'alternatives décisionnelles et d'en arriver à une compréhension plus sophistiquée de la manière dont les multiples filières du droit et certaines stratégies juridiques novatrices peuvent converger pour faire obstacle au mariage des enfants.

Traditionnellement, les lois sont créées à l'image masculine. Lorsque l'on envisage de nouvelles lois et stratégies juridiques, il importe d'y incorporer l'expérience des femmes, que les lois excluent si souvent. Le discours des droits humains fournit le langage et le cadre nécessaires pour procéder à une révision des vieilles lois et pour en concevoir de nouvelles. Le mariage des enfants viole toute une panoplie de droits interconnectés, dont par exemple le droit à l'égalité sur la base du sexe et de l'âge, le droit de se marier et de fonder une famille, le droit à la vie, le droit à des soins médicaux répondant aux meilleures normes possibles, le droit à l'éducation et au développement, et le droit d'être libre de l'esclavage, qui sont tous garantis par le Pacte international relatif aux droits civils et politiques, le Pacte international relatif aux droits économiques, sociaux et culturels, la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes, la Convention relative aux droits de l'enfant, la Convention sur le consentement au mariage, l'âge minimum du mariage et l'enregistrement des mariages, et la Convention supplémentaire relative à l'abolition de l'esclavage, de la traite des esclaves et des institutions et pratiques analogues à l'esclavage.

Les garanties établies pour le respect des droits humains entérinent l'application de peines élevées pour sanctionner les actes de violation des lois et des politiques empêchant le mariage des enfants. Le fait que l'on définisse le mariage des enfants comme une violation des droits humains contribue également à le placer au niveau d'un grave problème de vie publique plutôt que de le cantonner à une question privée devant se régler entre familles. Le programme de développement des droits humains contribue à ce que l'on voie le mariage des enfants à travers le prisme des droits civils et politiques et des pactes économiques, sociaux et culturels. Mais, surtout, la perspective qu'offrent les droits humains aide à redéfinir le mariage des enfants comme un crime contre les femmes et les filles. Le mariage des enfants affecte les filles de façon disproportionnée, et malgré des lois qui peuvent présenter le masque de la neutralité, les femmes et les filles reçoivent souvent, *de facto*, un traitement inégal par-devant la loi. Voilà pourquoi, abstraction faite des lois spécifiques sur le mariage des enfants, il faut renforcer les lois relatives aux interdictions de la discrimination fondée sur le sexe et l'âge si l'on veut éliminer les causes profondes du mariage des enfants.

## Resumen ejecutivo

El matrimonio infantil viola los derechos de la niña de ser libre de todas las formas de discriminación, de un tratamiento inhumano y degradante, y de la esclavitud. Este documento analiza los diferentes marcos jurídicos y las dimensiones del matrimonio infantil en materia de derechos humanos, dentro de una perspectiva feminista. El núcleo de este documento es el valor de un enfoque basado en los derechos humanos como poderoso instrumento de promoción para la supervisión del matrimonio infantil. Además, el documento subraya la relación entre la ley internacional de derechos humanos, las garantías constitucionales sobre la igualdad de género y otras leyes favorables a la igualdad de género, en la lucha contra el matrimonio infantil. El aspecto principal de este documento es que el matrimonio infantil es una violación de derechos humanos y que tanto los actores estatales como no estatales deben rendir cuentas de conformidad con las obligaciones adquiridas en los tratados internacionales para combatir el matrimonio infantil precoz.

Un aspecto único de este documento es que analiza el sistema jurídico en su conjunto y propone una serie de reformas holísticas jurídicas y normativas. Mediante un análisis de la gama diversa de leyes que tienen consecuencias para las mujeres y los niños, podemos generar un abanico de alternativas en materia de políticas y una comprensión más sofisticada sobre cómo los diferentes aspectos de la ley y las estrategias jurídicas innovadoras pueden confluír para evitar el matrimonio infantil.

Las leyes han sido creadas tradicionalmente siguiendo una imagen masculina. Al volver a considerar las leyes y las estrategias jurídicas es importante incorporar las experiencias vitales de las mujeres que han sido tan a menudo excluidas de la ley. El discurso basado en los derechos humanos ofrece el lenguaje y el marco necesarios para concebir nuevas leyes y revisar las ya existentes. El matrimonio infantil viola una panoplia de derechos mutuamente relacionados, entre ellos el derecho a la igualdad sobre la base del sexo y la edad, el derecho a casarse y fundar una familia, el derecho a la vida, el derecho al más alto nivel posible de salud, el derecho a la educación y el desarrollo y el derecho a estar libre de la esclavitud, que están garantizados por el Pacto Internacional de Derechos Civiles y Políticos; el Pacto Internacional de Derechos Económicos, Sociales y Culturales; la Convención para la eliminación de todas las formas de discriminación contra la mujer; la Convención sobre los Derechos del Niño; la Convención sobre el consentimiento para el matrimonio, la edad mínima para contraer matrimonio y el registro de los matrimonios; y la Convención suplementaria sobre la abolición de la esclavitud, la trata de esclavos y las instituciones y prácticas análogas a la esclavitud.

Las garantías en materia de derechos humanos legitiman penas firmes contra las violaciones a las leyes y políticas que impiden el matrimonio infantil. Considerar el matrimonio infantil como una violación de los derechos humanos contribuye también a que se convierta en una grave preocupación pública en lugar de una cuestión privada entre las familias. El programa sobre derechos humanos contribuye a considerar el matrimonio infantil bajo el prisma de los pactos sobre los derechos civiles y políticos, y los económicos, sociales y culturales. Sobre todo, la perspectiva de derechos humanos ayuda a enmarcar el matrimonio infantil como un crimen contra las mujeres y las niñas. El matrimonio infantil afecta desproporcionadamente a las niñas debido a su sexo, y a pesar de leyes que son neutrales en apariencia, las mujeres y las niñas son a menudo desiguales *de facto* ante la ley. Es por ello que, aparte de las leyes específicas sobre el matrimonio infantil, es preciso fortalecer las leyes relacionadas con las prohibiciones contra la discriminación basada en el sexo y la edad, en un esfuerzo encaminado a eliminar de raíz las causas del matrimonio infantil.



# CHILD MARRIAGE AND THE LAW

## Introduction

Child marriage<sup>1</sup> is one of the most pernicious manifestations of the unequal power relations between females and males. Begun as a practice to protect unwelcome sexual advances and to gain economic security, child marriage has undermined the very purposes it was meant to achieve. Child marriage often means for the girl a life of certain sexual and economic servitude. The subordination of women is both a cause and consequence of child marriage.

Paradoxes and legal contradictions are rife in the institution of child marriage. While consensual sex with girls below a minimum age constitutes statutory rape, the same act with a similar aged girl goes unsanctioned by the protective mantle of “marriage”. Similarly, violence within marriage was largely ignored by the law until recently. It was only when the international women’s movement tore down the artificial divide between the private and the public sphere, and revealed the violence in the home was domestic violence legally banned. The combined strength of the women’s and children’s movements should be directed towards the practice of child marriage, a tradition which constitutes one of the most severe forms of child abuse.

Although this issue affects boys as well as girls, given that the tradition of child marriage has a disproportionately negative impact on the girl child, the focus of this paper will be on girls. This paper offers a human rights framework and concrete legal guidelines to combat the practice of child marriage. Although law related strategies alone are inadequate to address child marriage, legal guidelines help to raise awareness and create clear benchmarks, standards and remedies to address child marriage.

The synergy between human rights norms, constitutional principles of equality and anti-discrimination norms and domestic laws on freedom of marriage combine to militate against child marriage. The major premise of this paper is the interconnectivity between international human rights law, constitutional equal protection provisions and domestic women’s rights laws. The paper frames child marriage in the context of the states failure to comply with international human rights conventions. The rights- based paradigm underpins all arguments made in this paper while highlighting the interrelatedness of discrimination against women in law and practice and child marriage. The role of law as a powerful tool to combat child marriage, along with a multiplicity of other advocacy tools, is the cross cutting theme in this paper.

The paper challenges the practice of child marriage within the framework of feminist legal analysis. The feminist legal method involves questioning the assumption of gender neutrality in law and asking why the lived experiences of women do not inform and shape laws and lawmaking.

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<sup>1</sup> The term “child marriage” is meant in this Paper to cover marriages of those under the age of 18. The minimum age of marriage has been prescribed by the CEDAW Committee as being 18 years of age.

Questioning why women's narratives are invisible in the law helps to resurface the laws biases, prejudices and flaws and opens it up for thoughtful review and revision.

Child marriage has grown on account of women's absence from lawmaking. Traditionally, law and practice is replicated in the image of the male. A feminist legal methodology attempts to recapture the experiences of women in a way that women's narratives become central to the law. Laws and interpretation of laws that exclude a gender perspective fail to understand the reality of women's lives and the impact laws have on women's and children's lives and perpetuate and further legitimate the practice of gender discrimination and violence against women.

Part One of the paper identifies the human rights principles that relate to the prohibition against child marriage. Part Two of the paper develops a rights framework and locates prohibitions against child marriage within that framework. Part Three of the paper explores some country studies and some of the new law-related developments regarding child marriage in those countries. Part Four examines the causes and consequences of child marriage and finally, Part Five of the paper locates child marriage as a continuum of gender discrimination and violence against women and the girl child and makes recommendations for a holistic approach to law and policy reform as a tool to address child marriage.

## **1 International Human Rights Norms that Address Child Marriage**

In 1945, the U.N. Charter reaffirmed a faith in fundamental human rights and in the equal rights of men and women and encouraged respect for human rights and for fundamental freedoms without distinction as to sex. The Universal Declaration of Human Rights similarly promoted the dignity and worth of the human person and the equal rights of men and women.<sup>2</sup> It specified sex as being among the impermissible grounds of differentiation and provided an equal protection clause. Despite the fact that the Universal Declaration does not in and of itself have legal effect on all states, it is morally persuasive and is considered part of customary international law. Provisions for equality of the sexes in the enjoyment of rights are provided for in all the major human rights covenants of the United Nations.

The Convention on the Elimination of Discrimination against Women provides for the prohibition of Child Marriage in Article 16.<sup>3</sup> While child marriage per se is not referred to in the 1989 Convention on the Rights of the Child (CRC), the Convention contains a provision calling for the abolishment of traditional practices prejudicial to the health of children<sup>4</sup>. In addition, child marriage is connected to other children's rights, such as the right to express their views freely, the right to protection from all forms of abuse, and the right to be protected from harmful traditional practices and is often addressed by the Committee on the Rights of the Child. The CRC prohibits States parties from permitting or giving validity to a marriage between persons who have not attained their majority.<sup>5</sup> In the context of the Convention on the Rights of the Child, "a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier." The

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<sup>2</sup> The Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948); Article 7 reads in part: All are equal before the law and are entitled without any discrimination to equal protection of the law.

<sup>3</sup> Article 16, states: "The betrothal and the marriage of a child shall have no legal effect, and all

<sup>4</sup> Article 24(3) of the Convention on the Rights of the Child, 1989.

<sup>5</sup> Article 16(2) of the Convention on the Rights of the Child, 1989.

Committee on the Rights of Child considers that the minimum age for marriage must be 18 years for both man and woman.

Child marriage is among the most frequently addressed issues by both the CRC and CEDAW Committees in their dialogue with State parties and in Concluding Observations.<sup>6</sup> Both the CRC and CEDAW Committees have emphasized the complementary and mutually reinforcing features of the two Conventions. The call for equality for women and girls applies to all ages, including the girl child. While the CRC does not specifically prohibit child marriage, reading the CRC in light of the CEDAW provides an urgent rationale to abolish early marriage.<sup>7</sup>

The “best interests of the child” principle in the CRC provides a basis for evaluating the laws and practices of States with respect to the protection of children. Since empirical evidence reveals that girls who marry early are often exposed to violence, divorce, abandonment, and poverty, and in light of the best interest of the child principle, States must take legal action to abolish child marriages.<sup>8</sup>

To pursue the best interests of children, parents and governments are responsible for protecting their children’s health, education, development and overall well-being to the best of their capacities. Since child marriage harms the girl child’s health, particularly her sexual and reproductive health, which often results in maternal mortality and morbidity due to early pregnancies, States are obliged under the CRC “to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.”<sup>9</sup> Inaction on the part of the States to eliminate child marriages also violates the principle of life, survival and development and the girl child’s right to the highest attainable standard of health under the CRC<sup>10</sup> and the CEDAW.<sup>11</sup> Sexual and reproductive health problems linked to early marriage is also a result of general lack of information and education on sexual and reproductive health issues and thus violates CEDAW’s entitlements that women shall have access to the necessary information, education and means to enable to decide freely and responsibly on the number and spacing of their children.<sup>12</sup>

Apart from the violation of health rights, early marriage disrupts girls’ schooling opportunities as guaranteed by the CEDAW<sup>13</sup> and the CRC<sup>14</sup> and employment rights including vocational training

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<sup>6</sup> Goonesekere, Savitri & De Silva-de Alwis, Rangita (2005). Women’s and Children’s Rights in a Human Rights Based Approach to Development. Working Paper. Division of Policy and Planning. UNICEF. 14

<sup>7</sup> Goonesekere, Savitri & De Silva-de Alwis, Rangita (2005). Women’s and Children’s Rights in a Human Rights Based Approach to Development. Working Paper. Division of Policy and Planning. UNICEF.

<sup>8</sup> Article 3 (1) of the CRC guarantees that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Article 19.1 of the CRC also requires States to take all appropriate measures to protect the child from all forms of abuse, neglect, or maltreatment while in the care of parents.

<sup>9</sup> CRC, Article 24.3

<sup>10</sup> Article 6 of the CRC states (1) States Parties recognize that every child has the inherent right to life (2) States Parties shall ensure to the maximum extent possible the survival and development of the child. 24 (1) of the CRC states that States should “recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

<sup>11</sup> Article 12 of CEDAW guarantees non-discrimination on the grounds of sex in the field of health care and access to health care services, including those related to family planning and pregnancy.

<sup>12</sup> 16 (e) of CEDAW

<sup>13</sup> Article 10 (a) of CEDAW guarantees that equality in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training”

affirmed in the CEDAW.<sup>15</sup> In light of early childbearing that mostly follows child marriage, the CEDAW Committee has cogently emphasized the negative effects child marriage has on the education and employment of girls, stating that “the responsibilities that women have to bear and raise children affect their right of access to education, employment and other activities related to their personal development. They also impose inequitable burdens of work on women.”

The rights to marry and found a family are the rights of adults and not children and adolescents.<sup>16</sup> The CRC endorses both the principle of the “best interest of the child”<sup>17</sup> and the “evolving capacity” of the adolescent.<sup>18</sup> Reading these two articles together implies that children incapable of judgment are entitled to appropriate direction and guidance from parents or guardians.

The social pressure on young brides to bear a child immediately after marriage is enormous. It is often a way of establishing their worth as wife, daughter- and sister-in-law. Child brides do not have the autonomy to negotiate with their spouse, nor the information and services to delay the birth of their children. This results in the denial of the right to decide freely and responsibly on the number and spacing of their children which is recognized in the CEDAW.

Other international agreements related to child marriage are the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, the African Charter on the Rights and Welfare of the Child, and the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa. Child marriage was also identified by the Pan-African Forum against the Sexual Exploitation of Children as a type of commercial sexual exploitation of children.

## **1.1 The Universal Declaration of Human rights (UDHR)**

The right to a 'free and full' consent to a marriage is recognized in the Universal Declaration of Human Rights. The recognition that consent cannot be 'free and full' when one of the parties involved is not sufficiently mature to make an informed decision about a life partner is a violation of the UDHR.

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<sup>14</sup> A minimum age for completion of compulsory education is not mentioned in the CRC, however, CRC Committee’s Guidelines for Periodic Reports require States to “indicate the particular measures adopted to make primary education compulsory and available free for all, particularly children, indicating the minimum age for enrolment in primary school, the minimum and maximum ages for compulsory education...” In Article 28 (1) (b) the CRC provides that States should encourage the development of different forms of secondary education, including vocational education, make them accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance. Similarly, CEDAW clearly guarantees the equal access to education for girls and women.

<sup>15</sup> CEDAW Article 11.1 (c)

<sup>16</sup> Cook, Rebecca. (1994). *Women’s Health and Human Rights: the Promotion and Protection of Women’s Health through International Human Rights Law*. Geneva: WHO. 32

<sup>17</sup> Accordingly, early marriage violates the principle of no discrimination (article 2), as it fall disproportionately on girls; the adverse consequences of early marriage violates the principle of the child’s maximum survival and development (article 6); thus, early marriage will not be in the girl’s best interest.

