



## Memorandum

TO: Hon. Justice M. Imman Ali, Supreme Court of Bangladesh

FROM: Leigh Blomgren, Women and Justice Fellow, Avon Global Center for Women and Justice

CC: Elizabeth Brundige, Executive Director, Avon Global Center for Women and Justice

DATE: August 28, 2013

RE: **Child Marriage in Bangladesh: Impact of Discriminatory Personal Laws**

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### **Introduction**

This Memorandum discusses the impact of personal laws on the treatment of child marriage within Bangladesh. Bangladesh's antiquated personal laws relating to marriage fail to protect children, reinforce support for early marriage, and directly contradict statutory law in Bangladesh. Examining Bangladesh's current legal framework highlights the problematic influence that discriminatory personal laws have on the fulfillment of national and international obligations concerning child marriage.

Section A outlines the legal framework for national statutory laws concerning child marriage and discusses the structure and applicability of religious personal laws to child marriage. Section B analyzes the particulars of personal marriage laws in Bangladesh and their discriminatory impact on women, and considers how these laws address child marriage. Section C presents the resulting legal divide arising from the inherent conflict between the treatment of child marriage under national laws and personal laws currently existing in Bangladesh and briefly addresses the challenges posed by the conflicting legal systems addressing child

marriage. Finally, Section D discusses Bangladesh’s obligations relating to child marriage under international human rights law, many of which are also referred to, as applicable, in the prior sections of the memorandum.

### **A. Current Legal Framework in Bangladesh**

As is the case with most South Asian countries, Bangladesh has national laws that prohibit child marriage; however, because such laws commonly conflict with customary and religious laws and practice, they cannot be effectively implemented or enforced.<sup>1</sup> The presence of parallel legal systems that result in the simultaneous existence of both civil law and religious personal law being governed and administered separately by religious teachers and government officials hinders public awareness, adaptation, and enforcement of legal protections against child marriage.

#### *Child Marriage Restraint Act, 1929 (CMRA)*

Within the national legal framework of Bangladesh, the Child Marriage Restraint Act, 1929 (CMRA)<sup>2</sup> is the main law concerning child marriage and the obligations of persons

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<sup>1</sup> United Nations Children’s Fund (UNICEF), *Early Marriage in South Asia: A Discussion Paper*, 17 (2008); (This brief details the experiences of females 15 years of age and older – International Center for Research on Women, *Too Young to Wed: The Lives, Health, and Rights of Young Married Girls* (2003), available at <http://www.icrw.org/publications/too-young-wed-0>).

<sup>2</sup> ACT NO. XIX OF 1929, available at [http://bdlaws.minlaw.gov.bd/print\\_sections\\_all.php?id=149](http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=149).

#### **Key CMRA Provisions:**

- Section 2:

In this Act, unless there is anything repugnant in the subject or context:

- (a) “child” means a person who, if a male, is under twenty-one years of age, and if a female, is under eighteen years of age;
- (b) “child marriage” means a marriage to which either of the contracting parties is a child;
- (c) “contracting party” to a marriage means either of the parties whose marriage is or is about to be thereby solemnized; and
- (d) “minor” means a person who, if a male, is under twenty-one years of age, and if a female, is under eighteen years of age.

involved to prevent child marriages. As set forth under Sections 4 through 6 of the CMRA, the contracting of a child marriage is a punishable offense, with imprisonment up to three months, a fine of one thousand Taka (USD \$14), or both.<sup>3</sup> This punishment applies to a parent or guardian who allows a child marriage to take place and any person who solemnizes a child marriage.<sup>4</sup>

Furthermore, enabling a child marriage to take place in violation of a court-issued injunction to stop such proceeding under Section 12 of the CMRA is punishable as well.<sup>5</sup> Despite the stipulated punishments under the CMRA, a recent report reveals that penal sanctions for parents or guardians and those who solemnize an early marriage are so minor that they become irrelevant and that provisions addressing child marriage under national laws are routinely ignored and enforcement is virtually nonexistent.<sup>6</sup>

### Religious Personal Law

In Bangladesh, marriage is considered to be based on religion and is governed by the applicable personal laws of each community – Christian, Hindu, Muslim, Parsi or Sikh – rather

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- Sections 4-6: Punishments for marrying a child:  
“Whoever, being a male above eighteen years of age, or being a female above eighteen years of age, contracts a child marriage shall be punished with simple imprisonment which may extend to one month, or with a fine which may extend to one-thousand Taka (USD \$14) or both.”
  - Section 8: Mandates that prosecutions follow the Code of Criminal Procedure 1898 as it applies to proceedings in complaint cases. The same punishment is prescribed for a parent/guardian who allows a child marriage to take place and any person who solemnizes a child marriage.
  - Section 12: Empowers the Court to issue an injunction to prevent the occurrence of a child marriage on the basis of a credible complaint.

<sup>3</sup> International Development Law Organization (IDLO), *Strengthening the Legal Protection Framework for Girls in India, Bangladesh, Kenya and Liberia – Bangladesh Country Report*, 70 (2010), available at [http://www.idlo.int/doccalendar/bangladeshreport\\_final.pdf](http://www.idlo.int/doccalendar/bangladeshreport_final.pdf).

<sup>4</sup> CMRA Section 6 provides that any parent or guardian or other “person having charge of” a child and who “has negligently failed to prevent marriage from being solemnised,” or any person who solemnizes such a marriage, may be punishable under the Act. In addition, under Section 4, either party to the marriage, if a male over 21 years or a female over 18 years, who “contracts a child marriage” would also be punishable.

