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

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7.1 DISCUSSIONS ON CHOICE IN CHILD MARRIAGE

When discussing child marriage, choice is an important yet uncomfortable topic. At Girls Advocacy Alliance's event in Amsterdam, they introduced their projects as aiming to support girls in Africa in "*having their own voice to be heard*". This suggests that the ultimate goal is to support their *choices*. Their representative was a girl from Ethiopia, selected to *be heard* in Geneva. The girl was chosen because she could tell "vibrant stories" of why she opposes child marriage practice with "capacity and confidence". Discussion about children's choice and agency to marry was simply absent. I tried to raise the issue by asking what their approach is to children who themselves want to marry. They replied to me that they were in "constant dialogue with local communities to change customs and traditions". "It is difficult to fight with that kind of perception", they said. In their eyes, children cannot possibly want to marry, so they blame such scenarios on bad customs and traditions that they need to combat.

Who, then, are these activists fighting? While they intend to support girls' choices, well-being, and rights, it seems that they could end up fighting against these very goals. The logic behind their approach is that *all* child marriages (regardless of the presence of 'consent') are wrong since marriage means the end of formal education. However, this is not necessarily the case. Some of my informants in Bali did continue their education while being married. However, the Girls Advocacy Alliance seemed unwilling to explore the varied meanings and possibilities of 'marriages' while being determined to undertake the massive task of changing the 'customs and traditions' of local communities on the African continent.

As this dissertation has demonstrated, the international child marriage framework influences both transnational and national policies and programs. Human rights advocates, such as the Girls Advocacy Alliance, work within this established framework. In this sense, human rights law and discourse *produce* particular practices. They provide specific rules and directions that CSOs and policymakers follow. However, these laws and discourses are a *product* of specific ways of thinking about development, progress, and freedom. This dissertation explored the puzzle of 'agency' within this framework and tried to understand what choice means for international organizations, and children themselves. It offers a perspective and creates space for discussions about this uncomfortable topic.

7.2 MULTIPLE NORMATIVE FRAMEWORKS THAT RELATE TO THE PRACTICE OF CHILD MARRIAGE

To understand the meaning of choice, one must understand the influences of structures, since children's agency is intimately entangled in social and cultural institutions and norms at different levels of society. To do so, I analysed multiple normative frameworks that child marriage practices inform and within which they are treated.

The first questions concerned the global discourse on child marriage and the influences of the international normative framework. By studying child marriage as a discursive practice, the analysis revealed that the framework had been constructed based on two assumptions: 1) what it means to be a 'child' and 2) the modern ideals of marriage (see Chapter 2). By building on these modern assumptions, the framework tends to *traditionalize* the problems. It dismisses what international institutions consider 'traditions' of 'the South' without seriously trying to investigate them. Such a process of international standard making, ignoring the diverse meanings of 'child' and 'marriage', seems to stem from a lack of dialogue, becoming 'monological'.

The influential international framework informs the state legal system since states need to adjust their legal framework once they subscribe to the international agenda. This dissertation considered law-making and implementation in Indonesia and revealed the dilemmas and compromises in legal practice around child marriage. Law-making in family law involves conflicts between liberal and conservative ideas on marriage, family, and sexuality. The tension between these ideas was at the heart of a series of recent judicial reviews of the 1974 Marriage Law at the Constitutional Court. Following the court's decision in 2019, the Indonesian parliament has set 19 as the new minimum marital age for both women and men. While marital age laws will change, the local and religious concerns will challenge their implementation. To give an indication about the scope of such challenges, about one million marriages a year that have been legally concluded in Indonesia, would be illegal once the new law comes into force.¹

Local state legal agents, charged with implementation, deal with a complex set of normative frameworks (i.e., religious, *adat*, and state law). Our study in West Java showed that (1) judges use their discretion to achieve compromises between state laws and local norms and (2) village bureaucrats use their unofficial support system to solve legal issues following their customary and religious norms (see Chapter 3). Both in West Java and Bali, courts almost always grant marriage dispensations, and the decisions are similarly reasoned and justified, although using different (state) laws and terms

1 The number is an estimate, calculated based on the total number of annual female adolescent marriages (15-19 years old) (Badan Pusat Statistik (BPS) 2016: 42).

tailored to each religious background. For instance, while in West Java judges use the Islamic concept of '*kemaslahatan*' (common good) to explain the negative consequences of not granting dispensations, in Bali judges similarly justify their decisions by using the words 'negative impact'.