<sup>18</sup> Article 5 of the Convention also requires that: “States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”



## **The UDHR Provisions Relating to Child Marriage:**

*Article 16:*

*(a) Men and women of full age....have the right to marry and found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.*

*(b) Marriage shall be entered into only with the free and full consent of the intending parties. Similar provisions are included in 1966 International Covenant on Economic, Social and Cultural Rights and the International Covenants on Civil and Political Rights.*

## **1.2 The Convention on the Rights of the Child**

The Convention on the Rights of the Child was carefully drafted over the course of ten years from 1979 to 1989. The CRC recognizes that children are entitled to human rights in their own right. Thus, the CRC reflects a movement away from the view of the child as a recipient of privileges bestowed at the discretion the family, community and the State towards a more progressive view of the child as the bearer of legal rights under international law.<sup>19</sup>

### **1.2.1 The CRC Provisions Relating to Child Marriage:**

*Article 1: A child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier*

*Article 2: Freedom from discrimination on any grounds, including sex, religion, ethnic or social origin, birth or other status*

*Article 3: In all actions concerning children...the best interests of the child shall be a primary consideration.*

*Article 6: Maximum support for survival and development*

*Article 12: The right to express his or her views freely in all matters affecting the child in accordance with age and maturity*

*Article 19: The right to protection from all forms of physical or mental violence, injury or abuse, maltreatment or exploitation, including sexual abuse, while in the care of parents, guardian or any other person*

*Article 24: The right to health and to access to health services; and to be protected from harmful traditional practices*

*Articles 28 and 29: The right to education on the basis of equal opportunity*

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<sup>19</sup> Savitri Goonesekere, *Children, Law and Justice: A South Asian Perspective*, 1997.

*Article 34: The right to protection from all forms of sexual exploitation and sexual abuse*

*Article 35: The right to protection from abduction, sale or trafficking*

*Article 36: The right to protection from all forms of exploitation prejudicial to any aspect of the child's welfare*

### **1.2.2 Some Concluding Observations of the Committee on CRC Relating to Child Marriage**

The Committee on the Rights of the Child has in its concluding observations on early marriages in Nepal, articulated concerns over the widespread practice of early marriage especially in certain ethnic and religious communities in Nepal. It further raised the concern that once girls are married, they are not afforded the protection of the rights enshrined in the Convention, including the right to education.<sup>20</sup>

The Committee has also recommended that Nepal strengthen its enforcement of existing legislation to prevent early marriages and develop sensitization programmes, involving community and religious leaders and society at large, including children themselves. It has also recommended that Nepal should take measures to ensure that when underage girls are married, they continue to enjoy the rights as set out in the CRC, including the right to education.<sup>21</sup>

The Committee was also concerned about the gap between existing legislation and its practical implementation.<sup>22</sup> The Committee was particularly alarmed by the insufficient measures adopted to ensure the effective implementation of the principle of non-discrimination. It notes the persistent discriminatory attitudes towards girls, as reflected in the prevailing son preference, the persistence of early marriages, the notably lower school attendance of girls and their higher dropout rate. The Committee is further concerned at the caste system and traditions such as the *deuki*, *kumari* and *devis*. The Committee also expresses its concern at section 7 of the Children's Act which allows parents, members of the family and teachers to beat a child "if it is thought to be in the interest of the child", as well as at the fact that, as recognized in the State party's report, the views of the child are unlikely to be respected. The persistence of such traditional practices and attitudes seriously hampers the enjoyment of the rights of the child.<sup>23</sup>

In Concluding Observations to other State Party reports too, the CRC Committee has been concerned that the health of adolescents, particularly girls, is neglected, given for instance, a very high percentage of early marriages, which can have a negative impact on their health.<sup>24</sup>

For example, the CRC Committee directed Nigeria to review the compatibility of customary laws with that of the values of the CRC especially in regard to child marriage.<sup>25</sup> The CRC Committee was also concerned about the widespread practice of child marriage in Lebanon and drew attention

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<sup>20</sup> Concluding Observations of the Committee on the Rights of the Child: NEPAL, CRC/C/15/Add.261, June 2005.

<sup>21</sup> Concluding Observations of the Committee on the Rights of the Child: NEPAL, CRC/C/15/Add.261, June 2005.

<sup>22</sup> Committee on the Rights of the Child, Concluding observations on Nepal, Twelfth session, 1996, (CRC/C/15/Add.57)

<sup>23</sup> Committee on the Rights of the Child, Concluding observations on Nepal, Twelfth session, 1996, (CRC/C/15/Add.57)

<sup>24</sup> Concluding Observations of the Committee on the Rights of the Child: India, 23/02/2000, CRC/C/15/Add.115 Para 32.

<sup>25</sup> Concluding Observations of CRC: Nigeria, CRC/C/Add.54 Para. 26, 1995.

to the related consequences of high child mortality rates and the negative impact on the health of the young girls made to bear children.<sup>26</sup>

Just as much as the CRC Committee expressed concern to Nepal regarding the differentials in the minimum ages of marriage for boys and girls,<sup>27</sup> the CRC was particularly concerned about the discrepancy in the age of marriage between male and female in Guatemala.<sup>28</sup>

The CRC Committee also urged Kuwait to undertake all measures, including legal measures, to prevent and combat the harmful traditional practice of child marriage which directly affected the health and well-being of the girl child.<sup>29</sup>

What can be seen here is that the CRC committee links child marriage to a whole host of rights violations against the girl child and sees child marriage in the context of gender discrimination and inequality.

#### **RIGHTS DENIED BY CHILD MARRIAGE OR EARLY MARRIAGE**

Early marriage of girls undermines a number of rights guaranteed by the Convention on the Rights of the Child:

- The right to education (Article 28).
- The right to be protected from all forms of physical or mental violence, injury or abuse, including sexual abuse (Article 19) and from all forms of sexual exploitation (Article 34).
- The right to the enjoyment of the highest attainable standard of health (Article 24).
- The right to educational and vocational information and guidance (Article 28).
- The right to seek, receive and impart information and ideas (Article 13).
- The right to rest and leisure, and to participate freely in cultural life (Article 31).
- The right to not be separated from their parents against their will (Article 9).
- The right to protection against all forms of exploitation affecting any aspect of the child's welfare (Article 36).

### **1.3 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**

The General Assembly of the United Nations adopted CEDAW in 1979. Considered the Bill of Rights of Women, the CEDAW guarantees the State's responsibility to ensure those rights. The CEDAW is supplemented by a number of General Recommendations that further detail the content and the use of CEDAW. Up to date, 185 countries have ratified the CEDAW.

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<sup>26</sup> Concluding Observations of CRC: Lebanon, Committee on the Rights of the Child, 12<sup>th</sup> Session, Para 16, CRC/C/Add.54: 1996.

<sup>27</sup> Concluding Observations of CRC: Nepal, 12<sup>th</sup> Session, Para. 12, CRC/C/15/Add.57 Para 17; 1996.

<sup>28</sup> Concluding Observations of CRC: Guatemala, 12<sup>th</sup> session, CRC/C/Add.58 Para. 15;;1996.

<sup>29</sup> Concluding Observations of CRC: Kuwait, 19<sup>th</sup> Session, CRC/C/151/Add.96 Para. 28; 1998.

The promulgation of CEDAW was the culmination of the efforts of the global women's human rights movement to bring together in a single document a charter of women's rights. Despite many of its shortcomings, it gives voice to the notion that women's rights are human rights.

The CEDAW covers the public as well as the private sphere and argues for the indivisibility of rights including civil and political rights, as well as socio-economic and cultural rights like the right to health. For example, the convention seeks to enforce women's rights to equality in areas ranging from political participation to employment to women's reproductive rights and articulates the importance of ensuring women's social and cultural equality by revising social and cultural patterns of conduct that lead to stereotyped roles and hierarchies between the genders. To secure women's rights, the CEDAW calls upon state parties to adopt enabling legislation prohibiting discrimination against women, and to take "all appropriate" measures to eliminate discrimination.

The CEDAW is structured in six parts. In Part I of the Convention (Articles 1-6), States Parties agree to take all appropriate measures to bring about the advancement of women. These take the form of legal, administrative and other measures, which include temporary special measures of affirmative action, modification of social and cultural patterns of conduct and suppression of traffic in women and exploitation of prostitution of women. In Part II (Articles 7-9), States undertake to protect women's rights in political and public life. In Part III (Articles 10-14), governments make various commitments to eliminate discrimination in education, employment, health, and in economic, social and cultural life. In Part IV-VI, States Parties agree to afford women equality with men before the law in exercise of legal rights and in the marriage and family law.

Since states are bound to eliminate discrimination as defined by Article 1, they are obliged to eliminate discrimination against women in all spheres of life, including the private sphere—especially in the family. This includes not only eliminating practices that are intended to constrain women's human rights but also those unintended consequences of facially neutral laws. In pursuing these goals, states may under Article 4 of the CEDAW even introduce temporary affirmative action measures until equality between men and women is achieved.

Article 2 obliges States to take concrete steps to eliminate discrimination against women. This provision also requires states to eliminate discrimination against women by any "person, organization, or enterprise". This provision makes the CEDAW unique since international human rights treaties are usually limited to the conduct of the State or its agencies.

The main objective of Article 2 is to achieve the establishment of an appropriate legal structure that will guarantee de jure and de facto equality, the necessary resources for its implementation, and a definition of the necessary punishment for "public and private discrimination acts".

CEDAW'S affirmative obligations are another distinct feature of the convention. Article 2 of the CEDAW specifies that State Parties must take affirmative actions to condemn all forms of discrimination against women and to pursue, by all appropriate means, a policy of eliminating such discrimination. For example, Article 2 (f) delineates that States party to CEDAW must take all appropriate measures including legislation to dismantle or revise all existing laws, practices, and customs that discriminate against women. One of the most important obligations under CEDAW is

that under Articles 2 (f) and 5 (a), State Parties must correct cultural customs and practices, in addition to cultural patterns of conduct between men and women, which promote any type of discrimination or stereotyped roles for men and women.

Articles 7, 8 and 9 of the Convention recommend the specific provisions that should be adopted to guarantee women the full enjoyment of their civil and political rights on equal terms with men, both at national and international levels. The enforcement of Articles 7 and 8 require states parties to adopt measures of affirmative action centered on the promotion of wider participation of women in political activities. Such measures would affect areas of public administration and sectors such as unions, business organizations, and in general, social institutions and organizations.

Article 16 also includes equal legal rights related to matrimony and to family relations, including the right of women to freely get married, to decide the number and timing of their children, to exercise their rights to administer property without interference.

The CEDAW requires state parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular to ensure on a basis of equality of men and women the same right to enter into marriage and the same right freely to choose a spouse and to enter into marriage only with their free and full consent.<sup>30</sup> The Convention also provides that the betrothal and marriage of a child shall have no legal effect and that all necessary action, including legislation, must be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.<sup>31</sup>

Although the CEDAW does not contain a specific provision on gender –based violence, Recommendation No. 19 notes that gender based violence perpetrated by public authorities as well as by any person, organization or enterprise constitutes discrimination. It also affirms that family violence is one of the most insidious forms of violence against women and is prevalent in all societies. Recognizing that within family relationships, women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetrated by traditional attitudes.” In light of General Recommendation No. 19, states parties must be requested to take positive measures to prevent and eliminate violence against women in public and private life.<sup>32</sup>

### **1.3.1 CEDAW Provisions Relating to Child Marriage**

*Article 16 (1) prescribes equally for men and women:*

*(a) The same right to enter into marriage*

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<sup>30</sup> Article 16(1) of the CEDAW Convention, 1979.

<sup>31</sup> Article 16(2) of the CEDAW Convention, 1979.

<sup>32</sup> In 1993, the General Assembly also issued the Declaration on the Elimination of Violence Against Women, expressing concern that violence against women is an obstacle to the achievement of equality....” The Declaration stated that all women have the right to equal enjoyment of all human rights including the right to just and favorable work conditions. (Article 3 of the Declaration on the Elimination of Violence).

*(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent*

*Article 16 (2) states: The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage.*

### **Reporting under the CEDAW as a tool to Combat Child Marriage**

The reporting obligations under the CEDAW also enable women's rights advocates to play the role of watchdog for state compliance with CEDAW. Article 18 requires each State Party to submit a report to the Committee within one year of entry into the CEDAW and every four years thereafter. The report should illustrate the legislative, judicial, administrative, and other measures the State Party has taken to give effect to the provisions of the CEDAW. In the "Guide to Reporting under the Convention", one of the required questions that a member state has to ask itself under Article 1 of the Convention is whether ". . . the legal definition of discrimination [is] sufficiently broad or interpreted broadly enough to be compatible with that contained in the Convention." Further, states are required to ask themselves whether the definition covers practices which, although not intending to discriminate, are discriminatory in effect and not reasonable or justifiable. State Party reporting is a very important tool to keep State Parties accountable under the CEDAW.

State Party reporting is not the only enforcement mechanism under CEDAW. The convention has an Optional Protocol which provides for a right of complaint-- something that was suggested in the Vienna Declaration and Programme of Action adopted in 1993. It entered into force on July 22, 2001, after the requisite number of ratifications had been deposited. Under the Optional Protocol, individual women and groups of women, under the jurisdiction of a State Party, can submit complaints to the Committee alleging violations of the Convention provided that the State Party in question has ratified the Protocol. A person other than the victim can also submit a complaint on her behalf. Complaints under the Optional Protocol are to be sent to the Division for the Advancement of Women. At its twenty-sixth session in January/February 2002, the Committee finalized guidelines for the submission of communications that had been drafted by the Working Group on the Optional Protocol. Individual women or groups of women can submit claims of violations of rights under CEDAW to a committee of twenty-three independent experts. Another novel enforcement procedure under the Optional Protocol is the provision which allows the CEDAW Committee to conduct an inquiry into allegations of grave and systematic violations of the CEDAW by a State Party. When the Committee receives information of such alleged violations, it can invite the State Party concerned to cooperate in the examination of the information and to submit relevant observations to the Committee.

For countries that have not yet signed the Optional Protocol, however, advocates can play a proactive role in ensuring state compliance with CEDAW by submitting information in the form of "shadow" or Alternative Country Reports, presenting their own views on rights violations such as child marriage.

NGO's have a very important role in making the CEDAW an instrument of women's empowerment, through advocacy and monitoring their government's implementation of the treaty. Because CEDAW's enforcement mechanism is based on a reporting system, it is imperative that NGO's

understand and use the reporting mechanism to maintain government accountability both inside and outside the country.

NGO participation in the reporting process is an important factor in inducing States to comply with their obligations under the CEDAW. The CEDAW Committee will often seek information on the role of NGO's in the preparation of the report. Women's NGO's are also a valuable source of reliable information, especially when presenting alternative or shadow reports.

The NGO community in each country can get together to write a shadow report or alternative reports which often serves as the basis to for the CEDAW Committees questions on the governmental report. Reporting can be used productively, especially by women's non-governmental organizations. The reporting process can serve as an important tool to draw attention to child marriage.

### **1.3.2 Selected Concluding Observations of the CEDAW Committee**

In responding to the initial report of Nepal to CEDAW, the CEDAW Committee expressed its concern about traditional customs and practices detrimental to women and girls, such as child marriage, dowry and polygamy. The Committee also expressed its concern about the high incidence of girl children being taken across the border for the purpose of child marriage.<sup>33</sup>

In its Concluding Observations on the second and third periodic report of Nepal, the Committee restated its concern over continued existence of child marriage and polygamy and other practices and required the state party to enforce its marriage laws, particularly as they relate to the prohibition of child marriage and polygamy in light of General Recommendation 21 on equality in marriage and family relations.<sup>34</sup>

#### **General Recommendation 21 of the CEDAW Committee**

“A woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being. An examination of States parties' reports discloses that there are countries, which, on the basis of custom, religious beliefs or the ethnic origins of particular groups of people, permit forced marriages or remarriages. Other countries allow a woman's marriage to be arranged for payment or preferment and in others; women's poverty forces them to marry foreign nationals for financial security. Subject to reasonable restrictions based for example on a woman's youth or consanguinity with her partner, a woman's right to choose when, if, and whom she will marry must be protected and enforced law.”

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<sup>33</sup> CEDAW/C/SR.434 and 439; 1999.

<sup>34</sup> Committee on the Elimination of Discrimination against Women

Thirtieth session, 12-30 January 2004; Concluding Comments: Nepal CEDAW/C/SR.630 and 631

## **1.4 The Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage**

This Convention requires the state parties to take legislative action to specify a minimum age for marriage and stipulates that no marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to the age, for serious reasons, in the interest of the intending spouses.

The Convention calls upon parties to eliminate the marriage of girls under the age of puberty and requires that states to stipulate the minimum age of marriage.<sup>35</sup>

### **1.4.1 Relevant Provisions of the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage**

*Article 1:*

*No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person....as prescribed by law.*

*Article 2:*

*State Parties to the convention shall specify a minimum age for marriage ("not less than 15 years" according to the non – binding recommendation accompanying this Convention). No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interests of the intending spouses...*

*Article 3:*

*All marriages shall be registered in an appropriate official register by the competent authority.*

The Convention was passed by the General Assembly in November, 1962. The Preamble to the Marriage Convention establishes both the context to the passage of the Convention, and appropriate manner of interpretation of its provisions. The Preamble declares that the Marriage Convention recalls article 16 (1) of the Universal Declaration of Human Rights which states that: Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. It further establishes that State Parties should take all appropriate measures with a view to abolishing such customs, ancient laws and practices by ensuring, inter alia, complete freedom in the choice of a spouse, eliminating completely child marriages and the betrothal of young girls before the age of puberty, establishing appropriate penalties where necessary and establishing a civil or other register in which all marriages will be recorded.

