

# CHILD MARRIAGE AND THE LAW: TECHNICAL NOTE FOR THE GLOBAL PROGRAMME TO END CHILD MARRIAGE

## BACKGROUND AND PURPOSE

The United Nations Population Fund (UNFPA)–United Nations Children’s Fund (UNICEF) Global Programme to End Child Marriage (the Global Programme) works with many partners to advocate and support practical, rights- and evidence-based actions to end child marriage and promote gender equality and the empowerment of adolescent girls. This technical note explores laws and their application and enforcement in relation to child marriage. By unpacking the issues, the technical note supports the Global Programme and its partners to gain a better understanding and be able to develop more nuanced approaches to child marriage and the law.

This note is based primarily on documents produced by and with the support of UNFPA, UNICEF, the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) and Girls Not Brides over the past 12 years. One of the sources cited extensively is the ‘Southern Africa Development Community (SADC) Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage’,<sup>1</sup> whose development was supported by UNFPA through the Global Programme. These sources were complemented by specialized texts on criminal justice and customary law and by country experiences with the reform of legislation<sup>2</sup> and the enforcement of laws and regulations<sup>3</sup> related to child marriage and access to child-friendly justice. The endnotes provide additional information for a deeper understanding of concepts and programming strategies.

The primary audience of this note are Global Programme country office and partner staff.\* The note has been written for a non-technical readership and has been reviewed by several lawyers. For a comprehensive compilation of human rights instruments related to child marriage, readers are referred to the ‘Child Marriage and the Law Legislative Reform Initiative Paper Series’.<sup>4</sup>

### 1. Core elements of child marriage legislation

The core elements of legislation related to child marriage<sup>5</sup> are the minimum age of marriage, and free individual and informed consent.<sup>6</sup> The law should specify 18 years as the minimum legal age for marriage; prohibit the marriage of girls as well as boys below that age; allow for the voidance of marriages involving children; and specify the requirement of free and full informed consent of both parties. The SADC Model Law on child marriage focuses exclusively on the age of consent to marriage, with no exceptions.

Why is it important to have 18 years as the minimum legal age of consent to marriage?<sup>7</sup> Laws that set a minimum age of marriage are an important way to safeguard boys and girls from being married when they are not physically, mentally, psychologically or emotionally ready to reach their fullest potential. Multiple harms are caused by child marriage, particularly for girls who are denied their rights to health, education and development as a result. Their physical immaturity leads to increased risk of complications during pregnancy and childbirth that can also lead to maternal mortality. The harm is intergenerational, because a young mother whose own development is stifled will be less able to ensure the full development of her children.<sup>8</sup>

Countries take different legal approaches to ensure that the minimum age of marriage is enforced. Some criminalize child marriages, some ban or invalidate marriage below the legally prescribed minimum age, and others merely prescribe a minimum age of marriage without expressly criminalizing or banning it. Governments need to have clear and consistent legislation that establishes 18 years as the minimum legal age of marriage solemnized under any marriage law of the state (religious, civil). Adequate safeguards must be in place to ensure that parental consent, judicial consent or other exceptions are not used to force girls into marriage.<sup>9</sup>

\* This note has been written for practitioners who work on programmes to end child marriage. Rather than presenting separate sections on civil, family and criminal law related to child marriage, the note touches on many different legal dimensions related to child marriage: different types of law (civil, family, criminal); different legal systems (formal statutory, informal customary and religious); and legislative reform, promotion of the law and the application of existing laws.

## THE GLOBAL PROGRAMME APPROACH TO CHILD MARRIAGE AND THE LAW

The Global Programme supports legislative reform efforts to raise the age of consent to marriage to 18 years. The application and enforcement of child marriage laws has to consider the provision of justice, remedies and protection services for child victims of marriage and associated human rights violations. In addition, countries have to establish systems for the mandatory registration of births and civil, customary and religious marriages. Governance and justice systems should contribute to broader efforts to end child marriage that include the promotion of change in social norms and gender norms, and the provision of services and greater opportunities for adolescent girls and boys. These three pillars (Figure 1) should mutually reinforce each other to end child marriage. This also means that the application and enforcement of child marriage laws should not undermine community-based efforts to promote the empowerment of adolescent girls and boys, and to promote change in harmful gender and social norms and behaviours.

FIGURE 1: Three pillars of a comprehensive response



## 2. Complexities of criminalizing child marriage

The criminalization of child marriage is a complex and polarizing issue.<sup>10</sup> Applying child marriage laws and punishing perpetrators sends a clear signal that marrying children is illegal and there is no impunity for violating the law. On the other hand, criminalizing child marriage may have unintended negative consequences for children and families. At the core of the criminalization debate are the fundamental tensions between statutory (state) law on the one hand and religious and customary law on the other. These laws are often inconsistent or contradictory.

