



# THE TIPPING POINT PROJECT

A Policy Brief on the Child Marriage Restraint Act, 2017



This paper was prepared based on a study analyzing Child Marriage Laws in South Asia conducted by Dr. Shanaz Huda, Professor, Department of Law, University of Dhaka. The recommendations were formulated from a series of consultations with experts and practitioners. It is expected that the recommendations will be further vetted by policy makers, activists, practitioners and donors to strengthen the legal framework in Bangladesh for the prevention of child marriage.

**ACKNOWLEDGEMENTS :**

CARE Bangladesh extends its special thanks for valuable insights and contributions to :  
Dr. Shahnaz Huda, Professor, Department of Law, Dhaka University  
Manusher Jonno Foundation  
Ain O Shalish Kendra  
Bangladesh National Woman Lawyers' Association



## Context

This paper presents the summary findings of a study commissioned by CARE Bangladesh, conducted to understand child marriage-related laws in South Asian countries that share similar socio-cultural realities with Bangladesh. It provides insight into the newly enacted Child Marriage Restraint Act 2017 of Bangladesh and highlights recommendations from experts and activists for strengthening the newly enacted law and its implementation mechanisms.

South Asia has the highest prevalence rates of child marriage globally, with approximately 1 in 2 girls married off before the age of 18<sup>1</sup>. As with elsewhere in the world, the drivers of child marriage in Bangladesh are multifaceted. A complex set of factors - including deeply entrenched cultural norms and religious beliefs, worries about family reputation and opinions of others in the community, dowry, poverty, parents' desire to secure the safety of girls and their economic well-being – all perpetuate the practice of child marriage. Laws and policies play an essential role in preventing child marriage. A robust legal framework that looks at both prevention and protection measures can create an impetus for transforming social norms that perpetuate harmful practices like child marriage.

<sup>1</sup> UNICEF State of the World's Children 2015  
[https://www.unicef.org/publications/files/SOWC\\_2015\\_Summary\\_and\\_Tables.pdf](https://www.unicef.org/publications/files/SOWC_2015_Summary_and_Tables.pdf)

## An Analysis of Legal Provisions in South Asia

### The Minimum Legal Age of Marriage

Most South Asian countries have introduced or reinforced a minimum legal age of marriage of 18 as stipulated in key international legal frameworks<sup>2</sup>. India introduced a new law in 2006 known as the “Prohibition of Child Marriage Act” which repealed the previous law dating back to 1929. It sets the minimum age of marriage for women at 18 and at 21 for men. This new law also made offences under the Act cognizable<sup>3</sup> and non-bailable<sup>4</sup>, as well as punishable with sentences of rigorous imprisonment. In Bhutan, the minimum age of marriage for both men and women is 18. In Nepal, the minimum age for marriage for both men and women is 20. The Constitution of Nepal explicitly prohibits child marriage and establishes victims’ right to compensation for violations from perpetrators<sup>5</sup>. In Pakistan, the Provincial Assembly of Sindh passed a Child Marriage Restraint Act in 2013, fixing the minimum age of marriage for both males and females at 18.

### Legal Provisions Regarding Exceptions to the Minimum Age of Marriage

India, Pakistan<sup>7</sup>, Nepal and Bhutan do not allow any exceptions to their minimum age of marriage through either the courts or parental consent. Apart from the above mentioned South Asian countries, the trend in recent years in many other countries has been not only towards increasing the age of marriage, but also disallowing any exceptions. In Jordan, marriage below the legal minimum age of 18 is allowed with court permission, but the adverse consequence of such exceptions has become apparent. According to activists and development practitioners, the definition of 18 as the legal age for marriage in Jordan is undermined by the acceptance of court permission,

<sup>2</sup> Universal Declaration of Human Rights and Covenants such as the Child Rights Convention of 1989, the Convention on the Elimination of All Forms of Discrimination Against Women of 1979 and the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage 1962

<sup>3</sup> Cognizable : capable of being judicially heard and determined

## A SNAP SHOT OF CHILD MARRIAGE LAWS IN OTHER COUNTRIES AND REGIONS

The trend is similar in countries in Africa, which have similar although not identical socio-cultural issues. Several African countries have increased the legal age of marriage to conform to international laws and sought to make legal instruments more effective in combating child marriages. For example, the high court of Tanzania, where one third of the population are Muslim, ruled in favor of protecting girls from the harms of child marriage. The court ruled unconstitutional sections 13 and 17 of the Tanzanian Law of Marriage Act, which allow girls to marry at age 15 with parental permission and at age 14 with the permission of a court. Another African country, Chad, which has the third highest rate of child marriages in the world, in 2015, promulgated an ordinance increasing the age of marriage from 15 to 18.