The comparison between West Java and Bali indicates that religion and kinship custom are the main explanatory factors for different motivations and impacts of child marriage. For instance, in West Java with mainly Muslim populations, the most urgent reason to marry is to avoid *zinah* (premarital sexual intercourse), while in Bali, premarital sexual intercourse is somewhat accepted and considered 'common'. And in the Balinese patrilineal kinship system, it is crucial to marry before prospective brides give birth, as newborns join their fathers' lineage. But such motivation and narratives are absent in West Java. What both areas see in common is that, in cases dealing with teenage sexuality in Indonesia, families, *adat* authorities, and state agents collaborate to find a way to maintain a moral and social order. The pressure to do so is especially strong when unmarried teenagers are pregnant. This way of dealing with sexuality results in mid-teenagers' marriage, which international institutions call 'child marriage'.

In Bali specifically, when marriage dispensation cannot provide a solution to extra-marital pregnancies, girls' families sometimes prosecute the boy for sexual intercourse. These cases indicated that the families and judges use laws to re-establish the moral order that they feel has been disturbed, often by punishing boys for premarital sexual intercourse. The overall analysis of both marriage dispensation cases and sex crimes suggests that judges take a pragmatic moral approach to using law to 'restore harmony and peace in the community'.

Both at the national and local levels, the process of law-making and implementation is the outcome of continuous struggles with diverse norms on marriage, family, and adolescent sexuality, in a rapidly modernizing Indonesian society. At another level, individuals also deal with the increasingly diverse normative frameworks, stemming from their various social relationships (i.e., 'reference networks'; see Chapter 5). In the analysis of individual cases of children who marry under the age of 18 in Bali, I explored the social and societal contexts in which they decide to marry. The findings showed that while international human rights institutions consider child marriage a *problem* and tend to view those who practice it as 'traditional' (i.e., insufficiently modern), for these young people 'child marriage' is actually a *solution* to navigating the modern world.

With increased mobility and educational opportunities, lifestyle norms and choices have generally diversified. Adolescents now live with different simultaneous normative frameworks, more so than their parents did. While adolescents today tend to marry later and have 'permissive' attitudes and

behaviour towards sexual relationships before marriage, they are also constrained by their religious norms of piety. For example, a remark by one of the teenage girls in Bali illustrates this tension:

“This friend of mine who got pregnant used to go home early morning, drunk, and in open clothes. Even more open than people in the West. [...] In the West they can be open about relationships between boys and girls, but here rumour can spread and taint a good name of the family”.

For adolescents caught in between ideas of sexual morality and marriage, they manage their romantic and sexual relationships by balancing modern demands within customary normative systems. ‘Child marriage’ is often a way to bridge the normative gap. This highlights the discourse’s paradox of modernity. While international human rights actors advocate eliminating child marriage to achieve modernity’s ideals, ‘child marriage’ is a response to modern social conditions (see Chapter 5).

Finally, case studies of ‘child marriage’ from my fieldwork in Bali explain how some children (particularly in their mid- to late-teens) exercise their agency and capacity in deciding to marry. The case studies contrast the common image of child marriage as forced with many cases where teenagers decide to marry. The careful examination of their decision-making process shows that these teenagers can and do decide to marry, at times under relational and situational constraints.

Relational constraints are the power dynamics among children, their parents, their extended family, and local leaders. Swasti, who became pregnant at 15, felt she had to marry because of the strong social norms in her rural village. She and her family would have lost the crucial part of their relational and social life in the village if she had given birth outside of wedlock. Situational constraints are the options children had at the time of decision-making. For instance, Ayu, who married through run-away marriage, lived in a ‘difficult situation’ with poverty and no education. However, while the ‘difficult situation’ requires special attention, it is also important to acknowledge the possibility of exercising agency under such conditions. Ayu, despite the situational constraints, was proactive in deciding to marry young. *“I am more free when I am married – I do not have to work and raise money so I can be lazy at home”.* She seemed to be aware of her life options and chose what she felt was her best option, even though her expectations of married life were later proven wrong.

The analysis of the general international children’s rights framework showed that the current child marriage framework does not necessarily reflect children’s rights as laid down in international instruments such as children’s rights conventions (CRC and ACRWC). If one asks when policies and laws should intervene in children’s decisions, the process of decision-

making needs to be carefully assessed. This assessment should consider both how much children participate in the decision-making process and on how they make the decisions (i.e., the relational and situational constraints).