The Human Rights Council resolution on child, early and forced marriage “recognizes that the criminalization of child, early and forced marriage *alone is insufficient* [emphasis added] when introduced without complementary measures and support programmes and may instead contribute to the marginalization and loss of livelihood for the families affected and have the unintended effect of increasing the practice of informal unions or unregistered marriages.”<sup>11</sup>

### 2a. Diverse positions on criminalization

International efforts to end child marriage have taken different positions on the criminalization of child marriage:

- Some legal perspectives based on children’s and women’s rights propose tougher sentencing for sexual and gender-based violence against women and children, including child marriage. Some proponents of this position consider child marriage as a form of sexual violence.<sup>12</sup>
- Research institutes such as the International Center for Research on Women and the Population Council have pointed out that there is no evidence that the enforcement of child marriage laws has been effective in reducing child marriage prevalence and may have negative effects on those strategies that are most likely to succeed in preventing child marriage.<sup>13</sup>
- Programme and advocacy initiatives, such as the Global Programme, Girls Not Brides, and the SADC Model Law, support legal advocacy on the legal minimum age of marriage and other legislative reforms related to child marriage. They also recognize the challenges of implementing laws, however, and the potential for the negative and unintended consequences of punishing the perpetrators of child marriage. They emphasize that law enforcement and the severity of the punishment should complement and support, rather than undermine, community-based efforts to promote changes in social and gender norms and behaviours.

### 2b. Negative effects of criminalization

The following are possible negative and unintended consequences of criminalization depending on the different legal provisions adopted by states.

- Girls are punished for not reporting the assaults they are victims of.
- Girls face social stigma, retaliation and mental distress associated with putting family members in prison.<sup>14</sup>
- Families and communities are destabilized in cases where everyone that attended a wedding is imprisoned.<sup>15</sup>
- Social impacts on families and children of the dissolution of child marriages, including stigma and ostracization.

- Economic impacts on families and complexities of reclaiming dowry payments and returning the bride price.
- Girls' separation from children, custody issues.
- The legal prohibition of child marriage may drive the practice underground and beyond the reach of the law.
- In some countries (e.g., parts of India), the intense focus on anti-child marriage laws precludes attention to complementary interventions to engage families and communities and to support for adolescent health, sexuality, education and support services.
- Criminalization of consensual sexual relations (and elopement) between adolescents and imprisonment of consenting adolescent boys and girls.

### 2c. A note on criminalization of consensual sexual relations

The original intention of laws that criminalize consensual sex (such as statutory rape or defilement) is to primarily prevent adults from engaging in sexual acts with children. In countries with conservative sexual mores, however, parents use the law to break up own-choice marriages between adolescents that they do not approve of, and to stop the sexual activity of their children. As a result, the law is used to criminalize sexual relations between consenting adolescents, and boys and girls are convicted and sent to prison. In Bangladesh, for example, underage girls and boys are punished with imprisonment of up to 15 days or fined, or both (Ministry of Women and Child Affairs, 2017). In these situations, law reform has to eliminate the criminalization of consensual sexual acts between adolescents.

Setting high minimum ages for both sexual consent and marriage is problematic. If the age of sexual consent coincides with that of marriage and both are set at 18 years, it effectively criminalizes behaviour in which large numbers of young people are engaged in societies throughout the world. In Mongolia, research indicates that 38 per cent of 16-year-olds have started sexual activity. In Zimbabwe, 30 per cent of girls between 15 and 19 years of age have had sex at least once. In the United Kingdom, 64 per cent of girls have had sex before the age of 18 years, and in Iceland and Denmark, the figure was over 70 per cent. Indeed, in the United Kingdom, 25 per cent of girls and 33 per cent of boys have had intercourse before the age of 16 years. Furthermore, rendering sexual activity unlawful reduces the possibility of young people receiving the reproductive health care and advice that they need for their protection and safety. In consequence, measures designed to provide protection can have the reverse impact. On the other hand, the introduction of a lower age for sexual consent than for marriage effectively endorses the fact that unmarried

young people will engage in sexual activity, which may be unacceptable in many countries.<sup>16</sup>

South Africa and Kenya had criminalized consensual sexual acts among adolescents. In both countries, the legislation was subject to constitutional challenges.<sup>17</sup> The legal challenge was successful in South Africa but failed in Kenya, which means that Kenya continues to treat such consensual acts as criminal offences. The common factor in both countries' cases is the recognition that the criminalization of consensual sexual acts among adolescents and young people is not appropriate for the following reasons:

- It is a denial of the evolving capacities of adolescents and their normative development as far as adolescent sexual and reproductive rights are concerned;
- It infringes other rights such as to dignity and privacy;
- It stigmatizes adolescent sexuality;
- It may result in adolescents and young people not seeking sexual and reproductive health and protection services and information, in fear of prosecution;
- It may result in gender-skewed convictions;
- It unnecessarily brings adolescents and young people into the criminal justice system.

