

THE PERSISTING MENACE OF CHILD MARRIAGE: AN ACCOUNT OF NON-LEGAL FACTORS CONTRIBUTING TO INEFFECTIVENESS OF LEGAL FRAMEWORKS

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Abstract: Child marriage is an ever-persisting human rights issue that has been addressed multiple times. However, despite the existing international frameworks and theoretical deliberation, the practice still continues to thrive across the globe. This presents a ground for review of non-legal causes of child marriage. This paper presents an account of child marriage as a human rights issue and reviews such causes by classifying them as basic factors and catalysts, with basic factors being aggravated by catalysts. The author discusses armed conflict as a catalyst that increases impact of basic factors. Additionally, the paper attempts at presenting recommendations to inhibit the effect of such causal factors.

Keywords: Child marriage, forced marriage, armed conflict, child rights.

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1. INTRODUCTION

One of the sustainable development goals, as iterated by the United Nations General Assembly, is to end the ‘harmful practice’ of child marriage by 2030 (UNGA, Oct.2015 § 5.3). The practices of child, early and forced marriage (‘CEFM’) are often clubbed together (UNHRC, 2019; UNHRC, 2015; UNHRC, 2014) and addressed as a ‘harmful practices’ (UNGA, Jan.2015 § 7). To elaborate, early marriage includes child marriages as well as marriages that happen earlier than they were intended to be because of undesirable circumstances, be it economic, social or cultural (UNHRC, 2014 § 5). Early marriage need not necessarily involve children and involves consent on the part of either or both parties to escape an extenuating circumstance. Had such circumstances been absent, either or both parties would have married at a later age. Forced marriage, on the other hand, is also not age-specific as individuals could be married off forcefully at any age (UNHRC, 2014 § 6; CEDAW/CRC, GC 18 § 22). Simplistically, forced marriage lacks ‘free and full consent’ on part of one or both contracting parties, regardless of their age. Child marriage is a specific form of forced marriage where there is an absence of free, full and informed consent owing to the age of either or both contracting parties. The United Nations Children’s

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Fund ('UNICEF'), in its report on Harmful Practices, defines child marriage as 'formal marriage or informal union of any child *under 18 years of age*' (UNICEF, Jun.2021). The right to marry with full and free consent is a recognized human right, available equally to both men and women (UDHR, art 16.2; ICCPR, art 23.3; ICESCR, art 10.1). In 2014, the Committee on the Elimination of Discrimination against Women ('CEDAW Committee') and the Committee on the Rights of the Child ('Child Rights Committee') issued a Joint General Recommendation on the Elimination of Discrimination against Women and Girls. The Recommendation noted that child marriage or early marriage 'is any marriage where at least one of the parties is under 18 years of age' and considered 'child marriage' to be 'a form of forced marriage, given that one and/or both parties have not expressed full, free and informed consent'(CEDAW/CRC, GC 18).

1.1. Legal frameworks addressing child rights and child marriage

States bear a positive obligation to safeguard the rights of their subjects at all times. This state obligation flows from right to life of every person, which is recognized by international and regional human rights instruments. Article 2 of the Universal Declaration of Human Rights ('UDHR') and Article 6 of the International Covenant on Civil and Political Rights ('ICCPR') mention the right to life of all persons. Regionally, Article 2 of the European Convention on Human Rights ('ECHR') mentions the right to life of every person as well as a duty of the State to protect the said right. The European Court of Human Rights ('ECtHR') explains the state duty to be twofold, i.e. refraining from unlawfully and intentionally taking life of those within its jurisdiction (*L.C.B. v. UK, 1998*) and; to safeguard the lives of those within its jurisdiction (*Câmpeanu v. Romania, 2014* § 130). The ECHR also places a 'procedural' obligation on States to take preventive measures to safeguard life of those under its jurisdiction (*Emin v. Cyprus, Greece and the United Kingdom, 2010*); and an 'assistive' obligation on States where evidences are situated, to assist the investigating states (*Rantsev v. Cyprus and Russia, 2010* § 245). This, however, does not imply a Contracting State to exercise universal jurisdiction (*Ibid* § 244). The State's obligation, however, also extends to refugees in the State's jurisdiction. The ECtHR has clarified that States cannot expel (*M.A. v. France, 2018; Salah Sheekh v. The Netherlands, 2007* § 135) or refuse admission (*N.D. and N.T. v. Spain, 2020* § 178) of refugees at border or high seas (*Hirsi Jamaa and Others v. Italy, 2012*). The obligation of hosting State includes ensuring the safety of returning refugee to a 'safe third country' and states have procedural obligation to ensure the safe nature of such third countries (*Ilias and Ahmed v. Hungary, 2017* §§ 124-141).

When it comes to the rights of children, primary focus is on the general right to life of all persons, since a child is also a person. Just as the state is obliged to safeguard the right of all persons in their jurisdiction, it has an implied obligation to protect all children in its territory, irrespective of their status as citizen or refugee. Article 2 of ECHR has been observed to include the right to life of all persons irrespective of their age (*Boso v Italy, 2002*). Protecting children is a State obligation since children are deemed to be more vulnerable than adults. The ECtHR has clarified this obligation to be stronger than any consideration which relates to the child's status as an irregular migrant (*Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, 2006* § 55; *Muskhadzhiyeva and Others v.*

Belgium, 2010 §§56-58; *Popov v. France, 2012* § 91). More specifically, the Convention on the Rights of the Child ('CRC') guides a state to place primary consideration on the 'best interests' of the child while making laws that would relate to children (*Rahimi v. Greece* § 108; *Popov v. France* §140). Similar obligation is also placed on States by the ECHR, where they should provide special protection and care to children and ensure reasonable measures to be taken in order to prevent ill-treatment of children (*Rahimi v. Greece, 2011* §§ 60 and 62; *Khan v. France, 2019* § 73). For example, the ECtHR held that the state obligation under Article 8 of the ECHR to respect private and family life cannot be interpreted as requiring a State to recognize a marriage that was entered into below the age of 18 years (*Z. H. and R. H., 2015*). In this case, the applicants had a religious marriage in Iran, with their ages being 14 and 18 years.

