

ENSURING THE RIGHTS OF THE GIRL CHILD BY AMENDING 'THE MINIMUM AGE OF MARRIAGE' UNDER MUSLIM LAW IN SRI LANKA.

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Introduction

This paper examines the legal framework governing marriage under Muslim Law in Sri Lanka. The main objective of this study is to evaluate the adequacy of existing legal measures in order to use them to eliminate child marriages. Currently, Human Rights documents are sprouting-up everywhere in the world. Therefore, every country has a state responsibility to ensure equal rights for both genders accordingly. Despite Sri Lanka being a state party to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the domestic law of Sri Lanka discriminates against women in several forms; therefore, it is apparent that the state violates its obligations under the treaty law.

This paper aims at exposing a discriminatory law relevant to women, which still exists in the country. Further, the author discusses the manner in which the law discriminates against women, and how it should be reformed, in order to achieve gender equality. Thus, this paper intends to establish the fact that legislative intervention is needed to revisit the existing legal framework, in order to bring it on par with international standards, and there by eradicate child marriages, uphold the best interest of the girl child and enable the empowerment of the girl child by ensuring the non-violation of women's rights. Hence, there should be a mandatory minimum age applicable to marriage for women of Sri Lanka, irrespective of race or religion. Such guarantees would allow the girl child in the Muslim community to maintain equality with girl child in the other communities, in relation to her child rights.

Background

"Child marriage is one of the most pernicious manifestations of the unequal power relations between females and males. Begun as a practice to protect unwelcome sexual advances and to gain economic security, child marriage has undermined the very purposes it was meant to achieve. Child marriage often means for the girl a life of certain sexual and economic servitude. The subordination of women is both a cause and consequence of child marriage".¹

Even though child marriages are prohibited in the world, at present child marriages are permitted through the legislation which has been enacted in Sri Lanka. The discriminatory statute that exists in Sri Lanka negatively affects the girl child of the Muslim community. Sri Lanka being a legal pluralistic country, there are different statutory laws that affect marriage consequences. Muslims are governed by No. 13 of 1951 of Marriage and Divorce (Muslim) Act. However, Sri Lanka is a state party in the CEDAW. Nevertheless, under Muslim law, there is no specific minimum age for marriage², because this Act is silent regarding the minimum age pertaining to marriage. Hence, parties are allowed to proceed with child marriages within the country. It is noteworthy that such child marriages are mentally, physically, socially and/or morally dangerous and harmful to the girl child. Furthermore, these girl children are not only deprived of their childhood, but are also subject to danger through-out their entire life.

In section 23 of MMDA- Marriage of a girl who has not attained the age of twelve cannot be registered without Quazi's permission. Although, section 47 1 (j) of the Act³ mentions that it is permitted to register the marriage of a girl child who has not passed the twelve years of age with the permission of Quazi, after applying to Quazi courts. Nevertheless, the minimum age for marriage of male child is the age of puberty.⁴ Therefore, it can be argued that the law permits the registration of a marriage if the girl child is below 12 years of age. This provision seriously discriminates against women in the Muslim community because in General Law and in Kandyan Law, if the parties have not completed 18 years of age they are legally unable to have their marriage registered.

While females enjoy their rights in other communities, females from the Muslim community are highly discriminated against even though their rights are already well established under the law governed by international standards.

Analysis of Selected Statute

Since the Muslim Marriage and Divorce Act does not mention a minimum age for marriage, it violates different types of interrelated Human Rights. The girl child who is under the age of twelve years is also able to get married with the Quazi's

¹ Child marriage and the Law, Legislative reform initiative paper series , Division of Policy and Planning January 2008, UNICEF

² No. 13 of 1951 of Marriage and Divorce (Muslim) Act

³ *ibid*

⁴ Marsoof, S., (2006), *The Muslim Law of Marriage Applicable in Sri Lanka*, Law College Law Review.

authority, even though she is a minor.⁵ The Quazi is not an office which includes a legal background. Therefore, it can be argued that without having proper legal knowledge it is difficult to understand and to ensure Human Rights. In both the law-suits Nabiza Umma v. Sale⁶ and Alim v. Mohamed Musthapha⁷ the court recognized these marriages as valid under the law, even though the parties were minors under age of twelve years. Judgments are contrary to Human Rights because they do not serve to uphold the rights of the girl child, and more often than not, even violated them.

