

CHILD MARRIAGES IN THE CONTEXT OF BANGLADESH'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

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Abstract

The marrying off of minor children that are below the age of 18 years has been common in Bangladesh for more than a century. The objective of the study is to discuss the legislative framework that regulates child marriages in Bangladesh and assess whether there is any progress made or not. The second objective is to discuss the main causes of child marriages and assess whether Bangladesh has complied with its international human rights obligations or not. The study adopted the desktop research and relied on the information available on books, journals and legislation. The study found out that there is no political will to end child marriages because the legislative framework forbids child marriages but also permits it if it is condoned by the parents and the courts. Islamic law is the major cause of the prevalence of child marriages because it permits and tolerates child marriages and 90 per cent of the population subscribes to it. Bangladesh failed to comply with its international human rights obligations.

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1. Introduction

The issue of child marriages have been an order of the day in the People's Republic of Bangladesh for a period that spans for more than a century. Bangladesh is one of the countries situated in Southern part of Asia, inhabited by the overwhelming majority of Muslim communities. It is estimated that ninety per cent of its population are Muslim believers, while nine per cent of its population is constituted by Hindus and the other one per cent is constituted by other religions such as Buddhism and Christianity.² As the country is highly dominated by Muslim believers, it goes without saying that the Muslim values and their normative system dominate the way of life in Bangladesh. It is not surprising that amongst the Southern Asian countries, Bangladesh has the highest prevalence of child marriages in that region. This is so because other than tolerating child marriages, Sharia law also promotes such marriages. The legislation that is apparently aimed at discouraging child marriages and also punishing the offenders who marry minor children has been in existence in the People's Republic of Bangladesh for more than ninety one years now but there is no sign of any substantial decline in child marriages. The Child Marriage Restraint Act³ was adopted as early as 1929 to fight against the scourge of child marriages in Bangladesh. The provision of section 2 of the 1929 Act set the minimum marriageable age at 18 years for girls and 21 years for boys. Ninety two years later, an alarming number of 52 per cent of girls are still reported to have solemnised their marriages before celebrating their 18th birthday.⁴ Recently as early as the year 2017 the Child Marriage Restraint Act⁵ has been repealed and replaced by the Child Marriage Restraint Act of 2017. The recent legislative enactment has retained the provision of section 2 of the repealed Act that placed the minimum marriageable age at 18 for girls and 21 for boys. On the face of it, this recent legal development is not likely to yield any fruits because it tolerates the marriage of girls that are still at tender age below the minimum marriageable age of 18 years under special circumstances through the approval of parents and the courts of the country.

This paper seeks to make a discussion on the legislative framework that is designed to fight against child marriages in Bangladesh and make an assessment of whether any progress has been

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² Ahnaf Tahmid Arnab and Sanwar Siraj "Child Marriage in Bangladesh: Policy and Ethics" 2020 (11) 1 *Bangladesh Journal of Bioethics* 23

³ Child Marriage Restraint Act 50 of 1929.

⁴ Ahnaf Tahmid Arnab and Sanwar Siraj, *op. cit.*, p. 23.

⁵ Child Marriage Restraint Act of 2017.

achieved. In view of the fact that there are numerous factors that feeds to the continuation of child marriages such as, among other things, dominant religion prevailing in Bangladesh, poverty, lack of education and many more, the second part of this paper intend to discuss the major causes of child marriages in Bangladesh. The major reason seems to be closely tied with the dominant religion that prevails in the country in question. The third part of the paper recognises the fact that Bangladesh is part and parcel of the world community of states that subscribes to the doctrine of human rights that are generally perceived as universal and also inviolable. So the third part of the paper intends to discuss child marriages in the context of Bangladesh's international human rights obligations and thereby make an assessment of whether it has complied with its international human rights obligations or not. The fourth part of the paper would deal with the conclusion.

