

CHILD MARRIAGE

**"Comparative Studies in the Context of Afghanistan, India and
International Human Rights Instruments"**

**By
Mohammad Yahya**

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PROFESSOR: Renata Uitz

Central European University

1051 Budapest, Nadorutca 9.

Hungary

ABSTRACT

This paper deals with the topic of child marriage which is perceived as a harmful traditional practice, directly threatens the rights to education and health as well as personal development and wellbeing of girl-children. Africa, Southern Asia and some Arab countries in Middle East have widespread practices of child marriage. International Conventions affirm child marriage as violation of human rights. It denies girls' rights to free and full consent as well as the best interest of the child. Poverty, lack of education, negative cultural and religious practices, bride price and giving girl-children as a means of resolving disputes are the significant features underlying child marriage in most developing countries. Research reveals that one in three girls in developing countries are yet to be married before the age of 18 and one out of nine girls will probably be married before the age of 15. A UNFPA survey estimated that 39,000 girl children marry every day around the world. The statistics illustrate that if States do not show commitments to end child marriage, 14.2 million girls under the age of 18 will be married every year over the current decade and the rate will increase to 15.1 million girls every year from 2020 to 2030. The thesis will review the international human rights instruments, as well as the context of child marriage in Afghanistan and India as two countries that have common traditional practices of child marriage.

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ABBREVIATIONS

UN	United Nations
UDHR	Universal Declaration of Human Rights
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic Social and Cultural Rights
CRC	Convention on the Rights of the Child
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
ICPD	International Conference on Population and Development
OHCHR	Office of the High Commissioner for Human Rights
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Funds
UNFPA	United Nations Population Fund
UNIFEM	United Nations Development Fund for Women
UNAMA	United Nations Assistance Mission in Afghanistan
UN-HRC	United Nations Human Rights Council
GA	General Assembly
GR	General Recommendation
UN-TMBs	United Nations Treaty Monitoring Bodies
NGO	Non-governmental Organization

EVAW	Elimination of Violence Against Women
ASEAN	Association of Southeast Asian Nations
CMRA	Child Marriage Restraint Act
UNESCO	United Nations Educational, Scientific and Cultural Organization
WHO	World Health Organization
ICRW	International Centre for Research on Women
WCLRF	Children Legal Research Foundation
MoWA	Ministry of Women Affairs
MoPH	Ministry of Public Health
MoJ	Ministry of Justice
OIC	Organization of Islamic Cooperation

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I would like to dedicate this paper to the memory of my 12 years old nephew Ali Omran who has been killed on June 2014 in Mazar-e-Sharif, Afghanistan. Ali was a student of primary school and he has been kidnapped, raped and beheaded by criminal groups. I wish he may rest in peace and he will be fondly remembered by all my family.

AUTHOR'S DECLARATION

This work is being submitted in partial fulfilment of the requirement for the degree of Master of Law in Human Rights at Legal Studies Department of Central European University based in Budapest, Hungary.

It is my own unaided work, except where otherwise stated, and has not previously been submitted for any other degree or examination.

Mohammad Yahya

Central European University, Legal Studies Department

Budapest, Hungary

28 November 2014

INTRODUCTION

1. Child Marriage Facts and Figures

Child marriage is a long lasting and widespread practice that continues in several parts of the world. Currently, millions of girl-children, mostly in developing countries, are suffering from this harmful practice. In addition, it has severe threats to lives, health, education and future prospects of girl children as the main victims of this practice.¹ A UNFPA survey indicates that during 2000 – 2011, "one-third of girls in developing countries have been married before the age of eighteen."² In 2010 the estimated number of underage married girls were 67 million, of whom about 12% were married before the age of 15.³ The UNFPA prognosis shows that if the present tendency persists, "14.2 million girls under the age of 18 will be married every year over the current decade."⁴ This estimation counted as 39,000 girls married each day.⁵ Statistically, the rate will increase to 15.1 million girls every year from 2020 to 2030.⁶ "UN-Secretary General Ban Ki-moon in his July 2013 annual report to the UN General Assembly emphasized that child marriage practice must be ended everywhere."⁷

¹UNFPA, "*Marry Too Young: End Child Marriage*", (New York: UNFPA Publication, 2012), 4.
<<http://www.unfpa.org/webdav/site/global/shared/documents/publications/2012/MarryingTooYoung.pdf>> accessed 25 Nov 2013.

² Ibid, 18.

³ Ibid.

⁴ Rhys Ruth Gaffney, "*International law as an instrument to combat child marriage*", (The International Journal of Human Rights, 2010), p. 361. <<http://www.tandfonline.com/doi/pdf/10.1080/13642980903315398>> accessed on 27 Nov 2014.

⁵UNFPA, "*Marry Too Young, End Child Marriage*", (n 1), 10.

⁶ Ibid.

⁷ UN General Assembly, "*Secretary General Report 'A Life of Dignity for All': Accelerating Progress Towards the Millennium Development Goals and Advancing the United Nations Development Agenda Beyond 2015*", (68 Session, Item 118 of the provisional agenda, A/68/202, 26 July 2013), Para 85.

<http://www.un.org/ga/search/view_doc.asp?symbol=A/68/202> accessed on 30 April 2014.

African and South Asian girl-children are the most vulnerable groups affected by child marriage in their everyday lives.⁸ Based on the UN figures, South Asian countries have almost half of child marriage practices around the world.⁹ Many of these countries with expressively high rates of child marriage failed to co-sponsor the UN resolution's proposal, particularly India, Bangladesh, Afghanistan and Pakistan.¹⁰ Poverty, lack of education, negative cultural and religious practices, bride price, giving girl-children as a means of resolving disputes and other types of traditional practices are the significant features underlying child marriage in most developing countries.¹¹ Parents believe that marriage would guarantee their daughters future life or secure them from rape, child trafficking or sexual relation out of legal marriage.¹²

In addition to that, child marriage has various other negative impacts on girl children, their families and for society as a whole. Child marriage first, limits the personal freedom and development opportunities of girl children. It also psychosocially and emotionally denies girl child's well-being, reproductive health and educational opportunities.¹³ Secondly, child marriage has an implicit weight on the family and society, where girls are uneducated and lack skills and knowledge for

⁸Centre for Reproductive Rights, “UN Takes Major Action to End Child Marriage”, (web article, 16 October 2013). <<http://reproductiverights.org/en/feature/un-takes-major-action-to-end-child-marriage>> accessed on 30 April 2014.

⁹UN General Assembly (GA), “Strengthening Efforts to Prevent and Eliminate Child, Early and Forced Marriage: Challenges, Achievements, Best Practices and Implementation Gaps”, (HRC/24/L.34/Rev.1, 27 September 2013). <<http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G13/175/05/PDF/G1317505.pdf?OpenElement>>accessed 9 Nov 2014.

¹⁰ Ibid.

¹¹International Center for Research on Women (ICRW), “Too Young to Wed: Education and Action Toward Ending Child Marriage”, (ICRW Child Marriage Factsheets, 2007). <<http://www.icrw.org/files/publications/Child-Marriage-Toolkit.pdf>> accessed on 30 April 2014.

¹² Ibid.

¹³UNICEF, Innocenti Research Centre (IRC), “Early Marriage, Child Spouses”, (Innocenti Digest No. 7, Florence, Italy, March 2001), 9. <<http://www.unicef-irc.org/publications/pdf/digest7e.pdf>> accessed on 30 April 2014.

their roles as mothers and wives.¹⁴ These circumstances caused that girls are facing domestic violence and are losing their well-being and hopes.¹⁵

Afghanistan is one of the developing countries, suffering from child marriage. The UNFPA report rates Afghanistan with 39 per cent of child marriage practice between the years of 2000 – 2011.¹⁶ Although, Afghanistan ratified the CRC and CEDAW and is "bound to end child marriage"¹⁷, the efforts performed so far are insufficient to tackle this practice in the country's traditional society.¹⁸ In a positive development, Afghan President Passed the Elimination of Violence Against Women (EVAW) Law In 2009.¹⁹ This law criminalized child marriages but the concept is still have common practice. EVAW law has been challenged by radical members of the Afghan Parliament in May 2013. The Parliament radical members exposed their will to repeal the law. They perceived the law in contrast with the Islamic jurisprudence on women's rights. The law is still valid under Presidential degree.²⁰

Historically, women and children were severely affected by the last three decades of armed conflict in Afghanistan. In addition, Afghan women and girls are suffering from the country's patriarchal cultural and restricted traditional norms and practices.²¹ Child marriage is also one of these common practices in Afghanistan. It has severe negative consequences on women's lives as it

¹⁴ Ibid.

¹⁵ Ibid, 10.

¹⁶ UNFPA, "*Marry Too Young, End Child Marriage*", (n 1) 23.

¹⁷ S. Bahgam, W. Mukhatari, "*Study on Child marriage in Afghanistan*", (Published by Medica Mondiale, May 2004), 13. <<http://www.khubmarriage18.org/sites/default/files/84.pdf>> accessed on 30 April 2014.

¹⁸ Ibid.

¹⁹ HRW, "*Afghanistan: Ending Child marriage and Domestic Violence*", (Publication 2009), 6. <http://www.hrw.org/sites/default/files/related_material/Afghanistan_brochure_0913_09032013.pdf> accessed on 4 May 2014.

²⁰ Ibid.

²¹ UNAMA/OHCHR, "*Silence is Violence: End the Abuse of Women in Afghanistan*" (OHCHR Publication, 2009), 3. <<http://unama.unmissions.org/Portals/UNAMA/vaw-english.pdf>> accessed on 30 April 2014.

limits many opportunities associated childhood including preventing them from further education, causing health problem, physical and psychological trauma.²² In 2014 the UNDP's annual "Gender Equality Index" has ranked Afghanistan as the sixth worst country for female equality in the world.²³ A survey conducted by the Afghan Ministry of Public Health in 2010, showed that 53% of all Afghan married women at the age of 25-49, were married by the age of 18 and 21% of women were married at the age of 15.²⁴ Adding to that, the UNFPA survey on 2010 rates Afghanistan as one of the worst places for female life expectancy.²⁵

There is widespread ambiguity on the legal status of child marriages in Afghanistan. According to the Afghan civil law, 16 years old is the minimum marriage age for girls, and it permits a father or court to consent to minimum marriage age of 15.²⁶ At the same time, there are various interpretations of Sharia law based on traditional and customary practices which allow local communities to approve marriage at earlier ages.²⁷

In parallel to Afghanistan, India is highly affecting child marriage practice as one of the largest country in developing region. The UNFPA 2000 – 2011 survey report, figured India among the 41 countries with more than 30 per cent of child marriage.²⁸ The minimum age of marriage in Indian law since 1987 is “18 for women and 21 for men”.²⁹ Child marriage was permissible by the

²²ICRW, *‘Too Young to Wed’*, (n 11).

²³UNDP, *‘Statistical Tables’*, (Human Development Report, 2013).

<<https://data.undp.org/dataset/Table-4-Gender-Inequality-Index/pq34-nwq7>> accessed on 30 April 2014.

²⁴Afghan Public Health Institute and others, *‘Afghanistan Mortality Survey 2010’*, (Published on November 2011), 52. <<http://www.measuredhs.com/pubs/pdf/FR248/FR248.pdf>> accessed on 30 April 2014.

²⁵UNFPA, *‘Child Marriage Factsheet’*, (web article, 2005).

<http://www.unfpa.org/swp/2005/presskit/factsheets/facts_child_marriage.htm> accessed on 30 April 2014.

²⁶Afghanistan Civil Code (1977), arts 70, 71(1). See also Bahgam& Mukhatari, *“Study on Child marriage in Afghanistan”*, (n 17), 13.

²⁷HRW, *“Afghanistan: Ending Child marriage and Domestic Violence”*, (n 19), 7.

²⁸UNFPA, *“Marry Too Young, End Child Marriage”*, (n 1), 23.

²⁹Gayle T. Lemmon and Lynn S. El Harake, *“High Stakes for Young Lives: Examining Strategies to Stop Child Marriage”*, (Working Paper published by the Council of Foreign Relations (CFR), New York, April 2014), 8.

children's guardian within the Islamic community of India based on Muslim Personal Law (Shariat) Application Act of 1937.³⁰ Another Muslim Act (The Dissolution of Muslim Marriage Act of 1939) repudiated any marriage before reaching the age of 18 years old.³¹ The new Indian Prohibition of Child Marriage Act (2006) has provided more preventive provisions on child marriage. This act is the revision of the Child Marriage Restraint Act (1929) which strongly emphasized on prohibition of child marriage irrespective of religion or cultural perspective.³² With all these legislative restrictions, India still has high rate of child marriage. The root cause of child marriage practice in India has more similarity to Afghanistan, which is tradition and religious practices.³³

2. Thesis Research Methodology and Limitations

The main objective of this paper is to do a comparative research on the issue of child marriage within the international human rights instruments. The paper highlights the international norms, from legal, social and cultural perspectives and compare the practice of child marriage in Afghanistan and India as a regional context. It is a comparative desk research paper focusing more on the existing secondary sources, including books, journal articles, news and blogs. This thesis reviews; 1) whether child marriage is a human rights violation. 2) Is child marriage only a cultural

<<http://www.cfr.org/women/high-stakes-young-lives/p32764>> accessed on 9 Nov 2014.

³⁰ "The Muslim Personal Law (Shariat) Application Act, 1937", [Act No. 26 of 1937 dated 7th. October, 1937].

<<http://www.ms.gov.pl/resource/e75c9c6a-42be-465e-822d-29bc1d01cc1d:JCR>> accessed 25 Nov 2014. See also Hilary Amster, "Analyze the Indian government's 2006 Child Marriage Prohibition Act", (University of San Francisco School of Law, November 2009), 10.

³¹ The Dissolution of Muslim Marriage Act § 2(vii), No. 08 of 1939; India Code, <<http://indiacode.nic.in/>> accessed 25 Nov 2014. See also Amster, "Analyze the Indian government's 2006 Child Marriage Prohibition Act", (n 30), 10.

³² ICRW and UPFPA, "Child Marriage in South Asia: Realities, Responses and The Way Forward", (Solidarity for the Children of SAARC, 2013), 8.

<https://www.icrw.org/files/publications/Child_marriage_paper%20in%20South%20Asia.2013.pdf> accessed on 9 Nov 2014.

³³ Gayle and Lynn, "High Stakes for Young Lives: Examining Strategies to Stop Child Marriage", (n 29), 8.

problem and traditional practice or is it tied to poverty and lack of education as well, and 3) What efforts have been made by the United Nations, governments and non-governmental organizations (NGOs) tackling the issue of child marriage?

In addition, the paper on its part about Afghanistan answer the following questions; a) Why is the Afghan Government unsuccessful in tackling child marriage? b) What are the key factors that lead to child marriage in Afghanistan and c) what practical measures should be taken to address the problem of child marriage in the Afghanistan context?

Children's rights and women's rights are broad subjects. It is beyond the capacity of this paper to review all the aspects of either children rights or women rights. The thesis will only concentrate on the key issues of child marriage with special focus on girl children as the main victims of this practice.

3. Structure of the Thesis

This thesis is divided into five key chapters. Each chapter will specifically concentrate on one aspect of the topic as below;

Chapter one will review child marriage in international human rights instruments such as UN conventions and resolutions, regional treaties that highlight the major human rights violation of child marriage. This chapter will analyses the concept of child marriage within the framework of these international documents.

Chapter two will concentrate on problems attributed to child marriage. The chapter will review the social impact and consequences of child marriage and negative effect of this exercise on

education, health reproductive rights, personal development and well-being of the girl child. State and non-State actors' activities to combat child marriage are under the review of this chapter.

Chapter three will discuss child marriage in the Islamic context, not only as a matter of Sharia, also as matter of cultural diversity, in a geographical perspective. The chapter will also review the legal perception of child marriage within the Islamic Sharia *fiqh* (*Hanafi* and *Jahfari* jurisprudence) and how cultural diversity is interpreted as Sharia and what is the basic interpretation of Sharia (both *Hanafi* and *Jahfari* jurisprudence) on child marriage. The main concentration to these two Islamic schools of thought (*madhhab*) is because that Sunni (*Hanafi*) and Shia (*Jahfari*) are the dominant population of Afghanistan and Indian Islamic community.

Chapter four compares the practice of child marriage within Afghanistan and India from a legal and social perspective. Child marriage is traditionally practiced in both countries and this chapter of the thesis will review and analyses Afghanistan's and Indian's legal statutes in relation to child marriage, as well as its actual practice within traditional societies of both countries. Furthermore, the chapter will concentrate on the new Afghan EVAW law and its implication on real life of girl children in Afghan society.

Chapter five will provide a set of key recommendations tackling child marriage. The recommendations' central target would be Afghanistan and India as the main comparators of this paper. The set of recommendations may eventually have two parts; the first part is recommendations for policy makers, government and legislative bodies and the second part of the recommendations are for civil society organizations and NGOs.