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<sup>35</sup> Article 1 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1964.



Article 2 of the Marriage Convention requests States Parties to take legislative action to specify a minimum age for marriage. The same provisions further provides that no marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses. Finally Article 3 with an eye on implementation of the goals of the Marriage Convention, mandates that all marriages be registered in an appropriate official register by the competent authority

## 1.5 International Convention on Civil and Political Rights (ICCPR)

The Political Covenant's Human Rights Committee has developed interpretations of its substantive articles by issuing general comments. Comment 4/13 interprets Article 3, which requires states to ensure for all individuals the rights recognized in the Political Covenant as imposing a positive obligation on states to remedy sex discrimination. This positive obligation requires not only that states take measures to protect women, such as the enactment of laws, but also to take measures of affirmative action designed to ensure the positive enjoyment of rights. It also imposes on states a duty to obtain information regarding the role of women in its jurisdiction in order to determine specifically what additional measures need to be taken.<sup>36</sup>

Article 23 of the ICCPR establish for the rights of men and women of marriageable age to marry. It also states that no marriage shall be entered into without the free and full consent of the intending spouse.

The Human Rights Committee's General Comment 28 elaborates on the obligation of the State in terms of equality of rights between men and women. It states:

“Inequality in the enjoyment of rights by women is deeply embedded in tradition, history, and culture including religious attitudes. States parties should ensure that traditional, historical, religious and cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights.”

In its Concluding Comments, the Human Rights Committee has raised the issue of the right to decide if, when, and whom to marry.

For example, the human rights committee has raised that early marriage and the statutory difference in the minimum age of girls and boys for marriage should be prohibited by law and the government of Zimbabwe was asked to adopt measures to prevent and eliminate prevailing social and cultural attitudes.<sup>37</sup>

Further, the human rights committee has criticized the legal provisions exempting a rapist from criminal punishment if he married his victim and condemned this as a violation of the rights of the ICCPR.<sup>38</sup> At the

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<sup>36</sup> U.N.GAOR, 36<sup>th</sup> Sess., Annex 7, U.N. Doc. A/36/40 (1981).

<sup>37</sup> ICCPR Concluding Comments, Zimbabwe, A/53/40 (1998) par. 214; Israel, A/53/40 (1998) par.325; Venezuela, A/56/40 (2001) par.77(18).

<sup>38</sup> ICCPR Concluding Comments, Guatemala, A/56/40 (2001) par.85(24)

same, the committee has recommended that all legal provisions inhibiting a woman's free choice of marriage and the age differentials between the man and woman's right to marriage were to be repealed in Sudan.<sup>39</sup>

Steps have also been recommended to be taken to prevent certain traditions and customs, such as forced marriage that are inconsistent with the equal rights of women.<sup>40</sup>

## **1.6 International Convention on Economic Social and Cultural Rights (ICESCR)**

The ICESCR provides in Article 10 that marriage must be entered into with the free consent of the intending spouse. ICESCR Concluding Comments have elaborated further concerns on child marriage. Some of these concern the following:

Differences in marriageable age between males and females violate Article 10<sup>41</sup>; the practice of early marriage has a negative impact on the right to health, education and work<sup>42</sup> and the ICESCR Committee has also recommended that the legal minimum age of marriage be raised to 18.<sup>43</sup>

## **1.7 The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices, 1956**

The Supplementary Convention equates any marriage that is forced upon a girl or woman by her family or guardians as similar to slavery<sup>44</sup> and requires the state party to eliminate it.

*Article 1(c) – Any institution or practice whereby a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family....*

## **1.8 The International Labour Organisation's Convention 182 on the Elimination of the Worst Forms of Child Labour, 1999**

*Article 3*

*(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, forced or compulsory labour, debt bondage and serfdom:*

*(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;*

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<sup>39</sup> ICCPR Concluding Comments, Sudan, A/53/40 (1998) par.122.

<sup>40</sup> ICCPR Concluding Comments, Nigeria, A/51/40 (1996) par.296.

<sup>41</sup> ICESCR Concluding Comments, Suriname, E/1996/22 (1995) par.159

<sup>42</sup> ICESCR Concluding Comments, Sri Lanka, E/1999/22 (1999) par.73.

<sup>43</sup> ICESCR Concluding Comments, France, E/C.12/2002.22 (2001) par. 876

<sup>44</sup> Article 1(c) (i) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices, 1956.

*(d) work which, by its nature or the circumstances in which it is carried out, is likely to jeopardize the health, safety or morals of children."*

## **1.9 The WHO Constitution**

The WHO Constitution enshrines a right to the highest attainable standard of health and defines health broadly as a “state of complete physical, mental and social well being and not merely the absence of disease or infirmity”. Child marriage goes against the spirit of the WHO Constitution.

## **1.10 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)**

According to Article 1 of the CAT, the acquiescence of the law enforcement in failing to prosecute rape in child marriage, especially in countries where rape covers both marital and non-marital rape, provides the necessary requirement of Article 1 (1) that the act be inflicted “...with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>45</sup>

## **1.11 Regional Treaties**

Although the Asian region lacks a human rights mechanisms, the 1983 Declaration of the Basic Duties of ASEAN (Association of Southeast Asian Nations) Peoples and Governments, to which China, Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Brunei Darussalam are now parties, does ensure the right to life and health-related rights to Asians. This document endorses and is intended to supplement the Universal Declaration.

### **1.11.1 The American Convention on Human Rights, 1969**

The Inter- American system for protecting human rights has three distinct legal sources: the Charter of the OAS; the American Declaration and the American Convention on Human Rights.

*Relevant Articles Relating to Child Marriage*

*Article 4 (1): Right to Life*

*Article 13: -Freedom of Information and Expression*

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<sup>45</sup> “For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

### **1.11.2 The African Charter, 1981**

Fifty-three countries are parties to the Charter. The African Charter explicitly prohibits the marriage of persons under eighteen years old. Article XXI (2) provides: "Child marriage and the betrothal of girls and boys shall be prohibited, and effective action including legislation shall be taken to specify the minimum age of marriage to be eighteen years." It unequivocally fixes the minimum age of marriage at eighteen and allows no exceptions for local religious or other cultural practices, nor does it allow for exceptions based upon the consent of a local authority or the parents or guardians of the children concerned.<sup>46</sup>

The Assembly of Heads of State and Government of the Organization of African Unity (OAU) adopted the guiding human rights document for the system- the African Charter on Human and People's Rights which came into force in 1986. The most distinctive feature of the Charter is its recognition of collective rights.

#### *Relevant Articles Relating to Child Marriage*

##### *Article 16: Right to Health*

*Every individual shall have the right to enjoy the best attainable state of physical and mental health*

*Article 18: States responsibility to protect the family and take care of its health and moral health*

*Article 2: Protection against international monopolies that engage in foreign economic exploitation*

*Article 24: Stipulates the rights of all people to a general satisfactory environment favorable to their development*

### **1.11.3 The European Convention on Human Rights**

The European Convention on Human Rights (ECHR) does not contain an explicit "right to health" or "right to a clean environment." However, both the right to life in Article 2 of the ECHR and the right to respect for private life and home in Article 8 ECHR have been held by the European Court of Human Rights to impose certain positive obligations on the State.

#### **1.11.4 Relevant Articles Relating to Child Marriage**

*Article 2: Protects the right to life, imposes an obligation on the State not only to refrain from taking life but also to take appropriate steps to safeguard life.*

*Article 8: Protects the individual's right to respect for his or her private and family life and home, has been interpreted by the Court of Human Rights as applying where an individual is directly and seriously affected by environmental pollution. The Court has also held that the positive obligations inherent in an effective respect for private life may involve the adoption of measures designed to secure respect for private life "even in the sphere of the relations of individuals between themselves",*

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<sup>46</sup> Elizabeth Warner, Behind The Wedding Veil: Child Marriage As A Form Of Trafficking In Girls 12 Am. U.J. Gender Soc. Pol'y & L. 233 at 254

*that is, measures which regulate the private sphere. The State's responsibility can therefore arise from a failure to take measures to regulate private behaviour in order to protect individuals against harm caused by pollution in circumstances where it could reasonably be expected to act.*

*Article 14: guarantees the right to enjoyment of the Convention rights without discrimination on the basis of a list of enumerated grounds, or "other status". It applies wherever the State acts within the ambit of one of the Convention rights, even if it is not strictly speaking required to act in order to avoid a breach of the relevant right.*

### **1.11.5 The European Social Charter**

The European Social Charter provides that "all workers have the right to safe and healthy working conditions" and "everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable."

### **1.11.6 The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms**

The Council of Europe Convention enshrines the right to life in Article 2.1. The European Social Charter articulates the right to protection of health in Article 11, which imposes a duty upon the parties to the agreement to "take appropriate measures designed inter alia: ... to remove as far as possible the causes of ill-health."

## **2 Developing A Rights Framework to Combat Child Marriage**

This section locates child marriage within a context of inequality and denial of access to resources, including information, education and employment and attempts to build a rights framework to challenge child marriage.

### **2.1 Child Marriage and the Right to Equality and Non-Discrimination**

When the girl child is given in marriage, she is discriminated on the basis of age and gender. This violates article 2.2 of the CRC which places a duty upon States to "take all appropriate measures to ensure that the child is protected against *all forms of discrimination*...on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members" and Article 2 (e) of CEDAW which protects women from discrimination in both the private and public spheres. The States failure to protect the rights of the girl is a clear abdication of the State's duty to protect her rights under the CRC and CEDAW.<sup>47</sup>

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<sup>47</sup> Goonesekere, Savitri & De Silva-de Alwis, Rangita (2005). Women's and Children's Rights in a Human Rights Based Approach to Development. Working Paper. Division of Policy and Planning. UNICEF. 19

The equality provisions of the CRC and CEDAW overlap and complement each other. Early marriage violates girls' right to equality on the ground of sex and gender. The CEDAW obliges States parties to take "all appropriate measures, *including legislation*, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."<sup>48</sup>

The CEDAW Committee has observed that, "some countries provide for different ages for marriage for men and women. As such, provisions assume incorrectly that women have a different rate of intellectual development from men, or that their stage of physical and intellectual development at marriage is immaterial, these provisions should be abolished."<sup>49</sup>

Despite this, a review of State Parties Country Reports to the CRC Committee, at least twenty five States have no specified age for compulsory education and in forty five States girls can be married earlier than boys.<sup>50</sup> Over thirty countries still allow child marriages below the age of fifteen. These countries include Ethiopia, Kenya, and Nigeria, Peru and Argentina, Lebanon and Iran and the United States.<sup>51</sup>

The CRC Committee has often commented on the disparity of the minimum age of marriage between boys and girls under law as a violation of the principle of non-discrimination and urges that legislation is brought into full conformity with the provisions and principles of the Convention.<sup>52</sup>

### *Constitutional Equal Protection Provisions*

Equality clauses in the Constitution have served to dismantle unequal family laws and marriage laws.<sup>53</sup>

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<sup>48</sup> Article 3 of the CEDAW.

<sup>49</sup> CEDAW Committee, General Recommendations 21, para 38

<sup>50</sup> Melchiorre, Angela (2004). "At what age?...are school-children employed, married and taken to court?". Second Edition. *The Right to Education Project*. 3

<sup>51</sup> Askari, Ladan. The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriages. *Journal of International & Comparative Law*. Fall 1998

<sup>52</sup> Vanuatu CRC/C/15/Add.111 10 November 1999

<sup>53</sup> The **Indian** Constitution prohibits discrimination on grounds of religion, race, caste, sex or place of birth (Article 14 & 15). Similarly non-discrimination on the grounds of sex is in the constitutional provision of **India** (Art 14), **Bangladesh** (Art 27), **Pakistan** (Art 15 (1)), **Sri Lanka** (Art 12 (1)) and **Nepal** (Art 11 (2)).

The Constitution of **Vietnam** states that Marriage shall conform to the principles of free consent, progressive union, monogamy and equality between husband and wife (Article 16.3).

The **Ethiopian** Constitution states that women shall, in the enjoyment of rights and protections provided for by the Constitution, have equal right with men (Article 35.1). The following article also states that women have equal rights with men in marriage as prescribed by this Constitution.

The **Namibian** Constitution declares that "men and women of full age...status shall have the right to marry and to found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution (Art 14). Article 144 of the Constitution states that "the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia". The Government is cooperating with NGOs in working towards more protection for children and women, bringing domestic law more in line with CEDAW and CRC.<sup>53</sup>

The Constitution of **China** states that "everyone is equal before the law and has the right to equal protection and benefit of the law...the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including sex" (Section 9.1 and 3)

The Constitution of **Lebanon** states that "All Lebanese are equal before the law".

Law reform has the potential to review local traditions and customs in light of international standards. Article 2 (f) and 5 (a) of CEDAW are premised on the notion that where cultural constraints on gender hinder the achievement of women's equality, it is the cultural practice that must give way. The CEDAW binds States to eliminate discrimination<sup>54</sup> in national constitutions or appropriate legislation and to modify or abolish to customs, practices and laws that discriminate against women<sup>55</sup>. Article 2 prohibits discrimination against women and holds States accountable to a policy of eliminating discrimination against women through *constitutional, legal* and other appropriate means.

## 2.2 Child Marriage and the Right to Free Expression and Information

While in the vast majority of countries the law grants women the right to consent, these legal provisions are merely symbolic. The question arises, as to what extent a child's consent to marriage and sexual relations can be gauged. For instance, although the Transitional Code of Eritrea provides that "each of the spouses shall personally consent to the marriage at the time the marriage takes place (525).....representation shall not be allowed unless a dispensation be given for good cause by the attorney general" and that "no consent shall be valid which has been extorted by threat (Art. 528)"<sup>56</sup>, these provisions are insufficient shields against child marriage unless they can be referenced with a minimum age of marriage.

The CEDAW General Recommendations on marriage and family relations state that "when men and women marry, they assume important responsibilities. Consequently marriage should not be permitted before they attain full maturity and capacity to act."<sup>57</sup> To exercise full, free and informed consent as provided by Article 16 of the CEDAW, a woman needs to have the capacity to understand the meaning and responsibility of marriage; access to full information about her future spouse; knowledge of the institution of marriage; and her right to exercise a choice as to whether or not to marry, who to marry and when to marry.

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The Constitution of **Mauritania** guarantees equality before the law to all of its citizens without distinction as to...sex" (Art 1.2)

The Constitution of **Oman** states that there shall be no discrimination between them on the grounds of gender.

<sup>54</sup> Article 1 defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

<sup>55</sup> Article 2 (f) recommends that all appropriate measures be taken to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Article 5 (a) obliges states to work to eliminate "prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".

<sup>56</sup> Country Report CEDAW/C/ERI/1-3 (2004)

<sup>57</sup> General Recommendation No. 21 (13th session, 1994). Para 36

## 2.3 Rights to Education and Employment

Many studies have shown that early marriage is universally associated with low levels of schooling and thus in violation of girls' right to education as guaranteed by the CRC and CEDAW.<sup>58</sup> A lack of education further denies girls' their right to personal development as guaranteed in the CRC, which is crucial for them to prepare for adulthood and effectively contribute to the future wellbeing of their families and society.

After marriage, young girls' access to formal and even non-formal education is severely limited because of domestic burdens, childbearing, and family pressures. Furthermore, recent UNICEF studies have reconfirmed the theory that girls who have a secondary education are less likely to marry. Compulsory education laws requiring girls to stay in school up to the age of sixteen years significantly decreases the chances of early marriage. The lack of education is both the cause and effect of child marriage.

The CRC requires States to ensure that primary education is free and compulsory.<sup>59</sup> Although a minimum age for completion of compulsory education is not mentioned, the Committee's Guidelines for Periodic Reports require States to "indicate the particular measures adopted to make primary education compulsory and available free for all, particularly children, indicating the minimum age for enrolment in primary school, the minimum and maximum ages for compulsory education...." State parties to the CRC here have extended compulsory education beyond primary schooling. The CRC has also expressed its serious concerns over the right to education, particularly girls' education through its Concluding Observations. Often this issue is discussed in connection with the need to raise and enforce the legal age of marriage.

The CEDAW obliges States to provide for women equal rights with men in education. It recognizes girls particular disadvantage in school and explicitly calls on States to reduce female student drop-out rates. Since the Concluding Comments consistently express concern that early and forced marriages and early pregnancies cause a high-drop out rates of girls from school<sup>60</sup> the CEDAW Committee clearly calls on States to use all available measures, including legislative reforms, to eliminate early marriage.