In South Africa, the age of sexual consent is now 16 years for boys and girls, and includes same-sex sexual experiences. Children will not be criminally charged if they have sex when both partners are between 12 and 16 years old. And it is not criminal for a child under 16 years to have sex with a partner less than 2 years older. The law stipulates access to reproductive health services from the age of 16 years, and puts the minimum age of marriage at 18 years.<sup>18</sup>

### 3. Comprehensive reform

A law that criminalizes child marriage embodies an essential symbolic and deterrent power and sends a strong signal that child marriage is a crime and will not be tolerated. A comprehensive law will also encompass legal remedies and redress for victims of child marriage. The enactment of the law should be accompanied by efforts to ensure broad public awareness of the law and its provisions.<sup>19</sup> Public awareness efforts should focus on the rights of victims to report and how to access child-friendly and gender-sensitive justice mechanisms.

For a comprehensive legal approach to child marriage,<sup>20</sup> a strong legal framework for child marriage needs to be supported by laws and policies that promote gender equality and children' rights, and protect women and girls against

discrimination in law and practice. This includes laws related to, among others: marriage and divorce (including registration and solemnization of marriages), harmful practices such as female genital mutilation, dowry and bride price, nationality and citizenship, property and inheritance, alimony and custody of children, sexual and gender-based violence (including marital rape), child labour, slavery, child trafficking and sex trafficking, right to education and health care, and mandatory birth and marriage registration.

### 3a. Key components of a comprehensive approach

The following elements have been proposed as key components of a comprehensive legislative approach to child marriage:

- **Right to services:** Guarantee reproductive rights and access to reproductive health services for girls and boys; ensure the right to education (including comprehensive sexuality education); ensure that girls can stay in school after marriage, during pregnancy and after having children; and guarantee the right to benefit from social security.
- **Right to information, expression, privacy and confidentiality:** Guarantee the right to privacy and confidentiality of the child; to expression, including freedom to seek, receive and impart information.
- **Access to justice:** Children's access to justice, civil remedies, safety and protection.<sup>21</sup>
- **Protection from violence and exploitation:** Protect children from abuse, neglect and harmful practices, including child marriage, rape, sexual slavery and forced labour, bride kidnapping, trafficking of women and girls, wife inheritance, marriage as settlement or payment, international marriage brokering, and polygamy.
- **Mandatory civil registration** through a system to register all marriages, births and deaths. Ensure registration for all marriages, including civil, religious and customary unions as a means to track marriages and the age of marriage. Data gathered through registration systems should be used to monitor and facilitate enforcement of the minimum marriage age standard, provide age verification, and compile statistics on marriages.

**In many countries the legal status of child marriage is regulated through a complex interplay of legislation that includes civil law, criminal law and family law.**

### Understanding adolescents holistically: Three ages of consent

*UNFPA in East and Southern Africa went beyond the age of consent to marriage to strategically prioritize the age of consent to sexual activity and to health services as well.<sup>22</sup> It is important to have clarity about the age at which young people may legally consent to sexual activity but the decision about where to draw the line of legal consent is a difficult one. On the one hand, laws must protect children from sexual abuse. However, these legal parameters must be carefully drawn, as this age delineation has other implications, one of which is to draw young people into the net of the criminal justice system for consensual acts engaged with informed consent in line with the United Nations Convention on the Rights of the Child "principle of evolving capacities".*

*Establishing rules for adolescents' consent for medical care<sup>23</sup> has been one of the more difficult issues to face policymakers. Adolescents and young people who are sexually active, pregnant or infected with a sexually transmitted infection, who use drugs or alcohol, and who suffer violence or abuse at home or suffer from emotional or psychological problems may avoid seeking assistance if they must involve their parents or caregivers (or their husband/partner). Recognizing this reality, many countries explicitly authorize a minor to make informed decisions about their own medical care after a prior assessment of their mental and psychological capacities. However, balancing the rights of parents with those of adolescents and young people to confidentially access sexual and reproductive health services remains a topic of debate. To exercise their autonomy, adolescents and young people should be able to exercise and enjoy their right to make decisions regarding their medical treatment when they are capable of providing their full, free and individual informed consent affecting their health, bodily autonomy or integrity.*

### 3b. Addressing pluralism - civil, criminal, family, customary and religious laws

In many countries the legal status of child marriage is regulated through a complex interplay of legislation that includes civil law, criminal law and family law. Countries involved in the Global Programme feature a wide range of combinations of formal law systems (postcolonial civil and common law systems), customary laws and religious laws (see table 1). The status of customary and religious laws varies by country. Customary laws do not just vary by country but are often specific to each location and open to interpretation by individual chiefs and community or traditional tribunals. The application of religious or customary law depends on the hierarchy of sources of law and are also part of national legislation.