CHAPTER ONE

1. International Human Rights Norms Addressing Child Marriage

Child marriage is recalled as a human rights abuse for both girls and boys, although girl children are the main victims of this practice.³⁴ In addition, the term child marriage is usually used together with early and forced marriage in many of the international human rights instruments.³⁵ Despite international agreements and national laws, child marriage remains a major concern and a real threat to lives, health, education, well-being, sexual and reproductive rights of girls.³⁶ United Nations for the last three decades is undertaking practical efforts to reduce the rate of child marriage around the world.³⁷

The concept of child marriage has been explicitly and implicitly outlawed by many international human rights instruments, such as Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, and the Supplementary Convention on the Abolition of Slavery. In addition to that, many other human rights conventions and UN resolutions issued normative guidelines for marriage with particular focus on age, consent, equality within marriage and other rights and freedoms for girls as real victims of child marriage.³⁸

³⁴ UNFPA, *“Marry Too Young: End Child Marriage”*, (n 1), 11.

³⁵ UNICEF, IRC, *“Early Marriage, Child Spouses”*, (n 13), 10.

³⁶ Ibid.

³⁷ UNFPA, *“Marry Too Young: End Child Marriage”*, (n 1), 11.

³⁸ ICRW, *‘Too Young to Wed’*, (n 11).

The current chapter will concentrate on international human rights instruments, specifically norms and obligations applied to child marriage, such as key provisions covering the issues related to age, consent, rights and freedoms of children's childhood as well as governmental obligations and parent's responsibility to protect and ensure these fundamental rights and freedom of the children. Before going to the international human rights instruments, the chapter provides a brief section on the definition of the child and child marriage. The second section will review the concept of child marriage within the UN human rights instruments. Furthermore, the section will address specific UN treaties, conventions and resolutions that have been required State parties to abolish child marriage as a harmful traditional practice. Section three review the concept of child marriage within the regional human rights instruments with special focus on most affected regions such as Africa and Southern Asia.

1.1. Definition of Child Marriage

Biologically, a human being is called a child between birth and puberty.³⁹ Legally, child is a minor person who has no legal capacity and mental maturity.⁴⁰ Legal capacity restriction is not limited children's access to their rights. Unlike, there should be more protection mechanisms that children can enjoy their childhood rights.⁴¹ The UN Convention on the Rights of the Child (CRC) defines child as "every human being below the age of eighteen years unless under the law applicable to

³⁹Bob Franklin, *The New Handbook of Children's Rights: Comparative Policy and Practice*, (Published by Routledge in London and New York, 2002), 22.

⁴⁰Nazeemudeen Ziyana, *Age of Majority and Evolving Capacity of the Child in a Plural Legal System*, (Faculty of Law, University of Colombo), 2.
<http://www.academia.edu/7501894/AGE_OF_MAJORITY_AND_EVOLVING_CAPACITY_OF_THE_CHILD_IN_A_PLURAL_LEGAL_SYSTEM> accessed on 26 Nov 2014.

⁴¹ Ibid.

the child, majority is attained.”⁴² In Islamic Shari’a law, childhood and adulthood have not been specified, but puberty has been recognized as physical maturity for both girls and boys in the majority of the Islamic schools of thoughts (*Madhhab*).⁴³

Marriage has been defined “as equal rights of men and women of full age with the free and full consent” in the Universal Declaration of Human Rights (UDHR).⁴⁴ Stephanie and Agust in the book on “Universal Declaration of Human Rights”, defines the term “full age” or “marriageable age” as the age that the couple shall be capable to know the meaning of their decisions and the consequence of a marriage.⁴⁵ Minimum age shall not be fixed at the level that the youths don’t be physically and mentally immature.⁴⁶ Under international human rights instruments, child marriage is defined as marriage of couples in which at least one party is under the age of 18 years old.⁴⁷ According to Andrea Parrot and Nina Cummings, child marriage is a type of forced marriage. Because children are mentally not mature to understand marriage and family relationships.⁴⁸ *Shari’a* law also emphasizes on free and full consent of the intended parties to the marriage, but there is no clear marriageable age for both boys and girls in any Islamic schools of thoughts.⁴⁹

⁴² Convention on the Rights of the Child (CRC), (1990), art 1: “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained.”

⁴³Bharathi Anandi Venkairman, “Islamic States and United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are The Sharia and The Convention Compatible?”, (The American University Law Review, [Vol. 44:1949], 1996), p 1966.

<<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1512&context=aulr>> accessed 30 April 2014.

⁴⁴UDHR (1948), art 16. <<http://watchlist.org/wordpress/wp-content/uploads/Universal-declaration-of-human-rights.pdf>> accessed on 27 Nov 2014.

⁴⁵ Gudmundur Alfredsson and Asbjorn Eide, “Universal Declaration of Human Rights: A Common Standard of Achievement”, (Published by Kluwer Law International, 2508 CN, The Hague, The Netherlands, 1999), p. 331.

⁴⁶ Ibid, p. 332.

⁴⁷ UNICEF, ‘Child Marriage’, (web article 2011) <http://www.unicef.org/protection/57929_58008.html> accessed on 29 April 2014.

⁴⁸ Andrea Parrot and Nina Cummings, “Sexual Enslavement of Girls and Women Worldwide”, (Conneticutt: Greenwood Publishing Group, 2008), 58.

⁴⁹Venkairman (n 43), p 1970.

The United Nations Department of Economic and Social Affairs, Population Division in its 2011 report highlighted that the majority of countries (158 countries) adopted or amended their national laws which prescribed 18 years of age as "the minimum legal age at marriage for girls without parental consent".⁵⁰ So far 29 countries have legal age of marriage for girls below 18 years old. Additionally, 146 countries are still practicing marriage of girls below the age of 18 by parental permissions which 52 of them have girls' marriage below 15 years of age.⁵¹ Research reveals that among 63 developing countries where the minimum legal age of marriage specified 18 years without parental consent, 39 countries are still practicing almost 20% of child marriage below 18 years age and 20 counties are practicing at least 10 % of child marriage below age of 15.⁵²

1.2. United Nations Conventions and Resolutions

The concept of marriage with "free and full consent" and the term "full age" are notably highlighted in the three of (the UDHR⁵³, the 1966 ICESCR⁵⁴ and the 1966 ICCPR.⁵⁵) these important international human rights instruments which are famous as "International Bill of Rights". Article 16 of the UDHR mentioned the term "free and full consent" as the main rights of intending spouses. Thus, the article does not reference to parental consents especially in minor age

⁵⁰ UNDP, 'World Marriage Patterns', (UNDP Population Factsheet, No. 2011/1, 2011).
<http://www.un.org/en/development/desa/population/publications/pdf/popfacts/PopFacts_2011-1.pdf> accessed on 25 Nov 2013.

⁵¹ Ibid.

⁵² Ibid, see also Unicef Childinfo, "MICS4 Surveys: Reports, datasets and archives", (Monitoring the Situation of Children and Women, Nov 2014). <http://www.childinfo.org/mics4_surveys.html> accessed on 26 Nov 2014.

⁵³ UDHR (1948), art16 (1) '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 termination.' (2) 'Marriage shall be entered into only with the free and full consent of the intending parties.'

⁵⁴ ICESCR (1966), art 10(1) 'The States Parties to the present Covenant recognize that: (1) The widest possible protection and assistance should be accorded to the family... Marriage must be entered into with the free consent of the intending spouses.'

⁵⁵ ICCPR (1966), art 23(2) 'The right of men and women of marriageable age to marry and to found a family shall be recognized.' (3) 'No marriage shall be entered into without the free and full consent of the intending spouses.'

situation.⁵⁶ Stephanie and Agust have explained that the philosophy behind this disposition is that “the requirement of the consent of anyone other than the parties would indeed infringe the right of the parties to marry.”⁵⁷ On the other hand, parental consent is a widespread practice, which weight on the consent of intending spouses to complete an official marriage. Therefore many countries notified parents, guardians or public authority’s consent as completion of a marriage between intending spouses.⁵⁸ In addition, a clear marriageable age has not been identified in any of the International Bill of Rights, it is for the States Parties to identify “minimum age for marriage”.⁵⁹

Child marriage was a concerning issue for the United Nations since the very beginning, right after the adoption of the UDHR. The 1956 Supplementary Convention on the Abolition of Slavery is one of the old essential conventions prescribing the issue of child marriage.⁶⁰ Articles 1 and 2 of this convention prohibits forced and child marriage. Article 1, paragraph C (i) “requires State Parties to abolish any institution or practice on forced marriage and exchanging of a girl in payment of money by her parents, guardian or family member”.⁶¹ To end forced and early marriage, Article 2 of the convention “requires the State Parties to propose a proper minimum age of marriage whereby to the free and full consent of both parties to a marriage and to encourage the registration of marriage”.⁶² The convention has explicitly express a significant message to eradicate abusing

⁵⁶ Gudmundur and Asbjorn, “*Universal Declaration of Human Rights: ...*”, (n 45), p. 333.

⁵⁷ Ibid, p. 334.

⁵⁸ Andrea Parrot and Nina Cummings, “*Sexual Enslavement of Girls and Women Worldwide*”, (n 48), p. 65.

⁵⁹ UNICEF, IRC, ‘*Early Marriage, Child Spouses*’, (n 13), 11.

⁶⁰ UN ‘*Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*’, (226 U.N.T.S. 3, entered into force April, 1957).

<<http://www1.umn.edu/humanrts/instatee/f3scas.htm>> accessed on 1 May 2014.

⁶¹ Ibid, Art 1[c(i)].

⁶² Ibid, Art 2

girl children for the purpose of rewarding, exploitation, cultural and religious practices and required State Parties to lay down a legitimate and proportionate ‘minimum age for marriage’.⁶³

In addition, the 1994 International Conference on Population and Development (ICPD) recalled the countries commitment to end child marriage and safeguard free and full consent of girl children by national legislations.⁶⁴ ICPD in chapter 4 (B) urged that countries must take effective action on “elimination of all forms of discrimination against the girl child”.⁶⁵ The Conference stressed the States’ responsibilities to improve public awareness about the disadvantage of child marriage on girls’ health care and education.⁶⁶ Furthermore, chapter 6 (B) requires states to improve girls’ access to education, health care, social and economic activities and strictly prohibits the economic exploitation of girls, and early marriage.⁶⁷

The Convention on the Rights of the Child (CRC) which has been ratified by 191 States, broadly touches upon all aspects of children’s needs and rights. This Convention requires the States, parents and families’ responsibilities on the protection, promotion and fulfilment of children rights and freedoms. Directly and indirectly, many provisions of CRC make reference to the issue of child marriage. Article 1 clarified the age, Article 2 emphasizes on freedom from all forms of discrimination and Article 3 underlines “the best interests of the child”.⁶⁸

⁶³ Gulnara Shahinian, “*Thematic Report on Servile Marriage*”, (UN-General Assembly, Report of the Special Rapporteur on Contemporary Forms of Slavery, A/HRC/21/41, July 2012), para 23.

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-41_en.pdf> accessed on 25 Nov 2013.

⁶⁴ UNFPA, ‘*Marry Too Young, End Child Marriage*’, (n 1) 10.

⁶⁵ UNFPA, ‘*International Conference on Population and Development (ICPD)*’, (1994), ch 4(B).

<<http://www.unfpa.org/public/home/sitemap/icpd/International-Conference-on-Population-and-Development/ICPD-Summary>> accessed on 30 April 2014.

⁶⁶ Ibid.

⁶⁷ Ibid, Ch 6 (B).

⁶⁸ CRC (1990), art 2 & 3.

Furthermore, numerous articles of the CRC specified States' obligations and parents' responsibilities for protection and safeguarding children rights and few other articles ensured basic rights of children.⁶⁹ In addition, CRC under Article 24 (3) explicitly required State Parties to abolish any harmful traditional practices through suitable and effective actions, which child marriage is one of these prejudicial practices.⁷⁰ Child marriage harms the protection of girl children's health, education and personal development, particularly right to health as maternal mortality regularly result from early pregnancies. Therefore States are obliged to take all necessary measures to abolish this harmful practice.⁷¹

Another international convention focusing on child marriage is the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Convention covers forced marriage in Article 16 [1(b)] and child marriage in a specific provision under Article 16 (2).⁷² CEDAW in Art 16(2) expresses that "betrothal and the marriage of a child shall have no legal effect"⁷³ and emphasizes that the State parties should specify a 'minimum age of marriage' in their national legislations.⁷⁴ The combination of both articles show that child marriage constitutes as form of forced marriage, because the child in such harmful practice does not have free consent.⁷⁵ Article 16, paragraph 1 and 2 of CEDAW, in parallel to Article 16 of the UDHR

⁶⁹ Ibid, arts 19-24 (right to health), arts 28-29 (right to education), art 34 (right to protection from all forms of sexual exploitation and sexual abuse), art 35 (right to protection from abduction, sale or trafficking).

⁷⁰ Shahinian, 'Thematic Report on Servile Marriage', (n 63), para 28.

⁷¹ Rangita De Silva-de Alwis, "Child Marriage and the Law: Legislative Reform Initiative Paper Series", (Division of Policy and Planning, UNICEF, 2008), 2.

<http://www.unicef.org/policyanalysis/files/Child_Marriage_and_the_Law%281%29.pdf> accessed 30 April 2014.

⁷² CEDAW (1979) art 16(1) 'States Parties shall take all appropriate measures ... on a basis of equality of men and women: (a) The same right to enter into marriage; (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent.'

⁷³ Ibid, Art 16(2).

⁷⁴ Ibid.

⁷⁵ Shahinian, 'Thematic Report on Servile Marriage', (n 63) para 27.

and Article 23 (2 & 3) of the ICCPR, prescribes equality in marriage, and requires ‘free and full consent and marriageable age’⁷⁶.

Apart from human rights conventions and treaties, the UN adopted many resolutions and policy papers and conducted conferences to tackle this harmful practice. Child marriage is among the top priorities of both the CRC and CEDAW Committees' observations and dialogues with State parties.⁷⁷ The Committee on the Rights of the Child in General Comment No. 4 on “adolescent health and development in the context of the CRC, (2003)” has precisely recommended 18 years old as minimum age of marriage.⁷⁸ Further to that, the CEDAW Committee in General Recommendation (GR) No. 21 gives a broad interpretation of Article 16 (2) of CEDAW.⁷⁹ According to this GR No. 21, marriage is an important responsibility which requires the spouses should be in full maturity and capability. Child marriage leads the girl-child’s life and health in danger and limits other rights of girls, such as the right to education and other childhood enjoyment.⁸⁰

The UN Human Rights Council (HRC) on 27 September 2013 adopted the first-ever ‘UN Resolution on Child, Early and Forced Marriage’.⁸¹ More than 100 countries signed this resolution and acknowledged child marriage as a severe abuse of girl children’s human rights that must be stopped. The HRC showed a deep concern on the widespread practice of “child, early and forced

⁷⁶ Ibid.

⁷⁷ De Silva-de Alwis, ‘*Child Marriage and the Law*’, (n 71) 2.

⁷⁸ CRC Committee, General Comment No. 4: “*adolescent health and development in the context of the Convention on the rights of the Child*”, 2003, UN document CRC/GC/2003/4, paragraph 9 [ii] Idem, para 20. Available at: <<http://tb.ohchr.org/default.aspx?Symbol=CRC/GC/2003/4>> accessed on 25 November 2014.

⁷⁹ CEDAW Committee, “*CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations*”, (1994) para 36. <<http://www.refworld.org/docid/48abd52c0.html>> accessed on 1 May 2014.

⁸⁰ Ibid, para 37.

⁸¹ UN General Assembly, (HRC/24/L.34/Rev.1, 27 September 2013), (n 9), para 1.

marriage” across the world, particularly in Southern Asia and Africa.⁸² The resolution identified, that child marriage is preventing individuals (girl child) from exercising and enjoying their free lives and human rights. Furthermore, the resolution pinpoint that tackling the practice of child and forced marriage should be prioritized in “the post-2015 development agenda discussion”.⁸³

As a result, the resolution required the Office of the High Commissioner for Human Rights (OHCHR) to prepare a summary report in consultation with States, other UN agencies, human rights NGOs and civil society activists, on the challenges and achievements on the elimination of child marriage. The report had been on the panel agenda and discussion at the HRC 26th session on 23 June 2014.⁸⁴ A summary of the report has been reviewed in the 26th session and the report will discuss in details at the “GA session 69th on November 20th in accordance with GA resolution 68/148 and under the title of “promotion and protection of the rights of children”.⁸⁵

The UN HRC resolution of 27 Sept 2013, in its first paragraph reaffirmed the Vienna Declaration and the Beijing Declaration. The both declarations recalled on the prohibition of child marriage and specification of a minimum age for marriage.⁸⁶ Moreover, the UN General Assembly Resolution of 19 Dec 2011, urged countries on full implementation of the rights of girl children as guaranteed under human rights mechanisms.⁸⁷ A worldwide efforts through UN Treaty Monitoring Bodies (TMBs), UN Special Rapporteurs and international policies adopted by governments is

⁸²Ibid, para 1.

⁸³Ibid, para 2.

⁸⁴ UN HRC 26th Session, “Panel Preventing and Eliminating Child, Early and Forced Marriage”, (Palais des Nations, Geneva, 23 June 2014).

⁸⁵ UN General Assembly 68/148, “*Resolution adopted by the General Assembly on 18 December 2013: Child, Early and Forced Marriage*”, (A/RES/68/148, 30 January 2014).

<<http://www.un.org/en/ga/resolutions.shtml>> accessed on 9 Nov 2014

⁸⁶UN General Assembly, (HRC/24/L.34/Rev.1, 27 September 2013), (n 9), para 1.

⁸⁷UN General Assembly, ‘*International Day of the Girl Child*’, (Resolution, A/Res/66/170, Dec 2011).

