

2029- IMPLEMENTING THE PRINCIPLE OF “THE BEST INTEREST OF THE CHILD (BIC)” INTO LEGAL PROHIBITION AGAINST CHILD MARRIAGE IN MALAYSIA

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ABSTRACT

The principle of the best interest of the child (BIC) is a fundamental principle recognised in international law and relevant to the prohibition of child marriage. The BIC is generally described as the well-being of the child. In the context of child marriage, this practice is considered as a violation of the best interests of the child as it can have a negative impact on girls' physical and mental health, education and economic opportunities. Child marriage remains a pervasive problem worldwide, and Malaysia is no exception. This article examines the application of the principle of BIC as a fundamental criterion for prohibiting child marriage. The study explores possible strategies to strengthen the legal framework for child marriage by comparing the legal framework implemented with the principle of BIC in other countries. The ultimate aim is to provide recommendations for legislative reforms that put the best interests of the child first and promote an environment in which every child grows, develops and thrives free from the harms associated with early marriage. In summary, the best interests of the child should be the primary consideration in any interpretation of legislation relating to child marriage.

Keywords: *Best interest of child, child marriage*

INTRODUCTION

The principle of the best interest of the child (BIC) is a fundamental concept in international human rights law and child protection. This principle is articulated in the United Nations Convention on the Rights of the Child (CRC). Article 3 (1) of the CRC states that:

“...in all actions concerning children, whether undertaken by public or private social welfare institutions, a court of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

The BIC emerges as a guiding principle in navigating the complexities associated with children’s welfare. In the perspective of child marriage, the principle serves as a lens through which can crucially examine and address the multifaceted challenges shown by the issue of child marriage in Malaysia.

An urgent need exists to evaluate how well-established practices adhere to the internationally accepted BIC in a nation where the legal minimum age of marriage fluctuates based on civil and religious settings. It is estimated by Najjua Zulekfli (2022) that Malaysian families marry off 1,500 children annually representing various religions, ethnicities, and communities. Furthermore, he stated that the minimum marriage age of 16 is still in place in the other 13 states, with Selangor being the only one that has raised the legal marriage age to 18.

Notably, child marriage can negatively impact girls' educational and general development, as well as constitute a violation of their human rights (Protect & Save the Children, 2013). Davis (2013) emphasises how girls' education, employment prospects, and mental and physical health may all suffer from child marriage. It is argued that child marriage hinders children's development and impedes their ability to meet their needs.

As a result, a strong legislative and policy foundation should support the application of the best interests of the child principle, which forbids child marriage (Technical Note, 2020). To safeguard the interests of children, the legal system should be age-appropriate and take into account their developing capacities (Chusnida, 2022). Thus, it is essential to include BIC in the legal framework to forbid child marriage in order to put an end to the practice.

METHODOLOGY

This study is a legal research in which content analysis technique is adopted to achieve the objectives of this study. The primary data consists from legislation and bills are examined to explain the objects of the law and its application to prohibit child marriage, align to the BIC. The study tried to understand all the laws and regulations related to the child marriage. By using the legal frameworks of other nations as a guide, future recommendations are shaped to fit within Malaysia's specific legal framework.

THE PRINCIPLE OF THE BEST INTEREST OF THE CHILD (BIC)

The BIC is a key concept in the global child rights movement and applies in the area of family disputes such as child custody, guardianship, maintenance and adoption. It is emphasised that when policies, laws, and decisions are made that have an impact on children directly or indirectly, the political, economic, and social interests of the child should be given the proper attention and priority (Degol, 2011).

The CRC states that determining what is in a child's best interests entails considering all relevant factors before making a decision that will affect that child or group of children in a particular circumstance. Potential conflicts between the different factors taken into account when evaluating and deciding what is in a child's best interests may seem to be at odds with one another or to be resolved on an individual basis. The right of the child to have the best interests of the child taken into account as the first priority means that the child's interests are prioritised and are not just one factor amongst many. What best serves the child is given more weight.

The principle of the best interests of the child is irrefutable, it does not allow any restrictions even in emergencies. It requires procedural safeguards and states can be held accountable as they are obliged to justify and demonstrate the explicit consideration of the child's best interests and the way in which this has been respected in all decisions about children (Weihrauch, 2021).

Ultimately, the best interests of the child principle underscores the importance of prioritising the welfare and interests of children in all decisions and actions that impact them, making it a cornerstone of children's rights. It is meant to guarantee that the child's political, economic,

and social interests are given the proper attention and priority and is a fundamental tenet in family disputes.

LAW ON CHILD MARRIAGE IN MALAYSIA

Due to Malaysia's dual legal systems, the country has a complicated legal framework surrounding child marriage. According to Voice of the Children (2013), civil law or (Islamic) *Syariah* law may decide the minimum marriage age. In Malaysia, Muslims have a minimum marriage age of 16 years old, while non-Muslims need to be at least 18 years old (Thuraisingama, 2021). The minimum marriage age of 16 is still in place in the other 13 states, but the state of Selangor has increased its legal marriage age to 18.

The complicated legal system that makes it challenging to define "child" in the context of child marriage is one of the many legislative and policy roadblocks impeding efforts to end child marriage in Malaysia (Mohd Awal, 2018). It is challenging to define the age of child marriage consistently, and the legal definition of a child in the context of child marriage is inconsistent (Voice of the Children, 2013). The fact that different set of laws define what constitutes a child in Malaysia presents yet another obstacle in the fight against child marriage.

Since many couples who attend traditional or religious weddings choose not to register their marriage, it is unknown how widespread child marriage is in Malaysia (Mohd Awal, 2018). Examining the underlying causes of child marriage becomes more difficult as a result.