2. Legislative framework that regulates child marriages in Bangladesh

Child marriages have been prevalent in the People's Republic of Bangladesh for more than a century now. The reading of the Penal Code Act⁶ attest to the fact that child marriages have been lawful in Bangladesh and the position has remained unchanged even by the 2004 amendment to it. Section 375 of the Penal Code Act⁷ as amended forbids rape but has an exception which provides that "sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape." The reading of section 375 of the Penal Code as amended suggest that the marital rape of a minor girl that has attained the age of 13 year and above is permissible in the current laws of Bangladesh.

The enactment of the Children's Act⁸ by the government of the People's Republic of Bangladesh was a beacon of hope on the fight against child marriages. The manner in which a child is defined by section 4 of the Children's Act raises some hopes and it defines a child as: "Notwithstanding anything contained in any other law for the time being in force, all persons up to the age of 18 (eighteen) years shall be regarded as children for the purposes of this Act."

The above definition of the child by the Act is in line with the definition that is adopted by the relevant international and regional human rights instruments. Likewise, it gives an expectation that Bangladesh would also follow the international human rights trends regarding the prohibition of child marriages. On the contrary, the Act is completely silent about the issue of child marriages. If any person that has the mammoth responsibility of supervising the child such as the parent, legal guardian or a caregiver encourages a child to seduction would be guilty of an offence. The Act goes further to prohibit those having the responsibility of supervising a child from encouraging any person other than her lawfully wedded husband to have sexual intercourse with her in terms of section 78 of the Act. The reading of section 78 of the Act gives an impression that it is not an offence for a parent or legal guardian to encourage a child to have sexual intercourse with her lawfully wedded husband. The Act prescribes a punishment for any person who encourages a child to seduction or to have sexual intercourse with any person other than her husband. The prescribed punishment is an imprisonment sentence of not more than five years or with a fine or both. It goes without saying that the enactment of the Children's Act has nothing to do with the alleviation of the plight of children who are married off at a tender age.

As already mentioned earlier, one of the progressive legislation that is aimed at combating the dilemma of child marriages is the Child Marriage Restraint Act of 2017 which sets the minimum marriageable age at 18 years for females and 21 years for males. This development in the regulation of marriageable age is a commendable step to the right direction but it is noticeable that it is not free from shortcomings of its own, namely:

Firstly, the Child Marriage Restraint Act of 2017 forbids the marriage of a girl that has not yet attained her eighteenth birthday and provides punishment to anyone who solemnise a marriage with a girl that is below the age of eighteen years. The Child Marriage Restraint Act of 2017 does not

⁶ Penal Code Act 45 of 1860.

⁷ Penal Code Act 45 of 1860.

⁸ Children's Act 24 of 2013.

declare the marriage of a girl that is below the minimum age of eighteen years as an illegal or invalid marriage. The Act is thereby sustaining a situation where the perpetrator of a child marriage would be punished for marrying an under-age girl but allowed to continue with such a marriage as a valid marriage. The rationale behind such reluctance on tackling the issue of illegality of marriage below the minimum age limit is attributable to the prevailing legal pluralism in Bangladesh. As far as the laws of the People's Republic of Bangladesh are applicable to everyone regardless of religion, family law remains an exception. This is similar to claw back clauses that are contained in the African Charter on Human and People's Rights (ACHPR).⁹ Claw back clauses enable the African member states to limit some of the rights protected by the African Charter on Human and Peoples Rights (ACHPR) to the extent permitted by national law.¹⁰

Bangladesh is a signatory to the international human rights instruments that restrict a minimum marriageable age to 18 years. One of those international instruments is the Convention on the Consent to Marriage, Minimum Age for Marriage, and Registration of Marriage that was ratified by Bangladesh on the 5th of October 1998 but with a reservation regarding the application of article 1 and 2 to the extent that relate to the question of the legitimacy of child marriage, in accordance with the prevailing family laws of different religious communities of Bangladesh. Apparently, the government of the People's Republic of Bangladesh enacted Child Marriage Restraint Act with the purpose of restricting the prevalence of child marriages. However, on a closer look of the situation, the Child Marriage Restraint Act is just a sham and there is no clear political will to end child marriages. Section 19 of the Child Marriage Restraint Act says it all as it provides that: "notwithstanding anything contained in any other provision of this Act, if a marriage is solemnised in such a manner and under such special circumstances as may be prescribed by rules in the best interests of the minor, at the directions of the court and with the consent of the parents or the guardian of the minor, as the case may be, it shall not be deemed to be an offence under this Act."