<http://www.un.org/en/ga/search/view_doc.asp?symbol=%20A/RES/66/170> accessed on 1 May 2014.

emphasizing the elimination of child marriage as a severe human rights violations. Many of these documents make governments responsible and accountable to tackle this practice.⁸⁸

In further positive development, the UN agencies and other International humanitarian aid agencies have initiated and conducted many successful programs to prevent child marriage. Since 11 October 2012, United Nations marked (11 October) as “UN International Day of the Girl Child” and called “18 years old as minimum age of marriage for girls and boys without exceptions.”⁸⁹ A joint WHO and ICRW online search and survey collected data from the organizations' websites has identified that in 1973 to 2009, more than 150 potentially relevant programs have been conducted in developing countries to eradicate child marriage.⁹⁰ The majority of these programs are directly working with girls in rural areas, offering them opportunities to attain skills and improve their educations. Some of these programs were working to improve public awareness, eradicate poverty, increase economic opportunities, and promote girls' education and women's empowerment.⁹¹

Despite hard efforts of the UN and other humanitarian agencies to combat child marriage, little progress has been made in preventing this harmful practice in developing countries.⁹² A UNFPA 10 years (2000-2010) survey, which was conducted in 107 developing countries around the world, shows that child marriage doesn't have major changes in most of developing countries, particularly

⁸⁸Shahinian, *'Thematic Report on Servile Marriage'*, (n 63), para 35.

⁸⁹OHCHR, *'First UN International Day of the Girl Child'*, (Experts' joint statement, 11 October 2012) <<http://www.ohchr.org/RU/NewsEvents/Pages/DisplayNews.aspx?NewsID=12646&LangID=E>> accessed on 9 Nov 2014.

⁹⁰Anju Malhotra and others, *'Solutions to End Child Marriage: What the Evidence Shows'*, (ICRW publication 2011), 6. <<http://www.icrw.org/files/publications/Solutions-to-End-Child-Marriage.pdf>> accessed on 30 April 2014.

⁹¹Ibid.

⁹²UNFPA, *'Marry Too Young, End Child Marriage'*, (n 1), 26.

in rural areas.⁹³ It is still highly practiced (61 countries have a child marriage prevalence of 20 per cent or higher) and so far, many of these developing countries are unable to develop suitable programs and policies to tackle child marriage.⁹⁴ According to the survey only few countries, named at footnote⁹⁵, are practicing 10 percentage of decrease at the rate of child marriage during these 10 years period.⁹⁶ With all these mechanisms and regulations as well as international efforts to tackle this practice, why child marriage is still a major violation of human rights, particularly girl children? One of the key features is the States' weakness to react harshly to this practice and adopting and implementing laws which compliance with international human rights instruments.

1.3. Regional Treaties and Conventions

In contrast to the UN conventions and resolutions, some regional human rights instruments give more clear description to the issues of forced and child marriage, except Asian declarations. Though, the main focus of this chapter is on the developing world, particularly African and Southern Asian countries, this section includes a short overview of "resolution 1468 on forced marriage and child marriage" adopted in Europe in 2005 and the American Convention on Human Rights as positive documents.

The 1990 African Charter on the Rights and Welfare of the Child that 53 African countries are the parties to, is one of the important regional human rights treaties that explicitly forbid child

⁹³Ibid, 18.

⁹⁴Ibid.

⁹⁵(Sub-Saharan Africa: Benin, Cameroon, Congo, Ethiopia, Lesotho, Liberia, Rwanda, Sierra Leone, Togo, Uganda, United Republic of Tanzania, Zimbabwe.) (Arab States: Jordan.) (East Asia and the Pacific: Indonesia, Philippines.) (South Asia: Bangladesh, Nepal.) (Eastern Europe and Central Asia: Armenia.) (Latin America and the Caribbean: Bolivia, Guyana).

⁹⁶UNFPA, *'Marry Too Young, End Child Marriage'*, (n 1), 24.

marriage.⁹⁷ The Charter in Article 21(2) prohibits child marriage and the union of girls and boys under the age of 18.⁹⁸ The Charter in this article also impresses on State Parties to take “effective action and issuing legislations to specify the minimum age of marriage which should be 18 only”.⁹⁹ In addition, the 2003 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa in Article 6 states that “no marriage shall take place without the free and full consent of both parties”,¹⁰⁰ and requires States to appropriately guarantee the minimum age of marriage for women which should not be less than 18 in the national legislations”.¹⁰¹ The African Charter is more explicit on the age of marriage rather than other Charters.¹⁰²

Asia with high rate of child marriage lacks a proper regional human rights mechanisms on children rights, particularly on child marriage. The Arab Charter on Human Rights 2004, that majority of Arab countries from Asia are party to the charter, is silent on child marriage.¹⁰³ The Charter only in Article 33(1) emphasises on the full and free consent of both parties to a marriage. But the Charter does not address a marriageable age or prohibition of child marriage.¹⁰⁴ However, the Charter in Article 33(3) addresses States’ responsibilities on protection, development, well-being

⁹⁷UN Secretary General Report, ‘*Forced Marriage of the Girl Child*’, (UN Economic and Social Council 52 Session, E/CN.6/2008/4, 2008), para 3. <<http://www.ungei.org/resources/files/Girlchildreport.pdf>> accessed on 1 May 2014.

⁹⁸ African Charter on the Rights and Welfare of the Child, (OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999), art 21(2)

<http://www.childinfo.org/files/fgmc_AfricanCharterontherightsandwelfareofthechild.pdf> accessed on 1 May 2014

⁹⁹ Ibid.

¹⁰⁰ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, (2003), art 6.

< <http://www.achpr.org/instruments/women-protocol/>> accessed on 27 Nov 2014.

¹⁰¹ Women Living Under Muslim Laws (WLUML), “*Child, Early and Forced Marriage: A Multi-Country Study*”, (A submission to UNOHCHR, 15 December 2013), 50.

<<http://www.wluml.org/sites/wluml.org/files/UN%20report%20final.pdf>> accessed on 27 Nov 2014.

¹⁰²Shahinian, ‘*Thematic Report on Servile Marriage*’, (n 63) para 31

¹⁰³ International Centre for Missing and Exploited Children (ICMEC), “*Child Marriage in the Middle East and North Africa*”, (Publication of the Koons Family Institute on International Law and Policy, 2013), 10.

<http://www.icmec.org/en_X1/icmec_publications/Child_Marriage_in_the_MENA_Region.pdf> accessed on 6 Nov 2014.

¹⁰⁴ Ibid.

and the best interest of the child.¹⁰⁵ Child marriage is not described as an act against the well-being and best interest of the child in this sub-article. Therefore it is difficult to require State parties to take legal action prohibiting child marriage.¹⁰⁶

ASEAN (Association of Southeast Asian Nations) has established a human rights body in 2009. The body is named "ASEAN Inter-government Commission on Human Rights". The Commission in mid-2012 drafted an Asian human rights declaration which is signed unanimously by all ten members of ASEAN (Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei, Vietnam, Laos, Burma and Cambodia) in November 2012. The main aim of this regional declaration is to ensure the right to life and health by the State parties.¹⁰⁷ The draft ToR for this human rights body included a future development plan for protection of women and children rights.¹⁰⁸ The ASEAN human rights declaration has been criticized by the UN High Commissioner for Human Rights, Asian civil societies and some international human rights organizations, such as Amnesty International and Human Rights Watch.¹⁰⁹ The main arguments were on the context of the declaration that was called as more governmental powers declaration rather than being a human rights statement.¹¹⁰ In addition to that, this declaration is lack of a convention or court mechanism for human rights violations. Both the Arab Charter and ASEAN have symbolic role rather than

¹⁰⁵ Arab Charter on Human Rights (2004), Article 33(3) "*The States parties shall take all necessary legislative, administrative and judicial measures to guarantee the protection, survival, development and well-being of the child in an atmosphere of freedom and dignity and shall ensure, in all cases, that the child's best interests are the basic criterion for all measures taken in his regard, whether the child is at risk of delinquency or is a juvenile offender.*"

¹⁰⁶ ICMEC, "*Child Marriage in the Middle East and North Africa*", (n 103), p 10.

¹⁰⁷ De Silva-de Alwis, '*Child Marriage and the Law*', (n 71) 15.

¹⁰⁸ Consortium of Non-Traditional Security Studies, '*A Fortnightly Bulletin Published by NTS Asia Secretariat*', (September 2009), NTS ALERT, 3-6.

<<http://www.rsis.edu.sg/nts/resources/nts-alert/NTS%20Alert%20Sept%200109.pdf>> accessed on 1 May 2014.

¹⁰⁹ UN News Centre, "*UN experts raise concerns over 'landmark' Southeast Asian human rights declaration*", (OHCHR, 16 November 2012).

<<http://www.un.org/apps/news/story.asp?NewsID=43520#.VHWTJ8kTWYI>> accessed on 26 Nov 2014.

¹¹⁰ Ibid.

being a strong human rights mechanism. State parties are not well-committed and supportive to these associations.¹¹¹ On the other hand, both declarations have not representing all Asian Countries.

The Parliamentary Assembly of the Council of Europe in 2005, adopted resolution 1468 on “forced marriage and child marriage”. The resolution is addressed to the Council of Europe member States. The resolution gives a specific definition for both forced marriage and child marriage.¹¹² Among other key recommendations, the resolution urged the member States to describe a minimum legal marriageable age for both men and women which either girl or boy shouldn’t be below 18 years of age. The resolution also insisted that registration of marriage should be compulsory and forced marriage should be criminalized by the State parties.¹¹³

The American Convention on Human Rights is mainly focused on the free and full consent to marry for both men and women in Article 17 (Para 2 and 3).¹¹⁴ The convention in Article 17 (4) obliged the State Parties to ensure that both parties to a marriage should have equal rights and responsibilities.¹¹⁵

¹¹¹ De Silva-de Alwis, ‘*Child Marriage and the Law*’, (n 71) 15.

¹¹² Parliamentary Assembly, “Forced Marriage and Child Marriage” Resolution 1468 (2005), Para 4.
<<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17380&lang=en>> accessed on 1 May 2014.

¹¹³ Shahinian, ‘*Thematic Report on Servile Marriage*’, (n 63), para 34.

¹¹⁴ The American Convention on Human Rights, Article 17 (2): “*The right of men and women of marriageable age to marry and to raise a family ...*” Article 17 (3) “*No marriage shall be entered into without the free and full consent of the intending spouses*”.

¹¹⁵ Ibid, Article 17 (4) “*The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution...* ”.

1.4. Conclusion

The chapter described the legal consequences of child marriage within the international human rights instruments, such as the UN human rights conventions, UN resolutions and other international human rights mechanisms in relation to this harmful practice. In addition to that, the concept of child marriage is illustrated as a severe human rights violations, explicitly affecting the girl children's rights to education, health, personal development and well-being. Many of these international instruments have stressed on equal rights and equal opportunities similarly for girls and boys.

The developing countries in Southern and Eastern Asia, many of African Countries and some cultural and religious relativist countries in Middle East are the main countries having wider exercise of this prejudicial practice. The UN and many other International institutions with human rights commitments are trying to eliminate this harmful practice worldwide.

The reviewed UN conventions and other international instruments stressed on elimination of child marriage and required preventive mechanisms. The State parties as direct audience of International Conventions and the UN Resolutions, are obliged to take preventive actions to end any traditional practices that explicitly effect children's rights and freedoms. Any practice which limit children childhood and are against the best interest of the children, should be prohibited. Child marriage is described as one of these serious negative traditional practice that requires comprehensive remedial actions to eliminate this practice. "Free and full consent to marriage" is defined as the full right of a marriageable age girl and girls below 18 years of age must not force to marriage by parents or guardian, otherwise it is violation of the girl-children's human rights.

CHAPTER TWO

2. Human Rights Dimension of Child Marriage

Jaya Sagade argued that “There is a long road from the ideal set out in international human rights documents to the actual realization of the human rights of young girls especially in the context of child marriage.”¹¹⁶ The common practice of child marriage and other violence against women and girls in developing countries show that State parties are very slow to address the problem of injustice to women and girls. Every day millions of girls are suffering from ongoing domestic violence, forced and child marriages, child sexual abuse, lack of access to education and personal development, inequality before the law, poverty and lack of dignity and well-beings.¹¹⁷ In majority of developing countries, the efforts so far are insufficient to tackle violence against women and girls as well as discrimination and inequality.

The current chapter reviews the root causes of child marriage in developing countries. Additionally, the chapter will deliberate the horrific implication of child marriage on fundamental rights of girl children and its consequences in the society.

2.1. The Causes and Effects of Child Marriage

Child marriage is commonly practiced in poor, uneducated and rural parts of developing countries. Sub-Saharan Africa, South Asia, Middle East and North Africa are the most common regions with

¹¹⁶ Jaya Sagade, “*Child Marriage in India: Socio-Legal and Human Rights Dimensions*”, (Oxford University Press, 2005), p. 257. See also Rene Wadlow, “*Summary of Jaya Sagade Child Marriage in India: Socio-Legal and Human Rights Dimension*”, (web article published by Theosophical Order of Service, USA, on 08/30/2007). <http://www.theoservice.org/node/78>> accessed on 28 Nov 2014.

¹¹⁷ Ibid.

a high rate of child marriage.¹¹⁸ Poverty and discriminatory cultural and religious traditional practices are the main reactions causing child marriage practice.¹¹⁹ Research reveals that in traditional societies' girls and boys are not equally treated in the families. Men as key person to have financial responsibility of the family, have absolute power. As a result girls and women are being unable to have similar social and cultural rights in family and community.¹²⁰

2.1.1. Dimension of Poverty

Poverty is one of the key elements causing child marriage practice. Low-income families in developing countries are marrying their girl-children to earn a bride price which is a source of financial support for them and alternatively they are assuming to safeguard their daughters' future life.¹²¹ Many developing countries in Southern Asia, North Africa and Middle East have a dowry system, even among the non-Muslim communities.¹²² Young girls' bride prices are higher than post-pubescent girls in many of these countries. This negative traditional practice is a motive to the poor parents to marry off their young age daughters.¹²³ Girl children are used as means of sexual exploitation. Young girls are sold, traded as payment for a financial dispute, used as payment of family debt and in countries such as Afghanistan and Pakistan exchange (*Baad*) for settling disputes.¹²⁴

¹¹⁸ UNICEF, "Early Marriage: A harmful traditional practice", (UNICEF Publication, 2005), 12.

<http://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf> accessed on 6 Nov 2015.

¹¹⁹ ICMEC, "Child Marriage in the Middle East and North Africa", (n 103), 11.

¹²⁰ Ibid.

¹²¹ De Silva-de Alwis, 'Child Marriage and the Law', (n 71), 32.

¹²² ICMEC, "Child Marriage in the Middle East and North Africa", (n 103), 4.

¹²³ Ibid.

¹²⁴ Ibid, 10.

The UNICEF 2005 “Early Marriage” study indicates that 20 per cent of child marriage in developing countries happens among the poorest families.¹²⁵ In some cases, girl children are marrying much older men for family survival. Poor areas lack education and family planning and girls have little opportunities to get sexual and reproductive health education. This situation has high risk of “sexual transmitted infection and HIV”.¹²⁶ In addition, the majority of girls who married at the early ages have no sexual consent and neither their birth family nor their husband family give any consideration to the best interest of the girl child. As a result, many of these girls are facing psychological problems such as depression and lack of self-esteem as they are isolated and confinement at homes.¹²⁷

2.1.2 Cultural and Religious Traditions

In traditional societies where there is no public awareness on the negative health effects of child marriage and disrupting girls’ access to education, child marriage has been encouraged by parents as a means of future safety and security of their daughters’ life.¹²⁸ Southern Asia, North Africa and Middle East countries are the majority of these traditional societies. Female members of families have limited rights and opportunities for education, personal developments and freedoms to escape the norms and traditions of male dominance.¹²⁹ Parents’ belief that it is their responsibilities and rights to decide for the future life of their girls and the presumption is that it is for the safety and insurance of their girls’ future life.¹³⁰ Moreover some of these decisions are apparently for the

¹²⁵ UNICEF, “*Early Marriage: A harmful traditional practice*”, (n 118) 14.

¹²⁶ WLUMML, “*Child, Early and Forced Marriage: A Multi-Country Study*”, (n 101), 17.

¹²⁷ Ibid.

¹²⁸ Shahinian, ‘*Thematic Report on Servile Marriage*’, (n 63), para 31.

¹²⁹ ICMEC, “*Child Marriage in the Middle East and North Africa*”, (n 103), 6.

¹³⁰ Francesca Moneti, ‘*We can Stop Child Marriage*’, (UNICEF to Congress Report, July 2010).

<<http://fieldnotes.unicefusa.org/2010/07/Unicef-we-can-stop-child-marriage.html>> accessed on 1 May 2014.

safeguarding of their girl children from rape, illegal sex and sexual exploitation. In some countries like Yemen, Ethiopia and Afghanistan, young girls are forced to marry their rapist in order to protect their families' honour.¹³¹ The concept of honour will be discussed in details in chapter three under the Islamic tradition.