The CRC defines a child as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier' (CRC, art 1). The Convention also imposes an obligation on the State Parties to 'respect and ensure the rights set forth in the [CRC] to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status' (CRC, art 2). Furthermore, it also imposes an obligation on States Parties to 'recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to *interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development*' (CRC, art 32.1). Although this provision does not mention child marriage, it nevertheless implicates it, because child marriage interferes with a child's education and is harmful to the child's health, physical, mental, and moral/social development (*Loveness, 2015*). Finally, the CRC imposes an obligation on States Parties to abolish all 'traditional practices prejudicial to the health of children' (CRC, art 24.1). Child marriage, of course, is one such practice. Regionally, with respect to obligations imposed on States by their national constitutions, the Constitution of the Republic of South Africa 1996, Section 28 imposes an obligation on the State to ensure that 'Every child has the right- [...] (d) to be protected from maltreatment, neglect, abuse or degradation; [...].'

International and regional human rights instruments address the issue of child marriage directly or indirectly. Although it does not specifically prohibit child marriage, the UDHR, nevertheless, deals with marriage. Article 16(1) states that '[m]en and women of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family.' It is worth noting that the right to marry is granted to 'men and women of full age' and not to 'children.' In addition, Article 16(2) deals with 'consent to marry' i.e., '[m]arriage shall be entered into only with the *free and full consent* of the intending spouses.' Laws of many States consider a child to be incapable of freely granting such consent because of his or her immaturity (see, for e.g., *Rebeca Z Gyumi v. Attorney General, 2017*). Article 16(2) of the Convention on Elimination of All Forms of Discrimination against Women ('CEDAW') is more direct where it states: 'The betrothal and marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration

of marriages in an official registry compulsory.’ Similarly, the UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage expressly prohibits child marriage and notes complete abolition of child marriage as the purpose of the Convention. There are only 16 signatories to the Convention and 55 state parties till date with many states opting for reservations such as Bangladesh which reserved its right to allow child marriage when accorded by personal laws.

Regionally, the Parliamentary Assembly of the Council of Europe has adopted a recommendation to set minimum age of marriage at 18 years, for both men and women, with an explicit prohibition on child marriage (Res. 1468, 2005, § 7). Similarly, in Africa, the Maputo Protocol obliges the State parties to guarantees men and women equal rights in marriage (Maputo Protocol, art 6). The African Union (‘AU’) states that have neither signed nor ratified the Protocol yet are Botswana, Egypt, and Morocco. The states that have signed but not yet ratified are Burundi, the Central African Republic, Chad, Eritrea, Madagascar, Niger, the Sahrawi Arab Democratic Republic, Somalia, South Sudan, and Sudan. The African Charter on the Rights and Welfare of the Child (‘ACRWC’) prohibits child marriage and mandates State parties to set the minimum age of marriage at 18 years, with no exception (ACRWC, art 21.2). Morocco, Saharawi, South Sudan, Somalia, Tunisia have not ratified the ACRWC.

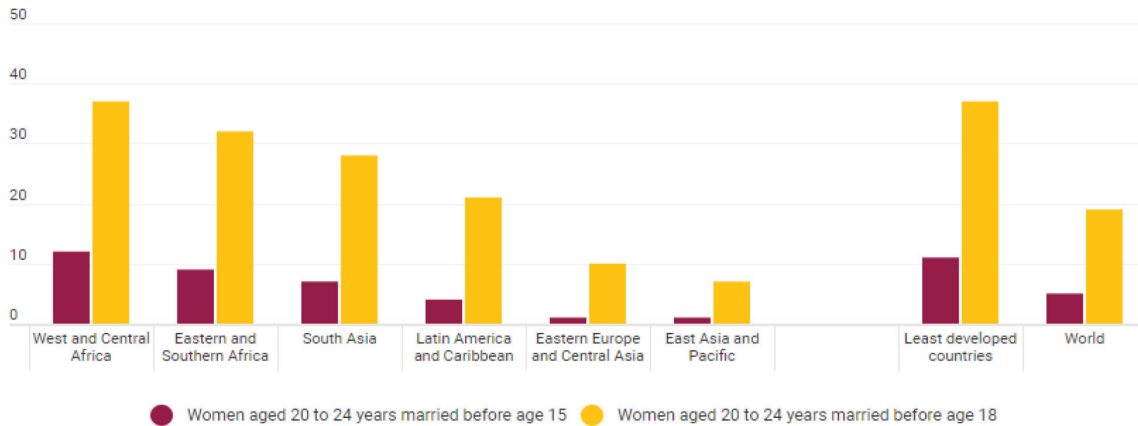
1.2. Ineffectiveness of legal frameworks

The ineffectiveness of international, regional and national legal instruments that oblige States to ensure best interests of children is evident from the statistics, reproduced below as Figures 1 showing increased rate of child marriage in South African countries, most of which have national laws and regional human rights instruments specifically in place to ban child marriage.

Tanzania, with 37% girls being married below the age of 18 years, has a Constitution that mandates protection against gender discrimination and guarantees equality before law (Tanz. Const., art 12). Still, the country had in place, the Law of Marriage Act, 1971 that allowed marriage of girls upon reaching the age of 14 years, while the minimum marriageable age for boys was set to 18 years. This law was declared unconstitutional by the High Court of Tanzania, in the decision of *Rebeca Z Gyumi v. Attorney General*, where the petitioner argued the law allowing different minimum marriageable ages for girls and boys to be discriminatory on the ground of gender. The Court, importantly, also observed the vulnerability of a 14 year old girl to be such that that a consent sought from her would not be free consent (*Rebeca Z Gyumi v. Attorney General, 2016*). Therefore, the impugned legislation was declared unconstitutional and the government was ordered to review the legislation in accordance with the state obligations under Maputo Protocol and African Charter on the Rights and Welfare of the Child. This decision was appealed against in the Court of Appeal, however, the appeal was dismissed (*Attorney General v. Rebeca Z Gyumi*).