<sup>5</sup> IDLO, *supra* note 3.

<sup>6</sup> *Id.* at 71.

than by a standardized State Code.<sup>7</sup> The concept of marriage differs among the various communities, resulting in several different yet overlapping legal systems. According to censuses, the large majority of the Bangladeshi population (89.7 percent) is Muslim; the population also consists of Hindus (about 9.2 percent), Buddhists (0.7 percent), and Christians (0.3 percent).<sup>8</sup> Each religion has separate laws that govern marriage, separation, and divorce.<sup>9</sup> The personal laws of each community are officially recognized laws and “are supplemented by authoritative decisions issued by the Supreme Court of Bangladesh and the High Court Division of the Supreme Court of Bangladesh.”<sup>10</sup>

These personal laws are a mixture of codified and uncodified rules, with codified rules dating back to the colonial era, some as far back as the 1860s.<sup>11</sup> Upon independence in 1971, Bangladesh adopted all laws that were in effect before its independence, and hence many personal laws have remained essentially untouched for over a century despite substantial changes in society and family life in Bangladesh.<sup>12</sup> Removed from modern legal developments, Bangladesh’s personal laws frequently trap women in abusive marriages or drive women into poverty when the marriage ends, rather than offer them protection.<sup>13</sup>

Further review of child marriage under Bangladesh’s personal laws sheds light onto the dilemma arising from invoking religion to justify sex-based discrimination in marriage and the

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<sup>7</sup> Flavia Agnes, *Family Law Volume 1: Family Laws and Constitutional Claims*, Oxford Scholarship Online, September 2012. The Special Marriage Act of 1872 (ACT NO. III of 1872) provides “a form of marriage for persons who do not profess the Christian, Jewish, Hindu, Muslim, Parsi, Buddhist, Sikh or Jaina religion, and for persons who profess the Hindu, Buddhist, Sikh or Jaina religion and to legalize certain marriages the validity of which is doubtful”, available at [http://bdlaws.minlaw.gov.bd/print\\_sections\\_all.php?id=25](http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=25).

<sup>8</sup> Human Rights Watch, *“Will I Get My Dues ... Before I Die?”: Harm to Women from Bangladesh’s Discriminatory Laws on Marriage, Separation, and Divorce*, 28-29 (17 September 2012), available at <http://www.hrw.org/sites/default/files/reports/bangladesh0912ForUpload.pdf>. (citing: Bangladesh Bureau of Statistics, “Bangladesh Population Census 2001,” 2004, as cited in Bangladesh Bureau of Educational Information and Statistics, “Bangladesh: Country Profile,” available at [http://www.banbeis.gov.bd/bd\\_pro.htm](http://www.banbeis.gov.bd/bd_pro.htm)).

<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.* at 4. See also *id.* at 29.

<sup>11</sup> *Id.* at 29.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, at 2.

problematic aspects of how child marriage is treated under personal laws, which fail to protect the realization of children's rights.

## **B. Personal Laws in Bangladesh**

In 1971 when Bangladesh attained independence, the government instituted a legal system in which the majority of laws were to apply to all citizens without discrimination based on sex or religious belief.<sup>14</sup> Exceptions to this general legal paradigm are the religious personal laws that perpetuate child marriage through discriminatory measures and denial of rights.

The primary personal laws in Bangladesh are those established under the religious tenets of Muslim, Hindu, and Christian communities. All of these personal laws discriminate against women in the context of marriage in violation of international and national human rights standards.<sup>15</sup> More specifically, aspects of these personal laws that address the minimum age for marriage and the requirement of consent violate Bangladesh statutory law and international human rights laws that prohibit child marriage. In addition, some provisions of personal law that establish systems for the registration of marriages also contribute to the high incidence of child marriage in Bangladesh.

### *Personal Marriage Laws and Discrimination against Women*

Bangladesh's personal laws fail to secure equality within marriage. Noted further below, in Section D, many components of Bangladesh's personal laws breach international human rights obligations on nondiscrimination in marriage and the family.<sup>16</sup> The personal laws on marriage in

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<sup>14</sup> *Id.* at 4.

<sup>15</sup> Among which include: the absence of full and free consent to marriage; failure to maintain standards for minimum age requirements; the legal recognition of polygamy; unequal divorce criteria for men and women; women's inability to claim marital property upon divorce; barriers to women accessing maintenance; and the lack of mandatory marriage registration. See also the discussion in Section D, *infra*.

<sup>16</sup> Among which include: the absence of full and free consent to marriage; failure to maintain standards for minimum age requirements; the legal recognition of polygamy; unequal divorce criteria for men and women; women's inability to claim marital property upon divorce; barriers to women accessing maintenance; and the lack of mandatory marriage registration. See also the discussion in Section D, *infra*.

Bangladesh discriminate against women and negatively affect the social development of the larger community.<sup>17</sup> Moreover, as will be discussed in more depth in Part C, personal laws sanction child marriage,<sup>18</sup> contributing to its high prevalence in Bangladesh – according to government estimates, more than 55 percent of women and girls over 10 years old are married before they reach the age of 18.<sup>19</sup> Consequently, the problems arising with respect to personal laws on marriage frequently give rise to accompanying concerns related to child marriage.