Under Section 15 of No. 19 of the 1907 Marriage Registration Ordinance, the minimum age of marriage is 18 years of age.⁸ Even though, there is confusion regarding the minimum age of marriage in the statute, it has been currently established as 18 years of age under the judgment given in Gunarathnam V. Registrar General.⁹ Furthermore, in Kandyan Law which is a special law applicable to up country Sinhalese governed under the No.44 of 1952 Kandyan Marriage and Divorce Act, the minimum age for marriage is age 18 years.¹⁰ Thus, it is clear that compared to these Statutes, there is clear discrimination against women in Muslim Marriage Law.

Moreover, there is a conflict between the provisions of the Penal Code¹¹ and the Muslim Marriage and Divorce Act. To explain, in the Penal Code, under the Section 363(e) it is stated that if a man has sexual intercourse with a woman who is under sixteen years with or without her consent, it is considered to be statutory rape, unless the woman is his wife who is over twelve years of age. Ironically according to this provision, any person is allowed to have sexual intercourse with his wife who is above twelve years, since it is not considered as a statutory rape. This over-rules the girl child's right and on the other hand, there is no provision indicating what the plight is of the girl children who are below age twelve. Nevertheless, it is noteworthy that according to the Penal Code, it can be argued that sexual intercourse with a girl below the age of twelve years is rape. Therefore, there is a conflict between those two statutes and a lacuna in the law. Legal drafters should revisit both legislations to recommend suitable amendments to rectify the injustice, which invariably follows as a result of such lapses.

Therefore, under this problematic statute, girl children are being discriminated against because of their gender and religion. Under the Sri Lankan Constitution,¹² Article 12 recognizes the right to equality. Section 12(2) states that no one should be discriminated against on the grounds of sex, religion, race, caste etc. Hence, it is evident that girl children are unable to enjoy their entitlement to equal rights because of their gender and religion. It is notable that this in turn is a violation of their fundamental rights.

Under the CEDAW Country Report in 2011,¹³ the CEDAW committee calls upon the state party to amend the Muslim Personal Law regarding marriages which take place at an early age in life. Furthermore, the Shadow Report in 2010 also raised the issue of minimum age of marriage for Muslims. However, it is most noteworthy that nothing has been changed thus far, based on the above Reports.

As mentioned earlier, child marriages serve to deny several rights of the child, especially the right to education. In Sri Lanka the age limit set for compulsory education is 16 years.¹⁴ This regulation is applicable to all citizens without any distinction. Therefore, there is a conflict between the Muslim Marriage and Divorce Act and the Regulation of the Compulsory Education. Therefore, child marriages violate this prescribed regulation and serve to deny a child's right to education. This is a serious act of discrimination because all the other girl children from different communities and boys belonging to all the communities, including the Muslim community, enjoy the right to education. As a result, these girl children are not only unable to access their right to education, but they are also deprived of access to higher education and consequent employment opportunities.

Moreover, there is another social issue which arises as a result of the above problem; such as if any girl gets married when below 12 years of age and her marriage ends up in divorce, under the above mentioned unfortunate circumstances the girl child is forced to find financial means to survive. According to the Employment of Women, Young Persons and Children's Act No. 47 of 1956, the minimum age for work is 14 years of age and the minimum age for hazardous work is 18 years of age. Therefore, these small girl children are unable to survive because law does not permit them to work until they reach the age of 14 years. Hence, these girl children are vulnerable with no proper education and no suitable employment.