Six of the 12 Global Programme countries apply Islamic law to some extent. Islamic laws and their interpretation differ according to the Islamic school of jurisprudence that

is prevalent in each country or region. In some federal systems, the state courts (rather than the federal courts) have jurisdictions for criminal prosecutions.

In India, child marriage is regulated under general legislation – namely, the Prohibition of Child Marriage Act (PCMA) – and by a range of personal laws (Hindu, Muslim, Christian, Parsi, Jewish). The inconsistencies between the PCMA and personal laws exemplifies the legal maze that girls throughout the country often find themselves in when facing child marriage. Contradictions persist in India’s plural legal system with regard to consent, the minimum legal age of marriage, punishments for child marriage, and married girls’ right to dissolve child marriages.<sup>24</sup>

**TABLE 1: Legal systems in Global Programme countries<sup>25</sup>**

COUNTRY	LEGAL SYSTEMS
<b>Bangladesh</b>	Mixed legal system of mostly English common law and Islamic law
<b>Burkina Faso</b>	Civil law system based on the French model and customary law (and informal use of Islamic law); in mid-2019, the National Assembly amended the penal code
<b>Ethiopia</b>	Civil law system
<b>Ghana</b>	Mixed system of English common law and customary law
<b>India</b>	Common law system based on the English model; separate personal law codes apply to Muslims, Christians and Hindus; judicial review of legislative acts
<b>Mozambique</b>	Mixed legal system of Portuguese civil law and customary law; note, in rural areas where there are predominantly Muslim villages with no formal legal system, Islamic law may be applied
<b>Nepal</b>	English common law and Hindu legal concepts; note, new criminal and civil codes came into effect on 17 August 2018
<b>Niger</b>	Mixed legal system of civil law, based on French civil law, Islamic law and customary law
<b>Sierra Leone</b>	Mixed legal system of English common law and customary law
<b>Uganda</b>	Mixed legal system of English common law and customary law
<b>Yemen</b>	Mixed legal system of Islamic (sharia) law, Napoleonic law, English common law and customary law
<b>Zambia</b>	Mixed legal system of English common law and customary law

Drafters of legislation should address the following considerations when customary/religious laws and practices conflict with formal laws:

- Review laws related to child marriage to reveal any gaps, inconsistencies and loopholes in the legislative framework that undermines girls’ ability to seek legal protection and remedy where child marriage persists.<sup>26</sup>
- Ensure that customary/religious practices and laws do not condone child marriage and discriminate against girls and women.
- National formal law should take primacy over customary/religious or religious laws that perpetuate child marriage and discrimination against women and girls.
- Ensure outreach to local and customary/religious leaders to facilitate the implementation of guarantees under the supreme laws (usually the constitution).
- Resolve conflicts between customary/religious and formal laws in a manner that respects the survivor’s human rights, principles of gender equality and the best interests of the child.
- Laws should ensure that the use of a customary/religious adjudication mechanism does not preclude the victim from accessing the formal justice system.<sup>27</sup>

### 3c. Stakeholders’ roles and responsibilities in drafting or amending laws

The process of drafting or amending legislation should include the participation of all major stakeholders to ensure their full support. Targeted advocacy and awareness-raising should be used to generate broad public knowledge of, and to mobilize support for, the drafting, adoption, dissemination and implementation of the legislation.<sup>28</sup> Once the legislation has passed, it has to be promoted widely, and key stakeholders have to be trained in order to understand the law’s implications and their responsibilities for enacting and upholding the law. Table 2 outlines the roles and responsibilities of stakeholders.