### *Muslim Personal Marriage Laws*

In Bangladesh, the majority of Muslims follow the Sunni-Hanafi school of legal thought,<sup>20</sup> certain components of which have been codified and amended under the Muslim Family Laws Ordinance of 1961.<sup>21</sup> Muslim personal law recognizes that a marriage is a contract and, while Muslim personal laws are in large part discriminatory towards women in the context of marriage,<sup>22</sup> personal laws do present some positive options for women, such as the potential to improve their economic protections within the marriage through negotiations under a standard form marriage contract.<sup>23</sup> Nonetheless, Human Rights Watch reported that in one study of 71

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<sup>17</sup> Human Rights Watch, *supra* note 8, at 51.

<sup>18</sup> See Subsection “Personal Laws Related to Child Marriage”, *infra*.

<sup>19</sup> Bangladesh Bureau of Statistics, “Population 10 Years and Over by Age Group, Sex and Marital Status,” Statistical Yearbook of Bangladesh (Dhaka: Bangladesh Bureau of Statistics, 2010), table 2.10, p. 45 *available at* <http://www.bbs.gov.bd/WebTestApplication/userfiles/Image/SY2010/Chapter-02.pdf>; According to this source, of the 44,642,068 women and girls above age 10, 28,102,602 were married (based on 2001 population census data); See also Bangladesh Bureau of Statistics, Report of Welfare Monitoring Survey 2009 p. 2, *available at* [http://www.bbs.gov.bd/WebTestApplication/userfiles/Image/Latest%20Statistics%20Release/welfaresurvey\\_09.pdf](http://www.bbs.gov.bd/WebTestApplication/userfiles/Image/Latest%20Statistics%20Release/welfaresurvey_09.pdf).

<sup>20</sup> Human Rights Watch, *supra* note 8, at 32 (referencing: the Muslim Personal Law (Sharia) Application Act, 1937).

<sup>21</sup> *Id.* (referencing: Bangladesh (Adaptation of Existing Laws) Order, 1972); (noting: “Other laws that have a bearing on Muslim marriages and their dissolution are the Dissolution of Muslim Marriages Act of 1939 and the Muslim Marriages and Divorces (Registration) Act of 1974”).

<sup>22</sup> Muslim personal laws are discriminatory in their embrace of polygamy for men, their unequal provisions on divorce, their limited rights to maintenance during marriage, and their overall treatment with respect to the role and rights of women and wives.

<sup>23</sup> Human Rights Watch, *supra* note 8, at 5.

Muslim women, all of the women “had little knowledge about the contract and the ways in which they could negotiate better terms” or protect themselves.<sup>24</sup>

### *Hindu Personal Marriage Laws*

The Dayabhaga school of Hindu law is the origin of most personal laws on marriage and separation governing Hindu practices.<sup>25</sup> Although codification is limited, as with Muslim personal law, Hindu personal law has many discriminatory elements regarding the equal treatment of men and women.<sup>26</sup> Divorce is not permitted for men or for women. Hindu women can apply for separate residence and maintenance from their husbands according to the Married Women’s Right to Separate Residence and Maintenance Act of 1946, but the permissible grounds for submitting a formal application, which must be done in family court, are very restricted.<sup>27</sup> The limited rights provided to Hindu women under personal laws are subject to a number of court-determined nullifications, such as the woman being “unchaste,” converting her religion, or not complying with “conjugal rights” decrees ordered by the court.<sup>28</sup>

### *Christian Personal Marriage Laws*

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<sup>24</sup> *Id.* at 32 (citing: “Human Rights Watch interviews with Muslim women in Dhaka city, Noakhali, Madaripur, and Gazipur districts, May and June 2011. Almost all women knew that they could specify mahr at the time of marriage but did not know of any additional protections that they could negotiate in the kabin-nama. In a few cases, the women were old and claimed that there was no standard format kabin-nama at the time they got married. Activists confirmed that that was the case.”).

<sup>25</sup> *Id.* at 40.

<sup>26</sup> *Id.* at 7. For example, there are no procedural preconditions placed on the number of times Hindu men are permitted to marry.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (referencing: the Hindu Married Women’s Right to Separate Residence and Maintenance Act, 1946, sec. 2.) (When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. Explanation. —Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society).

Laws enacted in the late 19th century govern Christian marriage and divorce.<sup>29</sup> Among these, the most influential are the Christian Marriage Act of 1872 and the Divorce Act of 1869.<sup>30</sup> Christian personal law also discriminates against women. For example, divorce is allowed for men on the basis of allegations that their wife committed adultery, but wives, conversely, must prove adultery and one additional act among a number of acts stipulated under the law, including “incestuous adultery,...bigamy with adultery,...rape, sodomy or bestiality, or... adultery coupled with desertion, without reasonable excuse, for two years or upwards.”<sup>31</sup>

### *Personal Laws Related to Child Marriage*

In addition to the above personal laws, which relate to child marriage by virtue of their discriminatory treatment of women in the context of marriage in general, there are also several features of personal laws in Bangladesh that address aspects of child marriage directly and contribute to the problems associated with Bangladesh’s incongruent parallel legal systems. In addition, the implementation of a mandatory nation-wide marriage registration system that would help to enforce Bangladesh’s national prohibition against child marriage is frustrated by the tenets of personal laws, which do not impart the same strict requirements stipulated by national laws.

### *Minimum Age of Marriage and Consent to Marriage*

In order for a marriage to lawfully exist under international and national standards, a person must meet the legal age requirements and must freely consent to the marriage. Laws relating to the minimum age of and consent to marriage provide an important example of the legal paradox that generally accompanies the mandates of personal laws in Bangladesh.<sup>32</sup>

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<sup>29</sup> *Id.* at 43.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 7 (referencing: the Divorce Act, 1869, sec. 10).