Zimbabwe is another country that has ratified the African Charter on the Rights and Welfare of the Child as well as the Maputo Protocol. According to UNICEF, 34% of

Percentage of women aged 20 to 24 years who were first married or in a union before age 15 and before age 18, by region



Notes: Estimates are based on a subset of 101 countries covering 77 per cent of the population of women aged 20 to 24. Regional estimates represent data covering at least 50 per cent of the regional population. Data coverage was insufficient to calculate regional estimates for the Middle East and North Africa, North America and Western Europe.

Figure 1: Region-wise representation of women married below the age of 15 and 18 years
 Source: UNICEF Global Databases, 2022.

girls aged under 18 are married (UNICEF, 2021). The Constitutional Court of Zimbabwe was approached in the case of *Loveness Mudzuru & Ruvimbo Tsopodzi v. Minister of Justice and Parliamentary Affairs*, challenging S. 22 (1) of the Marriage Act which allowed marriage of girls below the age of 16 years and boys below the age of 18 years, if consent of the Minister is sought. The petition also challenged the Customary Marriages Act as unconstitutional since it did not provide for a minimum age of 18 for marriages contracted under customary law. The statutes were argued to be against Section 78 (1) of the Constitution that mandated minimum marriageable age to be set to 18 years. More importantly, the Court observed that children form a vulnerable class that is incapable of representing themselves before the Court for seeking relief and that the Constitution places an obligation on the State to safeguard their rights. Furthermore, the Court emphasized the obligation of the state to abide by international instruments that have been ratified, this obligation being stated in the Constitution itself, under Section 34. It is important to note that the impugned statutes were in place even though the state had ratified the CRC, ACRWC and the CEDAW, all of which mandate a progressive interpretation of the minimum marriageable age, with the CEDAW and ACRC explicitly mandating against child marriage.

While commenting on the periodic report submitted by the state of Eritrea, the Child Rights Committee conveyed its concern about the continuing practice of child marriage despite the civil laws formally setting 18 years as the minimum marriageable age (CRC, 2008 § 62). It was noted by the Committee, that children between 13 and 15 years are married off under customary practices (Ibid). This is concerning since the African regional instruments also clearly stipulate 18 years to be the minimum marriageable age.

As compared to girls, lesser boys are married off before they turn 18, the number of child grooms being 115 million globally. Arthur *et al.*, in their paper while examining child marriage laws and minimum marriageable age around the world, find that ‘significantly more countries set a minimum [marriageable] age below 18 years for girls’ than for boys, or allow customary child marriage for young girls, resulting in more child brides than grooms (Arthur *et al.*, 2018). This is evident from the data reproduced below in Figure 2.

Much national legislation also deals with child marriage. For example, South Africa’s Children’s Act, through Section 12 (2) prohibits the arrangement of marriages or engagements for children below the minimum age for a valid marriage. In India, The Prohibition of Child Marriage Act, 2006, through its Sections 9, 10 and 11 criminalises child marriage. Child is defined in Section 2 (a) of the Act to be any person below the age of 18 years for a female and 21 years for a male. Recently, a Bill has been introduced in the Parliament to increase the minimum age of marriage for female to 21 years (Amendment Bill, 2021). However, UNICEF reports that 50 million of the 650 million girls alive today, who were married before they turned 18 years, were from Southern and Eastern Africa (UNICEF, May 2022). The Indian plight is not so impressive either, with about 23% of women aged 20-24, having been married before the age of 18 years (NFHS-5). These concerning statistics depict the situation in countries with national legislations, specifically banning the practice of child marriage.

Percentage of men aged 20 to 24 years who were first married or in a union before age 18, in countries where child marriage prevalence is above 10 per cent

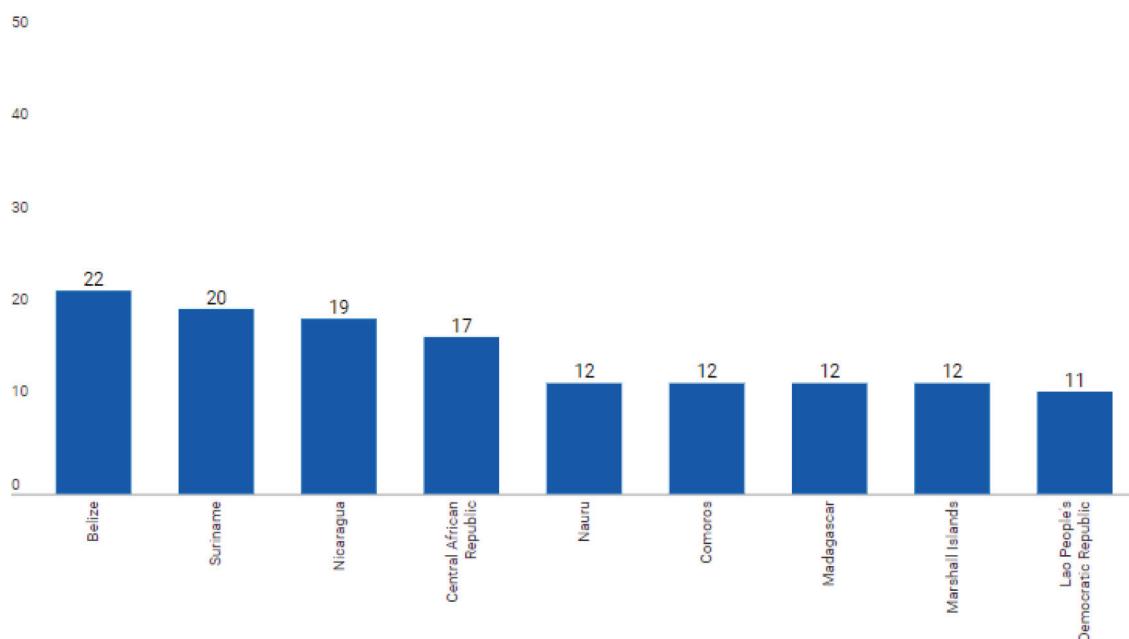


Figure 2: Region-wise representation of men married below the age of 15 and 18 years

Source: UNICEF global databases, 2022.