The right to "free and full consent to marriage" which has been granted under Article 16 of UDHR is not considered as the girls' rights.¹³² The concept of consent has similar challenges and difficulties like minimum age in relation to child marriage. The majority countries' national laws provide legal provisions for "free and full consent" as the right of both men and women in marriage. But in practice these legal provisions are basically symbolic in many of these countries' laws.¹³³ In practice, in most developing countries, consent is in the hand of parents to decide for marriage of their girls and boys. Parents' decisions override children's and fathers are more likely the main decision makers of the families with full consents.¹³⁴ In most cases girls are the victims of parental consent.¹³⁵ In some countries like Afghanistan, Pakistan, Bangladesh and Yemen, in rural areas the community elders are the decision maker for a girl child marriage even if the parents are unwilling.¹³⁶

¹³¹ ICMEC, "Child Marriage in the Middle East and North Africa", (n 103), 6.

¹³² Rachel Hodgkin and Peter Newell, 'Implementation Handbook for the Convention on the Rights of the Child', (UNICEF 1998, Fully revised third edition, September 2007), 11.
<http://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child_Part_1_of_3.pdf> accessed 1 May 2014. See also UNICEF, IRC, 'Early Marriage, Child Spouses', (n 13), 8.

¹³³ UNICEF, IRC, 'Early Marriage, Child Spouses', (n 13), 8.

¹³⁴ Ibid.

¹³⁵ Ibid, 9.

¹³⁶ ICMEC, "Child Marriage in the Middle East and North Africa", (n 103), 10.

2.2. Rights Denied by Child Marriage

Child marriage undermines a number of girl children's rights guaranteed by the CRC, CEDAW and other human rights instruments. In the CRC the following rights are challenged; the right to equality and non-discrimination (Article 2), the right to education (Article 28), goals of education (Article 29), the right to life and personal development (Article 6), the right to the best interests of the child (Article 3), the right to be protected from physical or mental violence, including sexual abuse (Article 19) and sexual exploitation (Article 34), the right to health (Article 24), the right to participate freely in culture life (Article 31), the right to not be separated from their parents against their will (Article 9) and the right to protect against any aspect of the child's welfare (Article 36)".¹³⁷ This part of the paper explains the consequence of child marriage on basic rights of girl children under the following three main topics;

2.2.1 Right to Education

Girls' access to education has been guaranteed by both CEDAW¹³⁸ and CRC.¹³⁹ Articles 28 and 29 of CRC are not only emphasized on compulsory education, it also insists on the need of education for children. The CRC General Comment (GC) No. 1 describes right to education for children as a set of inalienable rights which has direct link to human dignity and personal development of the child.¹⁴⁰ In addition, the GC emphasizes that education should be "child-centered, child-friendly and empowering", which equally accessible for boys and girls without

¹³⁷ De Silva-de Alwis, 'Child Marriage and the Law', (n 71), 8.

¹³⁸ CEDAW (1979), art 10.

¹³⁹ CRC (1990), arts 28(1)& 29(1).

¹⁴⁰ Committee on the Rights of the Child, General Comment No. 1, "The Aims of Education", (U.N. Doc. CRC/GC/2001/1), para 2. Available at: <<http://www1.umn.edu/humanrts/crc/comment1.htm>> accessed on 28 Nov 2014.

discrimination.¹⁴¹ The CRC in Article 5 highlights State parties' responsibility to respect to parents' rights and responsibilities to guide their children to grow up on the way that enjoy all their rights properly.¹⁴² Moreover, the CRC in Article 18 explicitly emphasized on parents or guardian as primary responsible on child development and make the States responsible to support children rights to development.¹⁴³ Adding to that, the GC No 1 emphasizes on the principle of gender equality, which describes that girls' right to education should not be limited by governments, parents and society.¹⁴⁴ Similarly CEDAW also protected the equal education opportunities for girls in Article 10 and emphasized on nondiscrimination principles in Article 2.¹⁴⁵

Right to education of girl children is inevitably impaired by early marriage. Several researches indicate that a high rate of uneducated girls are from the areas where there are common child marriage practices.¹⁴⁶ Such acts mostly have cultural and traditional origins where immediately after marriage the girl children restricted to go to school because of home responsibilities and lack of gender equality norms in traditional societies.¹⁴⁷ Motherhood is another significant factor to prevent adolescent mothers to continue their education.¹⁴⁸ Research reveals that young mothers dropped out from school to take care of their baby children. It is an extra burden that no one else in the family watch the children. On the other hand, there is no facilities at schools that adolescent

¹⁴¹ Ibid.

¹⁴² CRC (1990), art 5

¹⁴³ CRC (1990), art 18

¹⁴⁴ Committee on the Rights of the Child, GC No. 1, (n 140), para 7.

¹⁴⁵ CEDAW (1979), arts 2 & 10.

¹⁴⁶ De Silva-de Alwis, '*Child Marriage and the Law*', (n 71), 9

¹⁴⁷ Tina Khanna, Ravi Verma and Ellen Weis, '*Solidarity of the Children of SAARC "Child Marriage in South Asia": Realities, Responses and the Way Forward*', (ICRW Bangkok, Technical Thematic Paper to UNFPA, 2013), 11. <https://www.icrw.org/files/publications/Child_marriage_paper%20in%20South%20Asia.2013.pdf> accessed on 1 May 2014.

¹⁴⁸ Ashley Jackson, '*High Stakes: Girls' Education in Afghanistan*', (Joint Briefing Paper by ACSF and others, February 2011), 13. <<http://www.oxfam.org/sites/www.oxfam.org/files/afghanistan-girls-education-022411.pdf>> accessed on 1 May 2014.

mothers can keep their baby children there.¹⁴⁹ In addition, in some traditional countries like Afghanistan and Yemen, girls after marriage should not come out of home for education or work reasons. The perception is that it is against the family honor and community will misjudged against the married girls.¹⁵⁰

However, CRC Committee for Periodic Reports obliged the State parties to take necessary action in order to make a compulsory primary education and school enrolment, a vast majority of girl children are schooled out world-wide.¹⁵¹ According to the United Nations Educational, Scientific and Cultural Organization (UNESCO), a 2007 report, 75 million girls with secondary school ages are either in lower school or out of schooled. Majority of these girls, approximately 28 million are living in Southern and Western Asia and roughly 21 million in sub-Saharan Africa.¹⁵² Lack of access to education has explicit consequence on personal development and empowerment of girls. As a result, it has been given direct impact on girls' equal access to further education and work opportunities.¹⁵³

2.2.2. Health Consequence of Child Marriage

Child marriage explicitly puts negative implications on the girl child's health. CRC in Articles 6 (right to life, survival and development) and 24 (right to health) emphasizes on children's "health and development".¹⁵⁴ The CRC Committee GC No. 4 shows concern to the insufficient attention of State parties, particularly developing countries, in promoting adolescents' health and

¹⁴⁹ Ibid, 14.

¹⁵⁰ De Silva-de Alwis, '*Child Marriage and the Law*', (n 71) 20.

¹⁵¹ De Silva-de Alwis, '*Child Marriage and the Law*', (n 71) 20.

¹⁵² Khanna and others, (n 147), 11.

¹⁵³ De Silva-de Alwis, '*Child Marriage and the Law*', (n 71), 36.

¹⁵⁴ CRC (1990), arts 6 & 24.

development conditions.¹⁵⁵ The GC linked many articles of the CRC to “health and development” and emphasized on the right to non-discrimination principles. Adolescents are more vulnerable when their rights abused by the State, family or society.¹⁵⁶ State parties are responsible to protect adolescents, particularly girls from all forms of violence and exploitation, including sexual violence, physical and mental abuses.¹⁵⁷ In addition, the GC believes that CRC Articles 5 and 18 makes parents responsible “to provide a safe and supportive environment which the adolescent can develop”.¹⁵⁸ Child marriage prevents girls’ opportunities to a healthy and productive development which cause girls vulnerably transmitted to other sexually contamination or HIV.¹⁵⁹

On the other hand, CRC explicitly emphasized States’ responsibility to abolish traditional practices which have indirect effects to the children’s health.¹⁶⁰ In traditional societies where child marriage is commonly practiced, immediate pregnancy right after marriage is very common. Early pregnancy for girls whose bodies are not fully developed for childbirth is the major risk for both the mother and the baby.¹⁶¹ Every year approximately 16 million 15 to 19 years old teenage girls are giving birth.¹⁶² In developing countries child pregnancy and childbirth caused significance death among adolescent girls. Research shows that the rate of maternal mortality among pregnant girls at the age of 15 to 19 are twice than those over the age of 20s and pregnant girls under age of 15 are five times as likely to die as women in their 20s years of age.¹⁶³ A WHO survey indicates

¹⁵⁵ CRC Committee, General Comment No. 4 (n 78), para 3.

¹⁵⁶ Ibid, para 6.

¹⁵⁷ Ibid, para 12.

¹⁵⁸ Ibid, para 7.

¹⁵⁹ UNFPA, ‘Marry Too Young, End Child Marriage’, (n 1), 11.

¹⁶⁰ CRC (1990), Art 24(3): “*States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.*”

¹⁶¹ UNICEF, IRC, ‘Early Marriage, Child Spouses’, (n 13), 11.

¹⁶² UNFPA, ‘Marry Too Young, End Child Marriage’, (n 1), 11.

¹⁶³ Advocates for Youth, ‘Adolescent Maternal Mortality: An Overlooked Crisis’, (Fact Sheet, May 2007).
<<http://www.advocatesforyouth.org/storage/advfy/documents/fsmaternal.pdf>> accessed on 1 May 2014.

that 13% of all maternal deaths are adolescent girls.¹⁶⁴ Research added that 25% of new born infants from adolescent mothers die during child birth.¹⁶⁵ The highest rate is usually in developing countries where age is not only the main reason, but lack of adequate health facilities and lack of education and proper family planning among the families are other contributing factors.¹⁶⁶

From a sex education perspective, girl children have lack of knowledge about sex, reproduction and child birth.¹⁶⁷ The burden of marriage has put negative consequences on their childhood interests. All these features have direct effects on girl children's health as a result of early marriage.¹⁶⁸ Lack of public education and awareness on the health risk of child marriage violates CEDAW's non-discriminatory role of States and societies in regards to health care, family planning and pregnancy.¹⁶⁹

2.2.3. Right to Personal Development and Well-being of Girls

Child personal development is very basic and interlinked with many articles of the CRC. There are articles referring to protection and promotion of children's development as well as articles on the "development concepts of maturity and evolving capacity."¹⁷⁰ The CRC Committee GC No. 5 describes that child personal development is the primary responsibility of parents and guardians

¹⁶⁴ Peter McIntyre, "Pregnant Adolescents: Delivering on Global Promises of Hope", (WHO / UNFPA 2006), 4. http://whqlibdoc.who.int/publications/2006/9241593784_eng.pdf accessed on 1 May 2014.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ UNFPA, 'Marry Too Young, End Child Marriage', (n 1), 11.

¹⁶⁸ Ibid.

¹⁶⁹ CEDAW (1979), Art 12(1) "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."

¹⁷⁰ Martin Woodhead, "Early Childhood Development: a question of rights", (The Open University, UK, International Journal of Early Childhood, November 2005), p. 3.

with government support (mentioned in Articles 5 & 18).¹⁷¹ Additionally, the CRC Committee GC No. 4 emphasizes that right to development should be acknowledged in a holistic way. The Committee has identified four articles; (Article 6 on survival and development, Article 2 on non-discrimination principles, Article 3 on the best interest of the child and Article 12 on child personal views) as important principles on the right to development of the child.¹⁷²

As mentioned above the best interest of the child has cohesive link to many other rights and freedom of the children. Article 3 of the CRC and Article 2 of the Optional Protocol to CRC¹⁷³ are emphasized that the principle of the “best interest of the child” shall be giving proper priority by parents, governments and the society.¹⁷⁴ Despite all these international human rights efforts, children especially girl children in developing countries are suffering from violation of their rights to personal development and “best interest of the child”. Traditional practices, religion, poverty, illiteracy and lack of access to justice are key barriers challenging children’s suitable access to their rights.¹⁷⁵

Girl children's best interest and well-being have been severely affected by child marriage. Young girls physically and psychologically are not ready to become a wife and immediately a mother.

¹⁷¹ CRC Committee, General Comment No. 5, “General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)”, (CRC/GC/2003/5), para 4.

<http://www.unicef-irc.org/portfolios/general_comments/GC5_en.doc.html> accessed on 28 Nov 2014

¹⁷² CRC Committee, General Comment No. 4 (n 78), para 10. See also Martin Woodhead, “Early Childhood Development: a question of rights”, (n 170), p. 4.

¹⁷³ UN General Assembly Resolution 66, “66/138. Optional Protocol to the Convention on the Rights of the Child on a communications procedure”, (A/RES/66/138, 27 January 2012), art 2.

<<https://treaties.un.org/doc/source/signature/2012/a-res-66-138-english.pdf>> accessed on 28 Nov 2014.

¹⁷⁴ Michael Freeman, “A Commentary on the United Nations Convention on the Rights of the Child, Article 3: The Best Interests of the Child”, (published by Martinus Nijhoff Publishers, Leiden University, The Netherlands, 2007), p. 25. See also Istituto degli Innocenti, “Survey on the CRC Committee’s Concluding Observations on the last EU Countries’ Reports”, (published on June 2006), p. 20.

<http://www.childoneurope.org/issues/crc_committee/su00-Survey.pdf> accessed on 28 Nov 2014.

¹⁷⁵ FORWARD Safeguarding Rights and Dignity, ‘Child Marriage’, (web article, 2006).

<<http://www.forwarduk.org.uk/key-issues/child-marriage>> accessed on 1 May 2014.

Such change has serious impact on the girls' psychological welfare and most probably prevent them from further education and development.¹⁷⁶ On the other hand, girls marrying at a younger age are more likely to face domestic violence at their in-laws house and due to lack of education, they usually accept domestic violence as a nature of family life.¹⁷⁷ Such discrimination and violence had happened to mothers and moved to the girls and continues generations. The circumstances result in losing hope and well-being in girl children lives.¹⁷⁸

Furthermore child marriage has been linked to separations. Major differences of the ages of a girl child and the husband is a factor to increase separation or divorce later at the elder ages.¹⁷⁹ Adding to that, child brides marrying old husbands have the risk to become widows in very young ages. In communities where child marriage is practiced, women who separate from their husbands or became widows, are suffering other traditional practices and discriminations, such as forcibly marrying their former husband's brother or in some traditions in India, staying widow in all their entire life.¹⁸⁰ These circumstances put considerable implication for the social development of girl children and women.¹⁸¹

The cyclical nature of child marriage is fatal to personal development of girl children. It prevents girls to continue education and low level of education make them more vulnerable in the society.¹⁸²

¹⁷⁶ Ibid.

¹⁷⁷ Peter McIntyre, *Married Adolescents: No Place of Safety*, (Published by WHO, Geneva, 2006), 6. http://whqlibdoc.who.int/publications/2006/9241593776_eng.pdf accessed on 1 May 2014.

¹⁷⁸ UNICEF, IRC, *Early Marriage, Child Spouses*, (n 13), 9.

¹⁷⁹ De Silva-de Alwis, *Child Marriage and the Law*, (n 71), 4.

¹⁸⁰ UNFPA, *Marry Too Young, End Child Marriage*, (n 1), 12.

¹⁸¹ Ibid.

¹⁸² FORWARD, *Child Marriage*, (n 175).

The other risks are more likely poor health condition and acute poverty. Such conditions deny the girls' abilities to have proper family planning and future life expectancy.¹⁸³

2.3. Conclusion

Protection of girl-children from prejudicial and violent practices, survival and promotion of their rights to the uppermost reasonable standards of health, education and development with the “best interest of the child” are the main responsibilities of the parents and the governments.¹⁸⁴ Elimination of child marriage is the utmost responsibility of the States, emphasized under the CRC and the CEDAW.¹⁸⁵ Governments are responsible to educate parents and communities on negative consequences of child marriage and its severe affection on the future life of their girl children. Furthermore, parents must be aware that their girl children as human being and as children, have the rights to health, education, personal development and well-being and full consent for marriage in order to have perspective future lives.

In addition, State parties based on their international commitments are obliged to legally limit parental consents on practices that negatively affect children's rights, particularly on the context of child marriage. The principles of gender equality and non-discrimination shall be respected and protected by State parties. Developing countries require to increase public awareness campaigns to eradicate harmful traditional practices and provide equal education and other skills' development opportunities for adolescent girls and boys. Rights and freedoms of the children,

¹⁸³Ibid.

¹⁸⁴CRC (1990), art 3. See also De Silva-de Alwis, '*Child Marriage and the Law*', (n 71), 32.

¹⁸⁵De Silva-de Alwis, '*Child Marriage and the Law*', (n 71), 17.

which have been acknowledged by CRC must be respected and protected equally by parents, society and the governments.

CHAPTER THREE

3. Child Marriage in Islam

Child marriage is practiced in different cultures and it is more a cultural practice rather than a religious issue. Historically child marriage was a common practice around the world. In Ancient Rome, Greece and Imperial China child marriage existed and typically practiced.¹⁸⁶ Although child marriage is more a traditional practice, religions have also ruled on it. The majority of religions over the history have emphasized on girl's sexual maturity to set as the legal age of marriage and have been prohibited marriage of girls before puberty.¹⁸⁷ In Islam, there is no specific marriageable age and according to some classical Islamic scholars, marriageable age depends to the sexual maturity of girls that might be 9, 11 or 15 years old.¹⁸⁸

Marriage (*Nikah*) in Islam is a legal contract between two consenting parties. The conditions for a valid marriage in all Islamic schools of thought are as follows; a) clear proposal and acceptance of the contract between the groom and the bride or her custodian, b) agreeing to pay a specific dowry (*Mahr*), by the bridegroom to the bride and c) presence of two competent witnesses.¹⁸⁹ Women have the right to accept or reject marriage proposals and it has been emphasized in all Islamic schools of thought.¹⁹⁰ Various *Hadith* show that marrying a widow or divorced woman as well as

¹⁸⁶ Anti Arjava, 'Women and Law in Late Antiquity', (Oxford, 1996), pp. 29–37.