It is illuminating to see how these normative frameworks at international, national, provincial, local, and individual levels relate to each other. Relevant theories include the *socialization* of human rights norms (Ropp and Sikkink 1999) and the *vernacularization* of human rights (Merry 2006b). These are what Engel (2012) calls the “vertical model” of studying rights consciousness. He points out some potential problems with the vertical model. He proposes combining it with the “horizontal perspective”, “to ascertain what norms, practices, and beliefs prevail within various social fields where ordinary people engage in everyday interactions” (Ibid). He argues that only with that combination can researchers gain some understanding of human rights projects’ successes and failures in broader social contexts (Ibid).

My analysis of the multiple normative frameworks provided both the ‘vertical’ and ‘horizontal’ perspectives. The vertical perspective involved “tracing the flow of legal forms and practices from prestigious and authoritative centers of cultural production to local settings” (Ibid). It revealed the influences of international human rights institutions (i.e., law and discourse) and how these transnational norms may be adopted at the national level. The horizontal perspective provided perhaps the most significant findings of this study, revealing the gap between the rights that liberal legalism endorses (i.e., what international human rights aim to achieve) and the rights of the relational self (i.e., relating to other people). I will come back to this issue in Section 7.4.

7.3 MULTI-LAYERED REASONS WHY CHILDREN MARRY

Overall, the analysis and discussions throughout the chapters reveal the multi-layered reasons why children marry. Structural explanations (e.g., lack of opportunities and oppressive social structures) are important but not exhaustive explanations. Organizations that work within the international child marriage framework tend to focus exclusively on these structural reasons and are inattentive to the other subjective reasons why children marry. In contrast to structural constraints that individuals cannot control, subjective reasons are those an individual feels and describes.

By exploring the subjective reasons by listening to children’s perspectives, this dissertation showed that many of them decide to marry for love, desire, to belong to the community, and for new opportunities and hopes. These subjective reasons for why children marry have been largely absent from the human rights discourse because the structural reasons silence them.

Acknowledging children's agency to marry highlights that the current child marriage framework is constructed on a partial understanding of why they marry. For instance, adolescents' sexuality is missing, which is at the heart of child marriage. Social (un)acceptance of pre-marital sexual intercourse and (in)availability of tools for reproductive health are the core factors for why teenagers marry in Indonesia. Given that many adolescents worldwide live in societies where pre-marital sexual and romantic relationships are a taboo and even a crime, marriage is sometimes a way to have 'legitimate' sex, to gain sexual autonomy and moral legitimacy. In this sense, the new minimum age for marriage in Indonesia raises a serious question concerning adolescents' sexuality and age of consent (i.e., to have sexual intercourse), which was completely absent in the debates about the new law.

The control (or lack thereof) of teenagers' sexual behaviour is a common concern across countries. Even within the Western world, parents deal differently with their children's sexuality. Schalet (2011) demonstrates how American parents struggle controlling their children's sexual behaviour, while Dutch parents manage it by often permitting young couples to sleep together and providing them with contraceptives. Desiring bodies and mind is universal and hard to rationalize. Conceptualizing agency as making rational decisions thus seems to leave little space for children's sexual autonomy. The question about children's sexual autonomy leads further to discussing children's consent to sexual intercourse and state regulations on this issue, which needs further exploration.

Just as norms around sexuality differ, the meanings and norms around marriage also differ in each country and society, and for each individual. While marriage tends to be seen as a vehicle for individual fulfilment, the previous chapters showed that marriage in Indonesia often involves much more collective processes and meanings. These divergences in marriage and sexuality illuminate that when the human rights framework constructs an overall framework of 'child marriage', the consequences of this framework differ in each society.

This point about marriage's diverse meanings and consequences means that the strict and rigid child marriage framework to ban *all* marriages under the age of 18 is not an effective approach. In other words, legislation on minimum age of marriage is *not* the most appropriate way to decrease the incidence of child marriage, neither to fully realize children's rights. It is understandable why this abolitionist approach is appealing for advocates since they focus on the negative consequences of child marriage for girls, as presented in their reports and campaigns. These consequences include reduced educational opportunities, reproductive health hazards (e.g., difficult deliveries, a higher risk of HIV/AIDS, and premature babies with disabilities), and intergenerational poverty. However, these consequences are mainly a discourse at the international agenda for women's rights and

cannot be taken for granted. These discussions are limited because the consequences are not always well supported by evidence, and the causal relationship between child marriage and these consequences is often reversed. For example, child marriage can be a consequence of a lack of educational opportunities.