Though, the prevalence in the practice of child marriage is decreasing globally, still the total number of girls who are married before they turn 18, is concerning. The figure stands at 12 million child brides per year, with the most positive progress having been made by South Asia, where the rate of child marriage has decreased by almost a third (UNICEF, May 2022). Douglas observes that reviewing international standards on a particular issue helps states develop better internal policies (Douglas, 1997). However, from the above discussion, one can conclude that such review might not be very helpful since the rate of child marriage is still higher in countries with specific legislations banning the practice. This presents a need for finding other factors that have been making such national legislations and regional and international human rights instruments ineffective. The paper attempts at delineating and discussing these non-legal causes, utilizing the doctrinal methodology of research, with an aim to present recommendations to mitigate the effect of such factors.

2. CHILD MARRIAGE AS A HUMAN RIGHTS ISSUE

In July 2015, the Human Rights Council adopted its first substantive resolution recognizing child and forced marriage as a human rights violation (UNHRC, 2015). The Human Rights Council requested the UN High Commissioner for Human Rights to organize an expert workshop to review and discuss the impact of existing strategies and initiatives to address child, early and forced marriage (UNHRC, 2017) and in the UNGA's 71st session, a detailed report in progress in efforts to eliminate child, early and forced marriages from April 2014 to May 2016, was presented (UNGA, 2016). The Child Rights Committee (CRC GC No. 4 (2003) §§ 6, 20) and UNICEF (UNICEF 2005) have observed that child marriage is a 'harmful traditional practice' because of the impact it has on health of young girls (CRC GC No. 4, 2003 §6). Child marriage increases the risk of sexual and mental abuse (CRC, art 19) as well as domestic violence (Kidman, 2017) at the hand of the elder spouse (Jensen and Thornton, 2003; Mathur *et al.*, 2003); sexual health risks (Cook *et al.*, 2004), obstetric fistula (Cook *et al.*, 2004), permanent infertility (Raj *et al.*, 2009) and even death (UNGA, 2018 § 6; Nour, 2009) due to early pregnancy (Nove *et al.*, 2014).

Even though the risks and consequences faced by boys and girls due to early marriage are different, due to their biological specificities, the practice is unarguably a rights violation for children of both sexes. Child marriage violates right to health, which is an important human right mentioned in leading human rights instruments (UDHR art 12). In addition to this, CRC mandates that children have a right to enjoyment of 'highest attainable standard of health' (CRC art 24.1) and 'standard of living adequate for the child's *physical, mental, spiritual, moral and social* development' (CRC art 27.1). A child suffers harm in such union and this also affects their mental and social development. When a child is meant to be brought up in an environment conducive for their overall development, child marriage, on the contrary, results in the exact opposite.

The CRC stipulates an obligation upon states to ensure that 'best interest' of child is maintained in *both* public and private spheres (CRC, art 3). Child marriage threatens a child's development, safety, and survival, all of which are pivotal while deciding the best

interest of a child (CRC, 2013 GC 14 §§ 48-79; CRC, 2003 GC 4 §§ 6, 20). To decide his best interest, a child should exhibit a certain level of maturity (CRC, art 12). Interestingly, in absence of consensus over the age of adulthood, states still tend to allow child marriage claiming that maturity could be reached as soon as puberty is attained. However, it is argued that the element of ‘free and full’ consent, a prerequisite of marriage, would still be lacking in such marriages. *First*, while it is true that these forms of marriages often do not involve ‘consent’ on the part of the bride, it is important to distinguish between ‘consent’ given freely and ‘consent’ given through coercion, lack of information, and other factors surrounding children living under extreme poverty. This is the reason why many legal scholars and NGOs that advocate on behalf of children argue that a child by definition, cannot grant consent to enter into a marriage. Any such consent by a child to enter into marriage is by definition, coerced, and hence, is null and void. Moreover, child marriages are generally arranged by parents. For example, Article 15 of Yemen’s Personal Status Law, 1992 stipulates no minimum marriageable age and Article 23 does not require the bride’s full and free consent. Statutory provision mandating 15 years to be minimum marriageable age was repealed in 1999. With marriage decisions being made by the bride’s guardian, such marriages are not consensual in any sense. Another study focused on child marriages in Ethiopia found that 71 per cent of the child brides had never seen their husbands until after marriage (Dagne 1994, pp. 35–38). A child tends to have restricted capacity to take free decisions under the guardianship of his parents/guardians. Hence such consent is tainted with the parent’s/guardian’s views and not ‘free and full’, as required (Pupavac, 2001). *Second*, and more importantly, it is not the lack of consent that makes CEFM practices harmful. It is the very nature of CEFM practices that makes them harmful. In other words, child marriage, whether undertaken with the consent of the child or not, subjects the child to a life of suffering, exploitation, and degradation. The practice of child marriage violates multiple human rights as discussed above.

3. MINIMUM MARRIAGEABLE AGE

It is very important to draw a clear distinction between the age of adulthood and the minimum marriageable age. Age of adulthood might be determined by taking into consideration factors like maturity (Spear, 2004), minimum marriageable age has to be determined by keeping in picture biological (Stöppler, 2019) and cognitive development (Blakemore and Choudhury, 2006), as well as sexual maturity of the person (Eriksson, 1992). It is possible that according to a national legislation, a person might reach the age of legal majority and still not have attained the marriageable age. For example, according to Section 3 of the Indian Majority Act, 1875, every person who is domiciled in India shall attain the age of majority at 18 years. Such age of majority is important for the purpose of legal representation, entering into valid contract and other related legal issues. However, a male aged 18 years of age cannot legally be a party to a valid marriage according to the Prohibition of Child Marriage Act, 2006, that defines a child to be someone below the age of 21 years, if it is a male and 18 years, in case of female. In Iran, for example, the age of majority or legal adulthood is 9 years for girls and 15 years for boys according to Article 1210 of the Civil Code, 1928. While marriageable age is defined at 13 years for girls and 15 years for boys, there is no specific age limit for marriage in Iran and marriage is possible at any age. This is in accordance with the Article 1041 of the Code which

states that ‘marriage before puberty by the permission of the Guardian and on condition of taking into consideration the ward’s interest is proper’.