The promotion of employment opportunities for women in non-traditional occupations also helps to promote girls' education and postpone marriage. This has had the effect of encouraging parents' support for their daughters' education. The minimum age of labour laws and compulsory education laws are thus interdependent: the enforcement of one contributes to the enforcement of the other. The goals of universal education and elimination of child labour are inextricably linked. Unfettered access to free and compulsory education until the minimum age for entry to employment is a critical factor in the war on child labour and child marriage.

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<sup>58</sup> Alan Guttmacher Institute (1998) 'Into a New World: Young Women's Sexual and Reproductive Lives' and Forum on Marriage and the Rights of Women and Girls. (2000) "Whose Right to Choose." 15

<sup>59</sup> Article 28 of the CRC.

<sup>60</sup> States include, but are not limited to, the Congo, CEDAW/C/SR.606 and 607; Fiji 22 January 2002 (see CEDAW/C/SR.530, 531 and 538); Guatemala 12 August 2002 (see CEDAW/C/SR.577 and 578); Kazakhstan 18 and 23 January 2001 (see CEDAW/C/SR.490, 491 and 497); and Mexico 6 August 2002 (see CEDAW/C/SR.569 and 570)



While the CRC does not establish a single minimum age for admission to employment, the Committee has consistently indicated that minimum age of employment should be set in light of the ILO Minimum Age Convention N. 138. The general minimum age for admission to any employment should be no less than the age of completion of compulsory schooling and, in any case, no less than 15 years; where the economy and educational facilities of a country are insufficiently developed, it may be initially reduced to 14 years of age.<sup>61</sup>

The CEDAW guarantees that once girls have reached the minimum age of employment, they should have equal rights with men.<sup>62</sup> Because early marriage is an impediment to the realization of the rights to education and employment enshrined in the CRC and CEDAW, States must ensure that the minimum age of marriage is higher than the minimum school-leaving age, and the minimum age of employment. The CRC obliges States to set the minimum age of employment in line with that of education. Yet, a review of the States parties' reports indicate that forty four States have laws stipulating the minimum age of employment is lower than the minimum school-leaving age. For example, countries such as the Côte d'Ivoire, Democratic Republic of the Congo, Malawi, Mauritania and Yemen do not have a minimum school leaving age and all have a high prevalence of child marriages.

As the CEDAW Committee has expressed, child marriages not only affects women but also has a negative impact on families and entire communities.<sup>63</sup> The CRC Committee has recommended that a State party with a high prevalence of early marriage undertake awareness raising campaigns concerning the harms and dangers of early marriages on the health and education on girls<sup>64</sup>

In its Concluding Observations, the CRC Committee has required States to dismantle practices which prevent girls from attending school.<sup>65</sup>

## **2.4 Right to Life, Survival and Development**

While the difference between the age of marriage for girls and boys violates the equality clause, early marriage can violate the right to health of women and constitute “sexual exploitation and sexual abuse.”

The development rights of girls cannot be realized without a commitment to restrain early marriage. Since early marriage also impacts the health of girls, interventions in this area are relevant to the general concept of the health rights of girl children. When Article 6 of the CRC on survival and

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<sup>61</sup> There are various exceptions to this general rule. The main ones concern: a) light work, which is permissible on a set of conditions and for which the minimum age may be set at 12 or 13 years; b) hazardous work for which a higher minimum age is required (18). Furthermore, it is to be noted that activities such as domestic service, work in family undertakings and work undertaken as part of education are excluded from minimum age legislation.

<sup>62</sup> CEDAW article 11.1 (C)

<sup>63</sup> General Recommendations 21, para 37

<sup>64</sup> For example, INDONESIA CRC/C/15/Add.223 30 January 2004; MADAGASCAR CRC/C/15/Add.221 27 October 2003; ZAMBIA CRC/C/15/Add.210 4 July 2003; IRAN CRC/C/15/Add.123 28 June 2000

<sup>65</sup> For example, MOZAMBIQUE CRC/C/15/Add.172 3 April 2002

development and Article 29 (a) on education<sup>66</sup> are read with article 3 of the CEDAW, which obliges States to take “all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men” they require that States should take all appropriate legal measures to prevent child marriage in order to ensure the full realization of those rights.

Reading Articles 1 and 3 in the CEDAW together indicate that under international law, women are entitled to enjoy fundamental freedoms and development equally with men in all fields. Early marriage discriminates against girls by denying them the same freedoms allowed to boys. States that allow the practice of early marriage to take place including States that do not have laws prohibiting early marriage or those that have laws but fail to enforce them—violate their commitment to guarantee women’s fundamental freedoms and development as stipulated in the CEDAW.

Article 24.3 of the CRC provides that States parties shall take measures to abolish “traditional practices prejudicial to the health of children.” This provision too is an effective invocation against early marriage and the health risks associated with early sexual intercourse and childbearing.

The CEDAW Committee has recognized a “holistic approach to women’s health throughout the life cycle ....”<sup>67</sup> The CRC reinforces women’s rights to maternal health and the CRC Committee stated in 2004 that it remained seriously concerned at the unavailability and/or inaccessibility of free, high quality primary health care” and “The worsening maternal mortality rates”.<sup>68</sup> The CRC Committee has also directed that concrete steps be taken to combat sexual abuse, mother to child transmission of HIV/AIDS, sexual trafficking of children, and forced early marriage for girls, “which can have a negative impact on their health, education and social development.” Moreover, the Committee has recommended that sexual and reproductive health education be made accessible to adolescents.<sup>69</sup> Further, the CRC has recommended “gender impact studies when planning programmes relating to economic and social policies.”<sup>70</sup>

## 2.5 Child Marriage as Gender Violence

Child marriage often leads to violence against the child wife. While CEDAW does not mention child marriages as a form of violence against women, CEDAW explicitly mentions forced marriage in its General Recommendations 19 on Violence against Women, as a form of family violence. The Committee has read Articles 2(f), 5 and 10(c) together and has observed that the “traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as forced marriage”.<sup>71</sup> Recommendation 19 clearly requires States parties to take effective steps to overcome family violence.<sup>72</sup>

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<sup>66</sup> 29 (a) of the CRC obliges States to ensure that education of the child is directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential

<sup>67</sup> CEDAW Committee Concluding Observations, India. Para 78, UN Doc. A/55/38 ( Jan 2000).

<sup>68</sup> CRC Concluding Observations India, UN Doc.CRC/C/15/Add.228 ( Feb.26.2004)

<sup>69</sup> CRC Committee, Concluding Observations, IndiaU.N. Doc.CRC/C/15/Add.115 ( Feb.23,2000).

<sup>70</sup> Ibid..

<sup>71</sup> General Recommendations 19 on Violence Against Women. Para 11

<sup>72</sup> General Recommendations 19 on Violence Against Women. Para. 24

The CEDAW also declares that violence against women "impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under specific human rights conventions", including the right to life, the right not to be subject to torture, the right to liberty and security of the person, and the right to equality before the law. Even though there is no direct reference to domestic violence in the CEDAW, some guidance could be received from the Declaration on the Elimination of Violence Against Women (DEVAW), which defines violence against women as any gender-based violence that results in, or is likely to result in; physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in the family, such as battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women; non-spousal violence; and violence related to exploitation. The broad definition of domestic violence adopted by the DEVAW will also help in expanding the scope of harms recognized as domestic violence and acts of violence against women.

Article 5 of the CEDAW which deals with sex roles and stereotyping, recommends that States parties modify the social and cultural patterns of the conduct of men and women, with a view to achieving the elimination of prejudices and customs and all other practices that are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for men and women. The section on accountability and implementation of these provisions recommends that in order to ensure the implementation of this provision, States parties should take measures and steps to raise consciousness and inform law enforcement officials on the issue of violence against women, particularly within the home.

Article 16 of the CEDAW also requires states to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family. Further, these rights should extend during marriage and its dissolution.

### 3 Country Studies

#### 3.1 India

“...the social evil of child marriage can be eradicated only if the people revolt against the custom”

*Sushila Gothala v. State of Rajasthan, AIR 1995*

In India, the National Family Health Survey of 1998-1999 found that 65% of girls are married by the time they are eighteen.<sup>73</sup> Child marriages are solemnized during times of festivals such as *Akshaya, Tiritiya, Akha Teej, Ram Navami, Basant Panchami and Karma Jayanti*.

Despite commonly held views, it is not easy to find references in Indian literature to child marriage. The most popular form of marriage in Indian literature is *Swyamvara*, where the bride selected her

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<sup>73</sup> See *Child Marriages and the Law in India*, Human Rights Law Network, June 2005.

spouse from grooms assembled in her home. Examples of Swyamvara can be found in the epics of *Ramayana* and *Mahabharatha*. The *Rigveda* argues that a girl can be married only when she is fully mature, both physically and mentally.<sup>74</sup>

Although some Indian advocates question the existence of child marriage in traditional Hindu texts, child marriage existed historically in India and was first addressed in the 1869's when the Indian Penal Code prohibited child marriage. Child marriage was also linked to other exploitative practices that discriminate against and demean women, like *Sati*, or the forced self immolation of widows.

The first law addressing child marriage was the 1872 Native Marriage Act which was promulgated by the British colonial regime and fixed 14 as the age of consent to marriage. The Indian nationalist movement pushed for the Child Marriage restraint Act of 1929. The case of Rakhambai stirred much interest at this time. Rakhambai, a child was married to an unemployed and uneducated elderly relative. When her husband brought suit for the restitution of conjugal rights, Rakhambai engaged in a public debate about the evils of child marriage. Although the British court upheld her husband's right with a technical interpretation of the law, an out of court settlement allowed her continue her studies and become India's first woman doctor.<sup>75</sup>

Nepalese advocates argue that Hindu scriptures in 400 to 100 BC urged the father to marry off his daughter at a very young age, eight to ten being the ideal age of marriage.<sup>76</sup>

Such religious texts (the *Vishnu Sutra* and *Gautam Sutra*) direct the father to marry his daughter within three weeks of attaining puberty, and not later. By 200 BC, the rules for a daughter's marriage seemed to have become stricter. Sage Manu's treatise, *Manu Smriti*, mandates that if a girl remains unmarried after reaching the puberty, the father has failed in his duty towards her. Manu himself had married off his daughter Devbhuti at the age of seven.<sup>77</sup> Similarly, another sage, Parasara, said that the parents or guardians of a girl who reaches puberty before marriage will definitely go to hell.<sup>78</sup>

The *Yadav*, *Gupta*, *Thahare*, *Kurmi*, *Lodh*, *Harijan*, *Bajiya*, *Kalwar*, *Pasi*, *Pashwan*, *Mourya* and *Tharu* communities believe that if a daughter is married before the start of her menstrual period, the blessings that will accrue will be akin to the donation of 7,800 cows. On the other hand, if the marriage is solemnized after a daughter's menstrual period, it will have the same effect as killing 7,800 cows.<sup>79</sup>

Whatever the rationale for child marriage in 400 BC, one thing that must be kept in mind when tracing the religious and cultural roots of child marriage is that in 400 BC the average life span of a woman was between thirty five and forty years; if this was a justification for early marriage at one time, it is no longer the case.

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<sup>74</sup> Ibid

<sup>75</sup> See Radhika Coomaraswamy, *Men's Laws Women's Lives, a Constitutional Perspective on Religion, Common law and culture in South Asia*. Indira Jaising ed. New Delhi, 2005.

<sup>76</sup> Sapana Malla, *Nepal Report on Child Marriage*, 2005

<sup>77</sup> *Kantipur* :a national vernacular daily on November 3, 2006; p 7, in Sapana Malla, *Nepal Report on Marriage* , 2005.

<sup>78</sup> Ibid.

<sup>79</sup> *Kantipur* :a national vernacular daily on November 3, 2006; p 7 in Sapana Malla, *Nepal Report on Child Marriage*, 2005.

### *Age of Consent*

Age of consent in India was initially dealt under the rape provision in the Indian Penal Code. Under Section 375 of the Indian Penal Code one of the grounds for rape is sexual intercourse with a female under 16 years of age, with or without her consent.

However, sexual intercourse by a man with his own wife is considered rape if she is only under 15 years of age. This discrepancy in the age constitutes discrimination against married women.

### *Registration of Marriage*

As noted earlier in the paper, both the Marriage Convention and the CEDAW mandate compulsory registration of marriages. India, has filed a reservation to Article 16 (2) of the CEDAW stating that: "...the Republic of India declares that though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions, and level of literacy."

### *The Indian Child Marriage Restraint Law of 1929 and the Law of December 2006*

A new law banning child marriage was passed in December, 2006. The law provides certain positive initiatives for the intervention of courts to prevent child marriages through stay orders. The object of the Child Marriage Restraint Law of 1929 in India was to eliminate a practice which was potentially detrimental to the life and health of a girl child.

It is important to look at the weaknesses of the Child Marriage Restraint Law of 1929 in order to review the new development in the 2006 law.

Very few cases were prosecuted under this law. For example, in *Radha Krishnan and Ors. Vs. Ellamma Reddy*,<sup>80</sup> the court decided that the Act only prohibited the marriage of a girl under the age of fifteen.

Another problem was that according to Section 9 of the Act the complaint had to be filed within a year after the act was committed. *A.R. Antulay v. Ramdas Srinivas Nayak*, it was decided that the Magistrate was not competent to take cognizance of the case after a period of one year from the date of the offense. Similarly, the Andhra Pradesh High Court in *Panchireddy v. Gadela Ganapatlu*<sup>81</sup> ruled that child marriage was *void ab initio* only to be reversed by a full bench of the same high court in *Vankataramana v. State*.<sup>82</sup> Thus, the law also failed to address the status of married girl children. The reason for this was probably that there was concern that married women might be abandoned in case such a marriage was found to be illegal or voidable. However, in *Indira v. Balbir Singh*,<sup>83</sup> a decree for divorce was granted in a case where the appellant contended that she was married to the respondent when she was 8 years of age and that she had repudiated the marriage at age 15 but before attaining 18 years of age.

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<sup>80</sup> Manu/TN/00261983.

<sup>81</sup> AIR 1975 AP 193

<sup>82</sup> AIR 1977 AP 43.

<sup>83</sup> High Court of Punjab and Haryana.

In Rajasthan, the case of *Smt.Sushila v. State of Rajasthan and Ors*,<sup>84</sup> public interest litigation filed by Sushila Gothala for issuance of directions to the respondents to immediately stop the menace of child marriages, to enforce the provisions of the Child Marriage Restraint Act, 1929, and to punish the officer responsible for not preventing child marriages, had positive results. The Court ordered the state government to consider the feasibility of appointing a Child Marriage Prevention Officer for the whole state or such part that may be specified in the notification. The Court also directed that deterrents and punishments for the violation of the act be made more severe.

In *Smt. Seema v. Ashwani Kumar*<sup>85</sup>, a private matrimonial case, the Court issued an order making registration of all marriages mandatory. The Court placed on record the National Commission on Women's recommendations for the compulsory registration of marriage and directed the central and state governments to develop procedures for marriage registration and for the appointment of official to register all marriages in India.<sup>86</sup>

In April 2003, the Forum for Fact finding Documentation and Advocacy (FFDA), human rights NGO filed a public interest case seeking strict implementation of the Child Marriage Restraint Act of 1929.<sup>87</sup> According to the petition, "more than half of the girls in the State of Chattishgarh are married by the age of 16 which reflect the gross neglect and callous attitude of government, local administration and officials responsible for abetting child marriage". The petition further illustrated that child marriage was merely a camouflage for servitude and child sexual abuse of the girl child which is ...violative of her rights to life under Article 21 and constitutes bondage...within the meaning of Article 23.<sup>88</sup>

The FFDA petition cited several international conventions, including the CEDAW and the CRC. The petition stated that that by being a party to this treaty, India had committed herself to protecting and ensuring child rights and has agreed to hold her Government accountable for this commitment before the international community." The FFDA also drew attention to the Sri Lankan experience, and argued that in Sri Lanka, legislative changes have been supported by social policies on health and education...to create an environment in which the practice of early marriage is in steep decline.<sup>89</sup> The FFDA requested that the Court issue a writ directing the respondent states to: a) to require police officials to prevent child marriage from taking place; to hold government officials who fail to prevent child marriage liable; ensure that the Child Marriage Restraint Act is implemented; and to engage NGO's in reporting on the implementation of court directives.

In February 2005, the Court issued an interim order noting that pending passage of the Prevention of Child Marriage Bill which had been introduced in parliament, and would therefore refrain from ruling. However, the Courts stated that, "We...hope and trust that in the meantime the...States shall

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<sup>84</sup> MANU/0029/1995

<sup>85</sup> *Smt. Seema v. Aswani Kumar*. T.P. ( Civ.) No. 291 of 2005, Supreme Court of India, Nov. 18, 2005.

<sup>86</sup> *Id* at para 5.

<sup>87</sup> See Avani Mehta Sood, *Litigating Reproductive Rights: Using Public Interest Litigation and International Law to Promote Gender Justice in India*. Center for Reproductive Rights, 2006 at 73.

<sup>88</sup> *Ibid*

<sup>89</sup> *Id* at 74

make endeavour to prevent child marriages as far as possible and preferably in cases where mass marriages take place.”

