Child marriage as a choice: rethinking agency in international human rights
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Citation

Horii, H. (2020, March 18). *Child marriage as a choice: rethinking agency in international human rights. Meijers-reeks*. Retrieved from https://hdl.handle.net/1887/87059

Cover Page

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The handle http://hdl.handle.net/1887/87059 holds various files of this Leiden University dissertation.

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Title: Child marriage as a choice: rethinking agency in international human rights
Issue Date: 2020-03-18

2 | A blind spot in the international human rights framework: a space between tradition and modernity within the child marriage discourse

2.1 INTRODUCTION

Child marriage is a new and old phenomenon. It is new in that the term caught international attention as a human rights issue, defined as marrying below the age of 18. It is old in that marrying below the age of 18 was more common than marrying at a later age in many societies throughout human history. Yet today, it is believed to be something that has to end. Human rights organizations across the globe are advocating that communities "End Child Marriage". The movement has gained momentum over the last decade. In this sense, child marriage itself is a discursive practice. It is a specific way of talking about its causes and consequences in a condemning manner. This way of talking started in international human rights communities with a specific background and agenda based on a particular vision of childhood and proper human development.

Thus, child marriage is a construction and one that is currently hardly contested. Various human rights organizations have published reports and launched campaigns against child marriage, while their definition of child marriage is uniformly used and remains unchallenged. Academic research on the topic is limited, and only a handful of the research has pointed out the dominant and sometimes unproductive characteristics of child marriage discourse (Archambault 2011; Boyden, Pankhurst, & Tafere 2012; Bunting & Merry 2007).

The lack of critical study on the topic can be partially explained by Dembour's (2010) classification of the four schools of human rights. The natural school frames human rights as given. The deliberate school frames human rights as agreed upon. The protest school frames human rights as a way to redress injustice. Finally, the discourse school frames human rights as a language (ibid). The natural and deliberate schools are the major two schools of thought, deferring to the existing human rights system. In contrast, the discourse school considers rights as talked about, as a culture, and a construction, opposing the natural school, which sees rights as given. In Cowan's (2006: 10) words, the discourse itself is "human rights culture", which is "an increasingly pervasive structuring discourse […] that shapes how the world is apprehended". Calavita (2010: 97) also pointed out the pervasive nature of supranational legal institutions, impinging on local practices as globalization progresses. This view of seeing human rights as 'a culture'

is uncomfortable for human rights, as it challenges the stable core of the human rights system – their universality. In other words, the discourse school is confronting for those who believe in or rely on the universality of human rights.

This chapter applies the discourse school to study and deconstruct human rights. The school challenges the taken-for-granted assumptions to transform the existing human rights framework from which the dominant schools depart. This deconstruction approach to the dominant discourse, considering the global power structure, also has the potential to bring diversity into the idea of human rights. I take this approach in two steps.

The first step traces the establishment of child marriage as a discursive practice by analysing conventions and general recommendations about child marriage that international human rights institutions have issued since the 1960s. This part of the analysis aims to understand how child marriage has been formed into a discursive practice by international legal institutions, and to establish the assumptions underlying the concept's development. The second step unpacks the dominant child marriage discourse by analysing the use of specific words in 10 reports about child marriage published by major international organizations between 2001 and 2016. The publications were selected to investigate the dominant discourse in the international arena and the implications of this dominance.

The analysis is based on the Foucauldian assumption that ideology is embedded in language. The underlying idea here is that the construction of global human rights texts has both relied on and resulted in promoting a specific type of knowledge. Consequently, the construction has subjugated other types of knowledge. This chapter aims to clarify different types of knowledge that played a role in this process. Legal texts are of particular importance. They are constructed based on ideas and discourse in society and then reinforce these ideas by becoming the frame of reference for future discourse.

The next section discusses how the term 'child marriage' has developed over the last few decades, including the idea of it being a human rights violation. This section highlights the assumptions behind this development: 1) the concept of an innocent childhood and 2) the ideal that modern marriages are based on individual choices and romantic love. Section 2.3 examines the first assumption by discussing different terms related to child marriage, including arranged marriages and forced marriages. The international organizations' use of these different terms underlines liberal paternalistic concepts of childhood and children's agency. Section 2.4 focuses on the second assumption by using the dichotomic concepts of 'modernity' and 'tradition' to reveal how the problem of child marriage is *traditionalized* in the dominant discourse. Section 2.5 discusses the implications of the

dominant discourse. The conclusion reflects on alternatives to the current approach to child marriage.

2.2 Development of the concept 'child marriage' in the international arena

2.2.1 Child marriage as a human rights violation

Marrying young has long been commonplace. For centuries, it was normal to marry below 18 years of age in the Western world, and this is still the case in many places. The average marriage age has gone up in the course of social developments in modern society. However, in many countries, including developed countries, it still is possible to marry at or below age 16 with parental consent or judicial approval. Exceptions to rules about marriageable age are also common. For instance, until 2015, the Dutch civil law allowed girls of 16 years old to get married if they had fallen pregnant (Warendorf and Curry-Sumner 2003: 36).

Today, a 'child marriage' is considered a human rights violation. In 2001, the United Nations Children's Fund Innocenti Research Centre (2001) pointed out that the modern women's rights and children's rights movements had paid scant attention to early marriage. They had also not examined early marriage as a human rights violation itself. Since then, we can observe a growing movement against child marriage. 'End Child Marriage' has been a slogan of international organizations such as UNICEF, UNFPA, Council on Foreign Relations, Anti-slavery International, Plan International, Equality Now, and Girls Not Brides (United Nations Children's Fund 2014; UNFPA 2012; Vogelstein 2013; Turner 2013; Evenhuis and Jennifer Burn 2014; The World We Want: End Child Marriage n.d.).

In 2013, the UN Human Rights Council (2013) passed a resolution aimed at "strengthening efforts to prevent and eliminate child, early and forced marriage". In 2014, this was followed by another resolution on the same topic by the UN General Assembly (2015). More recently, the United Nations listed the elimination of child marriage as a target in the newly established Sustainable Development Goals (no. 5.3), supported by 116 member states.[1] Child marriage is now considered an impediment to development. Throughout their campaigns, those international organizations heavily emphasize what they consider negative consequences of child marriage (e.g., female genital mutilation, domestic and sexual violence, exploitation as domestic services, reduced educational opportunities, health hazards, and sex trafficking) (Equality Now 2014: 5). Bunting and Merry (2007: 330)

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[1] Sustainable Development Knowledge Platform, https://sustainabledevelopment. un.org/?menu=1300 (accessed on November 7, 2019).

have argued that child marriage is salient by being at the intersection of various themes on the human rights agenda (e.g., slavery, health hazards of traditional harmful practices, violence against women, and child welfare).