All of these countries have high percentages of child marriages and some also have similar problems as Bangladesh, such as gender inequality, poverty, harmful traditions and insecurity<sup>6</sup>. Other African countries where 18 is the minimum age of marriage for girls include the Central African Republic, Cape Verde, Congo, Djibouti, Eritrea, Gambia and Ghana. There have also been similar legal changes in Latin America. For example, the National Assembly of Ecuador in 2015 approved a reform of the Civil Code and raised the legal minimum age from 12 for girls and 14 for boys, to 18 for both without exceptions.

<sup>4</sup> Non-bailable : capable of being set free on bail

<sup>5</sup> Art. 39. Of the constitution of Nepal

<sup>6</sup> <http://www.girlsnotbrides.org/about-child-marriage/>

<sup>7</sup> The minimum Age of Marriage in the Federal Law of Pakistan is 16 for girls.

which is dependent on the interpretation and discretion of individual judges and is reportedly not difficult to obtain. Court orders may be given for children as young as 15 to marry.

### **Penalties and Compensation:**

Penalties for child marriages have also been made stricter in several countries. The provision of compensation to victims of child marriage has also been included in the law in several countries. For example in Nepal, child marriage is considered to be an offense against the State and therefore the State itself is obligated to initiate investigation and prosecution. The constitution of Nepal also provides compensations to the victims of child marriage.

In Pakistan several provincial legislatures have either increased the age of marriage or the penalties. For example, the Punjab Provincial Assembly in 2015 increased the punishment for parents and clerics who assisted in marriages between children. The Indian Prohibition of Child Marriage Act of 2006 penalizes persons who perform, arrange and participate in child marriages. It also includes provisions of penalty for violation of court orders. Under the Indian law, either party to the marriage





who was a child at the time of marriage, has the legal option to access the Court to have the marriage declared void within three months of turning 20 years of age, provided the couple do not have any children. Therefore, under Indian law, a marriage, where one or both parties are underage, is voidable, which means that the party to marriage who was a child at the time of marriage can access the court to have the marriage declared void or cancelled. In addition, any child marriage solemnized in contravention of an injunction of a Court is considered to be void. Nepal also has provisions declaring child marriages void.

### **An Overview of the Child Marriage Restraint Act in Bangladesh**

Like the other countries discussed in sections above, Bangladesh has also enacted a law to address child marriage. The new law, which is called the Child Marriage Restraint Act, was passed in February 2017 by the Bangladesh Parliament and replaced the previous law of 1929. Despite the absence of a preamble articulating the purpose and principles guiding the law, it clearly aims to prevent child marriages in Bangladesh given that the country has one of the highest prevalence of child marriages in the world. The law was enacted with the purpose of dealing with the issue of underage marriages comprehensively and contains several positive innovations including:

- a. Reiterating the cognizable, non-bailable and non-compoundable nature of the offense
- b. Setting up of Child Marriage Prevention Committees
- c. Strengthening the powers of government officials
- d. Increasing penalties for underage marriages

Despite many of the constructive aspects of the new law however, experts fear that some of these positive measures will be overshadowed by a provision which has been included in the Act under

section 19. While the law sets the age of marriage at 18 for girls and 21 for boys, section 19 provides exemptions, allowing marriage with parental and judicial consent before the minimum age prescribed by the Act under “special circumstances when it is in the best interests of the child.” The section does not however define what these “special circumstances” are, nor does it set a minimum age for marriage in these special cases. There is general concern that this exemption clause will be misused or misconstrued and treated as a license for underage marriage, which is a real risk in a context where governance structures are weak and the majority of the people do not consider child marriage to be harmful.

The other major argument against this particular provision is that it contradicts other national and international legal instruments as outlined below.