### Example of legislative reform

**United Kingdom of Great Britain and Northern Ireland:** *The legal minimum age of marriage is 18 years in England, Wales and Northern Ireland. However, there is provision for marriage with parental consent between the ages of 16 and 18 years. In Scotland, the minimum age of marriage is 16 years and marriage between 16 and 18 does not require parental consent. Some parents use these legal loopholes to force the marriages of their children who are aged 16 or 17 years. In 2014, England and Wales criminalized forced marriage under the Anti-social Behaviour, Crime and Policing Act. Forcing someone, including children, into marriage is now liable to a maximum of seven years in jail. The act also criminalizes forcing a British national into marriage outside of the United Kingdom. Importantly, breaching a forced marriage protection order now carries a maximum penalty of five years in jail.<sup>29</sup>*



**TABLE 2: Roles and responsibilities in legislative reform**

STAKEHOLDER	ROLE AND RESPONSIBILITY
<b>Parliamentarians</b>	Leadership in establishing and implementing a robust legal and policy framework for preventing child marriage and supporting married girls, and ensuring it is effectively enforced by relevant actors and institutions. They can advocate the adoption, strengthening and implementation of laws and policies on child marriage
<b>Civil society organizations, including youth networks and activists</b>	<p>Civil society organizations play important roles in legislative reform processes through:</p> <ul style="list-style-type: none"> <li>• Direct advocacy with policy and decision makers</li> <li>• Holding government accountable to commitments on ending child marriage</li> </ul> <ul style="list-style-type: none"> <li>• Mobilizing public opinion and raising public awareness of the law</li> <li>• Training key actors, including law enforcement officials and registrars, in the provisions of the law and its implementation</li> <li>• Implementing the programmatic provisions of the model law</li> </ul>
<b>Judicial court system</b>	Interpreting the laws passed by the legislative branch and enforced by the executive branch. They are responsible for the administration of justice and for child-friendly and gender-sensitive legal procedures
<b>Ministries enforcing the prohibition of child marriage</b>	Implementing laws that prohibit child marriage: e.g., appointing public officers as child marriage prohibition officers, committees that prevent child marriage, or other bodies established as part of a child protection system
<b>Ministry of education</b>	Design, implementation, monitoring and evaluation of educational legislations, policies and programmes and ensuring that all children have access to free and compulsory primary and equally accessible secondary education without discrimination of any kind
<b>Ministry of health</b>	Protecting and promoting public health and providing welfare and other social security services. They are responsible for the design, implementation, monitoring and evaluation of health policies, programmes and guidelines
<b>Ministry of civil registration and vital statistics</b>	Registration of births, marriages and deaths
<b>Representatives of customary and religious law and justice systems, local chiefs, traditional authorities</b>	Enacting customary and religious laws in accordance with existing legislation. Preventing child marriage
<b>Other stakeholders</b>	<ul style="list-style-type: none"> <li>• Administrative institutions</li> <li>• Police</li> <li>• Ministry of finance (anti-child marriage fund, budget)</li> <li>• Ministry of community development and traditional affairs</li> <li>• Ministry of local government</li> <li>• The private sector</li> </ul>

### Examples of legislative reform

**Pakistan:** While the Child Marriage Restraint Act of 1929 set an age of marriage at 18 years for males and 16 years for females, with punishments for guardians and those solemnizing underage marriages, child marriage rates remain elevated. Tribal customs play an important role in many communities, and marriage laws may be interpreted and enforced through tribal elders and jirgas (councils of elders). Generally, there is no strict enforcement of minimum marriage age laws and there are limited remedies for victims if they are violated.<sup>30</sup> In 2016, Pakistani clerics from the Council of Islamic Ideology condemned<sup>31</sup> a bill to raise the age of marriage to 18 years for girls, calling it “un-Islamic” and “blasphemous” and leading the legislature to drop the proposal. The bill would have imposed harsher penalties on people who arrange child marriages, and raised the legal age of marriage for girls from 16 to 18 years. However, jurisdiction for family law rests with the provincial legislatures and this particular bill would not have banned child marriage in all of Pakistan, only in the capital Islamabad. The picture elsewhere is more hopeful. Sindh and Punjab, two provinces that account for more than 75 per cent of Pakistan’s population, have made significant progress. In 2013, Sindh adopted a law banning child marriages, introducing stricter punishments and higher fines, and increasing the age of marriage to 18 years for girls. In 2015, Punjab followed suit and introduced stricter punishments and higher fines. However, the minimum age remains 16 years for girls and 18 years for boys.<sup>32</sup>

**Malawi:** In February 2017, the Malawi parliament amended the constitution to: raise the age by which a person is defined as a child to 18 years (from 16 years); and to raise the minimum age of marriage for boys and girls to 18 years without exceptions (from 15 years with parental consent). The constitutional amendment was signed into law in April 2017 by the president. As a consequence, the Ministry of Justice and Constitutional Affairs set up a constitutional amendment taskforce to amend all relevant laws to comply with the amended constitution and align with article 2 of the African Charter on the Rights and Welfare of Children (which defines a child as “every human being below the age of 18 years”). Comprising the ministries of gender and justice, representatives of United Nations agencies and civil society organizations, the taskforce is in charge of harmonizing all child-related laws accordingly – including the Penal Code, the Employment Act, and the Child Care, Protection and Justice Act. In this process, the SADC Model Law is used as a reference: when the laws are being reviewed, compliance with the content of the model law is also being checked.