Overall, the monolithic framework based on a partial understanding of why children marry further hinders understanding the core problem. It does so by *traditionalizing* the problem: turning a global social challenge (teenage pregnancy) into a cultural phenomenon ('harmful traditional practice') that is alien to the West or to the upper-middle-class in the South. The label 'harmful traditional practice' obscures the social reality and prevents policy efforts from being effective. The focus on 'banning' or 'eradicating child marriage' will not solve the underlying social problems, such as lack of tools and knowledge about reproductive health. The data has proved that child marriage is often a symptom of unplanned pregnancies outside of wedlock, and therefore policies and programs should be redirected to address this root cause.

7.4 RETHINKING AGENCY IN INTERNATIONAL HUMAN RIGHTS

How do these answers to questions about child marriage relate to critical and anthropological studies on human rights? They clarify the position of agency, structure, tradition, and modernity in international human rights. International institutions such as the CEDAW committee typically talk about culture as a barrier to progress, based on their understanding of culture as a static tradition (Merry 2003). Under the label of "harmful traditional practice", child marriage is paired with female genital mutilation, *sati* in India (the immolation of a widow), female abortion and infanticide due to son preferences, polygamy, seclusion and veiling, and food taboos for women (Ibid: 63).

However, this label is misleading. Under a relational understanding, agency is an ability to choose by making internal reconciliations with structure (i.e., patterned arrangements that influence or limit available choices). This is the difficult and significant boundary between consent and coercion. Importantly, the structure that actors interact with is not the essentialized 'culture' or 'tradition', but persons with whom they are in relationships. Structures do not disappear but are replaced by self-chosen ones (Bauman 2000: 8). Structures are essentially various relationships and social connections that an individual forms, which exist in any society regardless of it being 'traditional' or 'modern'. Child marriage occasionally occurs in 'modern' social conditions (i.e., increased educational opportunities and mobility) to accommodate modern needs within the children's structure.

In light of this understanding of structure, what can be labelled as ‘culture’, ‘tradition’, or ‘custom’ is an essential part of people’s lives. Therefore, it is not an obstacle to realizing human rights. On the contrary, it is an essential tool for realizing them. In legally pluralistic contexts, customary and religious laws can help external supporters of human rights understand what rights mean for their beneficiaries, and support these rights-holders in acquiring *their* rights. Such an approach also enables redirecting the current human rights framework to pay more attention to the rights of the ‘relational self’ (see previous chapters), which sometimes are in conflict with the liberal understanding of ‘individual rights’. The protection of individual rights does not necessarily lead to the protection of the rights of the relational self (i.e., belonging to a community), and the latter often stay unnoticed within the current approach to protecting human rights.

Why do relational self rights stay unnoticed alongside modern individual rights? The reason is that the child marriage framework (and the human rights framework in general) is constructed on too narrow a vision of human agency. As human rights are premised on the idea that human nature is individual and self-sustaining (Santos 2015: 7), they tend to focus on ‘full-autonomy’ (i.e., decision-making completely independent from social relationships and structures) in ‘non-traditional’ societies. This narrow interpretation of agency consequently produces a blind spot: failing to respect and promote the agency of all, regardless of gender, race, religion, and age.

Just as a homogeneous and static image of the “Third World Woman” is useful for Western feminists to motivate Western support (MacDonald 2016; Mohanty 1984; Mustonen 2017), the stereotypical image of the ‘child bride’ in ‘the Third World’ is appealing. The problem is that these images turn subjective beings into an ‘object’, producing the “third world difference” (Ibid). As the sex trafficking analysis suggests, when international institutions do not fully accommodate agency and consent, their interventions become “paternalistic control in the name of humanitarianism” (Merry and Ramachandran 2017: 255).

The increasing paternalistic control links to a “determining silence” (White 2002). White refers to the silence on the topic of race in development policies, demonstrating a neoliberal understanding of development reliant on ideas of modernity (MacDonald 2016: 6). The international human rights framework is similarly ‘silent’ on certain topics, informed by implicit assumptions about gender, race, and ‘progress’.