### Contradictions with Major National and International Legal Instruments :

<p><b>DOMESTIC VIOLENCE (PREVENTION AND PROTECTION) ACT, 2010</b></p> <p>defines any one under 18 as a child.</p>	<p><b>PREVENTION OF OPPRESSION AGAINST WOMEN AND CHILDREN ACT, 2003</b></p> <p>where sexual intercourse with a girl under age 16 is considered rape. This contradicts the CRMA which allows marriage at any age under the special circumstances</p>	<p><b>CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN</b></p> <p>reiterates that all human beings irrespective of sex are free to develop their personal abilities, pursue their professional careers and make choices without limitations set by gender roles and prejudices</p>	<p><b>CONVENTION ON THE RIGHTS OF THE CHILD</b></p> <p>recognizes that children are entitled to human rights in their own right. It reinforces that a child is anyone under 18 years of age</p>
<p><b>PENAL CODE, 1860:</b></p> <p>where minor girl under the age of eighteen years to go from any place or to do any act forcefully or seduced to illicit intercourse with another person shall be punishable and if the girl is under 14 years of age consent shall not be counted.</p>	<p><b>INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS</b></p> <p>which upholds the equal right of men and women to free and full consent to marriage.</p>		<p><b>UNIVERSAL DECLARATION OF HUMAN RIGHTS</b></p> <p>The right to free and full consent is recognized in the UDHR. Consent can not be free and full if one of the parties involved is not matured to take an informed decision.</p>





## Recommendations for Reforming The Law

Laws are driven by a future vision for a more welfare-oriented and equitable society. The main driver that ought to have influenced the enactment of legal provisions to reduce child marriages in Bangladesh is the State's aspiration for the empowerment and advancement of adolescent girls. The special provision aimed at addressing exceptional situations poses significant risks for achieving that vision and may outweigh benefits as the law gradually comes into practice.

Undoubtedly, Bangladesh also envisions a future where the fundamental rights of all children are protected. Given that girls continue to be disproportionately and negatively impacted by discriminatory social norms in comparison to boys, legal instruments should make an extra effort in facilitating freedom from discrimination based on gender. Below are some proposals that could improve the effectiveness of the law:

### Withdrawal of The “Special Circumstances” Clause:

Experts recommend that the special circumstances clause be withdrawn due to potential for misinterpretation and misuse. These dangers will persist even if the parameters of the special circumstances clause are strictly defined by rules. Another reservation about the special circumstances clause is that in Bangladesh, marriages are usually agreed upon between two parties/families and therefore, once such agreement has been made, it will not be considered necessary for the parties to access the court to obtain approval. Even if the court is given discretion to determine whether a situation constitutes a special circumstance or not, very few people will seek access to the court to obtain permission regarding the issue. Moreover, in the existing socio-cultural context, outsiders will not generally come forward to report a child marriage or intercede on behalf of a child, particularly a girl child whose opinions and choices are usually ignored. The current argument of policy makers that if the administrative mechanism to obtain approval is made difficult then the percentage of child marriage will decrease, does not hold true. The concern is that the Court will only be accessed in circumstances where a criminal offence such as rape or statutory rape has been committed, where a perpetrator will try to avoid punishment by agreeing to marry the survivor.

Moreover, experts and practitioners also question the added value of this exception clause on the grounds that the Child Marriage Restraint Act lays down the minimum age of marriage and punishes and penalizes those involved in solemnization of underage marriages – but it does not declare the marriage itself void. Therefore, marriages of children, including those organized informally, are still considered legally valid. Thus, inclusion of the special circumstances clause is not necessary as it does not close any loophole that the previous law did not already address. On the other hand, the provision creates an opportunity for those who want to misuse it or circumvent other laws. Instead of a separate clause providing for exceptions, the Court's discretion should be increased in other ways, for example, by giving judges the option to give suspended sentences or forego imprisonment and only impose fines on those involved in facilitating under-age marriages.