<sup>32</sup> Huda, Shahnaz, *Child Marriage: Social Marginalisation of Statutory Laws*, Bangladesh Journal of Law, 1 (2), 138 (1997), available at [http://www.biliabd.org/article%20law/Vol-01%20\(2\)/Shahnaz%20Huda.pdf](http://www.biliabd.org/article%20law/Vol-01%20(2)/Shahnaz%20Huda.pdf).



Religious personal laws that permit marriage at an earlier age than 18 years are in direct contradiction to the statutory laws in Bangladesh and international norms.<sup>33</sup> They also violate national and international standards with respect to the consent requirement, as consent cannot be “free and full” if a party involved is not sufficiently mature to make an informed decision about a life partner.<sup>34</sup> Muslim, Hindu, and Christian personal laws in Bangladesh do not comply with these requirements.

According to Muslim, Hindu, and Christian personal laws, the marriage of girls at an age below 18 years is acceptable in some circumstances. Under Muslim personal law, the marriage of a female child is permitted at the age of 14 years.<sup>35</sup> Muslim personal law also allows a lawful guardian, usually the parent, to give consent on behalf of the child, upon assumption of puberty.<sup>36</sup> According to Hindu law, no set minimum is established for the age of marriage, but rather, marriageable age is deemed to be the attainment of puberty by a girl, generally occurring around 13 years old.<sup>37</sup> The Christian Marriage Act of 1872 permits the marriage of a minor (defined as a person who is not yet 21 years of age and who is not a widow or widower) with the consent of a parent or guardian.<sup>38</sup> Section 19 of the Christian Marriage Act maintains that, “The father, if living, of any minor, or, if the father be dead, the guardian of the person of such minor,

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<sup>33</sup> IDLO, *supra* note 3, at 72.

<sup>34</sup> See Universal Declaration of Human Rights (UDHR), GA res. 217A (III), UN Doc A/810 at 71 (1948), art. 16, available at <http://www.udhr.org/UDHR/default.htm>; See also Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, adopted November 7, 1962, G.A. res. 1763 (XVII), entered into force December 9, 1964, art. 1(1), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/MinimumAgeForMarriage.aspx> (Bangladesh acceded to this convention on October 5, 1998); See also Sara Hossain and Suzanne Turner, *Abduction for Forced Marriage: Rights and Remedies in Bangladesh and Pakistan*, International Family Law (April 2001), available at <http://www.soas.ac.uk/honourcrimes/resources/file55687.pdf> (“Forced marriage involves the lack of free and full consent on the part of at least one of the parties to a marriage...The right to marry, including the requirement of free and full consent by each of the intending spouses, is clearly established under international human rights law and protected by national laws in many jurisdictions.”).

<sup>35</sup> IDLO, *supra* note 3, at 70.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (citing: ACT NO. XV OF 1872).

and, in case there be no such guardian, then the mother of such minor, may give consent to the minor's marriage."<sup>39</sup>

### *Registration of Marriages*

The practice of marrying children at a young age is perpetuated in many countries because of the lack of a functional system for the registration of marriages. The marriage registration system in Bangladesh remains unreliable, in part due to the fact that legal mandates for marriage registration are not required for all religious communities. Christian and Muslim personal laws do require the registration of marriages, but enforcement in religious communities is frequently poor because of the lack of a uniform system for record-keeping and because corruption by registrars is not uncommon.<sup>40</sup> Hindu personal law, on the other hand, does not provide for marriage registration at all.<sup>41</sup>

Muslim personal law calls for compulsory marriage registration,<sup>42</sup> yet is this requirement is rarely enforced. Furthermore, the procedures for marriage registration under Muslim personal laws are not sufficiently managed or regulated in order to facilitate accurate and accessible record-keeping.<sup>43</sup> Marriage registration files are difficult to access and verify because there are no centralized records, the registry system is not computerized or coordinated, and it can easily be circumvented or manipulated.<sup>44</sup> Moreover, irrespective of there being a functional system in place, under Muslim personal law, marriages are not invalidated for lack of a registration.<sup>45</sup>

Insufficient systems for the registration of marriages hinder the enforcement of national laws, including those related to child marriage, such as minimum age and consent

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<sup>39</sup> *Id.* (citing: ACT NO. XV OF 1872, art. 19).

<sup>40</sup> Human Rights Watch, *supra* note 8, at 95.

<sup>41</sup> *Id.* (Noting that a bill for the optional registration of Hindu marriages was approved in May 2012).

<sup>42</sup> Muslim Marriages and Divorces (Registration) Act, 1974, rule 3 (ACT NO. LII OF 1974).

<sup>43</sup> Human Rights Watch, *supra* note 8, at 6, 95.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 38.

requirements.<sup>46</sup> A further negative consequence of the poor marriage registration system in Bangladesh arises when girls, who believed they were married as a child, are not legally married or cannot prove their marriage according to official requirements under the law, and thus are unable to enforce their rights due to the invalidity of their marriage.<sup>47</sup>

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Religious personal laws in Bangladesh create significant barriers to protecting girls from child marriage and provide justifications for the denial of rights.<sup>48</sup> Personal laws for Muslims, Hindus, and Christians have not been significantly reformed in decades and reinforce the discriminatory cycles of past generations.<sup>49</sup> Consequently, child marriage should be defined and monitored according to updated national laws that incorporate international standards to protect children from early marriage and provide clear requirements for minimum age, consent, and systems of marriage registration.