2.2.2   The first assumption: what it is to be a 'child'

When and how did people under 18 become too young to marry, and why was 18 the relevant age? The first international instrument mentioning a minimum age for marriage is the 1957 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. This Convention states that 'the State Parties undertake to prescribe, where appropriate, suitable minimum ages of marriage' (Article 2). However, in the drafting process, several intergovernmental organizations and some states expressed that the Convention should set a suitable minimum age, and give these provisions a more mandatory form (Gutteridge 1957). Subsequently, the 1964 United Nations Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages stipulated the right for 'men and women of full age' to marry 'with free and full consent'. From 1966, the International Covenant on Civil and Political Rights (ICCPR) recognizes the right of men and women of 'marriageable age' (A23(2)) to get married. These conventions and the ICCPR merely require state parties to set a minimum age for marriage in national legislation, without specifying an age limit. In 1979, the issue emerged again in international conventions when the UN General Assembly adopted the Convention on the Elimination of All Forms of Discrimination against Women (hereafter CEDAW). In Article 16(2), CEDAW requires that all parties take the necessary actions to set a minimum age of marriage and to make marriage registration compulsory, but again without establishing an age limit.

While the international instruments listed above have not specified a lower age limit, this was specified in certain accompanying documents and regional conventions. In 1965, UN General Assembly (1965) resolution 2018 required Member States to specify a minimum age of marriage that was no less than 15 years of age. By 1994, the UN Committee on CEDAW recommended that the minimum age of marriage should be 18 years for both men and women. This recommendation was based on the impact of marriage on minors' education, health, and economic autonomy (UN Committee on the Elimination of Discrimination against Women 1994). Interestingly, the African Charter on the Rights and Welfare of the Child 1990 (hereafter ACRWC) (A21) and the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (A6) both set 18 as the minimum age for marriage (Sloth-Nielsen 2012). The Charter and the Protocol are the only binding global legal instrument to explicitly prohibit child marriage (Organization of African Unity (OAU) 1990; African Union 2003). Taken together, the changes in international conventions between 1957 and 1994

increasingly imposed substantive standards and demonstrated an on-going process of globalization.

It is then worth discussing how 18 became the specified age. The documented discussions from the CRC drafting process show that there was no clear consensus among the member states about the definition of a child (Office of the United Nations High Commissioner for Human Rights 2007: 305). In the CRC draft working group, some delegates worried that the age of 18 was quite old to still be a 'child', in light of some states' legislation (ibid). The alternative suggested age-limit was 14; in many countries, that was the legal marriageable age for girls and the age of finishing compulsory education (ibid). The Nepalese representative suggested the lower age-limit be 16, considering "the concerns of poorer States who may not be able to shoulder the burdens imposed by this convention for children up to 18 years of age" (ibid: 311). However, the working group eventually defined a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier", as stipulated in Article 1 of the CRC. While the argument about compulsory education seems a particularly sensible one, the available documents do not explain why this opinion was overruled.

Differences in opinions about the age limit defining a child are attributable to how experiences of childhood can differ globally. Childhood studies, a disciplinary field that took shape in the 1990s, can help unpack the concept of a 'child' underlying the development of the child marriage framework. Childhood scholarship has established that childhood has been defined differently over time and in different places with sometimes contradicting definitions (James, Jenks, & Prout 1998: 21). The historian Aries' (1996: 6) described 'childhood' as a modern European invention. Stephens (1995: 13, 19) followed by noting that the child/adult distinction was central to the development of modern capitalism and modern nation-states. James, Jenks, & Prout (1998) explain that there are different versions of imagined childhood: "the evil child", "the innocent child", "the immanent child", "the naturally developing child", and "the unconscious child". According to them, "the innocent child" is "what we have come to imagine as modern, Western childhood", although Freudian's "unconscious child" with sexual drives and instincts has also significantly impacted psychology. Jenks quotes Robertson, who claimed the idea of an innocent child is based on the philosophy of the eighteen-century European Enlightenment; Rousseau's calling attention to the needs of children (Jenks 2005: 57, 58). According to Jenks (ibid), the "the Apollonian" image of children has been influential in modern Western societies and has become increasingly dominant throughout the world. That image is of childhood as a time for play, when children need protection, are pure and innocent, and should be happy.

This thinking is also embedded in international policy-making (Ansell 2005). According to James and Prout (1997: 9, 10), the philosophy behind the CRC is informed by psychological explanations of child developmental psychology from the early twentieth century. The explanations contain three dominant themes: 'rationality', 'naturalness', and 'universality'. These concepts are so dominant that they are "incorporated into the everyday understanding of children in Western societies that it is difficult to think outside of it" (ibid: 11). Boyden (1997: 193) interprets the adoption of the CRC as the export of stereotyped childhood from the industrial world to the South.[2] Boyden (Ibid) argues that it has been the explicit goal of children's rights specialists to crystalize in international law a universal system of children's rights based on these post-enlightenment ideas of childhood. By this logic, the fixed minimum standard for marriage age has emerged within this 'crystalized system'.

2.2.3   The second assumption: modern ideals of 'marriage'

The previous section has shown that child marriage has emerged as a discursive practice based on modern assumptions about childhood. This section will discuss an assumption about marriage. In most parts of the world today, people increasingly perceive marriage to be about romantic love and companionship, although this perception is a recent phenomenon. Glendon (1989: 287) states that the idea of marriage as a vehicle for individual self-fulfilment became prominent only in the twentieth century. Modern family law has stimulated the transformation of ideas about marriage, internalizing tension between the ideas that family involve a community and that it facilitate the personal fulfilment of individuals (ibid: 143). The decision-making about marriage became less collective and more individualistic, and in this process, age and 'maturity' of the spouses have become relevant (Blackburn and Bessell 1997: 108). Moses (2017: 1) suggests that this change of ideas and laws on marriage has resulted in a "fragility of marriage", meaning that marriage has now become optional rather than an unavoidable rite of passage.