The FFDA case<sup>90</sup> was a catalyst for the Bill that was introduced in December 2006.<sup>91</sup>

In December 2006, the Indian upper house of parliament approved a bill outlawing child marriages and voiding those that have taken place. Introducing the Child Marriage Act, the Minister of State for Women and Child Development declared that: “Sixty-five percent of the girls married in India are below the age of 18. We need to remove this biggest obscenity of child-child and child-adult marriages”.<sup>92</sup>

A positive feature of this bill includes appointments by state governments for the establishment of child marriage prevention officers. The new bill also provides for maintenance of the minor girl until her remarriage. In the case of the husband being a minor at the time of marriage, the guardian must be called upon to pay maintenance to the minor.

At the option of the contracting party, every child marriage, whether solemnised before or after this Act came into force, can be declared void at the option of the contracting party. Since the first law on child marriage failed to have any impact, implementation of this law is critical.

Despite these laudable changes in the child marriage laws there is still some inconsistency in the law. For example, Indian statutes still define a child as a person under the age of 14 and India has yet to increase the age of consent under the Hindu Marriage Law to 18 years.

### 3.2 Nepal

Like many other countries, the Nepalese legal system fails to adopt a uniform and consistent definition of the age of a child. While the marriage law uses the language ‘girl’ for girls up to 14 years and ‘woman’ for girls above 14 years, the Children’s Act defines ‘child’ as children below the age of 16 years.<sup>93</sup> On the other hand, the Labour Act of 1991 defines a child as a person below the age of 14 years.<sup>94</sup>

The Nepalese Child Marriage law provides for inadequate punitive elements and allows for wide discretionary powers in sentencing. Boys and girls are treated differently in the law on child marriage. For example, marriage with a girl below 10 years is punishable with imprisonment from six months to three years and a fine from one thousand to ten thousand rupees. However, the marriage with a boy below the age of 10 years constitutes a lesser offense and is punishable with imprisonment up to six months or a fine up to ten thousand rupees or both.

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<sup>90</sup> Ibid

<sup>91</sup> Ibid

<sup>92</sup> The bill had been tabled in parliament in 2004. It was then considered by a parliamentary standing committee and a group of ministers before cabinet approval was obtained earlier this year.

<sup>93</sup> Section 2(a) of the Children's Act, 1991

<sup>94</sup> Section 2 (h) of the Labour Act, 1991.

On July 13, 2006, the Supreme Court issued a directive order in the name of the government for the effective enforcement of the Nepalese law on child marriage. In reference to this order, the Forum for Women, Law and Development conducted research on the causes and consequences of child marriage and to identify effective strategies to enforce the law.

### *Weaknesses in the Nepalese law*

#### *Lack of strict liability in the law:*

According to the Nepalese law, in the absence of knowledge as to the age of the girl or boy, those responsible for the marriage will go unpunished. This loophole in the law allows perpetrators of child marriage to go unpunished. In the Nepalese context, where registration of marriage is carried out in the breach, the lack of strict liability in the law makes it even more difficult to punish the perpetrators of child marriage.

#### *Inadequate Fines*

The maximum fine allowed in Nepalese law is 10,000 rupees. Not only is this fine too low to constitute any punitive element, it is also implemented in the breach.

#### *Reporting Requirements*

A case must be filed within three months of the child marriage. This is inadequate time given that the reporting of cases in Nepal takes a long time due to poor communication and general lack of awareness of the illegality of child marriage.

### **CASE STUDY FROM NEPAL**

I was married to a nine-year-old boy when I was three. At that point of time, I was unaware of marriages. I don't even remember my marriage event. I just remember that as I was too young and was unable to walk and they had to carry me and bring me over to their place. Getting married at an early age, I was destined to suffer a lot of hardships. I had to carry water in a small clay-pot in the mornings. I had to sweep and swap the floor everyday. Those were the days when I wanted to eat good food and wear pretty clothes. I used to feel very hungry, but I had to be satisfied with the amount of food that I was provided. I never got to eat enough. I sometimes secretly ate corns, soybeans, etc that used to grow in the field. And if I was caught eating, my in-laws and husband would beat me up accusing me of stealing from the field and eating. Sometimes the villagers used to give me food and if my husband and in-laws found out, they used to beat me up accusing me of stealing food from the house. They used to give me one black blouse and a cotton *sari*<sup>1</sup> torn into two pieces. I had to wear these for two years. Never did I get other accessories like petticoats, belts etc. When my saris got torn, I used to patch them up and continue wearing them. My husband married three times after me. At present, he lives with his youngest wife. Since I married at an early age, early child-delivery was inevitable. As a result, I now have severe back problems. I used to weep a lot and consequently, I faced problems with my eyes and had to undergo an eye operation. I often think that if I had the power to think like I do now, I would never go to that house. I also wish I had not given birth to any children. Retrospective sufferings make me wish not to see my husband again. Nevertheless, I do not want him to die because I don't



want to lose my marital status.

<sup>1</sup> A traditional long piece of cloth that is wrapped around a body and is worn as the main garment especially by Nepalese and Indian women

*Source: Nepal Report on Child Marriage: Forum for Women Law and Development 2006*

### **3.3 Pakistan**

The Child Marriage Restraint Act (XIX of 1929) states clearly that, "whoever, being a male above eighteen years of age, contracts child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both." Under the Muslim Personal Law, a girl under the age of sixteen years is, in view of the Child Marriage Restraint Act of 1929, incompetent to contract a marriage.

#### *Weaknesses in the Pakistani Law*

Although the law does not permit the marriage of a girl below the age of 16 years, if any girl below the age of 16 years marries in violation of that law, the marriage itself does not become invalid on that score, although the adult husband contracting the marriage or the persons who have solemnised the marriage may be held criminally liable. But if the girl has attained puberty and marries with an adult male of her free will, the marriage is valid under Muslim Law, and the Court acting under Section 491, CrPC may permit the marriage.

Thus, this capacity to bypass the law has bolstered the pernicious practices of selling girls into 'marriage' in exchange for money; settling disputes with the exchange of girls known as *vani* or *swara* and the use of a girl as compensation for crimes.

### **3.4 United States**

In the United States, in July of 2006, three Senators, Richard Durbin from Illinois and Hillary Clinton from New York, and Senator Chuck Hagel, a Republican from Nebraska, introduced the International Child Marriage Prevention and Assistance Act. The bill calls on the U.S. State Department to integrate efforts to fight child marriage in its overall development assistance strategy.<sup>95</sup>

The bill would provide \$60 million over the next three fiscal years to the State Department to support community-based organizations in developing countries that fight child marriage. It also

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<sup>95</sup> Although child marriage is most common among South Asian and African countries, countries world wide must strike unequal ages of marriage off the statute books and raise the age of marriage for girls. For example, Article 144 of the French civil Code states: A man who has turned eighteen and a woman who has not turned fifteen may not contract a marriage. A recent bill envisions raising the age to eighteen for each of the future spouses.

asks the State Department to report on child marriage in its annual human rights reports on foreign countries.

In the United States, teens can get married as young as 14 with parental consent in some states. After a recent case in Kansas in which a pregnant 14-year-old married her 22-year-old boyfriend, the state raised the minimum age of marriage to 15 with a judge's approval.

### 3.5 Mixed Legal Systems

Even when the minimum age of marriage is established at 18 years of age in the civil code, some countries have personal laws that allow marriage at an earlier age.

#### Examples of Countries with Mixed Legal Systems

Country	Minimum Age under Secular/Civil Law	Minimum Age under Customary/Traditional Law	Relationship between Secular Law to Customary/Traditional Law
<b>Benin</b>	18 years	Customary law of <i>Dahomey</i> , which severely discriminated against women, was nullified with a uniform civil code	Personal and Family Code (2004) elevates civil law above customary laws <sup>96</sup>
<b>Eritrea</b>	In each form of marriage, be in customary or religious, forms of marriage, both parties must be 18 years of age	18 years	Eritrean law recognizes religious marriage and customary marriage are the recognized forms of marriages yet seeks to regulate them
<b>Sri Lanka</b>	18 years	Muslim marriage laws remained unchanged and no minimum age was established. In response to this fact, the State Report argued that, although such discriminatory practices against girls are “deeply rooted in <i>cultural and religious beliefs</i> ... in an environment which calls for sensitivity to pluralistic religious and ethnic beliefs, it has not been possible to address these issues.” <sup>97</sup>	

<sup>96</sup> Country Report CEDAW/C/BEN/CO/1-3. para 21

<sup>97</sup> CEDAW/C/LKA/99. p7

<b>Ethiopia</b> <sup>98</sup>	18 years	The customary law of <i>Dahomey</i> , which severely discriminated against women, was nullified with a uniform civil code	
<b>Eritrea</b> <sup>99</sup>	18 years	18 years (Muslims, by virtue of being subject to Sharia law, can marry at lower age).	However, age can be lower if parental permission is obtained. Both customary and secular marriages are recognized.
<b>Sri Lanka</b>	18 years	Marriages of non- Muslims below the age of 18 are void. No statutory minimum age for Muslims to marry.	
<b>Vietnam</b>	18 years	18 years	Any marriage below the age of 18 must be invalidated by the courts. <sup>100</sup>

For example in India, Sri Lanka, and Nepal, the minimum age of marriage under the civil code is 18 years; however, personal laws provide lower minimum ages or none at all, in contravention with the CEDAW.

In Sri Lanka, where the legal age for marriage for girls was set at 18 years, even after significant efforts at reform, the minimum age for marriage amidst the country’s Muslims has not been addressed.<sup>101</sup> CEDAW comments on this conflict by invoking the discrepancy between “the constitutional guarantees of fundamental rights and **the** existence of law that discriminate against women” and urges the state of Sri Lanka “to review all existing laws and amend discriminatory provisions so that they are compatible with the Convention and the Constitution,” taking into consideration, when appropriate, comparative jurisprudence which “interprets Islamic law in line with the Convention.”<sup>102</sup>

The CEDAW frames the discussion of the absence of ‘a minimum marriage age requirement’ in Muslim laws as a violation of the non-discrimination principle enshrined in Sri Lanka’s Constitution and in the Women’s Convention. As a result, CEDAW argues that such discriminatory practices should be reviewed and made consistent and “compatible with the Convention and the Constitution.” This argument is in line with the Sri Lankan Shadow Report to the CEDAW Committee which

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<sup>98</sup> Ethiopia State report CRC/C/129/Add.8 27 October 2005. Para. 58 and 131

Ethiopia responded to the guarantees of rights expressed in their reformed Constitution, which came about after the country ratified the CRC, by reviewing existing legislations and thus raising the minimum age of marriage in the Family Code for girls from 15 years to 18 years.

<sup>99</sup> Country Report CEDAW/C/ERI/1-3 (2004)

<sup>100</sup> CEDAW/C/VNM/3-4. p46

<sup>101</sup> In Sri Lanka the Kandyan Marriage and Divorce Act of 1952 allowed female children to be married with consent of their parents at the age of 12. Under the Muslim Marriage and Divorce Act, the approval of the Quazi is deemed sufficient to allow a girl under 12 years to get married. Thus, although in 1995, Sri Lanka raised the minimum age of marriage from 12 to 18, there is a loophole for those of the Islamic State.

<sup>102</sup> CEDAW/C/2002/I/CRP.3 § 21.

concludes that, “[W]hile cultural diversity is an important aspect of Sri Lankan society, practices which are inconsistent with the constitutional provisions of gender equality need to be addressed.”<sup>103</sup>

Moreover, laws that require the permission of the courts to legally sanction a child marriage also have negative implications. Some courts have used their discretion in a way that has negative consequences for girls. For example in Algeria and Libya, in the case of rape of a minor, marriage law excuses the perpetrator of the crime from penal prosecution if he is prepared to marry his victim, thus allowing the judge to lower the minimum age for marriage.

Benin’s Personal and Family Code sets the minimum age of marriage at 18 years, it provides that “a special dispensation is granted for a valid reason by an order of the President of the Court of First Instance at the request of the Public Prosecutor’s Office.” Despite such a legal guarantee, the Concluding Comments expresses concerns about “structural patriarchal attitudes and deep-rooted stereotypes” that may undermine the effectiveness of the Personal and Family Code and prevent compliance with its provisions.<sup>104</sup>

## **4 Causes of Child Marriage**

Underlying causes of early marriage are many and include poverty, parental desire to prevent sexual relations outside marriage and the fear of rape, a lack of educational or employment opportunities for girls, and traditional notions of the primary role of women and girls as wives and mothers.

### **4.1 Poverty**

Poverty is one of the main determinants of early marriage. In many countries in the Middle East, South Asia and Sub Saharan Africa, poverty drives families to give their daughters in marriage in the hope that this will alleviate the family’s poverty and secure the family’s honour when it is at stake.<sup>105</sup> Although child marriage is seen as a way to escape the cycle of poverty, child marriage in fact worsens the cycle of intergenerational poverty.

Although poverty is one of the underlying causes of child marriage as parents see this as an opportunity to receive money or save money, child marriage is not restricted to poor families. Child marriage is also one way of preserving wealth in families of a higher socio-economic class.

### **4.2 Protecting the Girl Child’s Sexuality**

In certain cultures, child marriage is seen as a way to protect the family’s honour. Child marriages similar to honour crimes result in sacrificing girls at the altar of the family’s honour. A woman’s sexuality and virginity plays an enormous role in preserving the so called honour of the family.

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<sup>103</sup> Sri Lanka Shadow Report 2001.

<sup>104</sup> Country Report, Benin, CEDAW/C/BEN/CO/1-3. para 21.

<sup>105</sup> Research in communities in the grip of civil conflict show that child slavery, trafficking, prostitution, increase in HIV infection and child labour are on the increase. Such communities look to child marriage as a way to combat these threats.

### 4.3 Gender Discrimination

Child marriage is both a cause and a consequence of the most severe form of gender discrimination. Just as much as the devaluing of women and the girl child lead to child marriage, the heightened powerlessness and vulnerability of the child bride results in further gender-based discrimination. The discrimination often manifests itself in the form of domestic violence, marital rape, and deprivation of food, lack of access to information, education, healthcare, and general impediments to mobility.

Throughout the world, families and societies treat girls and boys differently, with girls disproportionately facing lower levels of investment in their health, nutrition and education. Gender-based discrimination continues in adolescence and is often a constant feature of adulthood.

Prevailing gender norms also inhibit adolescent girls' access to schooling and employment opportunities. Gender discrimination underpins many laws that prevent women's access to land, money, and other economic resources.

Child marriage is a continuation of gender discrimination as it places women in an inferior position disempowered to participate equally in their marriage, sexual and reproductive choices. In general, the male members of the family make decisions regarding their daughters' marriage, placing a host of patriarchal interests ahead of their daughter's well-being.

#### Case Study from Nepal

I was married at the age of eleven. I had no idea about marriage or husband. Being a daughter-in-law, I had to comply with the tradition of getting up early in the morning and touching my in-laws' feet with my head; and only after doing all the household chores, was I allowed to eat. I had to do tasks like cooking food, carrying water, washing clothes, carrying fertilizers, cutting fodder, etc. As I was very young and small and was brought up in my parents' place with a lot of care, I used to find the household work extremely tedious. I wished to study. I used to keep in touch with the teachers in the schools in my neighbourhood. My in-laws did not like me keeping in contact with them. My mother-in-law used to come while serving food. After feeding all the members of the family, she used to call me for food. She used to shout for my name to ensure the neighbours heard that I was summoned for food. When I sat down to eat, there used to be no food but only the dirty utensils. I had to wash all the dirty utensils, weeping in hunger. I was pregnant then. One day, pretending to show concern, my husband suggested that I go to my parents' place and stay there since I was going through a lot of hardships. He wanted me to stay there till the time I delivered a son. He asked me to come back only if I delivered a boy and not a girl. He was inculcated with the idea of marrying a second woman as my parents-in-law felt that I was not able to work hard enough in the house. I knew that it was all a façade so I refused to go and continued living there, doing all the household chores. The oppression and neglect from my husband and in-laws doubled when I gave birth to a daughter. After fifteen days of delivery I went to my parents' house and never returned. Later on I filed a case against him asking for alimony. They gave some amount, only for a short period though. I now live with my daughter. Some lawyers suggested me to file a property-rights case but my son-in-law didn't favour the idea. Both my husband and my son-in-law are dead now. I now want to fight for my property.

*Source: Nepal Report on Child Marriage: Forum for Women Law and Development 2006.*

#### **4.4 Inadequate Implementation of the Law**

Weak laws and inadequate implementation of the laws result in child marriages being conducted with impunity. In fact, advocates against child marriage argue that the conviction rate in breach of the prohibitions against child marriage in most countries is nil. Child marriage exists in the context of other gender-based unequal laws and practices. Enforcement of laws on anti-discrimination and violence against women must exist side by side with the implementation of laws against child marriage.