Application of International Standards to Ensure Equal Rights

Child marriages serve to deny different types of interconnected human rights in the context of the girl child. For example: the right to equality based on gender and age, the right to life, the right to education and development, the right to health, the right to

⁵Jaldeen, M. S, (1990), *The Muslim Law of Marriage, Divorce and Maintenance in Sri Lanka*, Haji Omar Foundation for Peace. Education and Reaserch, 15.

⁶ 1940 2 MMDLR 118

⁷ 1938 2 MMDLR

⁸Amendment No. 18 of 1955.

⁹(2002) 2 SLR 302

¹⁰Amendment No. 19 of 1995.

¹¹ Ordinance No. 2 of 1883

¹² The Constitution of Sri Lanka 1978

¹³Concluding observation of the Committee on the Elimination of Discrimination against Women, CEDAW/C/LKA/CO/7

¹⁴Compulsory Attendance of Children at Schools Regulations No. 1 of 2015.

have a family life, and the right to freedom from slavery¹⁵ are ensured by international standards such as the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention on the Consent to Marriage, the Minimum Age for Marriage and Registration of Marriage, the International Convention on Civil and Political Rights, the Convention on the Economic Social and Cultural Rights and The Universal Declaration of Human Rights.

The United Nations Charter established the fundamental human rights and equal rights of men and women without any distinction based on gender. Also, The Universal Declaration of Human Rights (UDHR) which is currently considered as a customary international law recognizes the equal rights of both men and women.¹⁶ Moreover, Article 16 states that men and women have an equal right to get married when they reach full-age and that they are entitled to equal rights during their marriage. Further, Article 16(b) states there should be free and full consent of the parties to the marriage. In child marriages there is no free consent whatsoever. Moreover, unfortunately children are unable to understand what the concept of marriage is. Nevertheless, the UDHR is a non binding legal document which is currently considered as a customary international law with moral obligation. Therefore, the Sri Lankan government also has to take on the responsibility to fulfill this obligation in order to ensure similar rights for both genders.

The Convention on the Rights of the Child (CRC) attempted to protect child rights relating to every possible area. The CRC has clearly mentioned that every human being below 18 years of age is a child,¹⁷ even though, under Muslim Law a girl child who is below the age of 12 years is permitted to marry.

Furthermore, according to Article 24(3) of the CRC state parties should take positive legal measures to eliminate traditional practices that are harmful to the health of children. Child marriages result in negatively affecting the both mental and physical health and well-being of a girl child when they are subject to giving birth to children without maturing themselves (sexual and reproductive health). Further, Article 6 states that state parties should recognize the child's right to life and survival and development.¹⁸ Therefore, there is a conventional obligation to facilitate the guarantee of rights which are relevant to the health of the girl child. Furthermore, Article 12 states that an individual has a right to express his or her view freely in all matters.

Moreover, child marriages serve to deny other rights of the girl child as well. Article 28 & 29 of the CRC ensures the child's right to education on the basis of equal opportunity and Article 34 states that "*state parties should undertake to protect the child from all forms of sexual exploitation and sexual abuse*". According to the author's point of view, if a girl child gets married before the age of 18 years, then it could be considered as a form of sexual exploitation. Moreover, Article 31 speaks of the right to engage in rest and leisure. However, because of child marriages usually, the girl child never has the opportunity to enjoy years of a playful carefree childhood, to which she has a right. Further, Article 35 & 36 also recognizes the child rights relating to eliminating child marriages.¹⁹ It can be argued that the Sri Lankan government fails in its duty to fulfill these rights of the girl child within the Muslim community.

Furthermore, the Convention on the Elimination of Discrimination against Women (CEDAW), which is the most important document for women, prohibited child marriages under Article 16 and recommended that state parties should specify a minimum age for marriage.²⁰ Even though the CRC specifically does not prohibit child marriages, the CEDAW provides sufficient legal protection to abolish 'under-age marriages which take place early in the life of children in the light of the CRC described above.'²¹ Since the best interest of the child²² is guaranteed in the CRC because Sri Lanka is a state party of both the CRC and the CEDAW, the government should take positive legal measures towards abolishing child marriages.