Through processes connected with 'modernization' (i.e., trade, mass migration, and growing empires in the eighteenth and nineteenth centuries), indi-

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2   It is important to note that the CRC is not necessarily the simple 'export'. As well as ACRWR that prohibits marriage under the age of 18, many laws in Africa have seen widespread acceptance of international and regional treaties (Sloth-Nielsen 2012). Imoh's (2019: 181) research showed that the Ghanaian society has localized global frameworks of childhood, "leading to constructions of childhoods that are neither completely local nor purely global". Furthermore, Grugel (2013) argues that the discrepancy results from the CRC's persistent reliance on welfare model, which is a product of a particular moment in Northern European history. This explanation suggests that the CRC is a weak legal tool not necessarily due to the irrelevant childhood model, but to lack of reflection on how to effectively bring children's rights and children's welfare together.

viduals encountered new cultures that seemed vastly different from their own (ibid: 7). These encounters promoted a 'normativization' of a particular marriage ideal, a celebration of one type of marriage over another. 'Modernity' in marriage implies "being 'civilized'" and is "denoted by monogamous marriage based on love involving an adult man and woman" or "companionate, affectionate and consensual relationships" (ibid: 1, 9). One of the examples of 'normativization' includes seeing an arranged marriage as a traditional practice. Majumdar (2009: 1) contests this idea by arguing that the institution of arranged marriage came to be solidified as a traditional practice that is juxtaposed against "love marriages", i.e., marriage based on romantic love.

Banning child marriage is part of the normativization of marital practices today. Child marriage gradually became a deviant behaviour after the rise of modernity in the Western world. It was followed by the idea of modern marriage being based on romantic love and individual choices: the autonomy of women, instead of 'arranged marriage'. In other words, child marriage as a discursive practice has emerged out of a modern and specific idea of marriage.

However, the main purpose of marriages varies significantly over time, culture, and social classes (e.g., the regulation of duties and responsibilities of the spouses and marriage's relation to sexual activity). Until today, "despite globalization – through improved communications technologies, travel and trade, the rise and fall of vast new empires, and new international organizations – marriage [has] continued to exist in a variety of configurations and remained imbued with diverse meanings" (Moses 2017: 1). Considering this variety and the fluid nature of marriage mores, the practical consequences of the child marriage framework also vary. For instance, in a society where premarital sexual intercourse is a religious sin, prohibiting marriage under a certain age is also the prohibition of sexual activities under the same age.

The ideal age for childbirth is another relevant assumption underlying the concept of child marriage. Campaigns often argue that one of the negative impacts of child marriage is higher maternal mortality rates in young pregnancies. Such campaigns rely on the claimed consequences to justify their interventionist approach to prohibit *all* child marriages. However, I found that these claimed negative consequences are not necessarily well supported by the evidence. The reports at times lack sources to prove higher maternal mortality rates in mid- to late-teenage pregnancies. Moreover, their claims frequently rely on previous international reports.[3] This cross-referencing between transnational organizations seems a sign of self-legitimation. While there is a physical and emotional limit to childbirth (e.g.,

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3   See, for instance, Girls Not Brides n.d.d; World Health Organization 2011; World Health Organization 2017; United Nations Population Fund 2013.

childbirth at the age of 12 is dangerous), these campaigners fail to provide convincing evidence that all childbirth before the age of 18 has negative consequences. Additionally, the quantified measurement itself likely contains problems and political aspects (Merry 2016). Similarly, with her research on cousin marriage among British Pakistanis, Shaw (2006: 214) demonstrates that what the dominant discourse considers "numerical biological risk" can be in fact a matter of culture, politics, and morality.

Scientific discussion about the ideal age for childbirth has varied opinions. For instance, Mirowsky (2002) argues that the best biological and physical age for carrying a healthy pregnancy is in the late teens or early twenties. The recent general concern focuses on how to balance the biologically ideal and socially ideal ages for childbirth, considering increasing social constrains to delay it.[4] Furthermore, campaigns against child marriage assume that early pregnancy is caused by child marriage, while often the opposite is true. Child marriage can be motivated by an extra-marital pregnancy (Grijns & Horii 2018). Blackburn and Bessel (1997: 108, 112) have noted that although physical readiness for sexual intercourse and child-bearing is a consideration for raising the marriageable age, marriage, and sexual intercourse are two separate matters. The consummation of marriage can be arranged much later than the wedding.[5] These alternative scenarios indicate the generalizing tendency of the international discourse, which does not consider the diversity of forms, motivations, and consequences of child marriage.

In sum, fixed ideas of childhood and marriage underlay the development of the 'child marriage' concept. In the next two sections, an analysis of international discourse will show how these ideas influence the way international reports present child marriage.

2.3   'Child marriage' in international discourse: childhood and agency

2.3.1   Use of terms related to child marriage

The assumptions about childhood in the child marriage discourse can be identified in how international organizations define different terms related to child marriage. This section discusses 'child marriage', as well as 'early marriage', 'forced marriage', and 'arranged marriage'. The platform of international organizations working against child marriage, Girls Not Brides (n.d.a) defines child marriage as "any formal marriage or informal

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4   See, for instance, Bellieni (2016).
5   This type of marriage is called *"kawin gantung"* (suspended marriage), practiced in colonial times in some parts of Indonesia.

union where one or both of the parties are under 18 years of age". 'Early marriage' is often used in the same sense. 'Forced marriage' is commonly defined as "marriage in which one or both of the parties is married without his or her consent or against his or her will". 'Arranged marriage' is "marriage in which both parties consent to the assistance of their parents or a third party, such as a matchmaker, in identifying a spouse, although the consent may be uninformed" (Greene 2014). International organizations use these terms often to emphasize that children who are married, particularly girls, are usually not in a position to give their free, full, and informed consent to marriage, and are often subject to marriage under pressure and coercion (Evenhuis & Burn 2014).

Most human rights advocates argue that child and early marriages are by definition 'forced marriages', even when the child appears to give his or her consent (Equality Now 2014: 53). The reasoning behind this argument varies. The United Nations Children's Fund Innocenti Research Centre (2001) bases its argument on the UDHR, which recognizes "the right to free and full consent to a marriage" and claims that consent cannot be "free and full" when at least one partner is "immature". The CEDAW Committee comments that "[w]hen men and women marry, they assume important responsibilities. Consequently, marriage should not be permitted before they have attained full maturity and capacity to act" (UN Committee on the Convention of the Elimination of All Forms of Discrimination against Women 1994: para 36). UNICEF Indonesia clarifies that even if the child consents to their marriage, it is to be considered a forced marriage, as such 'consent' is an outcome of prevailing social norms whereby children are expected to marry as children (Irdiana 2015).