#### **4.5 Consequences of Child Marriage**

Although child marriage most often stems from poverty and powerlessness, it only further reinforces the gendered notions of poverty and powerlessness stultifying the physical, mental, intellectual and social development of the girl child and heightening the social isolation of the girl child.

Evidence shows that child marriage is a tool of oppression which subordinates not just the woman but her family. Not only does child marriage perpetuate an inter-generational cycle of poverty and lack of opportunity; it reinforces the subordinated nature of communities that traditionally serve the powerful classes by giving a girl child in marriage to an older male.

#### **4.6 Domestic Violence**

Child marriage often partners young girls with men who are much older. Girls find themselves in new homes with greater responsibilities, without much autonomy or decision-making power and unable to negotiate sexual experiences within the marriage. Economic dependency and the lack of social support also expose young married girls to other kinds of violent trauma during marriage.<sup>106</sup>

A child bride is often regarded as a wife-in-training and is considered to be docile and malleable. This assumption exposes child brides to the greater risk of domestic violence and sexual abuse by her in-law's family.

Young married women are also more vulnerable to sexual exploitation which leads to economic abuse and psychological violence.

Child brides are also forced into household labour in their husband's families which result in the exploitation of the girl child.

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<sup>106</sup> Innocenti 9 and 12 (citing data on young girls who are married being exposed to domestic violence in Bangladesh, Egypt, India, Jordan, Lebanon, Pakistan, Turkey and elsewhere).

## 4.7 Trafficking in Women and Children

Since child marriages are contingent upon large amounts of money exchanging hands, child marriage amounts to trafficking in girls.

Child marriage often facilitates the trade in women as cheap labour and has led to a rise in trafficking in women and children. Child marriage is also used as a means to conduct prostitution and bonded labour.

## 4.8 Health Costs

Child marriage reinforces the incidence of infectious diseases, malnutrition, high child mortality rates, low life expectancy for women, and an inter-generational cycle of girl child abuse.

Pregnancy-related death is a leading cause of death for girls between 15 and 19 years of age. The dangers of early marriage affect not only the girl child but the child born to her as well. Premature birth, low birth rate, and poor mental and physical growth are some characteristics of babies born to young mothers.

The real costs associated with women's health and infant mortality are enormous. Child marriages can have devastating consequences on the sexual and reproductive health of girls increasing the risk of maternal mortality<sup>107</sup> and morbidity and contracting sexually transmitted diseases, particularly HIV/AIDS. Young girls, particularly those below 15 years of age, face serious reproductive health hazards, sometimes losing their lives, as a result of early pregnancies.<sup>108</sup> Those under age 15 are five times as likely to die as women in their twenties.<sup>109</sup>

In addition to their lack of power in relation to their husbands and in-laws, girls are further exposed to sexual and reproductive health problems because of their lack knowledge, information and access to sexual and reproductive health services, in particular, family planning, ante-natal, obstetrics, and post-natal care.<sup>110</sup>

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<sup>107</sup> The roots of maternal mortality have been linked to infancy or even prior to birth. At these stages the pregnant girl experiences calcium, vitamin, or iron deficiencies which continue throughout her life leading to several health and malnutrition problems such as stunted growth, contracted pelvis, iron deficiency anemia, all of which make pregnancy an even more life threatening endeavor for the girl. Underdeveloped and inadequately developed bodies, which are the result of unfulfilled nutrition needs and skeletal growth, lead to obstructed labor due to the disproportion between the pelvis size and the baby's head. Labor becomes a trying and frequently fatal undertaking because the pelvis has not fully developed for up to two years after menarche. Askari, Ladan. *The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriages*. *Journal of International & Comparative Law*. Fall 1998. 4

<sup>108</sup> For example, in Zaria, Nigeria, maternal mortality among women younger than 16 was found to be six times higher than for women aged 20-24, and similar findings have been reported from Cameroon and Ethiopia. Adolescent pregnancy is identified as one of the leading causes of high maternal mortality in developing countries and in India, for example, most of early pregnancies take place within marriage (p12 and 175). Similarly, in Niger, 17 years old nearly 50% of girls have already had at least one child or is pregnant for the first time (CP Survey.)

<sup>109</sup> Innocenti Digest No. 7 March 2001 – Early Marriage- Child Spouses/UNICEF

<sup>110</sup> *Whose Right to Choose? 7* (discussing For example, a study on married 15–19-year olds in Ethiopia revealed that only 27 percent know that condoms can be used to prevent HIV/AIDS. Even lower proportions of young married girls in these countries know that condoms can also be used to prevent pregnancy.)

## 4.9 Education

Countless studies have proven that early marriage is universally associated with low levels of schooling.<sup>111</sup> After marriage, young married girls' access to formal and even non-formal education is severely limited because of restrictions placed on mobility, domestic burdens, childbearing, and social norms that view marriage and schooling as incompatible.<sup>112</sup> Since in most cultures girls leave their parental home upon marriage, parents tend not to invest in the education of daughters because the benefits of their investment will be lost.

Child marriage, early childbearing, and lack of access to continued educational opportunities also limit young women's access to employment opportunities. Child marriage is also associated with early widowhood, divorce and abandonment, which often results in 'feminization of poverty.'

It is important to consider the cause and effect relationship between inadequate education and child marriage.

### 4.9.1 The Link between Education and the Prevention of Child Marriage

Research has shown that girls with higher levels of schooling are less likely to marry as children. Girls are often married off young because of lack of alternatives. In Ethiopia, 30 percent of girls not in school were married off before the age of 18. In Nicaragua, 45 percent of girls with no education are married before they turn 18. Approximately 60 percent of girls in Mozambique are married by age 18, and in Senegal, 41% of girls with no education are married as children.<sup>113</sup>

In countries such as Sri Lanka, Taiwan, Indonesia and Thailand, education of young women has been the pivotal factor in increasing the age of marriage.

## 5 Recommendations for law and policy reform<sup>114</sup>

Child marriage does not exist in isolation of other harmful traditions that devalue women. Child marriage must be clearly defined in the law as a form of discrimination and violence against women and children. It must be recognized that child marriage affects the public at large and is not a private arrangement between two families. The false dichotomy of the private/ public cannot obscure the way in which marriage can affect a child's civil, political, economic, social and cultural rights. The State is accountable for customs that violate the right to life of children and women. Even when

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<sup>111</sup> Alan Guttmacher Institute (1998) 'Into a New World: Young Women's Sexual and Reproductive Lives' and Forum on Marriage and the Rights of Women and Girls. (2000) "Whose Right to Choose". 15

<sup>112</sup> Whose Right to Choose? 9 Also the CP survey reveals that Bangladesh only 5 percent of married adolescents were in school. CP survey

<sup>113</sup> See child Marriage and Domestic Violence- ICRW Education and Action Toward Ending Child Marriage.

<sup>114</sup> See Annex for examples and checklist



the State is not directly a party to such violence, lack of due diligence on the part of the State can hold the State liable for inaction.

Child marriage must be viewed in the context of gender inequality in the public and private sphere. Child marriage does not exist in isolation but coexists with gender in equitable provisions in others areas of public and personal laws.

Law reform must therefore be seen as a holistic process, and all areas of gender inequity must be outlawed in order to combat child marriage.

### ***Clarify Minimum Statutory Age of Marriage***

- Fix or rise the minimum statutory age of marriage for both men and women to 18 and bring all other laws in line with that.

In compliance with the CRC, countries must establish the minimum age of marriage at 18 years of age.<sup>115</sup> This has also been recommended both by the CEDAW Committee in its General Recommendation 21 and the UN Special Rapporteur on Violence against Women. The CEDAW Committee's recommends that the minimum age for marriage for both men and women should be 18. Similarly, the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children states that early marriage is: any marriage carried out below the age of 18 years, before the girl is physically, physiologically, and psychologically ready to shoulder the responsibilities of marriage and child bearing”.

### ***Render Child Marriage Null and Void***

- Sale of children for the purpose of marriage should be made null and void
- Child marriages should be made voidable by either party and the application to void a marriage can be made within 2 years from the date of majority
- At annulment, the law should allow for maintenance until remarriage
- The law should also allow for a residence for the girl child in the event of the nullification of the marriage
- Provide for the maintenance and custody of children
- Check the validity of any marriage celebrated abroad.
- All marriages that are treated as null and void should allow the girl to retain all property as if the marriage was valid.

### ***Penalties and Remedies must be established***

- Punishments should focus on those responsible for the marriage and those who registered the child marriage.

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<sup>115</sup> In certain countries where customary law trumps over formal law, there is no limit on the minimum age of marriage for girls. This is so in Ghana. In Nigeria, nine years is recognized as the minimum age of marriage age for girls by the customary laws.

- Strict criminal and civil penalties should be made applicable to anyone who officiates, facilitates, or participates in such a marriage, including the girl's or the groom's parents.
- NGO's should be recognized parties to the complaint
- Punish those who are responsible for perpetrating child marriage.
- The punitive elements must include fines and imprisonment
- Make it misconduct for public servants to participate in child marriages.
- Provide alternative for communities that traditionally opt for child marriage.
- Make reporting of child marriage compulsory
- Provide incentives for reporting of child marriage
- Marital rape needs to be recognized as a penal offence, both under the specific statute dealing with child marriage, as well as under general criminal law of State parties.

### ***Make Marriage Registration Compulsory***

- Ensure that the registrar interviews both the bride and the groom prior to the registration of the marriage.
- The attendance of both spouses at the interview should be stipulated
- Registration of marriage should exist side by side with some credible evidence that the marriage is neither forced nor coerced.
- Refrain from recognizing forced marriages and child marriages contracted abroad
- An interagency committee must be set up to complete a thorough analysis of child marriage.
- Incentives such as tax credits should be created to register the marriage.

### ***Protection of the girl child must be prioritized***

- The girl child who has been 'married' must be entitled to the fullest protection of the law including the right to maintenance.
- Marriage should be made voidable at the initiative of the girl, regardless of whether the marriage had been consummated.<sup>116</sup> This would enable the girl to continue to receive, at her option, whatever protections she may have at law by virtue of the marriage, such as the right to inherit property or keep her children, while simultaneously allowing her to leave a marriage forced on her before she is mature enough to comprehend the ramifications.

### ***Mandatory Birth Registration***

Countries that do not follow a stringent method of birth registration indirectly reinforce child marriage. Mandatory birth registration and marriage registration can help track the ages of the brides. This practice has been recognised to discourage the practice of child marriage.

- Make registration of birth mandatory

### ***Monitoring Requirements***

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<sup>116</sup> Elizabeth Warner, *Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls*, 12 Am. U.J. Gender Soc. Pol'y & L. 233, 269-70 (2004).

- Monitoring and reporting systems should be set up to track the reporting of child marriage
- Create Child Marriage Prevention Officers
- Reporting of cases should be encouraged. Law enforcement and administrative officials must be trained to report and collect data on child marriage.

### ***Monitoring the Law***

- NGO's must be engaged in monitoring the law.
- A social audit should be used to check the implementation of the law

### ***Progressive Interpretation of Religious Texts***

- Promote alternative interpretations of religious texts to rebut the notion that early marriage is required or approved.

### ***Increase Educational Opportunities for Girls***

*“Investment in girl’s education may well be the highest return in investment available in the developing world.” IMF 2004*

High priority given to education in certain countries like Sri Lanka and Singapore has resulted in postponement of marriage for girls. While eliminating legal and administrative barriers to girls schooling is the first step in equalizing access to schools, establishing schools as safe havens for girls so that families feel safe in the knowledge that their girls are not harmed or abused in any way is important to broaden access to schools for the girl child.

A legal framework that ensures equitable education for all is important. Educational policies must address the following:

- Establish creative opportunities for educating out-of-school children, especially girls
- Provide incentives for households to help overcome the costs of sending girls to schools and the reluctance to send girls to schools
- Factor in lost household labour when providing incentives for the girl child to attend school.
- Establish a fund for programs targeted for at risk girls to go to school
- Draw adolescent girls into the mainstream of society. Greater social engagements will prevent young girls from being coerced into early marriage
- Provide free compulsory education for girls through secondary school, as well as vocational training programs, micro-loans and other economic measures to provide girls with alternatives to marriage and give them the means to lead independent productive lives.
- Establish schools as effective forums to oppose child marriage and provide alternative avenues for the girl child’s advancement.
- Provide safe transportation to schools for girl children
- Provide incentives to send girls to schools and penalties for withholding girl from schools
- Develop alternative education programs and centers for the girl child in areas where the girl child’s access to schools is at risk

- Provide conditional cash incentives to families defray the costs of sending girl children to school
- Establish scholarships for girls in at- risk communities

### ***Commit Government, Donor and NGO Support to Combat Child Marriage***

- Help young couples to delay child birth
- Provide opportunities for girls to continue their education or earn money as another strategy for delaying marriage as well as expanding life skills and choices.
- Extend the period before marriage by providing young women with the means to earn a living.
- Require a commitment that girls remain unmarried through the tenth standard final examination in specific target areas
- Offer incentives for women who have obtained a certain level of schooling
- A child marriage rehabilitation fund should be set up for the victims of child marriages. This should be used for education and other purposes.
- Integrate awareness raising of violence and discrimination against women in the school curriculum. Integrate issues of child marriage into the curriculum and discussion
- Pay attention to sub groups of vulnerable women such as girl children. Address the gender vulnerabilities arising from poverty, caste, ethnicity, lack of access to resources, etc.
- Donors should analyze specific barriers for girls' education.
- Support school programs that retain girls who are prime targets of early marriage
- Affirmative action policies must be established to compensate for a history of discrimination
- Governments, multilaterals and donors can support alternative forms of positive discrimination and broaden opportunities for girls' education
- Alternative, innovative programs for adolescent girls will help to provide preferred alternatives to marriage before the age of majority.
- These programs must target families in communities where child marriage is most prevalent

### ***Develop Programs and Provide Incentives to Delay Marriage***

- Establish programs that provide incentives to girls to delay marriage. For example, families and girls can receive a substantial cash payment if the daughter is still single at age eighteen.
- Emphasize the clear link between the economic improvement of a society and delayed and reduced childbearing
- Strengthen international commitments to reduce child mortality, improve access to reproductive health care for women and improve access to health care for society as a whole, which will reduce the incentives for families to produce as many children as possible. Foreign aid programs can target these specific goals or condition receipt of aid on improvement in reducing the incidences of child marriage.

### ***Provide the Powers and Duties of Protection Officers***

- These powers will include reporting on child marriage, ensure the victim is provided the necessary relief, maintain a list of service providers, make available a safe shelter home, to get the victim medically examined, to ensure that protection orders are made

### ***Provide for Mandatory Restraining Orders***

- Magistrates can pass a protection order prohibiting the child marriage and restraining the respondents from going through with the marriage
- The Magistrate may impose any additional conditions or impose any other directions which may be deemed necessary to protect or provide the safety of the girl child.
- The protection order will prohibit the respondent from committing any act that will lead to child marriage; or aid and abet in the commission of acts leading to child marriage.

### ***Develop Task Forces to Monitor Situations of Conflict and Natural Disaster***

The absence of gender sensitivity in disaster and conflict management and the inadequate levels of security for women in conflict and emergency management efforts result in increasing gender-specific risks such as child marriage.

- Take into account specific gender-based vulnerabilities that become heightened during conflict and disasters
- Legal protections that address the real threats that the girl child faces in conflict and situations of natural disaster must be put into place.

### ***Strengthen Community Networks***

- Strengthen informal community networks of women
- Provide psychological and physical support for young girls who run away from unhappy or coerced marriage. In Zimbabwe for example, an NGO named *Musasa* provides counselling, temporary refuge, and employment support.
- Develop prevention campaigns in primary and secondary schools on the right not to marry before age 18. Particular communities must be targeted.
- Provide emergency facilities where girls subject to child marriage can be cared for accommodated.
- Create programs to prevent child marriage and to reintegrate child brides into society and educational and training programs.
- Monitoring and Supervisory Teams organized by the local governments

### ***Collect Data***

Data is a powerful tool to demonstrate the ill effects of child marriage. Data should be collected at different levels on different issues. Data should also be collected on incidence and prevalence of child marriage. On the status of the girl child in the marriage, data should include: girl child's education, access to resources, including health care, education, information and entertainment, and the socio economic status of the family.

### ***Explore the Intersectionalities of CEDAW and CRC and other Human Rights Norms***

Linking the CRC and CEDAW has proven to be a powerful strategy for the protection of women and girl children. This is even more so in the case of child marriage. Child marriage is a perfect example of how gender discrimination begins at childhood and then continues to affect and mar the life of a woman. Child marriage is at the very intersection of the rights violations safeguarded by the CRC and CEDAW. Combining the strengths of the CRC and CEDAW will help to combat child marriage.

An example of how women's and children's rights interface is the way in which domestic violence laws provide protection to the victim of domestic violence and the children. Maintenance to the victim and the children are part of protective orders. Domestic violence and its impact on children in the family are also taken into consideration in custody disputes. Similarly, child marriage as a form of violence against women threatens both the girl children in vulnerable families who are at risk of being forced into marriage; it also affects the girl child who has been given in marriage and all of her progeny.