‘What constitutes a ‘child’ in one place and time and under one cultural, knowledge and legal regime *can differ*’ under another legal regime (Mazurana, 2019). As opposed to the argument by the Society of Adolescent Health and Medicine (SAHM, 2017, p. 758), this lack of consensus is not entirely due to the absence of a universally accepted definition of child or age of adulthood in the international instruments addressing child rights. It is seen that the definition of child is non-uniform within national legislations as well. While factors like religion (Al-Dawoody and Murphy, 2019) and cultural traditions (Boyden and De Berry, 2004) do contribute to the determination of minimum marriageable age, they might not affect the legal age of majority, which might be higher or lower than the marriageable age. Article 3 of the Cuban Family Code authorize allows marriage of female at 14 years and male at 16 years as an exception, even though the minimum legal age of marriage is set at 18 years. In a report, the Committee on the Rights of the Child expressed its concern regarding the exception in the Cuban legislation, which puts young girls a risk of sexual exploitation at the hands of elder men (CRC, 2020).

Such a lack of uniformity also prevails among regional instruments. For instance, the Maputo Protocol, through its article 6, clause (b), stipulates for the enactment of domestic legislation that guarantees minimum marriageable age for women to be 18 years. On the other hand, the South African Development Community’s Protocol on Gender and Development, 2008, mentions that marriage below the age of 18 years shall not be allowed by states *unless otherwise specified* by law by taking into consideration the *best interest and welfare of the child* (SADC, 2008, art 8.2 (a)). The terms ‘best interest and welfare of the child’ have not been explained in the document allowing states to argue, even on flimsy grounds, that marriage at an age lower than 18 was justified because it was contextually in the best interest of the parties.

It is noteworthy that what constitutes a child differs by culture and location and many scholars agree that a universal definition of a child is not possible currently. CRC, under Article 1, defines child as ‘every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier’. This definition presents two gaps that could let non-uniformity seep in. First, the definition is applicable only ‘for the purposes’ of the Convention, which sets minimum standards for treatment of children. However, the minimum standards for the treatment of children are set clearly by the CRC. So, even though CRC restricts the scope of its definition to be utilized for the ‘purpose of the Convention’, the wide ratification of the instrument signifies applicability of the definition of child under Art.1 of the Convention to be consented by the 195 states which have ratified the Convention, with an exception of United States. State ratification, a voluntary act of the states signifies their consent. Given the binding nature of the treaty, a safe conclusion would be that 196 state parties are bound by the definition in Article 1 of the Convention. *Secondly*, the definition provides an exception to the minimum age by allowing majority to be attained earlier by a law applicable to the child, thus opening way for domestic law to override even when states have ratified the Convention. However, even though such exception is in place, regional human rights instruments have been

inclining towards the definition utilized by the CRC, rather than setting a lower age of majority attainment. In ACRWC, the marriageable age is mentioned as 18, without any exceptions allowed, unlike the SADC Protocol discussed earlier. Such strict and clear wording is beneficial since they disallow interpretation and exceptions that could defeat the objective of the instrument itself.

4. NON-LEGAL CAUSAL FACTORS FOR CHILD MARRIAGE: 'BASIC' FACTORS

The driving factors behind the practice can be classified as '*basic factors*' and '*catalysts*'. 'Basic' factors lead to the practice, regardless of peace or conflict and 'catalysts' are situations that amplify the impact of basic factors. Traditional norms, economic constraints and lack of education are 'basic' factors. Armed conflict is a 'catalyst' since it amplifies the impact of these 'basic' factors. Additionally, armed conflicts also act as a 'basic' factor for certain aggravated practices, such as mass abduction of bush wives, and servile marriage, which do not occur during times of peace.

4.1. Traditional Factor

Jamobo in her paper, *The Developmental Effects of Child Marriage* concisely notes traditional reasons for child marriage:

Early marriage in many tribes is looked at as a way of protecting the girl, thus the wife is '*protected*', or placed firmly under male control; that she is submissive to her husband and works hard for her in-laws' household; that the children she bears are thus legitimate; and that bonds of affection between couples do not undermine the family unit. Parents may genuinely feel that their daughter will be *better off and safer* with a regular male guardian (Jamobo, 2012, emphasis supplied).

Levine *et al.* note that traditional reasons for child marriage are rooted in the gendered roles that are assigned to women which include maintaining the household and rearing children (Levine *et al.*, 2008). Traditional societies evaluate the social standing of a woman by her capacity to further such roles. Therefore, young girls are seen as lucrative options for brides owing to their stamina to carry out household chores and bear children (El-Arab and Sagbakken, 2019). Additionally, such societies also attach very high importance to the virginity of unmarried girls who are married off early to maintain family's honour and reputation (Jensen and Thornton, 2003, p. 18; Fahimi and Ibrahim, 2013). South Africa's *ukuthwala*, is a customary bride abduction practice prevalent among communities in the Eastern Cape and KwaZulu Natal (Karimakwenda, 2021). Kidnapping of girls for marriage among the *Latuka* group in Sudan, or the widely known customary practice of 'bride-stealing' has recently been turned down by a South Sudan court, which annulled a child marriage where the bride was 16 years old. This decision has been welcomed by activists across Sudan, where the rate of child marriage is high, despite regulations against the practice (Toby, 2019). Although bride kidnapping (bridenapping) is not always a form of a child marriage, some of it, specifically that involving children, usually leads to forced and child marriage. For instance, Country Reports on Human

Rights Practices published by the U.S. Bureau of Democracy, Human Rights and Labour, notes that many abducted young girls are often repeatedly subjected to rape and are then forced into marriage with their perpetrators to avoid the shame of having been raped (Country Report on South Sudan, 2019).