Some organizations even maintain that child marriage is a form of slavery (International Planned Parenthood Federation 2015). Anti-Slavery International's 'servile marriage', based on Article 1 (C) of the 1956 Supplementary Convention on the Abolition of Slavery, identifies the following practices relating to women in marriage as akin to slavery:

> ... promise or giving of a woman, without her having the right to refuse, by her parents, family or others in marriage in return for consideration in money or in kind; the handing over of a woman to another person by her husband or his kin for 'value received or otherwise;' or widow inheritance, whereby a married woman is transferred to become the wife of another man upon the death of her husband (Turner 2013: 22).

As children are in a weaker position than adults to give full and informed consent, their marriage easily becomes a form of servile marriage (ibid: 17). This categorization of child marriage as slavery can be strategic, as it puts more legal weight on the anti-child marriage campaigns, considering the *jus cogens* nature of the abolition of slavery (Asghari 2017: 12).

Some women's rights advocates have recently begun advocating reconsidering and changing the term 'child marriage'. They argue that 'marriage' is inappropriate as it suggests an official and joyful occasion, while they consider it to be sexual abuse and marital rape (Mihara & Abrahams 2017). For that reason, the African Union Goodwill Ambassador on Ending Child 'Marriage', Gumbonzvanda, urged people to reconsider and change the term 'child marriage', yet without suggesting an alternative.[6] These discussions show the significance and sensitivity of the (ab)use of terms.

2.3.2   'Childhood' imagined in the international reports

UNICEF argues that child marriage cuts childhood short (United Nations Children's Fund Innocenti Research Centre 2001: 1). Child marriage is often presented as an "abrupt", "premature", or "unnatural" end of childhood (Turner 2013; UNFPA 2012: 11, 57; United Nations Children's Fund Innocenti Research Centre 2001; Vogelstein 2013: 13). It is also described as a "harsh transition from childhood to adulthood" (Evenhuis & Burn 2014: 13) and therefore "abruptly sanctions the end of childhood and prematurely ushers in adulthood" (Chaudhuri 2015: 2). The CRC regards childhood as a process of development (United Nations Children's Fund Innocenti Research Centre 2001: 6). Thus, child marriage leads to "the denial of childhood and adolescence, the curtailment of personal freedom and the lack of opportunity to develop a full sense of selfhood" (ibid: 9). It also violates childhood (Chaudhuri 2015: 66). Child marriage "deprives", "robs", and "pushes [girls] out" of childhood (Chaudhuri 2015: 3; UNFPA 2012: 11; United Nations Children's Fund Innocenti Research Centre 2001: 6). The idea behind this common discourse is that childhood is a privilege (Chaudhuri 2015: iv) to which girls are entitled (UNFPA 2012: 12).

The ideas of childhood and children's agency are closely interlinked. In the current childhood model scheme, how much agency children exercise in deciding to marry is a difficult question. The CEDAW and CRC committees co-published a general comment in 2014 that seemingly attempts to create some space for exceptional cases, "as a matter of respecting the child's evolving capacities and autonomy in making decisions that affect her or his life"(Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child 2014: para 20). The general comment endorses "a marriage of a mature, capable child below 18 years of age" with or without parental consent in exceptional circumstances, under two conditions (Ibid). First, the child is at least 16 years old. Second, "such decisions are made by a judge based on legitimate exceptional ground defined by law and on the evidence of maturity, without deference to culture and tradition" (Ibid). This general comment is in line with the recent attention paid to the

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6   Nyaradzayi Gumbonzvanda, 'FreedomForFarirai' (2017), https://twitter.com/van-yaradzayi/status/922426611265409024 (accessed on November 7, 2019).

'evolving capacity' of children in the realm of the CRC based on Articles 5 (evolving capacity) and 12 (right to be heard), as a response to the criticism that the notion of best interests of the child is 'paternalistic' (Cantwell 2016). As such, other international organizations are also increasingly recognizing, somewhat reluctantly, the need to balance between the "growing demand for autonomy and self-determination" and the "intrinsically harmful nature" of child marriage (ECPAT International, Plan International, Save the Children, UNICEF, & World Vision 2014).

International children's rights literature has supported this increasing attention to children's autonomy. A number of scholarships have extensively discussed the concept of children's evolving capacities and their participation in decision-making process (Varadan 2019; Lundy 2018; Tobin 2015; Shier 2001; Tisdall 2017), right to be heard (Lundy 2007; Lundy, Tobin, and Parkes 2019; Daly 2018; Tisdall 2016), children's voice in research (Spyrou 2016; Liebel 2012a; Komulainen 2007; Hill 2006), and right to development as "freedom" (Peleg 2013).

These crucial legal concepts are often overlooked or set aside by international institutions. Why is this the case? A possible explanation would be that the CRC lacks serious discussions and reflection on the tensions between demanding rights in a post-welfare age (Grugel 2013: 22). Another explanation could be that, as Hanson (2016) mentions, when children do not "do the right thing", their autonomy and agency become severely limited. 'The right thing' here means what is 'right' for children to do or not do according to UN institutions. These institutions hold that it is not right for children to marry, work, engage in armed conflict, or commit a criminal offence (ibid). The international human rights regime imposing its moral authority is described as "international paternalism" (Hopgood 2017). The same goes for women's rights. There are some forms of behaviour which are considered to be so destructive to women that they could not possibly consent to them, and child marriage is one such form of behaviour (Merry 2009).

Liebel (2012: 103) suggests focusing on what children *can* instead of what they *cannot* do. While the "freedom to marry" (Glendon 1989) was promoted as a basic human right in Europe from around 1800, the international community has turned this freedom in the context of child marriage into the 'freedom not to have to marry' and even the prohibition of marriage below the age of 18. According to Merry (1997), "[r]ights generally act as a resource rather than a constraint". That said, the prohibition from marrying below 18 often serves as the denial of children's right to marry (a constraint), rather than as their right not to have to marry (a resource).

2.4   'Child marriage' in international discourse:
       modernity and tradition

2.4.1   Analytical framework

The analysis so far has established that child marriage as a discursive practice is a construction derived from a specific vision of childhood, marriage, and human development. Another prominent discourse found in the analysis is the use of the word 'tradition'. Before introducing the analysis, this section explains the complementary relation between the terms 'tradition' and 'modernity'.