### Upholding the Principle of Right to Consent:

The purpose of the exception clause cannot be to allow the marriage of very young children, whatever their



age, because it negates all the successes achieved by the Government towards the empowerment of women. According to Islamic law, an adult or a person who has reached the age of puberty must consent to his/her marriage. The parent or other guardian of such person, even if a daughter, has no right to consent on behalf of their child or ward and neither does the Court. The new law and rules of procedures must ensure that the right of all girls, including Muslims, are protected based on their religious laws as well as under international instruments. The positive provisions must be extended to girls of all religion.

### **Promotion of the Principle of Ensuring the Best Interests of the Child:**

The Child Rights Convention, of which Bangladesh is a State-Party, calls for protecting the best interest of the child. The onus of ensuring such paramount interest lies on both the State as well as the parents of the child. Given challenges faced by parents of girls, including pressures of poverty, lack of security and social norms where a girl child is most often considered to be a burden, child marriages are often considered by the parents to be in the best interest of the entire family. The parameters of what constitutes the best interest of the child must be carefully defined and contextualized, so that a girl's opinions, decisions and choices are recognized and valued in the process. A National Committee should be set up with adequate representation of children and adolescents themselves, so that their voices will be heard in determining what should be considered to be in the 'best interest' of a child, which in turn will provide guidelines for the Courts.

### **Appointment of Guardians Ad Litem :**

Questions have been raised as to whether the parties responsible for deciding what is in the best interest of the child have appropriate levels of knowledge, neutrality and the mindset to determine whether applications for underage marriages should be allowed under the 'special circumstances' exception. Suggestions have been made that local government representatives should be included to decide whether a case falls

within the special provision clause. However, in a context where local administration also consists of persons holding stereotypical mindsets, who also have to keep their constituents happy, and given the reality that corruption and nepotism is very much in existence, a better solution is that each court should have a registered pool of Guardians ad litem. The latter could assist the courts in analyzing the cases more neutrally with the main focus being the best interest of the child, as well as ensuring safe space for the girls to share their opinions about any potential marriage. The pool of Guardians ad litem could be drawn from Upazilla and District Women Affairs Officers employed under the Ministry of Women and Children's Affairs and also NGOs with experience doing work on violence against women and children.

### **Annulment of Marriage :**

Many laws in other countries contain provisions declaring child marriages void under certain circumstances. The Bangladeshi law does not include such provisions which has a serious bearing upon a girl's abilities to pursue her aspirations, as well as being able to live a life without violence. The law must create a space where a girl is able to opt out of marriage if it was not an informed decision on her part. This option must be provided within the law for a girl who was minor at the time of marriage. This will also make the law of 2017 consistent with the Dissolution of Muslim Marriages Act of 1939 but must also be available to all persons covered by the Act of 2017.

### **Revisiting the Provision Imposing Punishment on any Underage Person Who Marries :**

Section 7 (2) provides for punishment of any underage person who marries in contravention of the Child Marriage Restraint Act 2017. Such under-aged persons may be punished by detention of up to 15 days and/or a fine up to the limit of Taka 50,000. The clause was presumably included to deter underage persons from entering into marriage by themselves. In practice, the prevalence of such marriage is very low. Generally, the parents/guardians decide on when marriages are to take place. The provision unnecessarily subjects children, both boys and girls, to detention which needs to be avoided under any circumstances. Evidence suggests that punishing young girls with detention has serious consequences and may result in various forms of physical, psychological and sexual abuse by those in charge. Being detained has a certain stigma attached to it which may result in girls being stigmatized and treated with suspicion and unable to easily go back to their homes. Moreover, the practicality of imposing a fine of Tk. 50,000 needs to be considered given the economic realities where most adolescent boys and girls are not economically solvent or employed. The consequence may be additional and unnecessary financial burden on the parents.

### **Include Provisions to Declare Marriages in Breach of a Court Injunction Void :**

The Court may of its own initiative, or on the complaint of any person or being informed by any other means that a child marriage has been arranged or is imminent, issue an injunction against such marriage. Although it punishes any breach of an injunction of the Court prohibiting an underage marriage, such marriage continues to be valid. Provision should be made for such marriages to be declared void.

### **Allocate Resources for Implementation of the Law :**

Experience suggests that many good laws, particularly those related to women and children, are not implemented due to the fact that adequate resources are not allocated for such implementation. In order to make the law against child marriage effective from the onset, adequate resources need to be allocated for implementation of the law.



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