It is noticeable from the reading of the above section that apart from creating an exception to the minimum age requirement, it does not provide for the requirement of consent of the concerned minor. On the contrary, many countries have done away with the tendency of allowing third parties, such a parents or guardians to take a critical lifelong decision on behalf of the child. As far as Bangladesh is gradually embracing the doctrine of international human rights, there are some exceptions with regard to the application of religious family laws. Almost all the applicable laws in Bangladesh permit the marriage of a person that is below the age of eighteen years. Likewise a parent or legal guardian is allowed to grant consent for the marriage of a minor even if that is against the wishes of a minor. According to almost all Muslim schools of thought (*madhhab*) applicable in Bangladesh a female child may be married off by her parents or guardian on the attainment of puberty or even before puberty without her consent.¹¹ According to Sharia law a person is capable of solemnising a valid marriage when he or she reaches the age of puberty. The age of puberty is normally attained at different stages by different people, for females it can be early as nine years and for females it can be twelve years subject to the visible signs of puberty. When there are no clear signs of puberty both male and female would be regarded as adults upon attaining their 15th birthday. In a similar vein, Hindu personal laws applicable in Bangladesh do not prescribe any minimum age for marriage. The marriage of a minor is permissible in terms of the Hindu family laws.¹² The Christian marriages are regulated by the Christian Marriage Act¹³ which permits the marriage of a

⁹ African Charter on Human and People's Right.

¹⁰ Dlamini CRM "The Protection of Human Rights in Africa" 1989 LLM Dissertation, University of Zululand; Dlamini CRM "Towards a regional Protection of Human Rights in Africa: The African Charter on Human and People's Rights" 1991 (24) 2 *CILSA* 189-203; Adjei WJ "Re-Assessment of "Claw Back" Clauses in the Enforcement of Human and People's Rights in Africa" 2019 (24) 38 *Journal of Legal Studies* 22 and ; Mapuva L "Negating the Promotion of Human Rights through Claw Back Clauses in the African Charter on Human and People's Rights" 2016 (51) *International Affairs and Global Strategy* 1.

¹¹ Taslima Yasmin, "A Review of the Effectiveness of the New Legal Regime to Prevent Child Marriages in Bangladesh: Call for Law Reform, September 2020 Initiative by Plan International Bangladesh and Girls Not Brides Bangladesh at 27.

¹² Mahua Zahur, "The Hindu Marriage System in Bangladesh: Addressing Discrimination" 2014 (40) 4 *Commonwealth Law Bulletin* 613.

¹³ Christian Marriage Act of 1872.

minor in terms of section 3 and section 19 goes further to permit the marriage of a minor provided that his or her father or guardian has agreed to it.

3. Causes of child marriages

Muslims generally permit the marrying of a person at a young age as the Quran stipulates that girls can be married off upon attaining puberty. Majority of the Islamic schools of thought (*madhhab*) such as *hanafi madhhab*, *maliki madhhab*, *shafii madhhab* and *hambali madhhab* consider wet dreams for men or virginal lubrication for women and the appearance of pubic hair to be signs of puberty.¹⁴ In a situation where there is no clear physical sign of puberty, most Islamic jurists agree that the minimum age for attaining puberty is fifteen years for both boys and girls.¹⁵ It is a trite fact that when a person reaches puberty he or she begin to develop sexual desires and end up actively doing something in order to satisfy these sexual desires.¹⁶ As far as the sacred texts of main religions forbid pre-marital and extra-marital sexual intercourse, Muslims and Hindus are likely to be more conservative in enforcing pre-marital chastity.¹⁷ It is therefore not come as a surprise that Muslims perceives early marriage as a form of protection against pre-marital sexual intercourse. Likewise Islamic tradition perceives any form of pre-marital sexual intercourse as a sin and forbidden. Any performance of illicit sexual intercourse between an unmarried male or a female is regarded as *zina* and is punishable with one hundred lashes.¹⁸ According to the sacred text of Muslims commonly known as the holy Quran, believers are those who keep and protect their sexual organs only for their lawful wedded spouses. Anyone who engages in an extra-marital affair or sexual relations is viewed as a transgressor.¹⁹ In a similar vein Hadith (*Sunnah*) also forbids both extra-marital sexual intercourse and pre-marital sexual intercourse by stipulating that