### ***Draft Gender Friendly Laws and Harmonize Laws in Compliance with International Norms***

A comprehensive approach to law reform will review and revise all laws to strike down all forms of discrimination against women and girl children and to advance the rights of women and girl children in positive ways.

The principle of non-discrimination is among the most fundamental principles of international human rights law and underpins all other rights in the CRC and CEDAW. Both Conventions define equality broadly to include formal and substantive equality and recommend positive action as a way to redress a legacy of discrimination against girls and women.

Drafting Child Marriage Laws must be seen in the context of gender analysis of the legal system as a whole. Domestic violence laws, Anti-discrimination laws, Equal Education laws, Equal Employment Opportunity laws, and anti-sexual harassment laws must be drafted alongside of prohibitions against child marriage. The mutually reinforcing nature of these laws creates an enabling environment for the enforcement of all gender friendly laws.

*Avoid common weaknesses in prohibitory laws and ensure the following:*

- The law must be use prohibitory language
- The law must contain sanctions
- The law must include enforcement mechanisms
- A right to sue must be included in the law
- The law must include remedies
- The law must be enforceable and justiciable
- Provide training to prosecutors, law enforcement officers and judges on gender sensitivity and how to use the law

- Create community awareness program to educate the community about the uses of the law

## 6 Conclusion: Incorporate Human Rights Norms into Judicial Interpretation of Domestic Law

The Vienna Convention on the Law of Treaties states categorically that a state that ratifies an international treaty” establishes on the international plane its consent to be bound by a treaty.”

Many Constitutions direct the state to respect international law and treaty obligations. For example, the Indian Supreme Court has ruled that it must “interpret language of the Constitution ...in the light of the United Nations Charter and solemn declarations subscribed to be India...and construe our legislation so as to be in conformity with International Law and not in conflict with it.”<sup>117</sup> Further, the Indian Court has ruled that any ambiguity in national laws must be interpreted in accordance with the State’s international obligations.” In *Visakha v. Rajasthan*,<sup>118</sup> the Court held that the CEDAW should guide the regulation of sexual harassment in the workplace ‘until suitable legislation is enacted to occupy the field. The *Visakha* court concluded that, “it is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law where there is no inconsistency between them and there is a void in the domestic law.”<sup>119</sup>

In fact, both the CEDAW and CRC committees have commented positively on the way in which the Indian Supreme Court has applied the CEDAW and CRC through judicial lawmaking. In 2000, the CEDAW Committee in its Concluding Observations stated that it, appreciates the contribution made by the Supreme Court of India in developing the concept of social action litigation and jurisprudence integrating the Convention into domestic law by interpreting Constitutional provisions on gender equality and non discrimination.” Similarly, the CRC Committee has “welcomed that the Convention can be invoked before the courts and that the Supreme Court has adopted various decisions based on the Convention.

### 6.1 Using the Courts

Apart from implementing and revising legislation, it may also be possible to enforce the provisions of the CEDAW through national courts. Examples of such litigation include the decision of the highest court in Botswana in *Unity Dow v. Attorney General of Botswana*, which decided that the general equal protection clause of Botswana's constitution prevented the awarding of citizenship in a patrilineal manner and held that the "comity of nations speaks clearly against discrimination against women."<sup>120</sup> The highest court in Tanzania held that tribal law limiting women's property rights violated the state's international legal obligations under the CEDAW's anti-discrimination provisions. In *Muojekwu v. Ejikeme*, the Nigerian Court of Appeal invoked international law in determining the legitimacy of a custom which subordinated women. The court emphasized that

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<sup>117</sup> *Kesavananda Bharati v. State of Kerala*, 1973 Supp.S.C.R. 1, para. 165.

<sup>118</sup> *Visakha v. State of Rajasthan*, 1997 Supp.2 S.C.R. 404 .

<sup>119</sup> *Id* at para 14.

<sup>120</sup> Court of Appeal of Botswana, Civil Appeal No, 4/91 (unreported 1992).

Nigeria had ratified the CEDAW and therefore Nigeria had to live up to its international obligations. The court stated that Article 2 of the CEDAW which prohibits discrimination against women in all of its forms and agree to policy of eliminating discrimination against women, applied to the woman in question.<sup>121</sup>

In the case of *DNF v. HMG Nepal*<sup>122</sup> the Nepalese Supreme Court on May 2, 2005 directed government authorities to draft appropriate laws to ban the *Chaupadi* custom prevalent in the country sides of Nepal. This custom requires that during menstruation and after childbirth, girls and women must leave their homes and live in cowsheds. The Supreme Court issued the order in response to a joint petition filed by the Forum for Women, Law and Development and other NGO's. In Nepal, other traditional customs in law and practice have been challenged under the equal protection provisions of the Nepalese Constitution and CEDAW. In 2004, the Nepalese Supreme Court issued a directive to the government asking it to promulgate a law that would control and punish all forms of injustices committed against women accused of witchcraft.<sup>123</sup>

In issuing the directive order, the Court stated that as a party to various human rights treaties, the Government of Nepal has an obligation to ensure a dignified life for all Nepalese women.

In the case of *Prakash Mani Sharma*<sup>124</sup>, and the *Lily Thapa* case<sup>125</sup>, the Supreme Court struck down discriminatory clauses in the property law that provided in the former that married daughters have to return a share of the family property and in the latter that a widow needs the consent of her sons and unmarried daughters to dispose of all immovable property.

In courts around the world, judges have invoked international law as creative strategies to vindicate women's rights. Reliance on international law also reveals a concern for the rule of law and universal human rights values and a desire for a cross- fertilization of ideas. Examination of leading cases across jurisdictions reveals interesting insights into how international human rights norms can support domestic human rights claims and provide a forum for the enforcement of international instruments.

### *Public Interest Litigation*

Public interest litigation can be a powerful tool to prevent child marriage. The Right to Life Clause of the Indian Constitution has been interpreted broadly and creatively by the Indian Supreme Court to “breathe new life into the dry bones of the law”. Interpreting this provision creatively, the Indian Supreme Court has held that this provision includes the right to live with dignity and all the rights associated with living in dignity.

A public interest litigation was filed to challenge the asbestos industry and to claim compensation for workers in the asbestos industry. The Court ruled that the Union or State government was responsible for the promotion of health of workmen in the private and public spheres.<sup>126</sup> Thus in

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<sup>121</sup> 34 GWILR 555 (2002).

<sup>122</sup> *DNF v. HMG Nepal*, Writ No. 3303/061, decided on May 2, 2005.

<sup>123</sup> *Reshma Thapa v. HMG Nepal*, SCB 2004/05, Vol. 12, p.24

<sup>124</sup> Writ no. 31/061, decided on December 15, 2005

<sup>125</sup> Writ no. 34/061, decided on December 15, 2005.

<sup>126</sup> *Kirloskar Brothers Ltd. V. Employees State Insurance Corporation* ( 1996).



India, right to health and access to health care are inextricably interlinked with the right to life and the state has been accountable for any violations of the right to life. Extending this argument, child marriage is a cause of the violation of a young girl's health and reproductive rights and can be held to be violative of the right to life.

Using the ferment of public interest litigation, a petition can be filed for the protection of girls who are victims of child marriage in India, Bangladesh, Nepal and other common law countries. The impact on their physical, reproductive and mental health is a clear violation of the Right to Life Clause. The Court can be asked to issue directives to the State Government to report the extent of the prevalence of child marriages as well as ask the state to take preventive action.

Another strategy is to file a petition challenging child marriage. Using social science data and expert testimony, the petition could argue that child marriage violates international human rights law and Constitutional provisions on the rights to life and equality. Appearing on behalf of the petitioners, NGOs could ask the government for a clear plan of action to address child marriage and a budget for implementing alternative social action plans to veer families away from child marriage.

#### *Persuasive Authority of Comparative Law*

The Indian Supreme Court has also been influenced by comparative law and draws creatively from different comparative sources to augment its reasoning. The Indian Supreme Court's jurisprudence shows an admirable effort to stay in close touch with vibrant legal developments around the world.

In one of the seminal social action litigation cases in India, Justice Krishna drew from panoply of sources, including, U.S. Supreme Court cases, the Australian Law Reform Commission and an array of academic articles dealing with judicial review of administrative action.

In the case of *S.P. Gupta*<sup>127</sup> which broadened locus standi, Justice Bhagwati cited public interest cases from the United States, United Kingdom, Canada and Australia to define public interest law as a recognized form of rights vindication around the world. In fact, as shown in a recent case on child marriage, the petitioners brought an example from Sri Lanka to show how the executive, legislative and judicial branches worked together to raise the average age of marriage in Sri Lanka.

### **Develop Public Interest Litigation as a Powerful Tool to Combat Child Marriage**

#### *Engage with International Advocacy*

- Examine all relevant international conventions and treaty monitoring body concluding observations and jurisprudence
- Identify comparative law sources
- Use cutting edge and innovative case law as persuasive authority
- Make creative use of international accountability mechanisms. These measures can include submitting shadow reports on child marriage or helping the state party report to highlight the issue of child marriage; submit communications that describe rights violations to the United

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<sup>127</sup> PUDR, 1 S.C.R. 456 at para.9.

Nations Commission on the Status of Women; countries that have ratified the Optional Protocol to the CEDAW can access the treaty body directly, once all domestic remedies are exhausted.

### ***Bolster Civil Society Advocacy***

- Engage with lawyers to develop public interest litigation petitions on child marriage
- Support these petitions with field reports and empirical
- Engage with the national gender machinery and human rights commissions
- Work with the media on ethical reporting on child marriage. Educate the media on the right to marriage as fundamental human rights
- Monitor the the implementation of Court’s directives at the ground level.
- Partner with schools, universities and law schools to introduce awareness on child marriage
- Develop law school clinical programs that can collaborate with activists and lawyers on combating child marriage

### ***Explore intersectionalities of Rights Advocacy***

- Explore ways in which rights intersect. Explore ways in which child marriage advocates can work with reproductive rights and health rights advocates and educators
- Interpret human rights provisions in the state Constitution broadly and creatively
- Use gender lenses to examine how rights violations in any given field often have a disproportionate impact on women and children

## **6.2 Holding States Accountable**

In countries where treaties are not self-executing, a route for directly incorporating international human rights norms into domestic law is the argument that these norms are binding as customary international law or *jus cogens*, a subset of customary laws that are so fundamental that they are non-derogable. The human rights values embodied in the U.N. Charter, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights are all elements of customary international law that are rapidly establishing themselves as *jus cogens*, if they have not already achieved that status. For States that are not parties to the relevant human rights treaties, generally accepted standards of human rights are legally binding upon them according to customary international law.<sup>128</sup>

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<sup>128</sup> The Political Covenant's Human Rights Committee has developed interpretations of its substantive articles by issuing general comments. Comment 4/13 interprets Article 3, which requires states to ensure for all individuals the rights recognized in the Political Covenant, as imposing a positive obligation on states to remedy sex discrimination. This positive obligation requires that states not only take measures to protect women, such as the enactment of laws, but also take measures of affirmative action designed to ensure the positive enjoyment of rights. It also imposes on states a duty to obtain information regarding the role of women in its jurisdiction in order to determine specifically what additional measures need to be taken. Thus, even in the absence of local legislation, or when there are gaps in the enacted legislation, women's rights advocates can argue that as a fundamental human right, substantive gender equality is a norm to which countries are obliged to conform.

The CEDAW itself does not hold states accountable for achieving certain results, but it does require that States Parties exercise due diligence in implementing treaty provisions. Also, the Due Diligence Clause in Article 4 of the DEVAW requires the state to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women.

Apart from utilizing the CEDAW and CRC reporting mechanisms and the use of NGO reports to highlight the issue of child marriage, the Commission on the Status of Women (CSW) offers an important avenue of communications that can be used to bring attention to child marriage. The UN Commission on the Status of Women has established a working group that receives communications on rights violations. An allegation of gender discrimination is the only admissibility criteria for a communication to the CSW. Based on the working groups report, the CSW can be make recommendations to the ECOSOC. This avenue of communication could provide a powerful platform for advocates to publicize child marriage.

In certain countries there is a basic duty to investigate and prosecute crimes which violate human rights. This approach can provide a legal basis for cases where non- investigation and non-prosecution are alleged to have taken place on gender, race or religious grounds.<sup>129</sup> In the famous *Velasquez - Rodriguez* case<sup>130</sup>, the Inter-American Court of Human Rights held that States have an affirmative legal obligation to investigate and prosecute rights violators (including private persons who are not agents of the government). The court also held that the government must compensate victims of rights violations. This norm can be used creatively by women's rights advocates to hold the State responsible for private acts of discrimination and violence like child marriage. Further, in the Brazilian case of *Maria de Penha Maia Fernandez*, the Inter American Commission ruled that there was clear discrimination against women who are attacked, resulting from the inefficiency of the Brazilian judicial system and inadequate application of national and international rules.<sup>131</sup> Thus the improper application of human rights law can be a ground for liability in cases can concerning child marriage. Innovative cases and principles from around the world can open up creative new possibilities to combat child marriage.

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<sup>129</sup> See Articles 2, 3, and 8 of the European Convention on Human Rights. See also the case of *Maria de Penha Maia Fernandez*, the Inter American Commission. Stated that there was clear discrimination against women who are attacked, resulting from the inefficiency of the Brazilian judicial system and inadequate application of national and international rules. Case 12.051, Inter-Am.C.H.R., oea/Ser.L/V/11.111, doc. Rev. at para.47 (2001).

<sup>130</sup> Case 4, Inter-Am.C.H.R.35, OAS/ser.L./V)111.19, doc.13, app.VI (1988).

<sup>131</sup> 12.051, Inter- Am.C.H.R., oea/Ser.L/V/11.111, doc. Rev. at para.47 (2001).

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## APPENDIX

### *Model programs that help excluded girls overcome past inequities*

#### **Community Schools in Rajasthan**

Community schools like Shiksha Karmi in Rajasthan use paraprofessional teachers, allow the community to select and supervise teachers, and hire part time workers to escort girls to schools. The schools also target students from scheduled castes and scheduled tribes.

#### **Alternate School Programs in Madhya Pradesh, India**

This is a similar model to the Shiksha Karmi School, but includes a midday meal to address the needs of remote communities.

#### **BRAC Schools in Bangladesh**

BRAC is an NGO that established informal primary education programs in Bangladesh in 1979 to provide education for girls. Seventy percent of its students are girls. Local women (with at least nine years of schooling) are teachers. Community involvement is heavy in BRAC schools. Parents are engaged with BRAC staff to select a local teacher, establish a school calendar, and send their daughters to school.

#### **Anti- Poverty in Programs in Brazil**

Bolsa Escola in Brazil is one of the most successful anti-poverty programs in Brazil. Started in 1995, the federal program administered by local government made credit-card-based transfers to mothers of poor households contingent on children aged six-15 maintaining 85 percent attendance. Participants must attend after- school activities and cannot work.

#### **Food for Education Program in Bangladesh**

The Bangladesh government has designed program in which monthly food is transferred to poor households contingent on 85 percent attendance by primary school age children

#### **Progresa/Oportunidades, Mexico 1977**

Federal program which allows for cash transfers to mothers in poor households, subject to school age children maintaining 85 percent attendance. Grants increase with grade and are higher for girls in secondary school. Grants are terminated with non compliance.

#### **Program de Asignacion Familiar- Honduras 2000**

Centrally implemented program for cash transfers to mothers.

#### **Bono de Desarrollo Humano- Ecuador**

National program targeting poor families linking cash transfers of \$15 to women who send their children to school.

#### **Subsidio Unitario Familiar Chile 1981**

This is a local-government implemented program that provides incentives to mothers in eligible families whose school age children are in school.

#### **School Midday Meal Programs in Bangladesh**

An example of traditional families responding to financial incentives is the scholarship program for girls in Bangladesh

*Source: Inexcusable Absence: Why 60 million girls still aren't in school and what to do about it, Maureen A. Lewis and Marlaine E. Lockheed.*

## **Some Legislative Language on Domestic Violence Law**

### **The Indian Protection of Women from Domestic Violence Act, 2005**

#### **Chapter 11**

**3.** For the purposes of this Act, any act, omission or conduct of the respondent shall constitute domestic violence in case it-

- a) harms or injures or endangers the health, safety, life, limb or well being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or
- b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or
- c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or
- d) Otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

## **Some Legislative Language on Affirmative Action or Positive Discrimination**

### **European Union Law**

Article 2 (1) of the binding European Council Directive:

“The Principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

Article 2 (4) states:

“This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities.”

An additional paragraph was added to the European Community Treaty:

“With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity, or to prevent or compensate for disadvantages in professional careers.”

### **German Constitution**

Article 3 (1) and (2) of the German Constitution provides:

“Men and women shall have equal rights.”

After the reunification of East and West Germany, the Joint Commission of Constitutional Reform drafted the following amendment:

Article 3 (2):

“The State promotes the factual realization of equal rights of men and women and works towards the abolition of existing disadvantages.”