¹⁸⁷ Women Living Under Muslim Laws (WLUML), "Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World", (Published by Russell Press, Nottingham, UK, 2006), 29.
<http://www.wluml.org/sites/wluml.org/files/import/english/pubs/pdf/knowning%20our%20rights/kor_2006_en.pdf> accessed on 9 Nov 2014.

¹⁸⁸ Zafar Khan, 'Are Child Marriages Allowed in Islam?', (web article). Available at:
<<http://www.islamawareness.net/Marriage/Child/childmarriages.html>> accessed 1 May 2014.

¹⁸⁹ Ekaterina Yahyaoui Krivenko, 'Women, Islam and International Law within the context of the Convention on the Elimination of All Forms of Discrimination Against Women', (The Graduate Institute, Geneva, Martinus Nijhoff Publishers, 2009), 60.

¹⁹⁰ Ibid.

a virgin girl without their consent is strictly forbidden.¹⁹¹ *Ibn Abbas* reported that “once a virgin girl came to Prophet Muhammad and reported him that her father had forced her to marry without her consent. The Prophet gave her the choice either to accept or reject the marriage.”¹⁹² The above mentioned *Hadith* and many other *Hadiths* show that Prophet Muhammad was explicitly against forced marriage and emphasized women’s power to annul and say no to any marriage which are against their consents.¹⁹³ Alternatively, parental consent is heavily weighted in Islamic traditional societies. There are some *Hadiths* that Prophet Muhammad emphasized on parental consents in marriage with the perception that parents are always deciding for the well of their children.¹⁹⁴

Therefore, women rights, particularly right to marry and divorce and child marriage are subjects to debate among the different Islamic schools and Islamic scholars. Modern Islamic scholars emphasize on misunderstanding or misinterpretation of the Islamic holy book (*Qur’an*) and *Sharia* law particularly on women rights. These scholars are claiming that patriarchal interpretation of Islamic law has inferior women in several ways.¹⁹⁵ According to *Quraishi-Landes*, one of modern Islamic scholars, “*Qur’an* language is more often symbolic and majority of Muslim scholars have, unfortunately, failed to take account ethical values of *Qur’anic* interpretation”.¹⁹⁶ The *Qur’an*

¹⁹¹ Musawah for Equality in the Family, ‘*CEDAW and Muslim Family Laws: In Search of Common Ground*’, (SIS Malaysia, 2011), 25.

<<http://www.musawah.org/sites/default/files/CEDAW%20%26%20Muslim%20Family%20Laws.pdf>> accessed on 1 May 2014

¹⁹² Zafar Khan, (n 188)

¹⁹³ Venkairman, (n 43), p 1965.

¹⁹⁴ Asifa Quraishi-Landes, ‘*Who Says Sharia Demands the Stoning of Women? A Description of Islamic Law and Constitutionalism*’, (Univ. of Wisconsin, Berkeley Journal of Middle Eastern & Islamic Law, Vol. 1, 163-177, 2008), 126. <<http://ssrn.com/abstract=1140204>> accessed 1 May 2014.

¹⁹⁵ Musawah, (n 191), 25.

¹⁹⁶ Quraishi-Landes, ‘*Who Says Sharia Demands the Stoning of Women?...*’, (n 194), 126.

explicitly emphasizes on “human being and equality of men and women as God’s “*Khalifah*” (vicegerent) on earth with equal social rights considered by justice and sympathy.”¹⁹⁷

In contrast, the classical *Sharia* experts are maintaining that classical *fiqh* as the interpretation of *Qur’an* as “Word of God” and all Prophet Muhammad’s acts as *Sunna* must be a guidance for Muslims’ lives and are divinely enjoined and immutable.¹⁹⁸ According to these scholars, *fiqh* (The four official Sunni Islamic schools of thoughts and *Shia* jurisprudence) have a broad and comprehensive interpretation of *Qur’an* and *Sunna*. It includes protection and limitation clauses which are clearly mentioned either in *Qur’an* or in *hadiths*.¹⁹⁹ In addition to that, these scholars argued that issues such as age of marriage, polygamy, women’s inheritance, etc. are expressly indicated either in the verses of *Qur’an* or in the *hadith*, so that, it is impossible to change them.²⁰⁰

The current chapter highlights key points of views from classical and conservative Islamic scholars as well as modern Islamic scholars.²⁰¹ There are various thoughts and debates among Islamic scholars, though the main focus of this chapter is on child marriage according the two Islamic schools of thought (*Hanafi* and *Jahfari* jurisprudence). In addition, the perspective and how cultural diversity is interpreted as *Sharia* and what is the basic interpretation of *Sharia* (both in *Hanafi* and *Jahfari* jurisprudence) on the case of child marriage. The chapter will focus on some common legal terminologies used in Islamic legal jurisprudence. These two Islamic schools of thought (*madhhab*) are selected, because *Sunni* (*Hanafi*) and *Shia* (*Jahfari*) are the predominant

¹⁹⁷Ziba Mir-Hosseini, ‘Criminalizing Sexuality: Zina Laws as Violence against Women in Muslim Contexts’, (March 2010), 7. <<http://www.zibamirhosseini.com/documents/mir-hosseini-article-criminalizing-sexuality.pdf>> accessed on 1 May 2014. See also Yahyaoui Krivenko, (n 189), 56.

¹⁹⁸ Venkairman (n 43), p 1966.

¹⁹⁹ Yahyaoui Krivenko, (n 189), 49.

²⁰⁰ Musawah, (n 191), 26.

²⁰¹ This division of Islamic scholars to classical and modern scholars means that all followers of the Islamic schools of thought (*fiqh*) are in one side and Islamic scholars with secular and modern ideologies are on the other side.

population of Afghanistan and Islamic community of India as main comparator of this paper. Comprehensive concentration on women's rights in Islamic law and Muslim communities are beyond the capacity of this chapter and the overall thesis.

3.1. Is Child Marriage Allowed in Islamic Law?

Sharia law, both *Qur'an* and *Sunnah*, essentially required the issue of consent in marriage between the intending spouses. As mentioned above there are several *Hadiths* demand girls' consent for marriage.²⁰² All *Sunni* schools of thoughts as well as *Shia madhhab* are prohibiting forced marriage and distinctively maintain that Prophet Muhammad gave girls the right to annul marriage against their choice.²⁰³

Unlike to the issue of consent, *Sharia* law has not clarified any age limitation for marriage. However, some classical religious scholars are emphasizing on sexual maturity as only indication for marriage and they claim that based on science and practical experience, the age of maturity for girls is below sixteen.²⁰⁴ Majority of these scholars are pinpointing the common examples of Prophet Muhammad's marriage with Aishah. According to credible Islamic histories, Aishah was six years old while engaged and she was nine years old when consummated.²⁰⁵ Apparently the majority of classical scholars unanimously agreed that according to *Sunna*, marrying a 9 year old girl is permissible, if she reached puberty.²⁰⁶ In addition, the father or grand-father as guardian are

²⁰² Yahyaoui Krivenko, (n 189), 60.

²⁰³ Abdur Rahman I, 'marriage', (Doi Professor and Director, Center for Islamic Legal Studies, Ahmadu Bello University, Zaira, Nigeria) <<http://www.iupui.edu/~msaiupui/marriage.html>> accessed on 2 May 2014.

²⁰⁴ Zafar Khan, (n 188).

²⁰⁵ Ibid. See also Pamela Cross, "Violence Against Women, Health and Justice for Canadian Muslim Women", (Published by CCMW, 20 Sept 2014), 17. <http://ccmw.com/wp-content/uploads/2013/07/EN-VAW_web.pdf> accessed on 27 Nov 2014.

²⁰⁶ Shaykh Muhammad S Al-Munajjid, 'Child marriage in Islam is subject to the condition that it serve a clear and real interest', (Islamic Question and Answer, web article) <<http://islamqa.info/en/178318>> accessed on 2 May 2014.

legally permit to arrange marriage for their young daughters and sons without the child's permissions.²⁰⁷ Note that none of these scholars used Prophet Muhammad's marriage with Khadijah, a forty years old widow, as a model.²⁰⁸

On the other hand, the issue of sexual maturity is not mentioned in the Qur'an as age of marriage.²⁰⁹

One of the clear verses of the *Qurán*, expressly relate to the age of marriage, is in *Surah an-Nisa* 4:6 that highlights; "the orphans reach the age of marriage and found to be able for self-judgement, their property should be handed over to them before they got married".²¹⁰ This verse of the Qur'an illustrates that sufficient judgement and intellectual maturity are required for marriage, reaching the age of maturity alone is not sufficient.²¹¹ The *Hanafi* School of *fiqh*, indicates that "a boy will be considered to have reached the age of maturity (*Baligh*) at eighteen and a girl at sixteen while on the lack of other evidence".²¹²

The word *Baligh* in Islamic legal terminology refers to anyone who reaches the age of "full responsibility" such as maturity, puberty or adulthood.²¹³ However, this full responsibility does not include intellectual maturity. In Islamic terminology, the word *Rashid* refers to intellectual maturity of both girls and boys.²¹⁴ One of the debatable issues among the classical and modern Islamic scholars is principally on the concepts of *baligh* and *rashid* as marriageable stage for both girls and boys.

²⁰⁷ Ibid.

²⁰⁸ Zafar Khan, (n 188).

²⁰⁹ Venkairman (n 43), p 1995.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Musawah, (n 191), 28.

²¹³ WLUML, "*Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World*", (n 187), 18.

²¹⁴ Ibid.

Intellectual maturity or the age of being *Rashid* for boys and *Rashida* for girls does not feature as a recommended age of marriage for boys and girls. But the word *Rashid* has been used for 18 years old as the age of full responsibility, particularly criminal responsibilities of boys and girls in the constitutions of many of the Islamic countries, such as Afghanistan, Iran, Egypt, Pakistan, etc.²¹⁵ In addition, some modern Islamic scholars emphasize that only puberty is not suitably enough to enter a girl or boy into a marriage contract. The husband and wife should be *Rashid* and have the capability of sensible conduct or intellectual maturity.²¹⁶ Nevertheless, the majority of the classical scholars and almost all the Islamic schools of thoughts are emphasizing on *baligh* or *balaghat* as the only precondition requirement of marriageable stage.²¹⁷

According to *Fadlallah*, an Iranian Shia scholar, Islam has encouraged child marriage. He referred to a *hadith* which make parents responsible for their children. The *hadith* stated that “leave him free for seven years... discipline him for seven... and be his companion for seven”.²¹⁸ *Fadlallah*’s analysis concentrates on the social aspect of Islamic role in family life. He pinpointed that ages of 14 – 20 is a very hard stage of life for adolescent boys and girls. Therefore engagement and marriage at ages of fourteen to twenty is the good option to avoid non-Islamic relationship of young boys and girls.²¹⁹ His views and other conservative Islamic scholars’ arguments do not take into account the right to education, consequences of health condition after marriage, consent and other well-being of the girl child. These classical scholars have a traditionalist views that described

²¹⁵ Islam Centre of Omaha, “*Islamic Marriage*”, web-publication. Available at: <<http://www.icomaha.org/Marriage.php>> accessed on 9 Nov 2014.

²¹⁶ Ibid.

²¹⁷ Sayyed Muhammed Hussein Fadlallah, ‘*The Islamic Perspective on Adolescence*’, (Bayyanat, The website of Religious Authorities), <<http://english.bayynat.org.lb/WorldofYouth/themesII-1.htm>> accessed 4 May 2014

²¹⁸ Ibid.

²¹⁹ Ibid.

men's superiority and guardians, particularly father or grandfather, full rights to marry their girls.²²⁰

3.2. Child Marriage in Islamic Traditional Practice

In many Islamic countries, in Middle East, Southern Asia and North Africa girls shall be married in quite young ages by parents' consent, particularly by the girl's father or grand-father.²²¹ Sexual morality and women's behaviour in public are weighted as essential for the reputation and honour of families in many traditional societies. In Muslim communities family honour resides on women's behaviour that should be regulated and controlled by male members of the family.²²² Virginity of girls before marriage and sexual integrity are valued as part of family honour in Muslim traditional culture. Sexual transgression is not only sinful, but it is harmful for a girl and her entire family. In most of these traditionalist countries such as Afghanistan and Yemen, marriage of girl children is defined as an "ultimate protective measure against sexual immorality".²²³

According to some Islamic traditionalist scholars, early marriage of the girl children can ensure parents that their daughters properly set up in a family, under control of a man and legitimately honoured.²²⁴ The prospects of traditional cultures have explicitly showed a predominantly male running of the communities in which women's rights and freedoms are controlled and violated in the name of "values" and "honour".²²⁵ The other argument is that most of the traditionalist and

²²⁰ Yahyaoui Krivenko, (n 189), 62.

²²¹ Venkairman (n 43), p 1995.

²²² WLUML, '*Child, Early and Forced Marriage: A Multi-Country Study*', (n 101), 13.

²²³ Ibid.

²²⁴ Venkairman (n 43), p 1995.

²²⁵ WLUML, '*Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World*', (n 187), 18.

conservative scholars' theories concentrate only on the concepts of sexual and physical maturity of girls as pre-condition for marriage. The girl children's basic rights such as right to education, personal development and well-being have not been highlighted by classical Islamic scholars as important stages for future endeavours of girls' life.²²⁶

On the other hand, traditionalist interpretations of *Quran and Sunna* emphasize men's superiority on women in different aspects of life.²²⁷ Krivenko disagrees with this view and highlights that the Quran has not specifically described superiority of men over women. However, there are some verses which could be possibly interpreted to support the subordination of women under men in some particular circumstances.²²⁸ For instance holy Quran (2:228), "Men, however, have an advantage over women", or holy Quran (4:34), "Men are guardians and managers over women".²²⁹ According to modern Islamic scholars, these verses of the Quran do not illustrate superiority or subordination. Rather, these verses shall be interpreted addressing the responsibility of man and woman to each other as a couple or as a family member.²³⁰

The modern scholars are arguing that the traditionalist interpretation of Quran results in inequality and injustice towards women's rights. The origination of this gender inequality in Islamic legal tradition has shaped from patriarchal social customs.²³¹ These norms, such as using girls and women as slaves or sexually being under men's authority were part of the Arab fabric society.

²²⁶ Yahyaoui Krivenko, (n 189), 60.

²²⁷ Fadlallah, 'The Islamic Perspective on Adolescence', (n 217).

²²⁸ Yahyaoui Krivenko, (n 189), 58.

²²⁹ Dr. Muhammad Tahir-ul-Qadri, "*Gender Equality and Islam*", (Minhaj-ul-Quran International, web-publication, 8 March 2011). Available at: <<http://www.minhaj.org/english/tid/13544/Gender-Equality-and-Islam-Shaykh-ul-Islam-Dr-Muhammad-Tahir-ul-Qadri-International-Women-Day-2011.html>> accessed on 9 Nov 2014.

²³⁰ Yahyaoui Krivenko, (n 189), 58.

²³¹ Ziba Mir-Hosseini, '*Muslim Women's Quest for Equality: Between Islamic Law and Feminism*', (University of Chicago, 2006), 629. <<http://org.uib.no/smi/seminars/Mir-Hosseini/Questforequality.pdf>> accessed on 1 May 2014.

Fiqh schools of law (*madhabs*) which consolidated more than a century after death of the Prophet Muhammad were consequently affected by these traditional practices.²³² As a result of the vacuum on the traditional description of Islamic legal thought which has ordained the doubt of inequality and injustice, women's lives have vulnerably suffered since centuries. Though in reality, there is space available for debates, amendment and possibility of justice in the Islamic schools of thoughts.²³³

Adding to that, the modern Islamic scholars strongly argue that the classical interpretation of Islamic law are seriously affecting rights and freedoms of women as one half of the society.²³⁴ *Krivenko* stated that;

*"It is obvious that Islamic law is based on the Divine message but any step going beyond the simple processes of reproduction the text introduces an element of human involvement. Islam regards any human activity as open to contestation and criticism. Islamic law in its traditional form should therefore also be de-sacralised and the possibility of contestation and new developments should be recognized."*²³⁵

Her argument and many other modern Islamic scholars' views explicitly describe the strong influence of traditional culture in Islamic *fiqh* as interpretation of Islamic law.²³⁶ These scholars are emphasizing that interpretation of Islamic law (*Quran and Sunna*) should not be limited to the

²³² Ibid.

²³³ Musawah, (n 191), 30.

²³⁴ WLUM, 'Child, Early and Forced Marriage: A Multi-Country Study', (n 101), 14.

²³⁵ Yahyaoui Krivenko, (n 189), 56.

²³⁶ Musawah, (n 191), 30.