According to Article 2 of the CEDAW, state parties should take positive action to condemn all forms of discrimination against women. One of the important state obligations shown under Article 2(f) and 5 (a) says that: state parties should take appropriate steps to revise the cultural practices which endorse discrimination between men and women within the existing laws.

Further, under the General Recommendation No. 19, state parties should take positive measures to prevent and eliminate violence against women in both their private and public life.²³

¹⁵Child marriage and the Law, Legislative reform initiative paper series, Division of Policy and Planning January 2008, UNICEF, p.i

¹⁶The Universal Declaration of Human Rights, G.A.Res.217, UN.Doc.A/810 at 71 (1948); Article 7 reads in part: All are equal before the law and are entitled without any discrimination to equal protection of the law.

¹⁷Article 1 of the Convention on the Rights of the Child.

¹⁸ Article 6(1) & 6(2) of Convention on the Rights of the Child

¹⁹ Article 34 - The right to protection from all forms of sexual exploitation and sexual abuse, Article 35 – The right to protection from abduction, sale or trafficking.

²⁰Article 16(2) of the CEDAW, "The betrothal and the 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".

²¹Goonesekere, S., & De Silva – de Alwis, Rangita (2005), *Women's and Children's Rights in a Human Rights Based Approach to Development. Working Paper*. Division of Policy and Planning, UNICEF.

²²Article 3 of the Convention on the Rights of the Child.

²³Child marriage and the Law, Legislative reform initiative paper series, Division of Policy and Planning January 2008, UNICEF, p9.

Very often, a girl child does not know who her bridegroom is to be until the wedding ceremony because the girl child's family members decide who the bridegroom should be. The 21st General Recommendation of the CEDAW committee ensures the equal rights and dignity of women and recognizes the right to choose a spouse and enter freely into a marriage.

Sri Lanka is a state party to the CEDAW and as a dualistic country has enacted the Women's Charter, even though the Government has failed to ensure that the above discussed rights for women are incorporated into the law applicable to the Muslim community. Therefore, it is noteworthy that the discriminatory statute is still unfortunately implemented in the country, without any inhibition.

The Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, Article 2 mentioned that state parties should take legislative action to establish a minimum age requirement for marriage and to prohibit a marriage if the parties which are to enter into a marriage are under the age of the prescribed age requirement. Sri Lanka has signed this Convention even though the country has not ratified this Convention yet. Nevertheless, this Convention should be instrumental in establishing the legal requirement of a minimum age for marriage which would be applicable to all citizens without discrimination.

The International Convention on Civil and Political Rights (ICCPR) requires state parties to ensure all civil and political rights without any discrimination based on gender. Article 23 of the ICCPR states that no marriage shall be valid without the free and full consent of the spouse. Especially, The Human Rights Committee's General Comment 28 elaborates the state obligation of equal rights for both men and for women. Furthermore, this General Comment states "*Inequality in the enjoyment of rights by women is deeply embedded in tradition, history, and culture including religious attitudes*".²⁴ It endorses that state parties should not justify the violations against women based on traditional, religious and cultural attitudes. According to the General Comment 28, states should facilitate the fulfillment of equal enjoyment of all Covenant Rights. Therefore, as a state party, the government has no rationale to justify the failure to revise the Marriage and Divorce (Muslim) Act, as a Special Law.

International Convention on Economic and Cultural Rights (ICESCR) Article 10 emphasizes necessity to have the free consent of the spouse for a marriage to take place. Moreover, the ICESCR concluding comments have elaborated on the concerns relating to child marriages. According to the concluding comments in Sri Lanka,²⁵ 'under-age marriages' badly affect the right of the girl child to health, to education and to future employment opportunities.

Furthermore, under the concluding comments in Suriname,²⁶ it is mentioned that a difference relating to the marriageable age of females and males is a violation of Article 10. Moreover, the ICESCR committee recommended that the age of 18 years should be the minimum age for marriage.²⁷ According to the above discussed Conventions, Sri Lanka has an international, legal obligation to take positive steps towards abolishing child marriages under the Muslim law.