When it comes to CRC, the seemingly universal acceptance of the Convention due to its wide ratification is overshadowed by the reservations that states have opted for with regard to the application of the Convention for upholding its religious, traditional, or cultural values. The Committee on the Rights of Child observed that reservations regarding many articles of the Convention are made by states to comply with Islamic law and traditions (CRC, 2000 § 29). Bartels *et al.* present a study aimed at understanding the roles of factors which increase the rates of child marriage among Syrian refugees in Lebanon (Bartels et al., 2018). They found the contribution of traditional factor to be higher than other factors (Ibid). In one survey, Syrian parents who were interviewed cited the concept of *al sutrah* (which is a desire to protect the family's reputation and honour) as a reason for marrying off their daughters early to protect them from increased risk of sexual violence during conflicts (El-Arab and Sagbakken, 2019, p. 6).

4.2. Economic constraint

In addition to the above factors, parents also resort to child marriage as a strategy for economic survival. (Jensen and Thornton, 2003, p. 11). In its report entitled, *Early Marriage: A Harmful Traditional Practice*, UNICEF cites 'economic pressures' as a major reason for child and early marriage (UNICEF, 2005, p. 5). This report analyses data from different countries and finds the prevalence of child marriage to be maximum in the 'poorest 20 per cent of the population' of the countries chosen for study (Ibid). Likewise, UNICEF Innocenti Research Centre explains in its report that a young girl is considered an 'economic burden' in a family struck by poverty (UNICEF Innocenti, 2001, p. 6, emphasis supplied). Parents shift the financial burden of sustenance to the groom by marrying off their daughters early. (Ibid, pp. 2, 6). The report further notes, that sometimes, the family may even receive a 'bride price' for their daughters (Ibid, p. 6). Often young girls are priced higher which motivates the families to sell them and this, in turn, leads to the creation of a child bride selling industry, especially prevalent in Tanzania (Corno and Voena, 2021). Similar situation is reported in Nigeria where the cultural practice of bride price is an important factor inducing sale of young girls in marriage by poor families (Ibid).

Economic constraint as a causal factor also explains the increase in rates of child marriage during the COVID-19 pandemic (UNICEF, Mar. 2021). In the current pandemic situation, UNICEF estimated a notable rise in the practice, with around 10 million girls being at risk of being married early, due to poverty (Ibid). Describing the 'shadow pandemic' as a driving factor behind early marriages across the world, Sara Thompson notes financial desperation, loss of jobs, and closing of schools during lockdowns as major reasons for parents marrying off their adolescent daughters (Thompson, 2020). Reports from Ethiopia, after two months of schools having been closed, note that over 500 child marriages had been stopped by local NGOs (Wuilbercq, 2020). More than 200 such

marriages were stopped in Bangladesh, by Manusher Jonno Foundation, a local human rights organization (Tithila, 2020). Notably, both Ethiopia and Bangladesh are listed by UNICEF as countries with very high rates of child marriages and both nations stipulate 18 years as the minimum marriageable age. Individual violators of domestic legislation prohibiting child marriages are driven by economic and traditional factors that are often more pressing than the legal mandates.

4.3. Armed Conflict

Mourtada *et al.* note that conflicts even add ‘new factors’ that encourage parents to resort to the practice of child marriage (Mourtada *et al.*, 2017). This section discusses armed conflict as a factor for increase in aggravated forms of child marriage. Parents often consider child marriage as a ‘*protective strategy*’ to save their girls from being recruited as child soldiers (Park, 2006; McKay and Mazurana, 2004). Moreover, displacement and migration, which result from continued conflict (Lischer, 2007) lead to additional vulnerabilities such as trafficking and abduction of girls (Human Rights Watch, 2016) for their involvement in harmful practices e.g., forced prostitution, sexual slavery, and temporary marriages (UNHRC, 2019 § 6). Families, therefore, marry their girls at an early age to protect them against these exploitations.

An aggravated form of exploitation in areas under armed conflict is the forced marriages of girls or ‘jungle/bush’ wives. Eboe-Osuji remarks that the term bush/jungle/rebel wife came into being during the Sierra Leone Civil War to describe the plight of young women and adolescent girls during armed conflicts (Eboe-Osuji, 2012, p. 91). In the international criminal law jurisprudence, this practice has been noted to be a crime against humanity, with convictions being made by the Special Court of Sierra Leone (‘SCSL’), the Extraordinary Chambers in the Courts of Cambodia (‘ECCC’), and the International Criminal Court (‘ICC’) (*Brima et al.*, 2007; *Nuon Chea et al.*, 2010; *Charles Taylor*, 2012; *Ongwen*, 2016). During the Khmer Rouge regime, adolescent Cambodian girls were married off men they had never met. Such impersonal marriages were conducted in mass ceremonies, held publicly (*Nuon Chea et al.*, 2010 § 844). Even though such marriages were temporary and couples parted ways a few days post consummation, parents consented to such marriage to avoid their daughters from being recruited as labours (Jain, 2008, pp. 1024-25). The ECCC found the nature of such forced marriages to be that of crime against humanity, categorizing it as ‘other inhumane acts’ (*Nuon Chea et al.*, 2010 § 858). In Uganda, the rebel group which began to attack the civilian population after losing support, engaged in the mass abduction of adolescent females, who were then forced to become the wives of such abductors (Carlson and Mazurana, 2008, p. 4). Leaders higher in ranks had as many as 40 wives who were forcefully engaged in the armed rebellion apart from sexual slavery (Ibid). In the *Ongwen* case, the Appeals Chamber of the ICC held forced marriages to constitute ‘other inhumane acts’ within the meaning of the Rome Statute (*Ongwen*, 2016). In the Sierra Leone conflict, both the rebel forces and the government forces were found to be involved in the abduction of girls and women, who were forcefully made ‘bush’ wives of their captors (Human Rights Watch, 2012). Reportedly, the captives were exposed to cruelty and sexual violence, and slavery (STRC, 2004 Vol 2 § 511), with young girls being targeted more than women (STRC, 2004 Vol 3A § 127). In the *Charles*