“Receive teaching from me. Allah has ordained a way for these women. When an unmarried male commits adultery with an unmarried female, they should receive one hundred lashes and banishment for one year. And in case of married male committing adultery with a married female, they shall receive one hundred lashes and be stoned to death.”²⁰

As a result of this many Muslims in the People’s Republic of Bangladesh often perceive it as their sacred duty to marry off their children before reaching puberty or immediately after puberty. The following section is dedicated to the discussion of the protection against child marriages by the international human rights instruments.

4. Child marriages in the context of Bangladesh’s international human rights instruments

The Universal Declaration of Human Rights (UDHR) does not forbid child marriage in an explicit manner. However it can be deduced from the general reading of the provisions of the UDHR that child marriage is forbidden by the Declaration. Article 16 (1), for example, provides some requirements that ought to be complied with before the parties can solemnise a valid marriage. One of those requirements is that the parties who intend to solemnise a marriage must be of full age at the time of the conclusion of a marriage and article 16 (2) goes further to provide for another requirement that a marriage must be concluded freely with full consent. By the inclusion of full age, it can rightfully be argued that the drafters of the UDHR intended to talk about an age where a person

¹⁴ Hoko Harii “Legal Reasoning for Legitimation of Child Marriage in West Java: Accommodation of Local Norms at Islamic Courts and the Paradox of Child Protection” 2020 (12) *Journal of Human Rights Practice* 512.

¹⁵ *Ibid.*

¹⁶ Ahnaf Tahmid Arnab and Sanwar Siraj, *op. cit.*, p. 23.

¹⁷ Amy Adamczyk and Brittany E Hayes “Religion and Sexual Behaviours: Understanding the Influence of Islamic Cultures and Religious Affiliation for Explaining Sex Outside Marriage” 2012 (77) 5 *American Sociological Review* 726.

¹⁸ Ziba Mir-Hosseini and Vanja Hamzic *Criminalizing Sexuality: Zina Laws as Violence against Women in Muslim Contexts* 2010 Russell Press, Nottingham UK 11-17.

¹⁹ Quran 23: 5-6.

²⁰ Sahih Muslim 17: 4191

reaches sexual maturity or legal age of majority. The International Covenant on Civil and Political Rights (ICCPR) provides that the men and women of marriageable age should not be denied their right to get married and form a family. The ICCPR does not openly forbid child marriage but it can be deduced from the reading of the general provisions of the ICCPR that child marriages are forbidden. The ICCPR provides in article 24 (1) that every child shall have a right to some measures of protection provided by his family, society and the state and such protection ought to be commensurate with his status as a minor. Common sense dictates that marriage comes with a lot of burden and responsibilities associated with taking care of other family members and such burden and responsibility are not commensurate with the minor child's level of maturity as he is still depending on the parents for protection. So it can be argued that the drafters of the ICCPR had no intention of promoting child marriages because minor children needs to be protected by their families, society and the state. The ICCPR goes further to prohibit forced marriages by providing in article 23 (3) that no marriage shall be solemnised without the free and full agreement of the parties who intend to get married.