### **C. Treatment of Child Marriage: Conflicting Legal Systems in Bangladesh and Challenges to Reform**

Merging the national laws and personal laws in Bangladesh produce an incompatible outcome for the treatment of child marriage. The paradoxical relationship between the two legal systems warrants assessment of the challenges presented under the current framework in Bangladesh as well as inquiry into the possibilities for reform in order to better address the problematic practice of child marriage.

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<sup>46</sup> See UNICEF, *supra* note 1, at 17.

<sup>47</sup> Human Rights Watch, *supra* note 8, at 96 (For example, *see* p. 7 “Hindu women applying for maintenance or a separate residence must prove they were married in the first place, a difficult task since Hindu marriages lack a formal registration system.”).

<sup>48</sup> Sara Hossain and Suzanne Turner, *Abduction for Forced Marriage: Rights and Remedies in Bangladesh and Pakistan*, International Family Law (April 2001), available at <http://www.soas.ac.uk/honourcrimes/resources/file55687.pdf>.

<sup>49</sup> Human Rights Watch, *Bangladesh: Discriminatory Family Laws Fuel Female Poverty* (September 16, 2012), available at <http://www.hrw.org/news/2012/09/16/bangladesh-discriminatory-family-laws-fuel-female-poverty>.

### Divided Legal Framework

Under Bangladesh law, child marriage is both punishable and valid at the same time. As noted, child marriage is punishable under the CMRA; yet, although the CMRA provides penal sanctions for those who knowingly participate in the contracting of an underage marriage, at the same time, the resulting marriages remain valid under the law<sup>50</sup> and continue to be supported by the religious personal laws of marriage.<sup>51</sup> In Bangladesh, as explained by the International Development Law Organization (IDLO), notwithstanding provisions for punishment under the CMRA “no order passed by a court under the CMRA 1929, however, can nullify a marriage solemnized under the personal law of the marrying persons.”<sup>52</sup> Without clear provisions in the CMRA invalidating child marriages, the authority given to religious personal laws results in child marriages being legally recognized despite the penal sanctions assigned to those who facilitate the marriage.<sup>53</sup>

This peculiar outcome ensues from the inherent conflict between national laws and personal laws in Bangladesh, and because the provisions of the CMRA do not invalidate conflicting religious personal laws, the resulting legal pluralism concerning child marriage laws does not adequately protect young girls.<sup>54</sup>

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<sup>50</sup> Women Living Under Muslim Laws (WLUML), *Bangladesh: Is the Law Fair Towards Women?* (18 March 2004), available at <http://www.wluml.org/english/newsfulltxt.shtml?cmd%5B157%5D=x-157-40211>.

<sup>51</sup> Office of the UN High Commissioner for Human Rights (OHCHR), Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention – Bangladesh*, para. 47 (14 March 2003), available at [http://www.unhchr.ch/tbs/doc.nsf/0/c0800ae5e758a57fc1256d3a002b4951/\\$FILE/G0340776.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/c0800ae5e758a57fc1256d3a002b4951/$FILE/G0340776.pdf).

<sup>52</sup> IDLO, *supra* note 3 (Additionally noting that, “Moreover, because under the statutory laws of Bangladesh, child marriage is not void, a marriage becomes legitimate when the under-age member reaches the legal age of marriage, as stipulated in the Majority Act 1873.”).

<sup>53</sup> Kamal, Sultana, *Laws for Muslim Women in Bangladesh*, 5 (April 2010), available at [http://www.globalwebpost.com/farooqm/study\\_res/bangladesh/kamal\\_law\\_women.pdf](http://www.globalwebpost.com/farooqm/study_res/bangladesh/kamal_law_women.pdf).

<sup>54</sup> Although limited in practice, there is opportunity in some instances for girls who are married under personal laws to obtain legal redress. As noted, child marriages may be validly contracted under Muslim personal law. However, even though a minor may be married based on consent provided by his or her lawful guardian, ratification of this consent is necessary when that individual attains puberty. Thus a person forced into marriage as a minor may repudiate the marriage on reaching the age of majority, provided it had not been consummated, by an application before the Family Court under the Dissolution of Muslim Marriage Act; *See* Section 2(vii) of the DMMA.

### Challenges to Successful Reform

Bangladesh's religious personal laws – whether Muslim, Hindu, or Christian – incorporate and sanction the marriage of children. Although statutory law makes it a criminal offence to marry off a child, it does not invalidate child marriages conducted under personal law. Addressing the problem of child marriage therefore requires the Bangladeshi government to resolve the paradox arising from its overlapping yet incompatible legal systems and to bring its personal laws into compliance with national and international human rights standards.

Regardless of the existence of national legislation to combat the child marriage in Bangladesh, the practice will continue jeopardize the rights and lives of many girls without addressing the insufficient enforcement of laws that protect against child marriage and the discriminatory personal laws that condone the practice. Policies that challenge and seek to eliminate the widespread practice must be implemented in order for Bangladesh to fully realize their duties arising under human rights obligations.

Controversy frequently surrounds legal reform efforts, and this is particularly the case with respect to matters concerning family and religion, which can be especially contentious.<sup>55</sup> Reform, however, is not unachievable in the context of religious personal laws. Human Rights Watch calls attention to such reform:

But it is noteworthy that other countries with Muslim, Hindu, and Christian populations— including countries with Muslim majorities or countries that incorporate Sharia in their family laws, as Bangladesh does—have reformed personal laws to recognize greater rights for women. These reforms reflect diverse interpretations of “religious” teachings on marriage and its dissolution, as well as government recognition that states have an obligation to eliminate discrimination regardless of the personal law applied.<sup>56</sup>

In order to align the incompatible legal framework in Bangladesh, which curtails the country's capability to address and reduce the practice of child marriage, the religious laws of

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<sup>55</sup> Human Rights Watch, *supra* note 8, at 4.