## 4. Implementing and enforcing child marriage laws

Even where strong legal frameworks exist, implementation and enforcement are often weak, and the reasons vary from one context to another.<sup>33</sup> Table 3 presents some common challenges and potential solutions for implementation of laws.

**TABLE 3: Challenges in implementing child marriage laws and potential solutions**

CHALLENGES	SOLUTION
<b>Laws with provisions on age of marriage contradict each other</b>	Define a child as an individual under the age of 18 years, without exception. Set the minimum legal age of marriage for both males and females at 18 years. Harmonize all laws (civil, criminal, family and customary) to this standard
<b>Proving the age of a girl where birth and marriage registration is weak or non-existent</b>	Make birth and marriage registration mandatory and free. Strengthen civil registration systems and ensure that all births and marriages are registered. When in doubt, assume the girl (or boy) is under the age of 18 years (same provision as in juvenile justice)
<b>Majority of marriages are conducted outside of formal legal structures</b>	Work with religious and traditional leaders to raise awareness of the law, the harmful impact of child marriage and alternatives for girls. Ensure people conducting marriages verify the age of the bride and groom and report child marriage cases to the relevant authorities
<b>Misinterpretations of the position of different religions, traditions and cultures on child marriage</b>	Create space for respectful dialogues with religious and traditional leaders. Promote alternative interpretations of religious texts, and raise awareness of the negative impacts of child marriage on girls, children, families and communities
<b>Child marriage happens in rural areas with few resources to implement the law</b>	Create or strengthen non-discriminatory gender-sensitive and inclusive child protection and justice systems (i.e., mobile courts, children's helplines) and provide free legal aid for all children
<b>Underage victims of child marriage struggle to take their cases to court, due to their age, dependency, lack of knowledge or resources, and fear of stigma and reprisals</b>	Do law reform work (including legal standing and statute of limitations for child abuse) and support implementation of child-friendly and gender-sensitive justice process and procedures. Train local law enforcement authorities to respond to child marriage and gender-based violence cases. Provide free legal aid for children
<b>Lack of awareness of the provisions of the law by duty bearers and rights holders</b>	Raise awareness of the provisions of the law. Support legal rights awareness in schools and for out-of-school children

Women and children face unique challenges compared with men when seeking justice through the state system. They often find justice elusive and discriminatory, and their rights undermined by customary legal systems. In many cases, disputes are resolved by men, and women and children are represented by male relatives. Patriarchal norms and customs in some societies can result in customary justice systems not considering violence against women and children as serious offences. Some

customary justice systems tolerate discriminatory practices such as female genital mutilation and denial of widow inheritance, and impose discriminatory sanctions such as forcing a girl to marry the person who raped them.<sup>34</sup>

### 4a. Law enforcement and punishment

Perspectives on law enforcement are often polarized between a pro-law enforcement approach and those that consider other measures. A pro-law enforcement position calls for strong enforcement of legal provisions to effectively move towards ending child marriage. According to this approach, the punishment of perpetrators is necessary to ensure that laws prohibiting child marriage are effective. The enforcement of criminal law sends a strong message and can also influence changes in gender and social norms.<sup>35</sup> An alternative approach considers other measures. The state's right to punish criminal offences is not the only tool available, nor an absolute obligation to protect legal interests. This allows the use of criminal law where it is useful and necessary. When other mechanisms exist that provide this protection more satisfactorily, or when criminal law has negative consequences, criminal prosecution and punishment have to be adjusted and restricted according to the specific circumstances of each case.<sup>36</sup> The Global Programme supports this view by discouraging heavy-handed law enforcement approaches that have negative and unintended consequences, and undermine evidence-based interventions to change social and gender norms and behaviours and to promote access to social services for adolescents.

Who should and could be criminally punished for child marriage? In some criminal law provisions, the question of who should be punished is straightforward – for example, a civil servant who used a fake birth certificate, a corrupt officer who officiated a child marriage, or an official or health worker who failed to report a child marriage. The following are examples of various categories of people that may be held accountable for child marriage:

- Parents or guardians for forcing underage girls and boys into marriage
- Adults who receive a dowry for the marriage of children
- Officials and religious leaders who solemnize child marriages
- Administrators who register or certify child marriages
- Wealthy individuals who sponsor weddings of children (some leaders fund mass weddings in India to gain popular support – some of the spouses may be children)
- Medical professionals, government employees or civil servants who are involved or complicit in carrying out child marriages