Article 10 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) forbids forced marriages by providing that marriage must be solemnised with the free consent of the parties who intend to get married. The monitoring body of the ICESCR forbids child marriages by emphasizing an increase of marriageable age to 18 years in its concluding observations (ICESCR Concluding Observations 27th session, 2001). Article 1 (c) (i) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices forbids a forced marriage by stipulating that a marriage will be equivalent to slavery if it is forced upon a girl child or a woman by her family or guardian.

Article 1 of the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage emphasises the importance of agreement as a requirement of a valid marriage by stipulating that no valid marriage would be solemnised without the full and free agreement of the parties who plan to get married. Bangladesh is one of the state parties to the Convention and ratified it on the 5th of October 1998. Article 2 of the latter Convention places a duty on the state parties to take appropriate legislative action to specify a minimum age for marriage. The government of the People's Republic Bangladesh ratified the Convention but with a reservation regarding the application of article 1 and 2 of the Convention to the extent that relate to the question of the legitimacy of child marriage, in accordance with family laws of various religious communities of Bangladesh. The government of Bangladesh knew very well that the prevailing family laws of different religious communities in the country permits marriage of persons even before attaining the age of eighteen years. It goes without saying that the government of Bangladesh intended to preserve religious diversity that is prevailing in the country. Hindu personal law has no specified minimum age for marriage. In a similar vein, Muslim personal law has no specific minimum age for marriage. Puberty is regarded as an acceptable age for marriage and it varies from person to person. If there are no clear signs for puberty, acceptable minimum age for marriage is fifteen years. State parties to the Convention have an obligation to ensure that appropriate measures are taken which intend to abrogate customary practices that have the potential of restraining freedom of choosing a spouse.²¹ Moreover, the Marriage Convention also introduced the obligation for state parties to ensure that all marriages are registered. The registration of marriages is essential and serves as one of the operational ways to provide evidence of age in order to implement laws against child marriages.²²

The Convention on the Rights of the Child (CRC) does not openly prohibit child marriages. However, the reading of the general provisions of the CRC suggests that its drafters never intended to authorise child marriages. The CRC was signed by Bangladesh on the 26th of January 1990 and ratified it on the 3rd of August 1990. Article 3 of the CRC provides for the best interests of the child and the best interest principle can be interpreted in a manner that curbs human rights violations that occur as a result of child marriage. As already mentioned earlier, Bangladesh is a state party to the

²¹ UNICEF, "Early Marriage: Child Spouses", (March 2001, Innocenti Digest No, Innocenti Research Centre Florence, Italy 12).

²² UNICEF 2001 *ibid*.

CRC and has an obligation to have necessary measures in place in order to take into account the best interests of the child.²³ It is so unfortunate, that Bangladesh has ratified the CRC with a reservation to article 14 (1) and article 21. Article 14 (1) mandates the state parties to respect the rights of the child to freedom of thought, religion and conscience. Reservation entered by Bangladesh means that children within the territory of Bangladesh have no right to freedom of thought, religion and conscience. Likewise, the doctrine of the best interest of the child is also not applicable in Bangladesh because of the reservation entered on the provisions of Article 21 which mandates the state parties that permits adoption to ensure that the best interest of the child is of paramount importance.

Article 16 (2) of the Convention on Elimination of all Forms of Discrimination against Women (CEDAW) forbids child marriages by providing that the betrothal and the wedlock of a minor child are *void ab initio*. It is noticeable that the government of Bangladesh have not entered any reservation on the provision of article 16 (2) that forbid betrothal and the marriage of a minor child. However, the betrothal and the marriage of minor children is an order of the day in terms of the Muslim family law and Hindu family law in Bangladesh. The government of the People's Republic of Bangladesh ratified CEDAW on the 6th of November 1984 and also ratified the Optional Protocol to CEDAW on the 6th of September 2000. In view of the persistence of harmful traditional practices that nourishes the continuation of child marriages; the CEDAW monitoring body has observed that in order to protect children from child and forced marriages, it is essential for the state parties to enact legislation aimed at abrogating harmful traditional and religious practices.²⁴ Ninety per cent of the population of Bangladesh is constituted by Muslims, nine per cent constituted by Hindus and the remaining one per cent is constituted by other religions such as Christianity and Buddhism.²⁵ It goes without saying that the Muslim values system and normative system dominate the Bangladesh culture. It is not surprising that the government of Bangladesh ratified CEDAW with some reservations on articles 2, 13 (a) and 16 (1) (c) & (f) because were perceived as conflicting with Sharia law. This affirms the fact that Sharia law is one of the highly valued and dominant religions in Bangladesh. Sharia law encourages child marriages while the international human rights forbid child marriages. International human rights law is applicable in Bangladesh provided that it is not in conflict with Sharia law. This shows beyond any doubt that the government of Bangladesh is not complying with its international human rights obligations regarding the issue of child marriages.