<sup>56</sup> *Id.*

different communities need to be reconciled with the CMRA. Additionally, the provisions of the CMRA that provide penal sanctions for child marriage would be strengthened by supplementary provisions that would also invalidate marriages involving children solemnized under religious law.<sup>57</sup> In its Bangladesh Country Report, the IDLO suggests:

The legislation relating to child marriage should be revised to make it easier to apply and enforce. Moreover, legal reform is needed to ensure that the domestic legal framework aligns with international standards. The prohibition of child marriage should be an absolute prohibition, and the age of marriage should be set, uniform and nondiscriminatory. Law enforcement agencies must take more serious efforts to prevent and punish child marriage.

The government of Bangladesh, over the years, has struggled to develop successful policies and procedures to offset the shortcomings of the personal law system. Recently, however, Bangladesh has experienced increased momentum in this area, with active efforts by the government to consider reform to civil law procedures and engage in international initiatives designed to address the problem of child marriage as well as the nature and content of the outdated personal laws.<sup>58</sup>

#### **D. International Human Rights Framework and Bangladesh's Legal Obligations Regarding Child Marriage**

The international human rights framework addressing child marriage is established under international agreements as well as fundamental human rights norm and standards. The obligations set forth by this framework, many of which have been referred to throughout the memorandum as they interrelate with the issues covered in the prior sections, expose the problematic nature of Bangladesh's current implementation of international laws and standards,

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<sup>57</sup> IDLO, *supra* note 3, at 75.

<sup>58</sup> Human Rights Watch, *supra* note 8, at 3, 9. In 2012, the Law Commission of Bangladesh, supported by the Ministry of Law, Justice and Parliamentary Affairs, completed nationwide research into reforms for Muslim, Hindu, and Christian personal laws. In May 2012, the cabinet approved a bill for optional registration of Hindu marriages. The Ministry of Law, Justice and Parliamentary Affairs is also considering reforms to civil court procedures—especially on issuance of summons—that will improve family court efficiency. These small but important steps follow decades of pressure by women's rights groups that have consistently demanded personal law and procedural reform.

and confirms the invalidity of many reservations made by Bangladesh to international instruments.

*International Human Rights Treaties Relating to Personal Laws on Child Marriage*

Major international human rights instruments address the problem of child marriage, and governments have a duty to incorporate these laws into national legislation and establish mechanisms to implement them.<sup>59</sup> Many countries that are parties to international human rights treaties, however, have entered reservations to critical clauses relating to women's rights in the context of marriage or do not follow through in implementing their international obligations.

Bangladesh has ratified the major international human rights instruments relevant to the problem of child marriage, including the Universal Declaration of Human Rights 1948 (UDHR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child 1989 (CRC), and the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, among others. Along with ratification, however, Bangladesh has also made reservations and declarations to some of these instruments that seek to limit its international obligations, and, as evidenced by the continued pervasiveness of the practice, Bangladesh has not fully implemented these international obligations to prevent and punish child marriage.

The Universal Declaration of Human Rights (UDHR) provides the basis for the right to consensual marriage in Article 16, recognizing that consent cannot be “free and full” when one of the parties involved is not sufficiently mature to make an informed decision about a life

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<sup>59</sup> International Planned Parenthood Federation (IPPF), *Ending Child Marriage: A Guide for Global Policy Action*, 21 (2008), available at [http://www.unfpa.org/upload/lib\\_pub\\_file/662\\_filename\\_endchildmarriage.pdf](http://www.unfpa.org/upload/lib_pub_file/662_filename_endchildmarriage.pdf).

partner.<sup>60</sup>

According to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), “[T]he 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”,<sup>61</sup> the CEDAW Committee has recommended that minimum age to be 18.<sup>62</sup> At the time of acceding to the CEDAW in 1984, the government of Bangladesh entered reservations to Article 2 regarding the elimination of discrimination against women and to Article 16(1)(c) regarding equality of rights in marriage and upon its dissolution. Bangladesh does not consider these provisions binding as they “conflict with Sharia law based on Holy Quran and Sunna.”<sup>63</sup>

Similarly, in 1998 Bangladesh ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>64</sup> with a number of declarations, among which Bangladesh reserved the right to interpret the non-discrimination clauses of Articles 2 and 3 within the context of the national constitution and domestic law.<sup>65</sup>

While the 1989 Convention on the Rights of the Child (CRC)<sup>66</sup> does not address child marriage explicitly, it does set forth standards and protections specifically applicable to children,

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<sup>60</sup> Universal Declaration of Human Rights (UDHR), GA res. 217A (III), UN Doc A/810 at 71 (1948), art. 16, *available at* <http://www.udhr.org/UDHR/default.htm>.

<sup>61</sup> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980), *available at* <http://www2.ohchr.org/english/law/cedaw.htm>.

<sup>62</sup> CEDAW Committee, General Recommendation No. 21, Equality in marriage and family relations, UN GAOR, 1994, Doc. No. A/47/38, (1994), *available at* <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>.

<sup>63</sup> See United Nations Treaty Collection, *available at* [http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&lang=en).

<sup>64</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR), GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967), *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>.