Arab culture of more than ten centuries ago, Islamic law extensively assured scholarly debates over the interpretation of holy Quran based on life circumstances of Muslim communities.²³⁷

Modernizations and universality of human rights would obviously affect Muslim traditional societies to enhance the culture of respect, protect and fulfillment on women rights with modern interpretation of Islam law.²³⁸ This is an ongoing effort among the modern Islamic scholars to change the Muslim communities' views with more dynamic Quranic interpretation on gender equality and women's human dignity.²³⁹

3.3. Conclusion

Child marriage which basically affecting girl child, has been considered as one of the key concern of the modern Islamic scholars and modern Islamic institutions. These scholars are trying to integrate universality of women's human rights and women rights within the Islamic law. In contrast, conservative and classical Islamic scholars are explicitly emphasizing on the Islamic rights of women as incomputable Divine Law. Nevertheless, both classical and modern scholars are agreed on *Quran and Sunna* as main sources of Islamic Law. While *fiqh* as the interpretation of *Quran and Sunna* are the main points of disagreement between these two groups of scholars.

This chapter described that Islamic Law is very different from what traditionally practiced in Muslim communities. Islamic *fiqh* was strongly affected by the Arab culture of that time and this is one of the issues that both classical and modern Islamic scholars are accepting but see

²³⁷ Mir-Hosseini, 'Muslim Women's Quest for Equality: Between Islamic Law and Feminism', (n 231), p 630.

²³⁸ Wael B Hallaq, 'An Introduction in Islamic Law', (Cambridge University Press 2009), p 37.

²³⁹ Ferdous Ara Begum, 'Interpretation of the Islamic Jurisprudence in the Spirit of the International Human Rights Norms and the Convention on the Elimination of All Forms of Discrimination Against Women', (Rabat Round Table Discussion on Women Leading Change in the Muslim World, Morocco, May 2011). Available at: http://www.wunrn.com/news/2011/07_11/07_11/071111_islamic.htm accessed on 26 May 2014.

differently. On the other hand, both classical and modern scholars have similar point on public contestation of disagreement point, amendment and possibility of justice in the Islamic schools of thoughts are allowed and is acceptable. These points show that there is disagreement between points of views of the classical and modern scholars, yet most of the conservative scholars are emphasizing on traditionalist Islamic views.

Therefore, child marriage and particularly the girl children are mostly affecting by Muslim communities and traditional societies rather than the Islamic law. Holy Quran interpretation has not been limited by the current *fiqh*. Modern Islamic scholars are trying to facilitate more Islamic debates with legitimate reasoning based on modern Islamic interpretation which does not discriminate against women's rights at all.

CHAPTER FOUR

4. Child Marriage Practice in Afghanistan and India

Afghanistan and India are both geographically located in Southern Asia. The two countries have old culture and tradition similarities as historically they were under same reign for centuries.²⁴⁰ There are many positive similarities like in music, art, architecture, cuisine and language. In parallel, the both countries are practicing many similar negative culture and traditions, such as patriarchal traditional system, domestic violence against women and girls, forced and child marriages and unequal access of women and girls to all social aspect of the life. On the other hand, poverty, lack of access to education and adequate health facilities, poor economic, social and cultural rights, lack of or less women empowerment programs and child labour are the correlated concerning points that increase the risk of violence against women and girls in both Afghanistan and India.²⁴¹

In addition, religion plays quite tremendous role in Afghanistan and Indian traditional societies. Traditional practices accepted either as religion or culture and people in rural communities giving extraordinary respect to these practices. Child marriage as one of this harmful traditional practices, has been predominantly exercised in both Afghanistan and India, not only as a matter of religion but as a matter of tradition as well.²⁴² Furthermore, both India and Afghanistan are State parties to many of the international human rights instruments and have legal obligations on eradication of

²⁴⁰ ICRW and UNFPA, “*Child Marriage in South Asia: Realities, Responses and The Way Forward*”, (n 32), 2.

²⁴¹ Ibid.

²⁴² Australian AID, AFPPD, UNFPA, ICRW, “*Child Marriage in Southern Asia: Policy Options for Action*”, (ICRW, 2012). <<http://www.icrw.org/publications/child-marriage-southern-asia>> accessed on 12 Nov 2014.

all forms of discrimination and violence against women and children as well as elimination of all types of harmful traditional practices in their countries.²⁴³

The current chapter focus on the child marriage practice within the Afghanistan and Indian traditional societies and the consequences of this practice on girl children's life. The chapter will review the positive laws in relate to early and force marriage and other violence against women and girls. A comprehensive research on Afghanistan and India's tradition and legal system is beyond the capacity of this chapter. Therefore the chapter would be unable to provide a detailed explanation of all aspects of traditional practices in both Afghanistan and India.

4.1. Child Marriage in Afghanistan Legal System

The Afghan Civil Code in Article 70 specified 16 years old as legal age of marriage for girls and 18 for boys.²⁴⁴ Article 71 (1) permits a father or court to marry a 15 years old girl. Article 71 (2) explicitly restricted marriage of girls under age of 15.²⁴⁵ In contrast, the Afghan Civil Code in Article 39 specified 18 years as legal capacity age for male and female in both civil and criminal responsibilities.²⁴⁶ Now there is a question, if marriage is a legal contact between a boy and girl of full age, why girls are giving legal capacity of full consent at the age of 16? This is a debatable issue among Afghan civil law practitioners. According to Afghan law experts, the Afghanistan Civil Code is predominantly influenced by Islamic *Hanafi* school of thought. So that, the marriage age for girls specified as recommended by *Hanafi fiqh* and other Islamic schools of thought.²⁴⁷

²⁴³ Ibid.

²⁴⁴ Afghan Civil Law (1976), Article 70.

²⁴⁵ Ibid, article 70 (1)(2).

²⁴⁶ Ibid, article 39: "*The age of majority is 18 solar years. Person attaining majority age shall be recognized as having full legal personality in business transactions.*"

²⁴⁷ WLUML, "*Child, Early and Forced Marriage: A Multi-Country Study*", (n 101), p. 26.

Afghanistan, as committed State party to UN Conventions, has responsibility to take reasonable steps on elimination of all forms of discrimination against women and girls.²⁴⁸ Additionally, at the regional level Afghanistan is a member of Organization of Islamic Cooperation (OIC). This organization adopted a women empowerment Action Plan for Islamic countries in 2008. Elimination of early and forced marriage by all its possible means has been significantly emphasized by this Plan of Action.²⁴⁹ On the other hand, many Muslim dominant countries, including some in Afghanistan's region, such as Bangladesh, Egypt, Iraq, Libya, Tunisia, Morocco, Jordan, Oman, Algeria and the United Arab Emirates have taken positive steps to set 18 as the minimum age of marriage.²⁵⁰ Therefore, it is essential to recall that Afghanistan should take progressive steps to amend the minimum age of marriage for girls from 16 to 18 years old as its international legal obligations.²⁵¹

The Elimination of Violence Against Women (EVAW) law which was passed by a temporary Presidential decree in 2009, has shown government positive steps on fighting against violence against women and girls. This law imposed penalties for many abusive acts against women and girls. Article 5 categorized 22 types of violence against women and girls and criminalized them.²⁵² Child marriage, forced marriage, *baad*, *badal*, exchanging girls for a bride price and selling of girls are among the major criminal acts.²⁵³ EVAW law criminalized forced marriage in Article 26²⁵⁴

²⁴⁸ UNAMA & OHCHR, "*Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan (HTP Report)*", Published by UNAMA, Kabul, 9 December 2010), 5. http://unama.unmissions.org/Portals/UNAMA/Publication/HTP%20REPORT_ENG.pdf accessed 13 Nov 2014.

²⁴⁹ HRW, "*Afghanistan: Ending Child Marriage and Domestic Violence*", (n 19), 9.

²⁵⁰ Ibid.

²⁵¹ UNAMA & OHCHR, "*Harmful Traditional Practices ...*", (n 248), 5.

²⁵² Ibid, 4.

²⁵³ HRW, "*Afghanistan: Ending Child Marriage and Domestic Violence*", (n 19), 3.

²⁵⁴ Afghanistan EVAW Law (2009). Available at: http://www.laoa.af/laws/law_on_elimination_of_violence_against_women.pdf accessed on 16 Nov 2014.

and child marriage in Article 28.²⁵⁵ Parents, family members or others who arrange or forced a child marriage will be convicted from two to five years of imprisonment.²⁵⁶

The EVAW law in its legislative process need to be passed by Parliament. In May 2013, majority of the Parliamentarian Members during the debate on the law, describe the law against religious and cultural values of Afghanistan.²⁵⁷ In more negative development the following days, many Islamist radical people in several cities protest against the EVAW law and demanded for the repeal of the law.²⁵⁸ Alternatively, human rights and women rights defenders showed their deep concern on serious government failure to enforce the law. President Karzai also had no clear response in support to the law. Regardless of the Parliament objection and all other protests, the law remains valid, but of course, the lack of political will put negative effects on the enforcement of the law. UN and other women rights organizations are trying to put much pressure on Afghan government to enforce the law as part of Afghanistan's commitment to CEDAW.²⁵⁹

4.1.1. Practice of Child Marriage in Afghanistan Traditional Society

Afghanistan is ethnically and culturally a diverse country with dominantly Islamic tradition. Modernization always challenged by religious leaders and tribal elders as western theory and

Article 26: *"If a person gets a woman engaged or married who has reached the legal marriage age without her consent, the perpetrator shall, depending on the circumstances, be sentenced to medium-term imprisonment not less than two-years, and the engagement and marriage is invalid, according to the provision of the law."*

²⁵⁵ Ibid, Article 28: *"If a person marries a woman who has not attained the legal age of marriage without considering Article 71 of Civil code, the offender considering the circumstances shall be sentenced to medium imprisonment of not less than 2 years, and based on the request of the victim the marriage shall be revoked in accordance with the provision of law."*

²⁵⁶ Ibid.

²⁵⁷ Human Rights Watch, "Submission on the combined initial and second periodic report of Afghanistan to the UN Committee on the Elimination of Discrimination against Women", (June 23, 2013).

<<http://www.hrw.org/news/2013/07/04/submission-combined-initial-and-second-periodic-report-afghanistan-united-nations-co>> accessed on 28 Nov 2014.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

perceived against Islamic cultural values.²⁶⁰ On the other hand, the country is suffering from a patriarchal tradition where decisions about marriages are predominantly taken by fathers or male elders of the families.²⁶¹ The brides usually have no rights to consent or refuse. In many families boys are also forced by parents to marriage.²⁶²

In Afghanistan traditional society, the vast majority of marriages take place either as type of forced marriage or arranged marriage.²⁶³ Forced marriage is a common practice and there is a cohesive link between child marriage and forced marriage.²⁶⁴ According to a 2008 UNIFEM survey in Afghanistan, 70 to 80 % of married women are victims of forced marriage that 57% out of them got married when they were under age of 16.²⁶⁵ Another research conducted by Global Rights in 2008 estimated that 59% of women had practiced forced marriage and more than 80 % of women practiced at least one type of physical, psychological or sexual violence right after consummated.²⁶⁶ This research paper interviewed 4700 women in 16 provinces of Afghanistan and indicated that girl children marrying at the age of 10 to 14 are facing with high risk of physical, psychological or sexual violence.²⁶⁷

²⁶⁰ Esther Meininghaus, 'Legal Pluralism in Afghanistan', (ZEF Working Paper Series 72, University of Bonn, Dec 2007), 2. <http://www.zef.de/fileadmin/webfiles/downloads/zef_wp/wp72.pdf> accessed on 16 May 2014.

²⁶¹ WLUMI, "Child, Early and Forced Marriage: A Multi-Country Study", (n 101), 21.

²⁶² Ibid.

²⁶³ UN Women, "Like a Bird with Broken Wings: Afghan Women Oral History, 1978 – 2008", (Published by UN-Women, Afghanistan Country Office, December 2013), 37. Available at: <<http://www.unwomen.org/en/news/stories/2013/12/report-on-afghan-women-experiences-with-violence>> accessed on 28 Nov 2014.

²⁶⁴ Global Rights: Partners for Justice, "Living with Violence: A National Report on Domestic Abuse in Afghanistan," (Global Rights Afghanistan, March 2008), 1. <http://www.globalrights.org/sites/default/files/docs/final_DVR_JUNE_16.pdf> accessed on 11 Nov 2014

²⁶⁵ UNIFEM, "The situation of Women in Afghanistan", (UNIFEM Afghanistan Fact Sheet, 2008). <http://www.wunrn.com/news/2009/08_09/08_17_09/081709_afghanistan.htm> accessed on 11 Nov 2014. See also HRW, "I Had To Run Away: The Imprisonment of Women and Girls for 'Moral Crimes' in Afghanistan", (HRW, 28 March 2012), 30. <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4f787d142>> accessed 11 Nov 2014.

²⁶⁶ Global Rights, "Living with Violence: A National Report on Domestic Abuse in Afghanistan," (n 264), 13.

²⁶⁷ Ibid, 24.

Family violence is a regular practice among the Afghan families and it is not limited to husband. The new married girls, particularly girl children are facing violation by their husband, father in-law, mother in-law, brother in-law, sister in-law, aunt and other elders of the family. Physical violence usually happened by husband or father in-law and mother in-law and sister-in-law are more likely to put psychological pressure to the new married girls.²⁶⁸ The Global Rights survey shows that among the interviewed women; 30.6% were abused by husband, 23.7% by mother in-law and sister in-law, 9.9% by brother in-law while 7.4% by father in-law and 10.4% by other family members such as husband's uncle or aunt.²⁶⁹

The statistics about child marriage and forced marriage are more likely vary across the country. It is very difficult to find out the actual figures due to lack of proper documentation system that prove the age, such as electronic national ID or birth certificate.²⁷⁰ However, it is an obvious that girl children are vulnerable to child marriage in all part of Afghanistan. Various researches indicate that very large number of child marriages are among illiterate families with high rate of poverty and mostly in rural areas.²⁷¹ A 2010 UN survey stated that out of 200 child marriage conversed in Afghanistan, 71% of parents who marry their underage daughters by forced were illiterate.²⁷² According to another research survey conducted by Women and Children Legal Research Foundation (WCLRF), more than 50% of girl children are forced to marriage and more than 80%

²⁶⁸ Deborah J. Smith, "*Decision, Desire and Diversity: Marriage Practices in Afghanistan*", (published by AREU, February 2009), 5. Available at: <http://www.refworld.org/docid/4992cc722.html>> accessed on 28 Nov 2014.

²⁶⁹ Global Rights, "*Living with Violence: A National Report on Domestic Abuse in Afghanistan*," (n 264), 16

²⁷⁰ Australian AID and others, "*Child Marriage in Southern Asia: Policy Options for Action*", (n 242).

²⁷¹ UN Women, "*Like a Bird with Broken Wings: Afghan Women Oral History, 1978 – 2008*", (n 263), 22

²⁷² Australian AID and others, "*Child Marriage in Southern Asia: Policy Options for Action*", (n 242).

of marriage in Afghanistan are arranged marriage.²⁷³ This research paper categories Afghanistan traditional marriages to the following categories;

A) Parental Agreement: Almost 40% of marriages in Afghanistan happened only by parents' agreement.²⁷⁴ This type of marriage has two main categories. a) There are parents who forcibly marry their daughters to a boy or elder man against their daughters' will. It has been found by researchers that girls in these types of marriages are usually in early ages.²⁷⁵ On the other hand, the overwhelming majority of such marriage categories, the parents are under pressure by other family members or elders of the community to marry their daughters.²⁷⁶ This type of marriage has put many negative results on the girl child's future life. For instance, a girl who married against her will, has immediately face sexual violence and other types of domestic violence right after her union. Additionally, forced marriage sometimes makes the girl to runaway consequently face her with moral crimes accusations or honour killing situation.²⁷⁷ b) The second category is the less violent situation. There are parents who inform their daughters of marrying her to someone who may never see him before but never ask their girls' consent for the marriage.²⁷⁸ In traditional culture of Afghanistan, girl's right to consent has never raised as an issue. While parents take a decision, traditionally it is very disrespectful and a big shame for a girl to say no to her parent's decision. Therefore, such decisions must be accepted by girls anyway.²⁷⁹ These types of marriages

²⁷³ Women and Children Legal Research Foundation (WCLRF), "*Early Marriage in Afghanistan*", (Research Report, published in Kabul, Afghanistan, 2008), 14. <<http://www.wclrf.org.af/wp-content/uploads/2013/09/Early-Marriage-with-cover.pdf>> accessed on 28 Nov 2014.

²⁷⁴ Ibid.

²⁷⁵ UNAMA & OHCHR, "*Harmful Traditional Practices ...*", (n 248), 14.

²⁷⁶ Deborah J. Smith, "*Decision, Desire and Diversity: Marriage Practices in Afghanistan*", (n 268), 36.

²⁷⁷ WCLRF, "*Early Marriage in Afghanistan*", (n 273), 16.

²⁷⁸ UN Women, "*Like a Bird with Broken Wings: Afghan Women Oral History, 1978 – 2008*", (n 263), 23.

²⁷⁹ WCLRF, "*Early Marriage in Afghanistan*", (n 273), 17.

usually take place among the illiterate or medium educated families. Girls in these families are mostly uneducated or only having a primary education.²⁸⁰

B) Exchanging Daughters in Marriage (*badal*): In Afghanistan traditional system many families are exchanging their daughters for marriage and it is called (*Badal*). Although, *badal* is strictly forbidden in Islamic law and is criminalized by EAW Law, but it is an Afghan traditional culture to exchange their daughters in very early ages.²⁸¹ This type of marriage is usually practiced among families who are unable to pay a bride price and instead offer a girl to the other family.²⁸² On the other hand, it is a common practice among close relatives who are promising their daughters exchanged as wives for their sons.²⁸³ Most of these exchange marriages happen without consent of both the girls and the boys and such marriages usually end up with violation or separation among the couples.²⁸⁴ The below case study is the real history of an Afghan girl interviewed by UNAMA Human Rights Team in Nangarhar province of Afghanistan.