5. Conclusion

As already mentioned earlier, the marrying off of minor children that are below the age of 18 years has been common in Bangladesh for more than a century. The Penal Code Act 45 of 1816 authorises marital rape of a minor girl who is thirteen years and above and such legal position has remained unchanged despite several amendments to the Penal Code. Almost ninety two years ago, the Child Marriage Restraint Act of 1929 was enacted with the purpose of fighting against the scourge of child marriages in the country but to no avail. Recently as early as 2017 the 1929 act was repealed and replaced by the Child Marriage Restraint Act of 2017 which retained section 2 of the repealed Act that placed the minimum marriageable Act at the age of 18 years for girls and 21 years for boys. This legal development of 2017 also increased the penalty for those who violate the Act by marrying a minor that is below the age of 18 years. On the face of it, seems like a real progress on the fight against child marriages in the country but on a closer look it is just a sham progress that just exists on paper. This is so because the 2017 Child Marriage Restraint Act continues to permit marriages of minor children that are below the age of 18 years under certain circumstances provided that the parents together with the courts of the land agree to it. In view of the fact that 90 per cent of the

²³ Adrianasolo Nadeche "The Girl Child Marriage Practice in Madagascar: A Critical Analysis". LLM Dissertation, University of Pretoria, 2013 19.

²⁴ Mutyaba R, "Early Marriage a Violation of Girls Fundamental Human Rights in Africa", *International Journal of Children's Rights* 19 (2011) 341.

²⁵ Ahnaf Tahmid Arnab and Sanwar Siraj "Child Marriage in Bangladesh: Policy and Ethics" 2020 (11) 1 *Bangladesh Journal of Bioethics* 23.

population of Bangladesh is constituted by Muslims, the general way of life in the country is more likely to be influenced and dominated by the Muslim values and their normative system. It is trite law that Muslim communities promote child marriages and the majority of parents would continue to agree to child marriages as their faith demands. Fornication (*zina*) is strongly prohibited in terms of Sharia law and also attracts a serious punishment to the transgressors. The majority of the Muslims schools of thought (*madhhab*) permit children to get married immediately when they reach puberty and if there are no clear signs of puberty, they allowed to get married at the age of 15 years. It is beyond any doubt that the prevalence of Muslim communities in the country is the major reason for the continuation and high percentage of child marriages in Bangladesh.

In the year 2013 the country enacted the children's Act that raised the hopes of the international community because it defined the child as a person that is below the age of 18 years across the board. Such a definition is in line with the international definition of a child in terms of the international human rights instruments. However, the Act is silent on the issue of child marriages. Section 78 of the Children's Act forbids a parent, guardian or caregiver from encouraging a minor child to have sexual intercourse with a person other than her husband but permit them to encourage a minor to have sexual intercourse with her husband. The general reading of the Children's Act of 2013 suggests that it also tolerates child marriages. The government of Bangladesh is not complying with its international human rights obligations regarding the issue of child marriages. In view of the current legislative framework in Bangladesh one may quickly assume that a lot of progress has been made to combat against child marriages. On the contrary such progress on the fight against child marriages is merely a paper law that plays little or no role at all in alleviating the problem of child marriages.

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