'Modernity' and 'tradition' are often used as a contrast in various forms. Giddens (1991: 6, 13) has identified autonomy over lifestyle choice as the core of modernity: he understood modernity as a post-traditional order in which lifestyle choice is increasingly important in the constitution of self-identity and daily-activity. In other words, 'tradition' and 'modernity' are two sides of one coin; "the constructs of traditional and modern society are themselves products of modernity, in which tradition is the 'other' to modernity" (Merry 2009: 401).

Jacobson (2012) explains the dichotomic relationship between modernity and tradition. He suggests that globalization creates tensions in patriarchal societies, prompting a battle between the community and the self, and between patriarchy and modernity (Ibid: 4, 5). According to him, an honour society is where patriarchal and tribal traditions dictate that a woman's body belongs to and serves the community. An interest-based society privileges the self-determination of women and the sovereignty of the individual over her body (ibid). According to Appadurai (1996: 23), this tension between the two different normative systems is the challenge for modernizing society: will emerging cultural heterogeneity accommodate norms and values that do not require strict adherence to the modern West's liberal social norms. Child marriage is a typical case of such battles. As Bunting (2005: 26) also expressed, "early marriage can be a part of a struggle over cultural traditions and the future meaning of those customs".

Human rights are an institution of modernity, in that its movement is designed to achieve individual sovereignty, modernity's core ideal. The creation of the 1948 Universal Declaration of Human Rights (hereafter UDHR) was based on the perception of the individual as an autonomous being (Jacobson 2012: 11). Ignatieff (2003) demonstrates that the protection of agency is the core principle of human rights. Merry (2009: 385, 404) points out that the notion of agency is deeply enshrined in the human rights discourse. She argues "the human rights system is premised on the idea that it can facilitate the creation of modern subjectivity, in which utilitarian choices take precedence over obligations rooted in custom, tradition, and relation-

ships". She found that, in documents generated at global conferences, the CEDAW committee typically talks about culture as a barrier to progress, understanding culture as a static tradition (Merry 2003).

In reports, legal texts, and advocacy campaigns against child marriage, this specific conceptualization of 'tradition' is also observed. The 1995 Beijing Declaration and Platform for Action explicitly addressed child marriage as a harmful traditional custom (The Fourth World Conference on Women 1995). This reference derives from Article 24(3) of the CRC. It obliges State Parties "to abolish traditional practices prejudicial to the health of children". As well as these legal texts, the analysis of the selected ten reports in the next section reveals the persistent use of 'tradition' as being a 'harmful tradition'. For instance, one of the United Nations Children's Fund's (2005) reports is titled "Early marriage: a harmful traditional practice". All of the reports mention 'tradition', though with varying frequency and explicitness.

2.4.2   'Tradition' invented in the international reports

To start with, the United Nations Children's Fund Innocenti Research Centre's (2001) report mentions 'tradition' 23 times over 30 pages. It encourages governments to conduct "a serious examination of customary marriages that contravene existing legislation", as "harmful traditional practices are allowed to continue in spite of laws that forbid them" (ibid: 19). It argues that "marriage at or shortly after puberty is common among those living traditional lifestyles" and "[e]arly marriage lingers on as a culturally and socially sanctioned practice according to some traditional sets of values" (ibid: 2). The report includes several descriptions of "traditional societies". These are where "the idea of an adolescent period between puberty and adulthood is alien". Such societies are where many parents still believe that investment in a girl's education is wasted when she is simply going to be married and work in another household (ibid: 6, 11). It also describes the difference in family patterns "between the traditional 'familist' system and the modern 'individualist' systems", the latter being "the norm in industrialized countries" (ibid: 6). It claims that to end child marriage, "societies must re-examine traditional gender roles" (ibid: 19). It also discusses the "resilience of traditional practices and custom" despite demographic transitions, explaining that "[f]amilies in the process of transition may, therefore, be caught between traditional and modern values" (ibid: 7).

The UNICEF report (United Nations Children's Fund 2005), "Early Marriage: a harmful practice", uses "tradition" 22 times over 31 pages, excluding the title. Most uses refer to "traditional method of contraception" (ibid). The report introduces statistics about child marriage practice and its correlation with polygamy, domestic violence, and reproductive health. It contains no explicitly ideological message about tradition, except for the claim that

customary laws condoning the practice are one of the factors influencing child marriage rates (ibid).

In 2008, UNICEF published another report about "Child Marriage and the Law" (de Silva-de-Alwis 2008). It begins by describing child marriage as "a tradition which constitutes one of the most severe forms of child abuse". It emphasizes "the right to be protected from harmful traditional practices" (ibid: 1, 2). The term 'tradition' appears 39 times over 76 pages, including sentences such as "the tradition of child marriage has a disproportionately negative impact on the girl child", and "[u]nderlying causes of early marriage" include "traditional notions of the primary role of women and girls as wives and mothers" (ibid: 32). The report calls for legislative reform "to review local traditions and customs in light of international standards", and to adapt to such standards. Notably, this report also draws its argument from international conventions and the related documents (ibid: 19). It refers to Article 24(3) of the CRC about the States' obligation to abolish "traditional practices prejudicial to the health of children", including child marriage (ibid: 3, 22). It also refers to three institutional comments. The CEDAW Committee "expressed its concern about traditional customs and practices detrimental to women and girls, such as child marriage". The Human Rights Committee's General Comment 28 states, "Inequality in the enjoyment of rights by women is deeply embedded in tradition, history and culture including religious attitudes". The ICCPR Concluding Comments recommend steps "to prevent certain traditions and customs, such as forced marriage that are inconsistent with the equal rights of women" (ibid: 14).
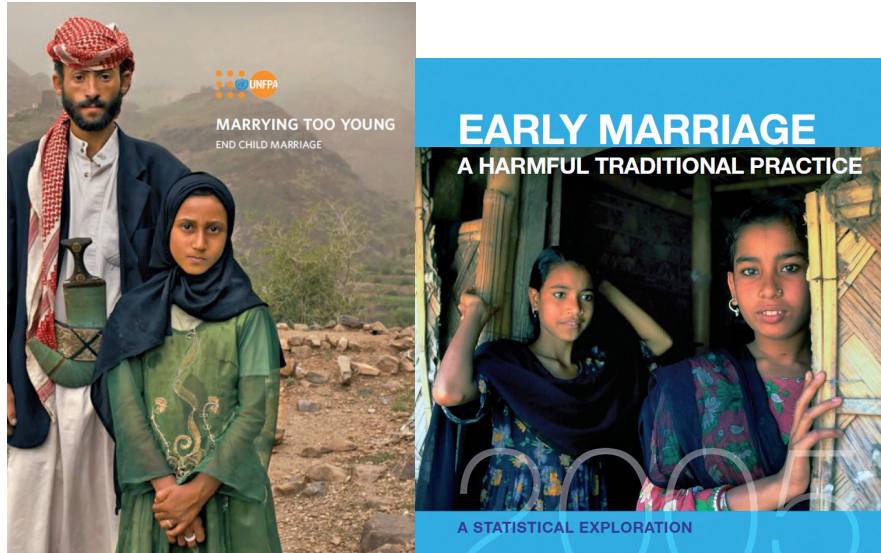
The United Nations Population Fund's (2012) report "Marrying Too Young: End Child Marriage", argues that child marriage is a human rights violation and a deterrent to development. It says that child marriage "may be part of local tradition", and that "persistent traditions in favor of early marriage […] set conditions in which the practice continues". In total, it mentions "tradition" 8 times throughout its 60 pages (ibid: 4, 50). It also refers to traditional gender roles, stating: "[t]raditionally the family and elders of the community have made the decision whether, when and whom a girl will marry". It concludes that "[c]hallenging harmful traditions that do not comply with human rights standards is an essential step" to address child marriage (ibid: 53).