The American Convention on Human Rights (1969), The African Charter, The European Convention on Human Rights, The European Social Charter and The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedom also emphasize the harmful effect that child marriages have on the ability to safeguard child rights. Even though Sri Lanka is not a state party to the above mentioned regional treaties, there is possibility of extracting the positive recommendations from these Articles and thereafter, of revisiting the existing legal provisions in the problematic statute.²⁸

Comparative Analysis with Other Jurisdictions

In developing countries one third of the girl children are married before they reach the age of 18 years and one of nine girl children are married before the age of 15 years.²⁹ It is a fact that child marriages occur frequently in Western Africa and Sub-Saharan Africa and also in South Asia.³⁰ According to the cultural and traditional practices worldwide, most of the Muslim countries are still plagued by this burning issue.

Pakistan which is ethnically a Muslim country can be chosen for a comparative analysis because Pakistan's law relating to the minimum age requirement for marriage is established on a more considerable level than in Sri Lanka. The Child Marriage Restraint Act, 1929 attempted to eliminate the solemnization of child marriages. To elaborate: Section 2(a) of the Pakistan's Child Marriage Restraint Act 1929, states³¹ that: the legal age for marriage is 16 years of age for women and 18 years of age for men. The Act has mentioned that a marriage when the age of the individuals is under the legal age limit is a penal offence. However, even though such a child marriage is a punishable offence, ironically the union is not rendered invalid. Moreover, if

²⁴ The Human Rights Committee's General Comment 28

²⁵ ICESCR Concluding Comments, Sri Lanka E/1999/22(1999) par.73.

²⁶ ICESCR Concluding Comments, Suriname, E/1996/22 (1995) par. 159

²⁷ ICESCR Concluding Comments, France, E/C. 122002.22(2001) par. 876

²⁸ Child marriage and the Law, Legislative reform initiative paper series, Division of Policy and Planning January 2008, UNICEF, Pp 15-17.

²⁹ www.Icrw.org, Child Marriages Facts and Figures

³⁰ *ibid*

³¹ Section 2(a) "child" means a person who, if a male, is under eighteen years of age, and if a female, is under sixteen years of age;

the child's parents or guardian promote or permit the solemnization of the child marriage, it shall be punishable by either imprisonment, which may extend to three months, or by a fine, which may extend to forty five thousand rupees, or with both.

It can be argued that, since Pakistan's marriageable age for girls is 16 years and Sri Lanka still does not have any provision indicating the minimum age for marriage, the Sri Lankan Government should consider the Law of Pakistan as a guide for amending the Muslim Marriage and Divorce Act of our country.

Even though, Pakistan has the aforementioned law, according to the statistical estimates, 21% of girl children in Pakistan get married before the reach to the age of 18 and as much as 35% of girl children are married by the age of 15.³² As an ethnically Muslim country its citizens follow tradition, culture and customary practices. Thus most often the parents of the bride to be arrange their daughters' marriage, with the objectives of either settlement of personal debts or a transfer of money. Nevertheless, the government of Pakistan has taken positive measures to ensure that the rights of the girl child are not violated. Pakistan is a member of the South Asian Initiative to End Violence against Children (SAIEVAC) and has adopted the regional action plan to end child marriages.

Moreover, in 2014 the Sindh (a Province of Pakistan) Assembly adopted the Sindh Child Marriages Restraint Act and increased the minimum age of marriage to 18 years, for both males and for females. Even though, in the Punjab Province, the Act was adopted as it is, and the minimum age of marriage for females is 16 years of age.

For the purpose of achieving sustainable development goals, Pakistan has targeted the end of child marriages to be the year 2030.³³ The Pakistan Country Report in 2013 raised the minimum age for marriage for girl children to 16 years. This applies to the girl children from religious minorities as well. Therefore, the CEDAW committee advised Pakistan to revise the Muslim Marriage Dissolution Act (1939) in order to remove discriminatory provisions against women; and amend the legislation by raising the minimum age of marriage for girl children to 18 years.³⁴

While comparing the two jurisdictions, it can be argued that Sri Lanka could implement those laws pertaining to the prohibition of child marriages by drawing from the relevant laws of Pakistan.