<sup>65</sup> See United Nations Treaty Collection, *available at* [http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XVI-3&chapter=16&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVI-3&chapter=16&lang=en).

<sup>66</sup> Convention on the Rights of the Child (CRC), G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, *available at* <http://www2.ohchr.org/english/law/crc.htm>.



which encompass issues related to child marriage.<sup>67</sup> Bangladesh ratified the CRC in 1990 with reservations that Article 14(1), which provides that and Article 21 “would apply subject to existing laws and practices of Bangladesh.”<sup>68</sup>

The Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage was adopted in November 1962 and entered into force in December 1964.<sup>69</sup> The Preamble to the Marriage Convention establishes both the context to the passage of the Convention and appropriate manner of interpreting its provisions.

The Preamble declares that the Convention recalls Article 16(1) of the UDHR and establishes that State Parties should take all appropriate measures with a view to abolishing such customs, ancient laws, and practices, by ensuring complete freedom in the choice of a spouse, eliminating child marriages, establishing appropriate penalties where necessary, and establishing a civil or other register in which all marriages will be recorded.<sup>70</sup> The Convention also calls upon state parties to eliminate the marriage of girls under the age of puberty and requires that states take legislative action to stipulate the minimum age of marriage.<sup>71</sup> It further provides that all legally binding marriages necessitate the “full and free consent” of both parties.<sup>72</sup>

Furthermore, under the Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages, it is the States’ responsibility to guarantee that “all marriages are

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<sup>67</sup> Including: non-discrimination (Article 2), the best interest of the child (Article 3), the right to life (Article 6), the right to be registered after birth (Article 7), the right of the child not to be separated from parents against his/her own will (Article 9), the right to express his/her views (Article 12), the right to health and to be protected from harmful practices (Article 24), the right to education, (Articles 28 and 29), and the right to freedom from abuse and exploitation (Articles 19, 34, 35, 36 and 39).

<sup>68</sup> Article 14(1) provides that “States Parties shall respect the right of the child to freedom of thought, conscience and religion.” Article 21 addresses the adoption of a child within or across countries.

<sup>69</sup> Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, adopted November 7, 1962, G.A. res. 1763 (XVII), entered into force December 9, 1964, *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/MinimumAgeForMarriage.aspx>. Bangladesh acceded to this convention on October 5, 1998.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at Art. 2.

<sup>72</sup> *Id.* at Art.1.

registered in an appropriate official register by the competent authority, yet, as noted above, despite these obligations Bangladesh continues to lack a competent system for registration.”<sup>73</sup>

The Government of Bangladesh acceded to the Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages in 1998, and entered reservations to Articles 1 and 2, to the effect that, “[T]he Government of the People's Republic of Bangladesh reserves the right to apply the provisions [of] Articles 1 and 2 in so far as they relate to the question of legal validity of child marriage, in accordance with the Personal Laws of different religious communities of the country”<sup>74</sup> and that Bangladesh would not be bound by the narrow exception in Article 2.<sup>75</sup>

### Invalidity of Reservations

Bangladesh’s reservations to the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, along with many reservations made to the other international agreements, suggest that the Bangladesh may not yet be prepared to confront the differing practices based on personal laws of religious communities. Bangladesh’s reservations are largely inconsistent with the object and purpose of the conventions and should therefore be seen as invalid.<sup>76</sup>

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<sup>73</sup> *Id.*

<sup>74</sup> See United Nations Treaty Collection, available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XVI-3&chapter=16&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVI-3&chapter=16&lang=en).

<sup>75</sup> *Id.* Article 1 provides: “No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person...as prescribed by law.” Article 2 provides: “State Parties to the convention shall specify a minimum age for marriage [“not less than 15 years” according to the non-binding recommendation accompanying this Convention]. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interests of the intending spouses.”

<sup>76</sup> United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, Art. 19, vol. 1155, p. 331, [UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969)], available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf). The question of compatibility of reservations with human rights treaties has been addressed by the UN Human Rights Committee, which has noted that reservations are subject to the Vienna Convention on the Law of Treaties, which provides (in Article 19(3)) that reservations may not be incompatible with the object and purpose of the treaty.

As addressed by the UN Human Rights Committee, the subject of reservations may not violate norms of international customary law.<sup>77</sup> Additionally, reservations made by Bangladesh that concern obligations to respect and ensure the rights guaranteed within a treaty or to give effect to the rights in a treaty through implementation of necessary measures at the domestic level are not valid.<sup>78</sup> Several of the reservations made by Bangladesh to international instruments are of the type that the Human Rights Committee found to be “of particular concern,” which

[a]re widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted.<sup>79</sup>

#### *International Human Rights Norms and Standards Relating to Personal Laws on Child Marriage*

Personal laws are also addressed in international discourse relating to the standards and norms surrounding the practice of child marriage. Sara Hossain and Suzanne Turner point to several human rights standards that contradict the practice of child marriage:

Forced marriage involves breach of a number of international human rights norms. Most central of these is the right to marry. This includes the right to decide when, if and whom to marry. With respect to minors, forced marriage has been found to include the practice of child marriage, as children do not have the capacity to give consent. It has also been identified as a form of discrimination against the girl-child. Forced marriage also implicates the right to personal liberty and security and the right to freedom from arbitrary detention. It may also involve breaches of the right to access to justice; the right to equality before the law and equal protection of the law; the right to an effective remedy and the right to freedom from gender-based discrimination.<sup>80</sup>

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<sup>77</sup> UN Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, April 11, 1994, para. 6, HRI/GEN/1/Rev.9 (Vol.I), p. 210, *available at* [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/69c55b086f72957ec12563ed004ecf7a?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/69c55b086f72957ec12563ed004ecf7a?Opendocument).