The US Council on Foreign Relations' 31-page report includes 13 explicit references to child marriage as a 'tradition', often as a 'harmful tradition' (Vogelstein 2013). It argues "the practice of child marriage is driven by "deeply embedded cultural traditions". It then directly refers to child marriage as tradition, e.g., "[p]rogress in curbing this tradition [child marriage] has been slow" and "[t]oday, this tradition [child marriage] is motivated by poverty and social and cultural norms and is perpetuated by the low status of girls and women" (ibid: 1, 3, 7).

Equality Now (2014) is an international human rights organization that works to protect and promote the rights of women and girls. Its 2014 report refers to 'tradition' 16 times over 52 pages. The report begins by writing that "[c]hild marriage legitimizes human rights violations and abuses of girls under the guise of culture, honor, tradition, and religion" (ibid: 7). It also condemns justification based on tradition, saying that many practices (including child marriage) are often tolerated by governments and permitted in law because they are defined as cultural norms, traditions, or viewed as religious practices (ibid: 15). Therefore, it states, the "[s]tate must conduct a full review of customary and religious laws and traditional practices and evaluate how these laws and practices affect girls and women and perpetuate child marriage" (ibid: 16). It also identifies "traditional practices" as "one of the contributing factors in child marriage", together with gender inequality, poverty, lack of education, and the rule of law (ibid: 32).

Plan International Australia's report relatively carefully mentions 'tradition' four times (Evenhuis & Burn 2014). It describes "international action against harmful traditional practices including child, early and forced marriage". It claims that "child marriage is driven by beliefs about the rights and status of girls, who are too often seen as having little value outside the traditional roles of wife and mother" (ibid: 8). Its more nuanced endnote states, "often what is regarded as 'traditional' may be a relatively recent change or variant in practices which were traditionally intended to protect girls and women. It is important to recognize that cultural beliefs and values can also be a source of support to end child marriage" (ibid: 46).

ECPAT International's report focuses on sexual abuse and exploitation of children in child marriage. It uses 'tradition' most carefully and with the least condemning tone, 46 times over 89 pages (Chaudhuri 2015). It first distinguishes various notions of marriage as "a social and economic institution which has long prevailed, especially in traditional societies", and refers to "traditional cultures" as "where early marriage is more prevalent" (ibid: 20, 21). It also recognizes the tension child marriage can cause, which I mentioned earlier in this section. "In societies where the practice is widespread, new policies and legislation framed to contract child marriage may generate tension between an established notion of child marriage as a community tradition and the individual right to be free from child marriage" (ibid: 30). It also quotes Archbishop Desmond Tutu, "a champion in the movement against child marriage": "child marriage is not a religious practice – it is a tradition. There are many good traditions that bind communities together. But traditions are also not static – they evolve. Traditions that are harmful, that have outlived their purpose, must be challenged" (ibid: 71). This approach suggests that one should not presuppose that traditions *are* harmful, but instead examine *if* some of them are harmful, and how.

(Image: The cover page of the reports (UNFPA 2012; United Nations Children's Fund 2005))

2.4.3   'Modernity' celebrated in international reports

The use of 'tradition' contrasts with the use of words associated with modernity, such as freedom, choice, and autonomy. For instance, UNICEF claims that the right to make choices about one's reproductive health is contested by tradition (United Nations Children's Fund Innocenti Research Centre 2001: 18). UNICEF presents "the free consent of both partners" as the core of marriage in modern Europe (ibid: 5). It also celebrates the "independent sense of self", which is "seen as undesirable for adolescents in some societies" (ibid: 7). Their key concern about the practice of child marriage is "the curtailment of personal freedom and the lack of opportunity to develop a full sense of selfhood" (ibid: 9). Girls that marry young tend to leave the education system prematurely, resulting in them growing up without self-confidence, with "no sense of the right to assert her own point of view" and a "lack of self-esteem or of a sense of ownership of her own body" (ibid: 12). The report claims that "what passes for 'consent' in the eyes of custom of the law" does not count as real "consent" (ibid: 2).

In the 2008 report on child marriage and the law, UNICEF further criticized states that allow the practice of child marriage, claiming that they violate their commitment to guarantee women's fundamental freedoms (de Silva-de-Alwis 2008: 22). According to them, girl brides do not have the "autonomy to negotiate with their spouse" and find themselves in their new home "without much autonomy or decision-making power" (ibid: 4, 34). This, it claims, "results in the denial of the [girls'] right to decide freely and responsibly on the number and spacing of their children which is recognized in

the CEDAW" (ibid: 4). It also points out that child marriage "discriminates against girls by denying them the same freedoms allowed to boys", as it is more common for girls than boys to marry below the age of 18 (ibid: 22).

UNFPA's (2012) report emphasized the 'choice' that girls lose when they marry. It writes, "[c]hoosing when and who to marry is one of life's most important decisions. […] For a girl, marriage can steal from her fundamental life choices" and child marriage "limits their life choices" (ibid: 4, 11). This is because when given a choice, girls marry later (ibid: 4). Equality Now (2014: 10) also states that their work is focused on "securing for women the rights they need to ensure they have future choices", and that "empowering girls to make their own choices/control their own lives" is necessary (ibid: 52).