As a result of Malaysia's dual legal systems, the country's legal framework for child marriage is complicated, making it challenging to define the age of child marriage in a consistent manner. While non-Muslims must be at least 18 years old to marry, Muslims in Malaysia have a minimum marriage age of 16. There are a number of legislative and policy barriers that make it difficult to effectively address child marriage in Malaysia; on top of that the actual extent of the problem is also unknown.

LEGAL FRAMEWORK TO PROHIBIT CHILD MARRIAGE

The following section examines the legal framework of other countries relating to child marriage:

United Kingdom of Great Britain and Northern Ireland

In England, Wales, and Northern Ireland, the legal minimum age for marriage is 18. On the other hand, marriage between 16 and 18 is legal as long as parents approve. The legal age of marriage in Scotland is 16, and consent from parents is not required for marriages between 16 and 18. Certain legal loopholes are used by some parents to force their 16- or 17-year-old children into marriage. In 2014, the Anti-Social Behaviour, Crime and Policing Act made forced marriage illegal in England and Wales. A maximum seven-year prison sentence is now the punishment for forcing someone, including children, into marriage. Significantly, the maximum sentence for violating an order prohibiting forced marriage is currently five years in prison.

Indonesia

According to the Marriage Law 1974, the age of marriage for women and men without parental permission is 21 years. In the version amended in September 2019, girls and boys can marry at the age of 19 with parental consent. Previously, the Marriage Law 1974 allowed girls to marry at the age of 16 with parental permission. After rejecting a petition in 2015, the Indonesian Constitutional Court finally declared this provision unconstitutional in December 2018 due to gender discrimination (since the minimum age requirement for men to marry is 19). The review petition was filed by three child bride survivors and their lawyer from the Indonesian Coalition to End Child Marriage (Koalisi 18+).

The legislature was given a maximum of three years by the court to amend the Marriage Law 1974 with respect to the minimum age at which women may marry. Though there is no minimum age in these situations, parents can also ask local authorities or religious courts to approve girls' marriages earlier.

Egypt

According to the Person's and Family Law No. 126 of 2008, the legal minimum age for marriage is 18 years for men and women. The legal minimum marriage age is also highlighted in Egyptian Child Law No. 126 of 2008. This 2008 change changed the legal marriage age from 14 to 18. Despite the change in the law and the lack of criminal penalties, families can circumvent the law and perform child marriages through religious ceremonies and then wait until the bride turns 18 to legally register the marriage.

Pakistan

Although the Child Marriage Restriction Act of 1929 placed restrictions on guardians and those who consummate minor marriages, as well as setting the marriage age at 18 for men and 16 for women, the rate of child marriages persists. Minimum marriage age laws are generally not strictly enforced, and victims of violations have few options for recourse (Tahirih, n.d.). A bill that would have raised the age of marriage for girls to 18 was vehemently opposed by clerics from the Council of Islamic Ideology in Pakistan in 2016. They called the bill un-Islamic and blasphemous, which led lawmakers to abandon the idea. The bill would have increased the legal marriage age for girls from 16 to 18 and imposed harsher penalties on those who arrange child marriages. However, jurisdiction over family law rests with the provincial legislature, and this particular bill would not have banned child marriage throughout Pakistan, but only in the capital, Islamabad. A more optimistic image can be found elsewhere. 45 percent of Pakistan's population resides in Sindh and Punjab, two provinces that have seen tremendous development. An anti-child marriage law was passed in Sindh in 2013, which also raised the marriage age for girls to 18 and tightened penalties and fines. Punjab adopted similar measures in 2015, including harsher punishments and larger fines. However, the minimum age is still 16 years for girls and 18 years for boys.

DISCUSSION AND CONCLUSION

It is argued that a comprehensive legal reform agenda driven by the best interests of the child principle is necessary to address the issue of child marriage in Malaysia. Implementing a comprehensive legal reform agenda, or a comprehensive set of changes to current laws and regulations, is necessary to address this issue in an effective manner.

Previous studies suggested that in order to prevent Muslim child marriages in Malaysia, Samuri (2022) highlights how urgently Islamic family law reforms must be made. To stop child marriage customs and defend children's rights, Malek (2023) recommends utilising the *Siyasa al-Shar'iyya* framework. The absence of laws and a standard marriage age are two of the factors Saiman (2023) identifies as contributing to child marriage in Malaysia.

Law reform is necessary, and it should be based on the belief that the best interests and rights of the children involved should come first, in addition to opposing child marriage as a practice. It highlights the significance of creating laws that go beyond a surface-level strategy, consider the broader influence on children's lives, and seek to establish a system of laws that actually serves to advance and safeguard their interests.

CONCLUSION

Legal reforms must be implemented in order to effectively address the issue of child marriage that still exists in Malaysia. To properly implement these laws, enforcement and accountability mechanisms should be strengthened, the minimum age of marriage for boys and girls should be raised to 18, and harsher penalties should be applied to those who assist or take part in child marriages.

The main suggestions include harmonising the legal system and establishing a uniform minimum marriage age of 18 in all civil and religious laws. A legal reform that sets a uniform minimum marriage age of 18 for Muslims and non-Muslims is imperative to stop child marriages. This could be the obvious justification for Malaysia's ban on child marriage.

Strengthening the penalties for child marriage and ensuring that the law is strictly enforced against offenders should be two goals of legal reforms. By marrying a child first in accordance with their religious practice and then registering the marriage when the child turns 18, for example, parents or other parties can take advantage of legal loopholes.

In conclusion, the best interests of the child principle must serve as the foundation for a comprehensive legal reform agenda in order to address the issue of child marriage in Malaysia. A consistent minimum marriage age, systemic coherence, and enhanced legal penalties for offenders are among the key points of emphasis in the made recommendations.

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