“I was 15 when I was forcibly married to someone in an exchange marriage when my brother married my husband’s sister [badal]. From the very first day my husband made it clear that he was married to me against his will and he regularly subjected me to violence including beating and abuse. In 2010 he married a second time and forced me to leave the house but my family forced me to return. In 2011 my husband and brother-in-law took me back to my father after severe beatings and told him they will not keep me. I took my complaint to the Afghanistan Independent Human Rights Commission which referred me to a women’s protection center. They appointed a lawyer for me. My case was mediated. My husband gave a written statement to the police that he would refrain from violence and I went back with him. Within a month he started beating me again. He tried to kill me when neighbors intervened to save me. I had to leave again. My case has been mediated three times by local elders, shuras, jirgas and the Department of Women’s Affairs. My family does not want me to do anything legal as it is considered a shame under Pashtunwali [traditional, unwritten ethical code followed by Pashtun people] and my brother will have

²⁸⁰ Deborah J. Smith, “Decision, Desire and Diversity: Marriage Practices in Afghanistan”, (n 268), 25.

²⁸¹ WCLRF, “Early Marriage in Afghanistan”, (n 273), 18.

²⁸² Ibid.

²⁸³ Deborah J. Smith, “Decision, Desire and Diversity: Marriage Practices in Afghanistan”, (n 268), 42.

²⁸⁴ UNAMA, “Silence is Violence: End the Abuse of Women in Afghanistan”, (n 21), 6.

to divorce his wife too. I have suffered a lot and I want justice. I don't care about anything else. "... NAK, age 24, from Nangarhar province, November 2013.²⁸⁵

This emblematic case shows that the majority victims of exchange marriages are girls, particularly girl children whom are more vulnerable.²⁸⁶

C) Exchanging Girls for Bride Price: In many Afghan families, girls are basically looked as an economic burden. Parents are trying to marry their daughters as soon as possible to earn the bride price.²⁸⁷ This tradition is common in rural areas and among poor families. Girl children are the main victims of this harmful practice where they are used as valuable goods to sell by parents for financial purpose.²⁸⁸ Bride price has no legal bases in Afghanistan Civil Code and it is forbidden by *Sharia* law as well. In most common way families are receiving this money as the name of dowry which based on Islamic law and Afghanistan legal system, it is the explicit right of the bride.²⁸⁹ Research indicates that the majority of girls who married against a high bride price are facing sexual and psychological violence.²⁹⁰ These girl children are usually selling to elder age men whom either have another wife or using the girls for sexual slavery.²⁹¹ In addition, girl children sometimes exchange for debt repayment by fathers. Such cases are very rare but it is practicing in some part of the country.²⁹²

²⁸⁵ UNAMA/UN-OHCHR, "A Way to Go: An Update on Implementation of the Law on Elimination of Violence against Women in Afghanistan", (Published by UNAMA, Kabul, December 2013), p. 1.

<http://unama.unmissions.org/Portals/UNAMA/Documents/UNAMA%20REPORT%20on%20EVAW%20LAW_8%20December%202013.pdf> accessed on 13 Nov 2014.

²⁸⁶ Ibid.

²⁸⁷ Australian AID and others, "Child Marriage in Southern Asia: Policy Options for Action", (n 242).

²⁸⁸ UN Women, "Like a Bird with Broken Wings: Afghan Women Oral History, 1978 – 2008", (n 263), 36.

²⁸⁹ WLUML, "Child, Early and Forced Marriage: A Multi-Country Study", (n 101), 26.

²⁹⁰ UN Women, "Like a Bird with Broken Wings: Afghan Women Oral History, 1978 – 2008", (n 263), 27.

²⁹¹ Ibid, 34.

²⁹² Deborah J. Smith, "Decision, Desire and Diversity: Marriage Practices in Afghanistan", (n 268), 38.

D) Exchanging Girls for Resolving Disputes (*Baad*): Girls, particularly girl children are the main targets to resolve a dispute among families. *Baad* is often practice in the rural areas where informal justice have ruled.²⁹³ In many types of such mediation that might be over a land dispute, murder case, rape or other moral issues, the family of the person who committed a wrongdoing should give a girl to marry to a man of the family who have been wronged. The girl is usually given as either blood price or compensation to end a dispute. These girls, because given to an affected family are usually facing egregious types of domestic violence as form of revenge.²⁹⁴ In classic *Pashtonwali* [traditional unwritten ethical code followed by *Pushton*] mediation system which is more common in Southern and Eastern part of Afghanistan, *baad* practice is described as below;

*“Girls are sometimes exchanged as compensation for a murder so as to prevent or settle a feud between families. Typically, a delegation from the murderer’s family will come to the house of the victim’s family. Such a delegation is known as a maraka. It is likely to bring cash, guns and sheep. If the victim’s family accepts the delegation’s request for reconciliation, the sheep will be slaughtered to provide a feast. The guns are likely to be accepted, but in general, money will be rejected on the grounds that no price can be put on a human life. If that happens, the delegation will propose that one or more girls from the murderer’s family be given in marriage to men from the victim’s family. This is baad.”*²⁹⁵

(Male focus group discussion conducted by UNAMA HR, April 2010)

Baad is forbidden under *Sharia* law and the Afghan Penal Code criminalized it in Article 517 (2) as an offensive violence against women.²⁹⁶ In addition, EVAW law criminalized *baad* in Article

²⁹³ UNAMA, “*Silence is Violence: End the Abuse of Women in Afghanistan*”, (n 21), 9.

²⁹⁴ Ibid.

²⁹⁵ UNAMA & OHCHR, “*Harmful Traditional Practices ...*”, (n 248), 14.

²⁹⁶ Afghanistan Penal Code (1976), Article 517 (2): “*If commitment of the crime specified under the above paragraph is for the purpose of “Bud dadan” (as a compensation for a wrongdoing), the offender shall be sentenced to medium imprisonment not exceeding two years.*”

25 and required long-term imprisonment (not exceeding 10 years) for those who performed this harmful practice and medium imprisonment for those participating a *baad* decision.²⁹⁷

4.1.2. Child Marriage Consequences in Afghan Society

Afghan governmental efforts to tackle forced marriage, child marriage and other violence against women and girls so far are insufficient. The UN Special Rapporteur on Violence Against Women in her last visit to Afghanistan on November 12, 2014, raised her deep concern on the situation of women and children rights in Afghanistan.²⁹⁸ She highlighted that “A large number of women and girls live in a context of deep inequality and underdevelopment”.²⁹⁹ High level of illiteracy among Afghan families, lack of girl children’s access to education, forced and child marriages, highest maternal mortality rate, imprisonment of women and girls for “moral crimes” and lack of access to fair justice are the key challenges against women and girls’ rights in Afghanistan.³⁰⁰

Additionally research revealed that Afghan women and girls, who are suffering from aggressive domestic violence are running away from home. Girls seeking refuge from family abuses are usually charged and convicted with accusation of “running away”, “attempt to adultery” or even adultery (*zina*).³⁰¹ In more discriminatory act, the police or judicial organs send the detained girls for virginity tests. The unlucky ones who fail the test are treated as ‘offenders’ whose loss of

²⁹⁷ Afghan EVAW Law (2009), Article 25

²⁹⁸ Rashida Manjoo, “Statement by the Special Rapporteur on violence against women finalizes country mission to Afghanistan and calls for sustainable measures to address the causes and consequences of violence against women, including at the individual, institutional and structural level”, (UN OHCHR, web-publication, 12 November 2014) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15284&LangID=E>> accessed on 13 Nov 2014

²⁹⁹ Ibid.

³⁰⁰ UNAMA & OHCHR, “Harmful Traditional Practices ...”, (n 248), 6.

³⁰¹ HRW, “Afghanistan: Ending Child Marriage and Domestic Violence”, (n 19), 12.

virginity is taken as proof that they committed the crime of *zina*.³⁰² A 2010 study report indicated that more than half of female prisoners in all over Afghanistan (almost 300 women and girls) detained for “moral crimes”.³⁰³

Alike other violations, forced isolation of women has widespread practice in Afghan families. This act exposed women and girls with serious psychological trauma. The practice has been criminalized by EVAW Law Article 31 as a type of domestic violence.³⁰⁴ Attempts at suicide among Afghan women and girls are the implication of forced isolation and other types of domestic violence.³⁰⁵ Research estimated that in 2010 about 2300 women and girls attempted suicide in all over Afghanistan.³⁰⁶ This report has not been confirmed by the Afghan Ministry of Public Health (MoPH) and Ministry of Women Affairs (MoWA).³⁰⁷ However, MoPH confirmed a high rate of women and girls attempt to commit suicide due to serious types of domestic violence, early and forced marriages and many other types of violence against women and girls.³⁰⁸ Self-immolation is a serious types of attempt to commit suicide among women and girls in Afghanistan. Public Hospital in Herat, one of the city with high rate of self-immolation, registered more than 100 cases in 15 months [2009 to 2010] which 76 had died reportedly.³⁰⁹

³⁰² UNAMA, “*Silence is Violence: End the Abuse of Women in Afghanistan*”, (n 19), 9.

³⁰³ UNAMA & OHCHR, “*Harmful Traditional Practices ...*”, (n 248), 3.

³⁰⁴ Ibid, 14.

³⁰⁵ HRW, “*I Had To Run Away: ...*”, (n 265), 34.

³⁰⁶ HRW, “*Afghanistan: Ending Child Marriage and Domestic Violence*”, (n 19), 12.

³⁰⁷ IRIN Asia, “*Afghanistan: Attempted suicide by women, girls on the rise?*” (IRIN, web article, August 6, 2010). <http://www.irinnews.org/report/90083/afghanistan-attempted-suicide-by-women-girls-onthe-rise> accessed on 14 Nov 2014.

³⁰⁸ Ibid.

³⁰⁹ Ibid.

The Afghanistan Mortality survey found that in 2010, 39 out of 123 death girls between the ages of 15 - 19 were because of pregnancy-related.³¹⁰ According to a 2010 research conducted by WHO and other UN agencies, Afghanistan has “460 pregnancy-related deaths for every 100,000 births”.³¹¹ Apart Sub-Saharan Africa, it is the second highest level of maternal deaths around the world.³¹²

4.2. Child Marriage in Indian Legal System

India has positive development in adopting legislations and policy papers for the purpose of eradication of child marriage. Child marriage is illegal in India since 1929 after the adoption of the Child Marriage Restraint Act (CMRA) 1929. This law as an old important legislation sets minimum marriageable ages of 15 years old for girls and 18 years old for boys. This law amended in 1978 and raise the minimum age of marriage to 18 years old for girls and 21 years old for boys.³¹³

Prohibition of Child Marriage Act (2006), which is replaced with the CMRA, provides more protective provisions on prohibition of child marriage irrespective of religion or cultural perspective.³¹⁴ The law sets an age limit of “18 years for girls and 21 years for boys as the minimum age of marriage”.³¹⁵ The Act strictly forbids child marriage and notified that those who perform,

³¹⁰ Afghan Public Health Institute, “*Afghanistan Mortality Survey 2010*”, (published by Afghan Ministry of Health, November 2011), 128. <<http://dhsprogram.com/pubs/pdf/FR248/FR248.pdf>> accessed on 13 Nov 2014.

³¹¹ WHO, UNICEF, UNFPA, World Bank, “*Trends in Maternal Mortality: 1990 to 2010*”, (published by WHO, 2012), 23.

<http://www.unfpa.org/webdav/site/global/shared/documents/publications/2012/Trends_in_maternal_mortality_A4-1.pdf> accessed on 13 Nov 2014.

³¹² Ibid. See also HRW, “*Afghanistan: Ending Child Marriage and Domestic Violence*”, (n 19), 6.

³¹³ Jacqueline Mercier, “*Eliminating Child Marriage in India: A Backdoor Approach to Alleviating Human Rights Violations*”, (Boston College Third World Law Journal, Volume 26 / Issue 2, Article 5, 2006), p. 378.

³¹⁴ ICRW and UPFPA, “*Child Marriage in South Asia: Realities, Responses and The Way Forward*”, (n 32), 8.

³¹⁵ Australian AID and others, “*Child Marriage in Southern Asia: Policy Options for Action*”, (n 242).

permit or even participate a child marriage shall be punished up to two years imprisonment and up to 100,000 INR (US\$ 1,800) cash fine.³¹⁶ In addition, the law predicted the cancellation of child marriage and give girl child the right to live separately from her husband or in-laws, until her legal marriageable age.³¹⁷

The National Plan of Action for Children adopted by Ministry of Women and Child Development in 2005 emphasizes on eradication of child marriage in India.³¹⁸ Further to that, India is State party to many international human rights instruments, including CRC and CEDAW. India in its international commitments has legal obligations to protect, promote and fulfil basic human rights of girl children without discrimination in all over the country.³¹⁹

4.2.1 Practice of Child Marriage in Indian Traditional Society

India is a culturally and religiously diverse country where child marriage is commonly practicing in many of its traditions.³²⁰ Fighting against this harmful practice in India has some positive outcomes compare to Afghanistan, Pakistan and some African developing countries. However, a UNICEF research estimated that in 2011 India has more than 23 million child brides, which was 40% of all child brides around the world.³²¹ Rural areas have high rates of child marriage practice compare to urban areas. Majority of Indian people are living in rural areas within their own

³¹⁶ The Prohibition of Child Marriage Act, (2006), Article 10, 11(1). Available at: <<http://wcd.nic.in/cma2006.pdf>> accessed on 16 Nov 2014.

³¹⁷ Ibid, Article 3(4).

³¹⁸ Indian Ministry of Women and Child Development, “*National Plan of Action for Children, (2005)*”. Available at: <<http://www.wcd.nic.in/NAPAug16A.pdf>> accessed on 16 Nov 2014.

³¹⁹ UNICEF, Ministry of Women and Child Development (MWCD) & HAQ, “Handbook on the Prohibition of Child Marriage Act, 2006”, (Published by MWCD & UNICEF), 5. <http://www.unicef.org/india/Child_Marriage_handbook.pdf> accessed 15 Nov 2014.

³²⁰ Carol E. Henderson, “*Culture and Customs of India*”, (British Library Cataloguing, 2002), p. 2.

³²¹ UNICEF, “*Child Marriage in India: An Analysis of Available Data (2012)*”, (Published by UNICEF, December 2012), p. 10. <<http://www.unicef.in/documents/childmarriage.pdf>> accessed on 28 Nov 2014.

community traditional systems.³²² In most Indian traditions women have house cares' responsibilities. Families are not attention to their girls' education and marry them in very early ages.³²³

Studies reveal that child marriage practice has been decreased in India from 47.4% in 2006 to 42.9% in 2008 and to 41.7% in 2011.³²⁴ A UNFPA survey indicates that child marriage among girls under age of 15 has been declining as twice as fast compare to girls under age of 18.³²⁵ Based on an Indian National Family Health Surveys, child marriage of girls under age of 15 falling from 18.2% in 2006 to 10.0% in 2009.³²⁶ UNICEF, other UN agencies as well as the girl children defence organizations are claiming that the declining process has been very slow which is less than one percentage point per year.³²⁷ UNICEF research recognized the following 8 States; *Bihar, Jharkand, Madhya Pradesh, Rajasthan, Uttar Pradesh, West Bengal, Andhra Pradesh and Kamatake* with above 50% of child marriage practice in India.³²⁸ Statistics reveal that still one in each two girls in India become a bride before the age of 18.³²⁹

There are many issues which vindicate the continuation of child marriage in India. Poverty, lack of education and traditional norms such as family honour and dowry are among the significant factors.³³⁰ In some regions like Rajasthan, girls become brides at very early ages. One of the

³²² UNICEF, MWCD & HAQ, "*Handbook on the Prohibition of Child Marriage Act, 2006*", (n 319), 1.

³²³ UNFPA, '*Marry Too Young, End Child Marriage*', (n 1), 46.

³²⁴ UNICEF, "*Child Marriage in India: An Analysis of Available Data (2012)*", (n 321), 11.

³²⁵ UNFPA, '*Marry Too Young, End Child Marriage*', (n 1), 47.

³²⁶ "*National Family Health Surveys (NFHS) in India, 1992–1993, 1999, and 2005–2006*". Available at: <http://hetv.org/india/nfhs/> accessed on 15 Nov 2014.

³²⁷ UNICEF, "*Child Marriage in India: An Analysis of Available Data (2012)*", (n 321), 10.

³²⁸ UNICEF, "*Child Marriage*", (UNICEF Information Sheet, November 2011), p. 1.

http://www.unicef.org/india/Child_Marriage_Fact_Sheet_Nov2011_final.pdf accessed on 15 Nov 2014.

³²⁹ UNICEF, "*Child Marriage in India: An Analysis of Available Data (2012)*", (n 321), 9.