Taylor case, the SCSL Appeals Chamber found the accused guilty on counts of sexual slavery and other acts of sexual violence while refusing to consider forced marriage as a non-sexual act classified as ‘other inhumane acts’ (*Charles Taylor, 2012* § 428). On the other hand, the Appeals Chamber in the *AFRC/Brima* case recognized forced marriages to fall under the category of ‘other inhumane acts’ under crimes against humanity (*Brima et al., 2008*). This classification was justified by scholars who perceive forced marriage as a ‘multi-layered’ act that includes both sexual and non-sexual abuse (Nguyen, 2014, p. 37). Eboe-Osuji believes that forced marriages are always sexually predatory in nature, be it accompanied by rape of the intended wife or not (Eboe-Osuji, 2012, p. 91). Theoretically, two explanations for this proposition are supplied by the author (Ibid). First, the chattel theory which explains women being captured, raped and married by militants, just like other chattels, to establish or celebrate their victory (for instance, bush wives in Sierra Leone). Second, is the prize theory of rape, correlative to which is the practice of inducing young men to join the militant groups to get the license to rape and marry non-combatants. For instance, reports from the Vietnamese war mention usage of sexual violence and forced marriage as a means to only encourage more young men to join the combat so that they could establish multiple sexual contacts by means of raping women from the enemy’s side. Sexual violence was also used as a method to obtain information from the enemy side where wives and other female relatives of the military personnel were raped or threatened to be raped if such information was not supplied (Zipfel, 2013). Apart from forced marriage, young girls are also increasingly susceptible to ‘servile marriage’, where the spouse is treated as a commodity that the owner can buy, sell, inherit etc. (UNGA, 2012). Since young girls are not physically and mentally developed enough for strong resistance and defense, they end up being more susceptible to servility than elder women (Ouattara et al. 1998).

5. NON-LEGAL CAUSAL FACTORS FOR CHILD MARRIAGE: ARMED CONFLICT AS ‘CATALYST’

The risk of sexual violence, economic insecurity, disruption in social networks, and discontinuation of education — all of it increase during armed conflict thus creating a need for resorting to ‘negative coping mechanisms’ (Roupetz et al., 2020; Bartles et al., 2018). Child marriage is one such mechanism. In addition to the above, the extent of the practice is concerning. For instance, the situation of armed conflict in Syria has led to an increase in the rates of child marriage not just in Syria but the Syrian refugees that move to nearby countries of Lebanon and Jordan are also at an increased risk. Jordan allows authorization for the marriage of children as young as 15 years of age and this places Syrian refugee girls in Jordan at an increased risk of child marriage. National law in Jordan which allows marriage of girls below the age of 18 years is used as means to exploit Syrian refugee girls by marrying them to much older Arab men (Rubin, 2013).

Secondly, in times of armed conflict, access to education is further restricted. In 2017, UNICEF released a report focused on the importance of education for children displaced from their homes due to conflicts and disasters. The report notes that ‘some 27 million children are out of school in conflict zones’ (UNICEF, 2017). Lemmon notes that girls are forced to discontinue their studies and drop out of school because of their

increased vulnerability to exposure to sexual violence (Lemmon, 2014). Often, schools are destroyed as well and if not, the number of staff is reduced to a minimum or nil (Dimitry, 2011). Even if the schools are intact, girls fear attending classes because of the risk of being sexually exploited on their way to and from school (Pereznieta, 2017) — all of which lead to their parents marrying them off early.

Thirdly, armed conflict results in acute economic backwardness of the zones affected by the crisis. The World Bank notes that for every ‘three years that a country is affected by major violence, poverty reduction lags behind 2.7 percentage points’ (World Bank, 2011, p. 5). Scholars like Moss note the emergence of an ‘organized transnational trade’ of refugee girls who escape a conflict (Moss, 2015). For instance, young female Syrian refugees are often lured for aid and shelter and handed over to bride traders (Damon, 2013). Often these girls are also sold to these traders by their own parents who are unable to sustain them (Ibid). These girls are sold to men, especially to Arab countries where, as Ross notes, demand for Syrian child brides increased after Saudi clerics declared that marrying Syrian girls is an act of Islamic charity (Rubin, 2013). Results of a mixed methods study on child marriage in Yemen also showed that conflict resultant displacement has an ‘exacerbating effect’ on economic security of displaced persons and refugees. Such affected economic security was found to be an important factor in decision-making for contracting child marriage (Hunersen et al., 2021, p. 4566).

Finally, unlike times of peace where families practiced child marriage as a tradition, increased vulnerability during armed conflicts leave parents with no choice than to marry off their daughters at an early age. The UN Inter-Agency Report found that many participants in the chosen focus group had known the practice of child marriage as a ‘rural tradition’ before the conflict started and that they had a choice to resort or not to resort to the practice (UN Women, 2013, p. 30). They also added that they did not have the latter option after the conflict affected them (Ibid). Concerningly, in cases where young civilian girls are sexually assaulted by men from armed rebel groups, they are even married off to their perpetrators to maintain the honour of the family (Jamobo, 2012, p. 36; Lee-Rife et al., 2012).

6. RECOMMENDATIONS

The Human Rights Council, in 2021, adopted a Resolution to point out the insufficient pace of progress being made in the reduction of rates of child marriage and the impact of the COVID-19 pandemic in further reducing the pace (UNHRC, 2021, p.2). It called states for closer cooperation in order to achieve the goal of eliminating child marriage by 2030 (Ibid). It notes that criminalization alone would be insufficient as a remedy and should be accompanied by support programs for gender equality (Ibid, p.4). It also urges states to harmonize their national legislation to uniformly curb the practice of child marriage (Ibid, p.7). This would also lead to a more inclusive international framework which would have more chances of being welcomed by the international community at large. However, this presents a need for adequate deliberation over the issue so that states do not continue the practice of child marriage even after the adoption of a standard universal minimum age. Scholars like Skivenes rightly note that a state’s ethical and cultural considerations

lead to different considerations of childhood (Skivenes and Sordsal, 2018). States might still adopt the reservation route to accommodate cultural grounds for exemption. It is important to realize the goal of eliminating such a practice because of its harmful nature. It is a settled principle that the cultural relativist approach of reservation should not be used by states to allow practices that violate the human rights of its subjects. These points need to be discussed, deliberated, and agreed upon by the international community. Therefore, relying on the route of universalization of international frameworks would be an over-enthusiastic method.