While the punishment of offenders should balance incapacitation (removing the offender from society), rehabilitation and restitution or indemnification to the victims, it is important to keep in mind that community service and lenient sentences could result in undermining the use of the law for accountability, and weaken the law’s potential for long-term change. Where government employees or civil servants are involved or complicit in carrying out child marriage, their status and responsibility, including to report, should be seen as an aggravating circumstance in the determination of criminal sanctions or administrative sanctions, such as the loss of a professional licence or the termination of a contract, which should be preceded by the issuance of warnings. The SADC Model Law recommends a nuanced and level approach that combines different levels of punishment for different typologies of crime and aggravating factors, which requires a detailed perpetrator analysis. The person marrying and sexually abusing a girl should be considered the primary offender, and therefore subject to harsher punitive measures. Parents or guardians as accomplices, and in light of intent or motive, would be subject to other fines or community work and, finally, milder punitive measures should be considered for other accomplices, such as those performing the weddings.<sup>37</sup> Ultimately, the decision of type of crime, the aggravating factors and therefore the severity of punishment is a local one that has to take many factors into account. More research is needed on how the criminalization of child marriage works or does not work at country level.

**TABLE 4: Punishment appropriateness**

<b>CONSIDERATIONS REGARDING CRIMINAL PROSECUTION AND PUNISHMENT OF CHILD MARRIAGE</b>	<b>CONSIDERATIONS IN RELATION TO THE SEVERITY OF PUNISHMENT</b>
<ul style="list-style-type: none"> <li>• Best interests of children as the primary consideration</li> <li>• No child should ever be criminalized or punished for child marriage</li> <li>• Understand and avoid negative consequences of punishment for children, their families and communities</li> <li>• Ensure that criminal prosecution and punishment support rather than undermine other evidence-based efforts to end child marriage</li> <li>• Avoid backlash in the community and among conservative groups to the criminalization of child marriage</li> <li>• Consensual sexual activities (and elopement) among adolescents should not be criminalized or punished</li> <li>• Provide legal recourse and free legal aid for children who are married and in union, divorced or widowed</li> </ul>	<ul style="list-style-type: none"> <li>• The level of punishment for people involved in child marriage should be determined based on each case and context</li> <li>• Increase punishment for the marriage of younger children</li> <li>• Greater punishment for forced marriage compared with unforced child marriage<sup>38</sup></li> <li>• Use a state’s typology of crime (felonies, misdemeanours, and infractions) to determine the crime severity index and the punishment. This includes different types of penalty that do not entail imprisonment, such as warning, suspended sentence, fine, community service, etc. and prosecutorial discretion</li> <li>• Criminal law distinguishes between intent and motive. Motive is the moving power that impels one to action for a definite result, whereas intent is the purpose to use a particular means to effect such a result</li> </ul>

#### 4b. Roles and responsibilities in implementation and enforcement

The judicial system is responsible for the administration of justice and for interpreting the laws passed by the legislative branch and enforced by the executive branch. Some of the actions that the judicial system and courts can take to prevent child marriage and address the needs of children in marriage and victims of child marriage include the following:<sup>39</sup> Define rules and procedures for the distribution of property acquired during a prohibited marriage and the dissolution/annulment of a voidable child marriage; issue a restraining order to anyone who is about to engage or marry a child, independently of what customary or religious laws and practices say; and provide free legal aid and legal services to victims of child marriage. Criminal law is usually prosecuted by the state, and courts should ensure the legal rights of child brides are respected.<sup>40</sup> On the petition of a child, adult or a third party, dissolve/annul the marriage contracted before the commencement of the law. This will likely also need reforms to the legal standing of a child, whereby a child can bring a case on their own rather than with the consent of their parent, guardian or ‘spouse’. The judicial system should provide custody, access and maintenance to the offspring and ensure the respect of the citizenship and nationality acquired through marriage.

International and national agencies have the following roles in relation to child marriage and the law:

- Support legislative reform to raise the minimum age of marriage, including: the harmonization of laws in line with the ‘General Comment No. 20 (2016)<sup>41</sup> on the Implementation of the Rights of the Child During Adolescence’; legal pluralism; broad stakeholder consultations; and so on.
- Support reforms of criminal justice systems to be more child-friendly and gender-sensitive, including the institutionalization of the ‘UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime’.<sup>42</sup>
- Legal empowerment of children and awareness-raising and public education on child marriage and criminal law for all ages.
- Training of key actors in the formal, customary and religious justice systems.
- Monitor and research the implementation of the law and the consequences on child marriage in different countries based on: different legal systems, country income contexts and strengths of child protection and justice systems.