However, the emphasis on choices, freedom, and autonomy seems occasionally contradictory. For instance, Plan International Australia considers that "[a]dolescence should be a period of physical, psychological and cognitive development for girls during which experimentation and risk-taking are a normal and fundamental part of developing decision making skills and autonomy" (Evenhuis & Burn 2014: 19). However, their autonomy cannot be exercised in the context of decision-making for marriage because "[w]hen child marriage abruptly ends a girl's education, it undermines her transition to adulthood and burdens her with all the responsibilities that marriage entails" (ibid: 19). The report also cites from the Human Rights Committee's General Comment No. 28: "human rights obligations require countries to protect children and to eradicate both through legislation and any other appropriate measures, all cultural or religious practices which jeopardize the freedom and well-being of female children, including child marriage" (ibid: 33).

ECPAT International's most recent report addresses this contradiction. It discusses "the need to find a balance between recognition of the evolving capacities and sexual maturity of children – linked to the right to autonomously decide their emotional lives – and the vulnerability stemming from entering early unions, which may impact children's rights and jeopardise their interests" (Chaudhuri 2015: 20). The articles on evolving capacities and the right to deciding emotional lives recognize children's autonomy to decide to marry. The vulnerability stemming from early unions implies that "the condition of being subjugated to an older husband or in-laws and being victims of power imbalances within the family and the community limits the autonomy, agency and decision-making of girls" (ibid: 59).

2.4.4   Blind spots in the dominant discourse

Altogether, analysing the dominant child marriage discourse has shown it celebrates the autonomous woman and dismisses 'tradition' as a con-

straint on a woman's autonomy. Such a normative position is based on the modern ideals of autonomy; that we all should be able to decide about our own lives, which is especially important in the lives of women. While this sounds clear and convincing, sociological and anthropological literature has demonstrated the complexity of agency. Mahmood (2004: 15) suggests not considering agency as the capacity to realize one's interests against the weight of custom, tradition, or other obstacles. Instead, we should talk about one's "agentival capacity", that encompasses not only acts that resist norms but also the multiple ways one inhabits norms.

There are, inevitably, clashes between the imagined autonomous self and the "relational self" shaped by obligations to traditional kin and community (Merry 2009: 404). In Donnelly's (1984: 415) words, modern institutions "tend to create communities of relatively autonomous individuals, who lack the place and protections provided by traditional society". For instance, when a national court in Papua New Guinea adjudicated a case concerning a local dispute settlement that comprised a girl as compensation from one clan to another, the girl expressed her worry that the trial process might result in the loss of her tribal support (Strathern 2004). If the ultimate purpose of human rights is not only to enable persons to be autonomous agents but also to relate to other persons through mutual respect and cooperation (Freeman 1994: 507, 508), the imagined autonomous self and the 'relational self' need to be balanced.

Ironically, members of modern societies are also constrained by relationships and customs. "Man is an animal suspended in webs of significance he himself has spun" (Geertz 1977). This famous remark underlines that what is now understood as 'autonomy' is inseparable from social relationships around the self. Therefore, the modern ideal of complete 'autonomy' is an illusion. Thus, it is more useful to think of "relational autonomy", which suggests that social relationships are a necessary background, enabling conditions for autonomy (Mackenzie 2013). Autonomy's complexity also highlights the existence of multiple perspectives on an individual's decision. A decision that seems like a sacrifice of autonomy to an outsider is sometimes an act of relational autonomy for an insider. The current human rights system and black-and-white conceptualization of child marriage are insensitive to such possibilities.

In other words, the current human rights framework's ignorance of the possibility of exercising agency in 'traditional' settings is its blind spot. This blind spot exists both in the child marriage framework and in the broader human rights framework. A typical example is the issue of female genital circumcision, where a global set of institutions tend to overwhelm local claims of autonomy (Hopgood 2017: 259). Another blind spot is its dismissal of the possibility of children's agency to marry, based on a certain model of childhood prominent in modern Western societies. While international

advocacy celebrates and emphasizes children's agency not to marry, the discussions about their agency to marry have been considerably limited. But if children lack the cognitive and emotional capacity to decide to marry, how are they capable of deciding not to marry?

These blind spots show that the discourse has been *modernifed*, i.e., built upon the premise of modern ideals and assumptions. Thus, the discourse on tradition reflects the ideology and beliefs of the discourse's creators, subsuming the reverse image of modernity as something undesirable. Given this, the next section turns to the discourse's implications.

2.5 Implications of the hegemonic discourse

The previous sections demonstrated the knowledge created about child marriage and the background of such knowledge. The analysis also showed that the recent campaigns against child marriage in the 2000s are built on legal documents produced by international legal institutions, which have been crafted under certain assumptions. According to Foucault, knowledge reproduces power relations. One major function of dominant discourse is to manufacture "hegemony", associated with consensus, acceptance, and legitimacy of dominance (van Dijk 1993: 255). The international discourse and the dominant schools of human rights (i.e., the natural and deliberate schools) manufacture legitimized 'hegemony' in terms of 'human rights culture'. They do so by deferring to the existing human rights system. This hegemony then continues to reproduce dominance, perpetuating the power hierarchy between North and South.

The blind spot found in the child marriage discourse analysis suggests that the current child marriage framework is based on implicit assumptions about gender, race, and 'progress'. In her essay on the American conception of 'culture', Volpp (2000) compares the narratives of two groups of female adolescents who marry older men: white and immigrants of colour. Although she does not use the term 'child marriage', she focuses on child marriage cases in the US. Volpp writes "we must recognize that our society tends more readily to identify those who deviate from the hegemonic norm, who are perceived to inhabit outsider communities, to inherit culture that we assume to be monolithic, fixed, and dysfunctional" (ibid: 98). In light of her account, the representation of child marriage is the 'othering' of a certain cultural practice. This assumption that immigrant women require liberation through induction into the progressive social mores and customs of the metropolitan West has been subjected to significant criticism (ibid). The same type of 'othering' is recognizable when international bodies call child marriage 'a harmful tradition'.

Giaquinta (2016: 1) and MacDonald (2016: 1) point out that "the girl child" has become the new favourite investment, symbol, and emblem of "a better future" from Westerners' perspective. Similarly, Mustonen (2017), critically examines the Finish Plan International's latest campaign about girl brides from a post-colonial studies perspective. She argues that this campaign is "situated within the nation's self-understanding as a 'developed' and 'progressive nation'", in the form of "celebrity humanitarianism" and relies on the "representation of third world women as passive and deprived of their agency" (ibid). Mohanty (1984: 336) warns Western feminist scholarship by drawing attention to the "explanatory potential" of particular analytic strategies employed by most Western feminist writings on women in the third world, and to their "political effects" in the context of such scholarship's hegemony. As hegemonic Western feminist scholarship tends to construct monolithic images of 'Third World Women', hegemonic child marriage discourse risks creating simplistic categories of 'Child Brides'.