Reforms Proposed for Sri Lankan Muslim Law

There should be a mandatory age of marriage for women in Sri Lanka, irrespective of gender or religion.³⁵ Firstly, the existing law of minimum age for marriage should be increased up to 18 years of age, in the light of international standards and of the above discussed jurisdiction. If the government would do so; then, the girl child in the Sri Lankan Muslim community will be able to ensure that she shares equal rights with males and with girl children from other communities. Moreover, there should be a suitable punishment that serves as a deterrent, which is aimed at persons who attempt to solemnize child marriages.

Secondly, the government should take positive measures to eliminate causes for the need to resort to child labour. Poverty, sexual relations outside marriage, lack of educational and employment opportunities for girls and traditional norms are the main causes for child marriages. When the law permits 'under-age' marriages, it is invariably a great relief for poor parents of the Muslim community, and as such, they seize the opportunity, to do so as quickly as they can.

Therefore, the government should attempt to address and solve these issues as much as possible, in order to guarantee the non-violation of the rights of the girl child, while simultaneously preventing discrimination against the girl children by amending discriminatory laws.

Conclusion

All over the world, women continue to be discriminated against in different ways because society-at-large is still a predominantly male dominated one. Therefore, it is difficult to change the status-quo rapidly, even though it is desirable that this should be so. There are a number of arguments which are brought in by the Muslim community to justify the practice of child marriages. Nevertheless, states should actively intervene in order to address and to rectify these problems. Furthermore, local laws need to be altered, so that they align with the laws based on international standards.

Sri Lanka which is a multicultural country is still governed by discriminatory laws that affect women negatively. The Muslim Marriage and Divorce Act discriminates against the girl child in relation to marriage, because there is no minimum age requirement applicable to marriage. Underage marriages deprive the girl child of her rights. There should not be any distinction related to women based upon gender. Females themselves, should be in a position to uphold their own rights and this is essential to ensure gender equality, in order to improve the empowerment of women.

There is a debate between Universalism and Cultural Relativism (**Universalism v Cultural Relativism**). Ideally Human rights should be applicable to every human being without any distinction amidst a backdrop of cultural norms which are of relevance to

³²<http://www.girlsnotbrides.org/child-marriage/pakistan/>

³³<http://www.girlsnotbrides.org/child-marriage/pakistan/>

³⁴ Concluding observation on the fourth periodic report of Pakistan adopted by the Committee at its fifty fourth session(11 February – 1 March 2013), CEDAW/C/PK/CO/04

³⁵ Critical issues arising from the 8th Sri Lanka Government CEDAW Report of April 2015, submitted by Sri Lankan Women's Groups.

them. However, if any cultural practice serves to discriminate against any person; then, such cultural practices should be deemed unacceptable. Hence, the government should take maximum measures to remove both cultural and gender inequalities which prevent the girl child from enjoying equal rights relevant to marriage.

References

- Goonesekere, S., & De Silva – de Alwis, Rangita (2005), *Women's and Children's Rights in a Human Rights Based Approach to Development*, Working Paper, Division of Policy and Planning, UNICEF.
- Marsoof, S., (2006), *The Muslim Law of Marriage Applicable in Sri Lanka*, Law College Law Review.
- Jaldeen, M. S., (1990), *The Muslim Law of Marriage, Divorce and Maintenance in Sri Lanka*, Haji Omar Foundation for Peace, Education and Research.
- Universal Declaration of Human Rights(1948).
- Convention on the Elimination of all forms of Discrimination against Women (1979).
- Convention on the Rights of the Child (1989).
- No. 13 of 1951 of Marriage and Divorce (Muslim) Act (Sri Lanka)
- Child Marriage Restraint Act, 1929 (Pakistan)

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