- Support the exchange of experiences with criminal justice approaches related to child marriage.
- Strengthen access to justice and child protection systems<sup>43</sup> for adolescents who have been married, divorced or widowed.
- Strengthen civil registration systems (births, marriages, deaths) and information systems to exchange information between registrars.
- Support girls and boys surviving child marriage to become advocates and activists for justice and child protection reforms on child marriage.

### India's example of law enforcement

India is home to 223 million girls and women who were married as children – a third of the world's child brides. India's Child Marriage Restraint Act of 1929 provided punishments of up to 3 months and fines of up to 1,000 rupees for child marriage, but very few cases were ever prosecuted.<sup>44</sup> The Prohibition of Child Marriage Act of 2006 increased penalties for child marriage to up to 2 years of imprisonment and fines of up to 100,000 rupees. However, between 2014 and 2016, just 1,785 cases of child marriage were registered across the country; 4,777 people were arrested; and only 274 were convicted.<sup>45</sup>

The example of India highlights both the relative ineffectiveness of existing criminal laws to prevent child marriage and the unintended consequences of misusing the Protection of Children from Sexual Offences (POCSO) Act to criminalize consensual sexual activities between adolescents. The POCSO Act was designed to prosecute child sexual abuse. However, the Act is being misused by parents of eloped girls to sue their daughters' boyfriends and have them put in prison for kidnapping and child sex offences.

First Information Reports (FIR) of child rape under the POCSO Act increased from 12,363 in 2013 to 19,765 in 2016. A study conducted by The Hindu newspaper in Delhi attributed this increase to the raising of the age of consensual sexual activity. The study showed that in 2013, out of the 460 cases that were fully tried, 189 cases (40 per cent) related to consensual sexual activity. Out of these 189 cases, 174 cases (92 per cent) were those of elopement, and in 107 of such cases (64 per cent), the female 'complainant' deposed that she was in love with the accused.<sup>46</sup>

With the increase in peer and love marriages and elopements in South Asia, a different approach is required that supports young people's empowerment and choices.

## GLOSSARY

This glossary was largely compiled based on the SADC Model Law<sup>47</sup> and on various legal dictionaries.

**Annulment:** The dissolution of a marriage in legal proceedings in which the marriage is declared null and void as though it never occurred.<sup>48</sup>

**Civil law** is a legal system originating in continental Europe (especially France and Germany) and adopted in much of the world. It places greater emphasis on the codification of the law than on precedent (as in the Anglo-American common law system). This is common in francophone countries inspired by the Napoleonic code.

**Common law** is a system of law based on previous judicial decisions by judges and embodied in reports of decided cases. This system originated in England and is common in anglophone countries.

**Criminal or penal code:** A consolidated compilation of laws concerning crimes and offences and their punishment, penalties, disciplinary or administrative sanctions.

**Criminal procedure code** is the main legislation on procedure<sup>49</sup> for the administration of substantive<sup>50</sup> criminal law<sup>51</sup> in India and other countries. The criminal procedure code ensures a fair trial where none of the rights of the accused is compromised nor unjustifiably favoured.

**Customary law** (or traditional justice) consists of a community's historically generated rules and norms. Customary laws are usually unwritten, passed down orally from generation to generation.<sup>52</sup>

**Islamic legal system:** Muslim personal law (sharia<sup>53</sup> – Islamic law) and fiqh<sup>54</sup> (Islamic jurisprudence) is the most widely used religious law<sup>55</sup>, and one of the three most common legal systems in the world alongside common law and civil law. There are different schools of Islamic jurisprudence.

**Judicial or administrative institution:** A court, quasi-judicial tribunal or administrative authority that interprets or applies a law.

**Minimum age of marriage** as established by the constitution or civil law.

**Legal pluralism:** Where two or more legal systems coexist with different sources of law in the same country (or social field).

**Model Law:** The ‘SADC Model Law on Eradicating Child Marriage and Protecting Children already in Marriages’.<sup>56</sup>

**Napoleonic code:** The French civil code<sup>57</sup> established in 1804.

**Personal law:** Law that applies to a particular person or class of people based on religion, faith and culture – regardless of nationality or citizenship within a given territory (distinguished from territorial law applying where the crime/act has occurred).

**Place of safety:** A place where a child in need of care and protection can be kept temporarily; includes a safety home or foster home.

**Religious authority:** A person who has the power to solemnize a marriage, give religious guidance, counsel or advice on any matter related to any particular social issue related to marriage or to perform any religious rite or service, whether as an individual or under the authority of a church or other religious institution.

**Safety home:** A place used for the care, protection, reception, education, counselling and safety of a victim of child marriage.

**Voidable:** A marriage is valid but voidable on their reaching majority, or can be annulled by a court if contested by one of the parties to the marriage.

## ENDNOTES

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