### **Canadian Charter**

Section 15 (2) states:

Every individual is equal before the law and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.”

Section 15 (2) states:



“subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national origin, colour, religion, sex, age or mental or physical disability.”

## **Some legislative language on equality provisions**

### **Republic of South Africa Promotion of Equality and Prevention of Unfair Discrimination Act Chapter 2**

Neither the State nor any person may unfairly discriminate against any person. Prohibition of unfair discrimination on ground of gender.

8. Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including—

- a) gender-based violence;
- b) female genital mutilation;
- c) the system of preventing women from inheriting family property;
- d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;
- e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;
- f) discrimination on the ground of pregnancy;
- g) limiting women’s access to social services or benefits, such as health, education and social security;
- h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons;
- i) systematic inequality of access.

### **Iceland Act on the Equal Status and Equal Rights of Women and Men**

#### **SECTION I**

Aim and Scope of this Act

#### **Article 1**

The aim of this Act is to establish and maintain equal status and equal opportunities for women and men, and thus promote gender equality in all spheres of the society. All individuals shall have equal opportunities to benefit from their own enterprise and to develop their skills irrespective of gender. This aim shall be reached by:

- a) gender mainstreaming in all spheres of the society,
- b) working on the equal influence of women and men in decision-making and policy-making in the society,
- c) enabling both women and men to reconcile their occupational and family obligations,
- d) improving especially the status of women and increasing their opportunities in the society,
- e) increasing education in matters of equality,
- f) analyzing statistics according to sex
- g) increasing research in gender studies.

### **Sweden Act on Equality between Women and Men- The Equal Opportunities Act (SFS 1991:433)**

#### **Purpose of the Act**

Section 1. The purpose of this Act is to promote equal rights for women and men in matters relating to work,

the terms and conditions of employment and other working conditions, and opportunities for development in work (equality in working life).

The aim of the Act is primarily to improve women's conditions in working life.

#### Co-operation

Section 2. Employers and employees shall co-operate as regards active measures to ensure that equality in working life is attained. They shall in particular endeavour to equalize and prevent differences in pay and other conditions of employment between women and men who perform work which is regarded as equal or of equal value. They shall also promote equal opportunities for pay development for women and men.

Work is to be regarded as of equal value with other work if it, on an overall assessment of the requirements imposed for the work and its nature, may be deemed to be of equal value with the other work. The assessment of the requirements imposed for the work shall be made taking into account criteria such as knowledge and skills, responsibility and effort. When assessing the nature of the work, particular regard shall be taken of the working conditions. (SFS 2000:773)

### **Taiwan Gender Equality in Education Law**

The law should promote substantive gender equality, eliminate gender discrimination, uphold human dignity, and improve and establish education resources and environment of gender equality

#### Purpose of the Act:

- To eliminate gender discrimination and promote substantive gender equality through education,
- Prohibit the conduct of sexual or<sup>1</sup> gendered nature that might result in rights or interests in learning or work.
- Supervise and evaluate gender equity-related activities carried out by the regional competent authority, schools and social education institutions under its jurisdiction under<sup>1</sup> its jurisdiction;
- Promote gender equity in family education and social education at national level;
- Draft regional laws and regulations, policies and annual projects related to gender equity education;
- Coordinate and integrate related resources, assist and fund the regional competent authority and schools and social education institutions under its jurisdiction in order<sup>1</sup> to implement and develop gender equity education;
- Supervise and evaluate gender equity-related activities carried out by schools and social education institutions under its jurisdiction;
- Promote research on curricula, teaching, and assessments on gender equity education and related issues;
- Provide schools and social education institutions under its jurisdiction consultation service related to gender equity education, and investigate and handle cases pertinent to this Act;
- The schools should establish a gender<sup>1</sup> equity education committee whose tasks include:
- Integrate related resources in various departments of the school, draft gender equity education projects, and implement and examine the results of the projects;
- Plan and implement activities related to gender equity education for students, staff, faculty, and parents;
- Research, develop and promote courses, teaching, and assessments on gender equity education;
- Draft and implement regulations on gender' equity education and prevention of sexual assault and sexual harassment on campus, establish mechanisms to coordinate and integrate related resources;
- Set up a gender equity education committee of the municipal government and county or city level shall consist of nine to twenty-three members, who shall serve specific terms;

- The competent authority at central, municipal, county or city shall designate budgeting in accordance with all the projects planned by its gender equity education committee;
- The competent authority shall supervise schools, social education institutions, or institutions under<sup>1</sup> its jurisdiction to carry out tasks pertinent to gender equity education, as well as provide assistance where necessary;
- Those who accomplish significant achievements shall be awarded, whereas those who have substandard achievements shall be collected and supervised for improvement;
- The school shall provide a gender-fair learning environment and establish a safe campus environment;
- The school shall respect the gender' temperaments and sexual orientation of students, faculty and staff;
- The school shall erect regulations to implement gender<sup>1</sup> equity education, and promulgate them;
- The school shall not discriminate against prospective students and their admission acceptance on the basis of their gender or sexual orientation. This does not apply to schools, classes and curricula with historical tradition, special educational missions, other non-gender related reasons, upon the approval of the competent authority;
- The school shall not discriminate against students on the basis of their gender or sexual orientation in its teaching, activities, assessments, award and punishment, welfare and services. This does not apply to matters only suitable for specific gender;
- The school shall affirmatively provide assistance to students who are disadvantaged due to their gender or sexual orientation in order to improve their situation;
- The school shall affirmatively protect lights to education of pregnant students, as well as provide assistance where necessary.

## **Some Legislative Language on Equal Employment Opportunity Laws**

### **The United Kingdom Sex Discrimination Act of 1975 (As Amended)**

An Act to render unlawful certain kinds of sex discrimination and discrimination on the ground of marriage, and establish a Commission with the function of working towards the elimination of such discrimination and promoting equality of opportunity between men and women generally; and for related purpose

#### 1. Direct and Indirect Discrimination against Women

1. (1) In any circumstances relevant for the purposes of any provision of this Act, other than a provision to which subsection (2) applies, a person discriminates against a woman if:

1. (1) (a) on the ground of her sex he treats her less favourably than he treats or would treat a man, or

1 (1) (b) he applies to her a requirement or condition which he applies or would apply equally to a man but:

1(1) (b) (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and

1(1) (b) (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and

1 (1) (b) (iii) which is to her detriment because she cannot comply with it.

#### 2) Direct and Indirect Discrimination against Women

- (2) (1) In any circumstances relevant for the purposes of a provision to which this subsection applies, a person discriminates against a woman if:
- (2)(1) (a) on the ground of her sex, he treats her less favourably than he treats or would treat a man, or
- (2)(1) (b) he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but
- (2)(1)(i) which is such that it would be to the detriment of a considerably larger proportion of women than of men,
- 3) Direct and indirect discrimination against married persons in employment field
- 3) (1) In any circumstances relevant for the purposes of any provision of Part 2, a person discriminates against a married person of either sex if:
- 3) (1) (a) on the grounds of his or her marital status he treats that person less favourably than he treats or would treat an unmarried person of the same sex, or
- 3(1) (b) he applies to that person a provision, criterion or practice which he applies or would apply equally to an unmarried person, but -3(1) (b)(i) which is such that it would be to the detriment of a considerably larger proportion of married persons than of unmarried persons of the same sex, and...

## **Some Legislative Language on Sexual Harassment Laws**

### **Philippines Republic Act No. 7877**

An Act declaring sexual harassment unlawful in the employment, education or training environment and for other purposes;

#### **SECTION 1**

Title - This Act shall be known as the "Anti-Sexual Harassment Act of 1995."

#### **SECTION 2**

Work, Education or Training -Related, Sexual Harassment Defined. - Work, education or training-related sexual harassment is committed by an employer, employee, manager, supervisor, agent of the employer, teacher, instructor, professor, coach, trainer, or any other person who, having authority, influence or moral ascendancy over another in a work or training or education environment, demands, requests or otherwise requires any sexual favour from the other, regardless of whether the demand, request or requirement for submission is accepted by the object of said Act.

(a) In a work-related or employment environment, sexual harassment is committed when:

- (1) The sexual favour is made as a condition in the hiring or in the employment, re-employment or continued employment of said individual, or in granting said individual favourable compensation, terms of conditions, promotions, or privileges; or the refusal to grant the sexual favour results in limiting, segregating or classifying the employee which in any way would discriminate, deprive or diminish employment opportunities or otherwise adversely affect said employee;
- (2) The above acts would impair the employee's rights or privileges under existing labour laws; or
- (3) The above acts would result in an intimidating, hostile, or offensive environment for the employee.

(b) In an education or training environment, sexual harassment is committed:

- (1) Against one who is under the care, custody or supervision of the offender;
- (2) Against one whose education, training, apprenticeship or tutorship is entrusted to the offender;
- (3) When the sexual favour is made a condition to the giving of a passing grade, or the granting of honours and scholarships, or the payment of a stipend, allowance or other benefits, privileges, consideration; or

(4) When the sexual advances result in an intimidating, hostile or offensive environment for the student, trainee or apprentice.

### SECTION 3

Duty of the Employer or Head of Office in a Work-related, Education or Training Environment - It shall be the duty of the employer or the head of the work-related, educational or training environment or institution, to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment. Towards this end, the employer or head of office shall:

(a) Promulgate appropriate rules and regulations in consultation with and jointly approved by the employees or students or trainees, through their duly designated representatives, prescribing the procedure for the investigation of sexual harassment cases and the administrative sanctions there for.

### SECTION 4

Administrative sanctions shall not be a bar to prosecution in the proper courts for unlawful acts of sexual harassment.

The said rules and regulations issued pursuant to this subsection (a) shall include, among others, guidelines on proper decorum in the workplace and educational or training institutions.

(b) Create a committee on decorum and investigation of cases on sexual harassment. The committee shall conduct meetings, as the case may be, with officers and employees, teachers, instructors, professors, coaches, trainers, and students or trainees to increase understanding and prevent incidents of sexual harassment. It shall also conduct the investigation of alleged cases constituting sexual harassment.

### SECTION 7

Penalties. - Any person who violates the provisions of this Act shall, upon conviction, be penalized by imprisonment of not less than one (1) month nor more than six (6) months, or a fine of not less than Ten thousand pesos (P10,000) nor more than Twenty thousand pesos (P20,000), or both such fine and imprisonment at the discretion of the court.

## Checklist - Legislative Reform to in relation to Child Marriage<sup>132</sup>

### I) International Conventions:

Has the country made a general reservation to the Convention on the Rights of the Child?

Has the country made specific reservations to the CRC in the context age, gender or religious/personal/traditional laws? If so, please specify?

Has the country made reservations to the definition of a 'child' under CRC? If so, what?

Has the country ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)? If so, has the country made reservations to CEDAW? Is there a reservation on Article 16 of CEDAW? reservations.

### II) Legal System

1. Are the CRC and CEDAW integrated into the national legislation? If yes, how?

2. If there national legislation governing marriage? If so, does the legislation discriminate against women?

- Does the law require free consent on the part of both parties to the marriage?

- Does the law fix the minimum age of marriage?

- If so it is the same for male and female?

- Does the law penalize forcible marriages?

- Does the law punish marital rape?

### III) Definition of Child

1. Does the law have a uniform definition of a 'child' across different Statutes? If so, what is the minimum age?

2. If not, are there differences in the definition of a 'child' on the basis of:

minimum age of marriage (specify variations on grounds of sex if any)

minimum age of employment

minimum age for compulsory education

Is there a difference in the definition of a child on the basis of sex, except in the situation of marriage listed above?

### IV) Registration

1. Is there compulsory birth registration in the country?

2. Is there compulsory registration of marriages in the country?

### V) Minimum Age of Employment

1. Has the country ratified the 1973 ILO Convention No. 138 concerning the Minimum Age for Employment?

2. Is there a minimum age of employment permitted by law?

3. Is there a distinction on the basis of sex, race or other grounds?

### VI) Non-Discriminatory Clauses & Equal Opportunity Clauses

#### Non- Discrimination Clauses:

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<sup>132</sup> This checklist is used to demonstrate – among others - the link between women's and children's rights

1. Does the Constitution, or other laws or national child rights laws have anti-discrimination clause (s)?
2. If so, does this anti-discrimination clause or definition ensure that all children are treated equally without discrimination on grounds of sex or gender ?
3. Does the law address discrimination within the family?
4. Does the law recognize that often traditional practices discriminate against women and girls
6. If so, does the law proscribe crimes and atrocities committed against the girl child, including child marriage, and forcing girls into prostitution?

Equal Opportunity Clauses:

7. Does the country have equal employment opportunity laws?
8. If so, do these laws prohibit discrimination on the basis of gender, of those who perform equal work of equal value?
9. Does the country have laws that prohibit discrimination in wages, conditions of work, nature of work and work-related benefits between male and female employees?

VII) Legislation related to Marriage

1. Is there legislation that prohibits child marriage?
2. If so, are there mechanisms for its enforcement?
3. Does the law proscribe and punish rape within marriage?

VIII) Prohibition of Violence and Harassment

1. Does the country have a law that prohibits gender-based violence?
2. If so, does the definition of such violence include traditional practices, customary or religious practices that impair the dignity or girls and women?
  3. Does the law prohibit bride-price, dowry or other consideration for marriage?
4. Does the country have a law that prohibits sexual harassment?

IX) Education

1. Does the law mandate a minimum level of education as mandatory for all children?
2. Is there a right to education enshrined in the Bill of Rights or the Constitution?
3. Does the law provide for free primary education?
5. Is there law or policy that specially reaches out to educate girls?
6. Is there any incentive program in place, to ensure that families below the poverty line send children, especially girls to school?

X) Monitoring and Implementation Laws

1. Is there a Children's Ombudsman/Children's Commission to promote and defend children's rights?
2. Is there a specific ministry in the Government that monitors issues related to gender, girls and specifically child marriage?
3. Can this office or officer investigate and resolve complaints regarding matters relating to the Children's laws in force?
4. Can this office or some other office have the power to take legal action on behalf of the child?

**Table 1: Married Adolescents: (Percentage of 15-19 year-olds married)**

**Sub-Saharan Africa boys girls**

Dem. Rep. of Congo 5 74

Niger 4 70

Congo 12 56

Uganda 11 50

Mali 5 50

**Asia**

Afghanistan 9 54

Bangladesh 5 51

Nepal 14 42

**Middle East**

Iraq 15 28

Syria 4 25

Yemen 5 24

**Latin America and Caribbean**

Honduras 7 30

Cuba 7 29

Guatemala 8 24

*Source: UN Population Division, Department of Economic and Social Affairs, World Marriage Patterns 20*



**Table 2: Percentage of Women Aged 25-29 Married before Age 18**

**Latin America**

Guatemala	39
Dominican Republic	38
Paraguay	24

**South Central**

**And Southeast Asia**

Bangladesh	81
Nepal	68
Pakistan	37
Indonesia	34

**Sub-Saharan Africa**

Niger	77
Mali	70
Burkina Faso	62
Mozambique	57
Malawi	55
Cote d'Ivoire	44
Cameroon	43
Benin	40

**Middle East and North Africa**

Yemen	64
Egypt	30

*Source: Population Council*

**Table 3: Statistical conclusion**

<b>Issue</b>	Statistical conclusion: ( <i>Women between the ages of 20-24 in Union by 18</i> )
<b>Place of Residence</b>	Proportion of women aged 20-24 married by the age of 18 tends to be higher in rural areas than urban areas.
<b>Household Wealth</b>	Child Marriage is most common amongst the poorest 20 percent of the population eg: Peru, 45 percent of the poorest compared to 5 percent of the richest 20 percent were married as children
<b>Level of Education</b>	Education is key in preventing child marriage. In 42 of the countries analysed by UNICEF, women 20-24 years of age who had attended primary school were less likely to be married by age 18 than those who had not. E.g: Senegal, where 20 percent of those who had attended primary school were married by age 18 compared to 36 percent of those who had not attended school. The reverse is true in only seven countries.  Women who attended secondary school were less likely to be married by the age of 18 than those who did not. For eg: in Tanzania, women with secondary education were 92 percent less likely to be married by the age of 18 than women who had attended primary school only.  For women who had tertiary education, child marriage rates were negligible.

(Source: Early Marriage: A Harmful Traditional Practice, Statistical Exploration, UNICEF 2005, the countries part of this study were: Bangladesh, Benin, Bolivia, Brazil, Burkina Faso, Cambodia, Cameroon, Central African Republic, Chad, Columbia, Comoros, Cote d' Ivore, Dominican Republic, Egypt, Eritrea, Ethiopia, Gabon, Ghana, Guatemala, Guinea, Haiti, India, Indonesia, Kazakhstan, Kenya, Kyrgyzstan, Madagascar, Malawi, Mali, Mauritania, Mozambique, Namibia, Nepal, Nicaragua, Niger, Nigeria, Peru, Philippines, Rwanda, Senegal, South Africa, Tanzania, Togo, Turkmenistan, Uganda, Vietnam, Yemen, Zambia, Zimbabwe)



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