<sup>78</sup> *Id.* at paras. 8 and 9.

<sup>79</sup> *Id.* at para. 12.

<sup>80</sup> Sara Hossain and Suzanne Turner, *supra* note 48 (referencing: UDHR, Art 16; ICCPR, Art 23; ICESCR, Art 10; CEDAW, Art 16, the Convention on Consent to Marriage, Art 1; the ECHR, Art 12 and its Protocol 6, Art 5; *See also* the Declaration on the Elimination of All Forms of Discrimination against Women, 1967, Art 6(2); the ICPD Platform of Action 1994, paras 4.21 and 9; the Copenhagen Programme of Action 1995, para 80 and the Beijing Platform for Action, para 274); (referencing: CEDAW General Recommendation No 21, para 3 (1994) “the betrothal of girls or undertakings by family members on their behalf ... contravene not only the Convention, but also

With respect to child marriage, international standards frequently address the specific harm caused by traditional and cultural practices and the problems stemming from cultural practices that threaten the rights of women and children through perpetuation of inequality and discrimination.

The CEDAW Committee has stated that “whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people.”<sup>81</sup> The UN Human Rights Committee has similarly stated that governments should ensure that “traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights” [guaranteed under the ICCPR],<sup>82</sup> acknowledging that “[I]nequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes.”<sup>83</sup>

International human rights law and standards impose a duty on States to change or eradicate existing customs and practices that are discriminatory towards women, and because of the marked discrimination against women caused by child marriages, States have an obligation to eliminate the practice.<sup>84</sup> Likewise, the Human Rights Committee has directed that “States parties

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a woman’s right freely to choose her partner”); (referencing: CEDAW, Art 16(2); the Convention on Consent to Marriage, Art 2; the Recommendation on Consent to Marriage (Principle II); the Declaration on the Elimination of Discrimination Against Women, Art 6(3); ICPD Programme of Action, paras 4.2.1 and 5.5 and the Beijing Platform for Action, para 274).

<sup>81</sup> CEDAW Committee, General Recommendation No. 21, *supra* note 62, at para. 13.

<sup>82</sup> UN Human Rights Committee, General Comment No. 28: Equality of rights between men and women (article 3), CCPR/C/21/Rev.1/Add.10, General Comment No. 28. Para 5 (2000), *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/13b02776122d4838802568b900360e80?Opendocument#\\*%20](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/13b02776122d4838802568b900360e80?Opendocument#*%20).

<sup>83</sup> *Id.*; *See also* Sara Hossain and Suzanne Turner, *supra* note 48 (“[c]ustomary and traditional practices, exacerbated by ineffective enforcement of the law, and inappropriate policies and procedures, constrain the practical realization of [rights]. Forced marriage is a practice, which continues to affect women, men, and children across diverse countries, cultures, and communities.”); *See also* CEDAW Committee, General Recommendation No. 21, *supra* note 62, at para. 16 (The UN Committee on the Elimination of All Forms of Discrimination has found that forced marriage – “marriages arranged for payment or preferment ... on the basis of custom, religious beliefs or the ethnic origins of particular groups of people” – continues to prevail in a number of countries).

<sup>84</sup> *See* CEDAW, Arts 2(f) and 5 (state’s obligations to take appropriate measures to ‘modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customs and all

should eradicate, both through legislation and any other appropriate measures, all cultural or religious practices which jeopardize the freedom and well-being of female children.”<sup>85</sup>

Correspondingly, under the international human rights legal framework, States have an obligation to protect girls from early marriage and provide redress where it occurs.<sup>86</sup>

Allowing personal laws of religious communities to supersede international law maintains the practice of child marriage in Bangladesh. Accepting all provisions laid down by human rights conventions and international norms, both by removing reservations and employing measures that support international obligations, would broaden protections against child marriage for Bangladeshi children.

## **Conclusion**

As revealed within Section A and Section B, the national laws that impose penal sanctions upon those who negligently fail to prevent child marriage and the personal laws in Bangladesh that permit child marriage are not compatible with each other. Section C discussed the divided legal framework caused by the two competing legal systems and the challenges that this framework poses to the pursuit of reform. Section D illustrated that Bangladesh’s personal laws on child marriage also contravene international standards and highlights the specific reservations made to international treaties, which allow for personal laws to determine the legal treatment of child marriage, thus maintaining the practice despite international standards against

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other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women’); CRC, Art 24 (state’s obligations to take measures to “abolish ... traditional practices prejudicial to the health of children”); Declaration Of the Elimination of Violence against Women 1993, Art 4; *See also* the Vienna Declaration and Programme of Action 1993 which stated the overarching duty of states, ‘regardless of their ... cultural systems’, to promote and protect all human rights and fundamental freedoms. The Special Rapporteur on Violence against Women has reiterated the obligation of states to eradicate “cultural practices of the community which result in violence against women and which degrade and humiliate women, thereby denying them the full enjoyment of their rights.” International standards require that there be concerted state policy to eradicate practices even if their proponents argue that they have their roots in religious beliefs and rituals: UN Doc E/CN4/1997/47.

<sup>85</sup> *Id.* at para. 28.

<sup>86</sup> IPPF, *supra* note 59, at 26.

it. The examination of these factors in Bangladesh presents a picture of the existing obstacles to combatting the practice of child marriage as well as possible solutions to the country's current problems.