Additionally, the existing literature is divided over the universalization of children's rights. In this regard, the debate between scholars who support a universal application of children's rights and scholars who oppose the idea is worth discussing. As child marriage violates the rights of a child, it becomes important to discuss the theoretical feasibility of the realization of such a universal model of children's rights. In her article entitled, '*Can there be any universal children's rights?*', Kristina Bentley presents a case against the universal model of children's rights (Bentley, 2005). She argues that the rights in CRC are based on the Western aspect of childhood and ignore culturally relative rights (Ibid, p. 117). Bentley argues that the CRC, just like other international human rights instruments are Eurocentric and do not address the non-Western problems. However, this argument is problematic since the CRC was not adopted solely by the Western states. It was adopted by the UN General Assembly with the cooperation of non-Western countries, including Africa, the Middle East, South and Central America, the Caribbean, and Asia and Pacific. More interestingly, the only country that has not ratified the CRC is the United States, which is a Western state. Additionally, Non-western States in the Africas have not only ratified the Convention but also incorporated the principles into their regional systems and national legislations, as discussed previously. In fact, the ACRWC is majorly based on the CRC. When it comes to the rights of children, the argument of Western imposition is used by groups in Africa, Asia, the Middle East, and the Americas to justify the continuation of harmful practices such as Female Genital Mutilation, child marriage, servitude of girls at fetish shrines or Ghana's *trokosi* tradition (Avalos et al., 2015, p. 639). Therefore, achieving a universal minimum marriageable age would be the most appropriate step to curb child marriages, however, it is extremely difficult to achieve and implement. Therefore, steps should be taken to ensure the reduction in impact of non-legal factors that cause continuation of the practice.

6.1. Accurate data collection

In order to bring reduction in the impact of a persisting social issue, it is important to first know the accurate intensity of the problem. A very important reason for ineffectiveness of legal frameworks is the lack of accurate data on number of child marriages. Even though innovative approaches are being employed to collect data, there still remain gaps in the surveys. Very recently, SenseMaker® project used a mixed methods approach to extract meaning from stories that were collected from Syrian girls in Lebanon (Bakhache *et al.*, 2017, p. 8). Despite its innovative approach, it was noted to have some errors because the programme translated the stories from Arabic to English and some words were misinterpreted. Therefore, it is submitted that the current surveys

and data do not reflect the actual state of affairs in Syria and neighbouring countries owing to the shortcomings of the sample collecting methods and other practical issues such as non-registration of marriages which do not help in gaining the actual number of cases of child marriages in the region. An important reformative step to get the correct statistical representation of child brides is registration of birth and marriage. This will also ensure that the universally acclaimed right of a child to have his birth registered and have a nationality (CRC, art 7.1), is implemented in all states. Non-registration of birth makes it difficult to prove that participants were minors during the celebration of marriage. Moreover, a related issue is that of the non-registration of marriage. Often legal responses against these practices remain inadequate for the lack of proper regulation and registration of such marriages. For instance, some Yemeni societies do not abide by the national laws for marriage and instead adhere to the customary system of marriage where the ceremony is celebrated in presence of tribal sheiks or religious authorities (Rodgers *et al.*, 2008, pp. 5-6). Such marriages often involve children below the marriageable age mentioned in the national law. Since these marriages are not registered as per the legal system, they go unrecorded. This poses a concern of the actual number of child marriages in such societies being higher than what is reported through national data records. Additionally, unregistered marriages leave the girls and their children deprived of any rights of inheritance from the property of the groom, who could easily claim, in absence of official records, that such marriage never happened. Registration of marriage would help avoid such issues. Registration of marriage shall also reduce the practice of temporary marriage where girls are married to men for short periods of time, sometimes only for a couple of hours, and are divorced with no rights of inheritance in their husband's property and no record of marriage to prove the legitimacy of the offspring born out of such marriage.

6.2. Creating work and education opportunities

An important push factor is poverty and reduced working opportunities available to girls, both in their native country and in the host countries where they seek refuge (if they escape an armed conflict). Notably, refugees escaping armed conflict are left upon the generosity of their hosts, who sometimes offer a price to the families to sell their girls. These girls are later married off to men from the host as well as other countries. This can be combatted if the host government pays adequate attention to the education of refugee girls and also allow them to work legally in markets that do not require educational qualifications. This would increase the financial security of such girls, which would in turn discourage parents from marrying them early or selling them for marriage. Moreover, early marriage has the potential to contravene the provisions of international instruments which provide for right to education as a human right (UDHR art 26; ICESCR art. 13). UNICEF in its recent report entitled *Ending Child Marriage: Progress and Prospects*, through a specific case study of states in Africa, notes that child brides tend to have lower levels of education (UNICEF, 2014). Discontinued education makes child brides more vulnerable to discrimination at the hands of their spouse and other family members (Gaffney-Rhys, 2011, p. 363). In a marital union where the age difference between the spouses is significant, with the groom being older than the bride, discrimination is inherent. Gaffney-Rhys aptly notes that such unions have an 'imbalance'

of power created between the spouses because of the interplay of many factors such as difference of age and disparity in terms of education (Gaffney-Rhys, 2011, p. 362). Therefore, ensuring compulsory primary education would reduce such power imbalance and create more job opportunities for women. A financially independent mother would not opt for marrying her children at an early age to avoid economic constraints and this would at least help break the chain of the practice.

Inarguably, these recommendations are dependent heavily on the implementation by countries. Lastly, collection of data for comparative studies between different countries could play an important role in assessing the need for revision of national legislations. Comparative studies would allow noting the difference in rates of child marriage in countries with different national legislations and a comprehensive study of the same would finally help formulate an international framework influenced by the good from diverse national legislations.

7. CONCLUSION

This research acknowledges the practice of child marriage as a human rights issue and the ineffectiveness of existing international, regional and national frameworks in reducing the same. Therefore, this paper reviewed non-legal factors which cause child marriage in order to understand why even countries with national legislations explicitly banning the practice still have high rates of child marriage. Upon reviewing the existing literature, including debates regarding the universal application of children's rights, the universalization model was found to be most utopian and difficult to adopt. Therefore, recommendations were discussed to mitigate the impact of non-legal causal factors.

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