The idea that culture is a problem for human rights is related to a more general tendency to culturalize problems. It is a way to interpret women's subordination in terms of cultural practices (Merry 2003: 63). Similarly, the current conceptualization of child marriage allows the *traditionalization* of problems. If human rights are a virtue and based on the idea of modernity, then 'tradition' automatically becomes a vice, as in the international child marriage discourse. This is dangerous, as the human rights system is dismissing the 'traditions' of 'the South' without attempting to investigate and discuss them. Majumdar (2009: 1, 34) criticizes the same kind of automatic negative association with the word: although modern marriages do play out the theme of freedom, it would be problematic to equate the empty word 'tradition' with a lack of freedom. From her study in Vanuatu, Jolly (1996: 183) concludes that human rights are not necessarily inconsistent with their 'tradition', as tradition is not a static burden of the past but something created for the present. Lack of empirical work that refutes certain assumptions about 'tradition' prevents human rights systems from paying attention to context and crucial global power relationships.

Such distinction between tradition and the other is conceptualized as "abyssal lines", i.e., visible and invisible distinctions between knowledge from the South and the North, created and radicalized by modern Western "abyssal thinking" (Santos 2014). Abyssal thinking in human rights is demonstrated by the natural law theory developed by Thomas Hobbes, John Locke, Jean-Jacques Rousseau, Kant, and Hegel (Barreto 2014). Rorty (1998) argues that human rights activists rely too much on "rationality", a philosophical and normative assumption based on European Enlightenment. Baxi (1998: 129) emphasizes the role played by the non-European "subaltern discourse". Some scholars see reminiscences of colonialism. Mutua (2003: 901) describes the construction of human rights as "part of the colonial project that forms the unbroken chain of the Christian missionary, the early merchant of capi-

tal, and the colonial administrator". Merry (2006: 226) maintains that human rights are burdened by the colonialist understanding of culture.

Such limited knowledge also limits the legitimacy and validity of human rights, an "insufficiency of cultural legitimacy" in need of "cross-cultural dialogue" (An-Na'im 1992: 3). Flynn (2013) relies on Habermas' discourse theory and calls for "intercultural dialogue" about monological human rights concepts based on the natural law theory. Harris-Short (2003: 181) argues that this dialogue is insufficient within "a society of states for states" and "those at the grassroots must be given a direct voice". This chapter's dominant discourse analysis highlights the need for both this procedural and epistemological shift. While it is not easy to think of an alternative to abyssal thinking, one suggestion is, what Mingnolo (2001: 11) calls, "border thinking", which "engages the colonialism of Western epistemology from the perspective of epistemic forces that have been turned into subaltern (traditional, folkloric, religious, emotional, etc.) forms of knowledge".

The child marriage discourse analysis demonstrated an *a priori* view on what is called a 'harmful tradition'. Such a view would not exist if informed by anthropologically accurate accounts. Steps to rethinking and reworking human rights are twofold. An epistemological shift is needed throughout the campaigns striving to end child marriage practice. The above-mentioned 'border thinking' invites us to engage the currently hegemonic child marriage discourse with a perspective from 'the other' side, to avoid the simplistic representation of child marriage. The current challenge of the human rights framework is to recognize the agency of the "Exotic Other Female" (Engle 1992) or the "Third World Woman" which are caught between tradition and modernity, culturalism, and development (Mohanty 1984; Spivak 2010: 61). An accompanied procedural shift towards more inclusively making and applying human rights and to promoting multi-cultural dialogue would enable a more accurate understanding of local realities. Such efforts will help transnational organizations carefully consider the responsibilities of their intervention that aims at cultural changes (Hopgood 2017: 290). They have the potential to enable the child marriage framework to realize its capacity for emancipation and to move away from regulation and domination.

2.6   Conclusion

Over the last decade, child marriage has become an increasingly hot topic on the human rights agenda. With the common marital age increasing in modern times, child marriage gradually became a deviant behaviour in the Western world. It then quickly became a human rights violation, an idea propagated by international organizations. Despite a large number of campaigns and reports on this topic, the child marriage framework remains

uniform, unchallenged, and too simplistic. It might well be intentional 'strategic simplification' (see Section 1.1.1.). However, in Koskenniemi's (2009: 16) words, "(t)he world's causalities are too complex, the strategic simplifications too crude".

The role of legal texts is significant. The international conventions have provided binding norms concerning child marriage. Their associated committees have further specified their opinions with general comments and recommendations. The increasingly imposing substantive standard specified in the international conventions between 1962 and 1994 is a suggestive form of globalization. The analysis showed that the recent campaigns against child marriage in the 2000s are built on the legal documents produced by international legal institutions, which have been crafted under certain assumptions. The international discourse and the dominant schools of human rights silence the assumptions underlying the framework by taking human rights as given, thus perpetuating the power hierarchy between the North and the South. The analysis provides proof of the power of accumulated self-legitimation, which helps justify the increasing, strict norms imposed on child marriage.

The dominant discourse on child marriage has dismissed 'tradition' as something harmful while celebrating autonomous individuals, the ideals of 'modernity'. In fact, these two concepts are different sides of the same coin. The automatic dismissal of 'tradition' from 'the South' and the *traditionalization* of problems means one fails to recognize the possibility of autonomy existing in social settings in the Global South. Due to this blind spot, the human rights framework risks becoming self-defeating and failing to achieve an end goal: to protect the agency of human beings.

Finally, although potentially premature and experimental, I suggest ways to re-conceptualize the current child marriage (and broader human rights) framework. Reworking human rights requires a twofold shift in their construction and application: an epistemological shift to include perspectives from 'the other' side and a procedural shift to include multi-cultural dialogues. This alternative approach has the potential to aid the current black-and-white conceptualization of child marriage to overcome the blind spot. Consequently, it would help multi-lateral international organizations, and us researchers, move beyond using simplistic categorization. Only with such an inclusive approach can human rights become fully ethical, emancipatory, and efficient in practice.

One key to the inclusive approach, and towards overcoming the blind spot, is to pay attention to the context where human rights (are supposed to) work in practice. Thus the next chapter will focus on the concerns about and regulation of child marriage in Indonesia.