³³⁰ UNICEF, "*Child Marriage*", (n 328), 2.

negative traditional practices, not only in Rajasthan, but almost all over the India, is the issue of dowry.³³¹ In contrast to Afghanistan, in Indian tradition the girls' families are responsible to pay the dowry and conduct the marriage celebration of their girls. Therefore, girls in many Indian families are considered as an economic burden. Culturally, more educated girls in elder ages usually require a higher dowry.³³² Families who live in poor conditions have the perception that as soon as they marry off their girls, they spend less money. For instance in Rajasthan, families taking one ceremony to marry off their several girls.³³³

The second major tradition is the issue of chastity and virginity of the bride which is considered as family honour in Indian culture, not only among the Muslim communities but in Hindu and other religious communities as well.³³⁴ So that, child marriage is a justifiable reason for families to have the feeling that their girls are marrying someone with respect to the family honour and safely control by a man. Further to that, it reduce the parents' concern on their girls' relationship or illegal sex out of marriage as well as other unsafe situations.³³⁵

4.2.2. Child Marriage Consequences in Indian Community

Child marriage as violation of girl's human rights increased risk of maternal mortality, miscarriage, infant death, malnutrition, sterility, school drop-out and sexual abuses.³³⁶ A survey from Bihar and Jharkhand revealed that girls married before the age of 18 were three times as abused and

³³¹ George Thomas, "*India's Innocent: Secret Weddings of Child Brides*", (web-article, CBN News, Nov 4, 2012). <http://www.cbn.com/cbnnews/world/2012/June/Innocence-Lost-Indias-Children-Marrying-at-Age-8/> accessed on 15 Nov 2014.

³³² UNFPA, '*Marry Too Young, End Child Marriage*', (n 1), 5.

³³³ UNICEF, "*Child Marriage*", (n 328), 2.

³³⁴ Ibid, 3.

³³⁵ UNICEF, MWCD & HAQ, "*Handbook on the Prohibition of Child Marriage Act, 2006*", (n 319), 7.

³³⁶ Australian AID and others, "*Child Marriage in Southern Asia: Policy Options for Action*", (n 242).

mistreated by their husbands and in-laws as girls who married beyond 18 years of age.³³⁷ Girls' dropping from school is closely linked to child marriage. Research revealed that from 2007 – 2010 only 49% of girls attended secondary school in all over the country.³³⁸ Practical experience shows that further education of a child bride mostly depends to her in-laws' wishes. Overwhelming majority of uneducated married girls put significant negative effect to the economic situation of the families and their individual economic progress.³³⁹

Sexual violence by husband, which put severe health and psychological consequences, is high among early married girls. Research reveals that around 13% of girls who have married at the ages of 15 – 19 faced this practice. In comparison, 8% of girls who married at elder ages have faced sexual violence.³⁴⁰ Girl children are unable to satisfy their husbands sexually and on the other hand, unprotected sexual activities have severe health consequences on them. "It subjects them to early motherhood, reproductive tract infections and sexually transmitted diseases, including HIV/AIDS."³⁴¹ In addition, early marriage increases maternal mortality and infant mortality rates. Research shows that new born mortality is high among women younger than 20 years old. Statistic reveals that one out of six girls (16%) at the age of 15 – 19 are having childbearing. The statistics in rural areas are twice more (19.1%) compare to urban areas (8.7%).³⁴² These practices exposed overwhelming psychological and negative health consequences on future life of the youngest birth mothers.

³³⁷ USAID & Others, "Marry Me Later: Preventing Child Marriage and Early Pregnancy in India", (published by Dasra's advisory research organization), 54. <<http://www.dasra.org/pdf/child-marriage-report.pdf>> accessed on 27 Nov 2014.

³³⁸ Ibid.

³³⁹ UNICEF, "*Child Marriage in India: An Analysis of Available Data (2012)*", (n 321), 18.

³⁴⁰ Ibid, 23.

³⁴¹ UNICEF, MWCD & HAQ, "Handbook on the Prohibition of Child Marriage Act, 2006", (n 319), 6.

³⁴² UNICEF, "*Child Marriage in India: An Analysis of Available Data (2012)*", (n 321), 20.

4.3. Conclusion

Child marriage practice is relatively high in both Afghanistan and India. In both countries there are many similarities in tradition, culture and social life on the way of practicing child marriage. In contrast the efforts to tackle child marriage is correlatively vary in both countries.

Indian government exposed positive efforts in both legislative and policy level. Adoption of the Prohibition of Child Marriage Act (2006) and the National Plan of Action for Children (2005) are the two major documents strongly emphasizing on eradication of child marriage. The outcome of is the 8% of decrease on the rate of child marriage in all over the India. However, in practice India is still highly suffering corruption and culture of impunity which seriously affect law enforcement institutions in better implementation of the law and fighting against inequality and injustice.³⁴³

Alternatively, Afghanistan government has so far failed to tackle this harmful practice importantly. Child marriage has widespread practice in all over the country. Government law enforcement and justice intuitions are very indifferent to this harmful practice. Government is not yet provide any protective policies in regards to the eradication of child marriage practice. UN agencies and other international and non-government national organizations are unable to implement productive programs due to lack of political will in fighting against this harmful traditional practice. The only positive efforts is the adoption of EVAW law, that is currently use as valid law but facing legislative challenges by majority radical Parliamentarian Members. Afghan government has international commitments and legal obligations to the meaningful enforcement of the EVAW law in all over the country equally.³⁴⁴

³⁴³ UNICEF, “*Child Marriage in India: An Analysis of Available Data (2012)*”, (n 321), 10.

³⁴⁴ HRW, “*Submission on the combined initial and second periodic report of Afghanistan ...*”, (n 257).

CHAPTER FIVE

Conclusions and Recommendations

This thesis acknowledged that child marriage practice perceived as severe human rights violation of girl children. The paper analyzed the human rights dimension of child marriage practice and outlined the major negative effects of this practice on normal life of girl children. Right to education, health, personal development and best interest of the child have been highlighted as significant rights of girl children violated by child marriage. The United Nations since the last six decades are passing series of conventions, resolutions and statements documented child marriage as a harmful traditional practice and required State Parties to take effective actions on eradication of this prejudice practice worldwide. In addition, some regional conventions adopted in Africa, America and Europe, (Asia lacks a specific regional convention on child marriage) to specify 18 years old as minimum age of marriage for both girls and boys and outlawed any marriage below the age of 18.³⁴⁵

UN Special Rapporteurs and UN agencies such as, UNICEF, UNFPA and UN Women as well as some independent research institutions hardly working to identify the negative consequences of child marriage. Many field researches, conferences and development programs have been conducted in order to tackle this harmful practice particularly in developing countries. Further to that, quite number of policy papers, analytical papers and recommendation papers have been provided in relate to child marriage with particular focus in developing world. The current paper

³⁴⁵ UNICEF, “*Early Marriage a Harmful Traditional Practice*”, (Published by UNICEF, 2005), 28.
<http://www.unicef.org/publications/files/Early_Marriage_12.10.pdf> accessed on 19 Nov 2014.

reviewed some of these significant documents in order to highlight international communities' commitments to tackle the practice of child marriage.

Based on compiled information and the analysis in the paper, it is obvious that child marriage is still a pervasive practice in all over the world, particularly in developing countries. It is also cleared that child marriage occurs more likely in rural areas of developing countries where, there are lack of access to justice and education among the local populations. The overwhelming majority of people in the rural areas are living in poor life conditions and in a strict traditions.³⁴⁶ In addition, there is a cohesive interlink between poverty and education. Poor communities are usually uneducated and the combination of a poor and an uneducated community will never pave the ground to stop harmful traditional practices. Because these people are unaware of the future consequences of their wrong doing. In many of these cultures, child marriage of girl children and other domestic violence against women and girls are commonly practicing.³⁴⁷

Girls' access to equal opportunities and rights will improve economic and social developments. Public awareness programs, combating poverty and illiteracy, improving education and health facilities and fighting against negative cultural and traditional practices are the key features to eliminate child marriage. Social and economic development in rural areas of developing countries have explicit effect on the right to life, education, health and other economic and social rights of the communities. These efforts could possibly held through humanitarian aid organizations or government agencies in most developing counties.

³⁴⁶ UNICEF, "*Child Marriage in India: An Analysis of Available Data (2012)*", (n 321), 25.

³⁴⁷ Ibid.

As main comparator the paper reviewed child marriage practice in Afghanistan and India as two developing countries, located in the same region (Southern Asia) with a deep culture and traditional similarities. In both countries child marriage have been commonly practicing, especially among uneducated and poor families who are highly relying to communities' traditional norms. In both countries the statistics are vary and research institutions are yet unable to provide an exact figures about victims of child marriage. Thus, Indian efforts to tackle this practice has positive outcomes. The government passed series of legislations and plan of action on elimination of child marriage practice country-wide. Additionally, the UN and other non-government human rights and humanitarian agencies conducted many productive development programs on eradication of child marriage in many parts of India. The main outcome is that more than 8% of decrease on the practice of child marriage in all over the country.³⁴⁸

In contrast, Afghanistan has not much positive progress combating child marriage practice in the country. The only government efforts is the adoption of EVAW law which has been challenged by the Parliament since May 2013. The UN and other non-governmental human rights organizations' efforts to tackle child marriage and other harmful traditional practices so far are insufficient due to the following reasons; A) Lack of good security, particularly in rural areas where there are widespread practice of child marriages. B) On going culture of violence and local communities' misunderstanding of the concept of human rights and women rights as western ideology and perceived as phenomena against their culture and religious values. C) Lack of political will and support of government from human rights based approach development programs country-wide.

³⁴⁸ Ibid.

D) And widespread practice of informal justice system humbling the rule of law and access to justice particularly in rural areas.³⁴⁹

The analysis illustrates that lack of education could boost the risk of child marriage. To address the shortcomings of the child marriage practice and how to tackle with this harmful practice world-wide and with particular focus on Afghanistan and India, the paper presents the following set of recommendations that should be considered by the UN, International organizations working on women and girls' rights, Policy makers, Indian and Afghanistan's governments and non-governmental institutions and civil society organizations;

Recommendations

“The 2011 UNFPA survey revealed that if international community are not taking urgent actions to end child marriage, another 100 million girl children will be married by 2020”.³⁵⁰ It means that another 100 million girls will be placed at high risk of forced marriage, poverty, illiteracy, domestic violence, sexual violence, health problem including early pregnancy, maternal mortality and many more violence against girl children's rights as the consequence of child marriage. This paper tries to provide series of recommendations with regards to recommendations from UN agencies' research reports and policy papers as well as some papers from other non-governmental institutions. The recommendations will be divided into three main parts;

³⁴⁹ UNAMA & OHCHR, “*Harmful Traditional Practices ...*” (n 248), 25.

³⁵⁰ UNFPA, ‘*Marry Too Young, End Child Marriage*’, (n 1), 3.

1. Recommendations for International Community:

1 - International community including UN and other universal and regional bodies are obliged to bring child marriage topic consistently to the top priorities of their post-2015 agendas.

2 – Ending child marriage should be included in “the UN post-2015 development framework”.³⁵¹

3- Many research papers calling United Nations explicit attention on child marriage in 2015 agenda through adoption of “a UN General Assembly resolution to address child marriage as a violation of children’s rights.”³⁵²

4–Governmental institutions in developing countries should be assisted technically and support financially by the UN agencies and other international institutions to develop, adopt and implement legislations, action plans and development programs on eradication of child marriage practice and other violence against girl children’s rights.³⁵³

5–UN and other donor community should be invested and supported governmental institutions in developing countries to take holistic approach in order to fight poverty, illiteracy and lack of health facilities particularly in rural areas.

6 – Invest and support quality education for children, strengthening of child protection mechanisms and improve public awareness programs in developing countries.

³⁵¹ Ibid, 50.

³⁵²Anthony Davis, Claire Postles and Giorgia Rosa, “*A girl’s right to say no to marriage: Working to end child marriage and keep girls in school*”, (Working: Plan International, New York, 2013), 55.
<http://www.planbelgie.be/sites/default/files/user_uploads/a_girls_right_to_learn_without_fear_working_to_end_gender-based_violence_at_school_plan_international_-_engelstalig.pdf> accessed on 20 Nov 2014.

³⁵³ Australian AID and others, “*Child Marriage in Southern Asia: Policy Options for Action*”, (n 242).

7 - The UN agencies and international community should support research programs in order to enhance data collection as well as monitoring and evaluation on child marriage consequences.³⁵⁴

2. Recommendations to the National Government Institutions:

The recommendations will directly call Afghanistan and Indian governments as the main comparator of this paper.

2.1. Call to the Afghan Government:

1 –Afghan government is obliged to ensure the prohibition of child marriage into its national legislations and strengthen law enforcement institutions through capacity building programs.

2 –Registration of marriage should be a prerequisite and mandatory process before a marriage celebration. Either the Supreme Court or Ministry of Justice (MoJ) should add a new department for example “Marriage Registration Department” in their *Tashkel* (staff structure), to be based at District Municipality Offices to facilitated the marriage registration process.

3 – Afghan Civil Code, Article 70 should be amended and 18 years old has to be recognized as minimum age of marriage for both boys and girls as the country’s international commitments, particularly to CRC and CEDAW.

4 – Afghan Civil Code, Article 71 also need to be amended and right to consent must be given unanimously to girls and boys of marriageable age. Parents’ agreement should be accepted as an ethical requirement for a marriage rather than legal requirements.

³⁵⁴ Ibid.

5 – The EVAW law should be passed by Parliament to become a permanent law and Afghan government must support this law as the only legislation against violence against women and girls in Afghanistan.

6 – The Special Prosecutor Office for violence against women should support to enforce the EVAW law for the protection of women and girls' rights.

7 – Afghan Supreme Court should establish a separate criminal division within the Family Courts at provincial level to deal with violence against women and girls' cases.

8 – Afghan government should include eradication of the practice of child marriage in Afghanistan Millennium Development Goals benchmarks as severe violence against girl children.

9 – The UN agencies and other international institutions should support Afghan government with technical advices as well as preparing policy papers and action plans on eradication of child marriage and other traditional harmful practices against girl children.

10 - The UN agencies and other international funding organizations in Afghanistan should support meaningful development programs on quality education for girls, public awareness programs on human rights, children rights, women rights, access to justice and health services.

11 - Informal justice system in Afghanistan should not be supported and strengthened, or otherwise, amended with rules that harmful traditional practices such as *baad*, *badal*, bride price, etc, must be excluded from local *Shura's* (Council) decisions.

12 – The Afghan government institutions jointly with civil society organizations should work closely with community elders and religious leaders campaigning on eradication of child marriage

and other violence against women and girl children. There are some programs occasionally conducting with the collaboration of MoWA, Ministry of Haj and Religious Affairs and some civil society organizations country-wide, particularly on 16 days of activism against violence against women or International Women's Day. Such programs need to be conducted constantly country-wide, particularly in rural areas.

13 - The Afghan government can use the positive model projects conducted in some region of India that is called "government's cash transfer scheme program" which is an incentive to parents to delay their girls' marriage and keep them in school. As majority of Afghan families are living under a poor life conditions, such project could help them allow their daughters for further education and not marrying them in early ages.

2.2. Call to the Indian Government:

1 – The Indian government's efforts to eradicate child marriage are good, but still India needs to tackle with this harmful practice in all over the country.

2 –India still has major problem in birth registration and marriage registration system county-wide. Research reveals that birth registration is below 41% in India.³⁵⁵ This situation puts negative consequence on programs tackling to end child marriage. Therefore birth registration and marriage registration mechanisms should be support and expanded in rural areas and make it mandatory for families to register new born child as well as the marriage.

³⁵⁵ UNICEF, "Child Marriage in India: An Analysis of Available Data (2012)", (n 321), 32.

3 – India needs more governmental investment on quality education, health services and public awareness programs in rural areas and among the isolated communities.

4 – Indian government should increase number of law enforcement and judiciary organs in rural areas where there are high rate of child marriage practices. Lack of access to justice and law enforcement institutions increased harmful practices such as child marriage.

5 – Indian government should increase “life skills education and economic empowerment programs for girls”.³⁵⁶ Such programs strengthening girls economic and education capability that help the girls not to be a family burden anymore.

6 – Indian government should increase education scholarship programs for girls from rural areas. Such initiative encourage families to allow their girls for further education.

2.3. Call to the Civil Society Organizations:

1 – Civil society organizations are playing a crucial role in assisting governments with institutional development, capacity building and public awareness programs.

2 – Civil society organizations play a significant role as watch dog to criticize and publicize governments’ failure to implement the law meaningfully.

3 – Civil society organizations play a crucial role in collecting data on the violation of women and girls’ rights with particular focus on child marriages.

³⁵⁶ Ibid.

4 – In both Afghanistan and India, civil society organizations need to design and implement meaningful public awareness campaigns on eradication of child marriage practices.

5 – Civil society organizations should work closely with community elders, religious leaders and government stakeholders in rural areas to campaign on negative consequences of child marriage on girl children's future life.

6 – Male communities; fathers, brothers and other male member of the families should get awareness trainings on women and girls rights from rights based approach and gender based violence perspective.

7 – In the Afghan communities, civil society organizations try to work with close cooperation of religious leaders and criticized violence against women and girls particularly child marriage from Islamic perspective.

8 – Civil society organizations can play a crucial role in women empowerment projects in rural areas. In both Afghanistan and India, these organizations can implement women economic programs and educational skills programs among women communities. Such programs enable women to learn a profession in order to have an income and being independent financially.

9 – Civil society organizations should design and implement protective projects to provide educational and vocational programs for women who became the victims of child marriage.

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