International children’s rights are also based on implicit assumptions about childhood and developmental psychology (see Chapters 2 and 6). While the CRC increasingly acknowledges the need to respect children’s agency and stimulate their participation in decision-making, policies concerning

children still tend to rely on a protectionist approach. As studies on child labour and child soldiers also indicate,² some of the international policies concerning children's rights currently fail to walk the thin line between the empowerment and protection of children. The international children's rights scheme tends to overshadow a child's agency when their decision *seems wrong*, from the perspective of a specific socio-economical and socio-cultural background typical in the West. One difficult question is when the law should intervene in individuals' (particularly children's) autonomous decisions, which the following section will partially explore.

7.5 EPISTEMOLOGIES OF 'HUMAN RIGHTS' AND FUNCTIONS OF 'HUMAN RIGHTS'

Considering the blind spot on agency, the universality of international human rights is in a precarious position. While I do not reject the fundamental normative principle that all human beings should enjoy basic human rights, the assumed universality of human rights can be a double-edged sword. Focusing too much on the means (a strict and narrow framing of human agency) fails to achieve the ends (protecting the human agency of *all* human beings).

Macdonald (2013: 26) argues that the human rights idea is flawed not because of its inherent characteristics, but because of how proponents have used it. This dissertation has shown that advocates interpret and use human rights regarding child marriage in a dogmatic, unilateral, and simplistic vision of how things should change. However, this does not mean that the ideas and goals themselves should change. Human rights can focus on the ultimate goal without being interventionist (Ignatieff 2003; the "minimalist" approach to human rights) by critically assessing how they function in practice and allowing for differentiation.

Overcoming the human rights framework's blind spot then requires a two-fold shift: first, an epistemological shift to deconstruct the dominant narrative and engage with 'other' forms of knowledge; second, a procedural shift to include multi-cultural dialogues. For human rights to be truly universal, it needs a relativistic twist, not as tolerance without limits ('anything goes') but as an invitation to sufficiently respect differences and carefully access the need for tolerance and differentiation. This assessment cannot be done without considering how human rights operate in practice, in contrast to human rights on paper or as "idolatry" (Ignatieff 2003). Hopgood (2017: 259) usefully distinguishes between "Human Rights" as "universal, global and monotheistic in voice" and "human rights" as "bottom-up, interpretive

2 See Bodineau (2014); Hanson, Volonakis, and Al-Rozzi (2015); Nieuwenhuys (1996); Saadi (2012); Van Daalen and Mabillard (2018).

and flexible in the hands of local people". In this sense, the debates on universalism and relativism in *Human Rights* are in serious need of the anthropology of *human rights*.

The anthropology of human rights enables an understanding of human rights' functions in practice, critical to understanding when laws should intervene. When does a behaviour become so detrimental to individuals and societies that laws (including human rights laws) need to regulate it? The rationale behind child marriage bans is that this behaviour is so harmful that it needs to be eradicated by all means, including laws.

Such strict rules and rights frames can have several functions. First, they can have a symbolic value by setting a normative standard for citizens. They can also have an external value by signalling a state's compliance and commitment to international goals, such as the Sustainable Development Goals. Second, laws can create an "enabling environment" (Shell-Duncan et al. 2013) for those who have fought or wish to fight against specific behaviour. Shell-Duncan et al. (Ibid) demonstrate that where FGM is being contested, legislation gave CSOs and individuals greater leverage in favouring abandonment. State legislation can also be invasive. For instance, in the fight against gender violence, state courts and legal processes can reinforce specific cultural images of femininity and masculinity (Merry 1997). On some occasions, resorting to trials in state courts can result in the loss of communal support (Strathern 2004).

One important question is whether laws act as a resource or constraint. While Merry (1997: 270) suggests that rights *generally* act as a resource, in the case of child marriage, the international framework is currently more constraining rather than liberating. Such a framework limits its full effectiveness and emancipatory power. Other human rights issues also require a serious inquiry into and critical reflection on the functions of the propagated rights from the viewpoint of the rights-holders.

7.6 TOWARDS AN EMPOWERMENT APPROACH: POLICY RECOMMENDATIONS

If the child marriage framework remains monological and categorical, it also fails to incorporate the diverse views on what a child means. This lapse results in a protectionist approach of liberal paternalism that misdirects policy designs. Moving away from such a protectionist approach is not a straightforward journey. The child marriage framework faces a devilish dilemma between the protection and empowerment of children. The current framework focuses too much on protection, banning all child marriage regardless of the child's consent. We should also recognize that this approach unwillingly sacrifices empowerment by limiting children's freedom to marry that they could be exercising.

This dilemma goes beyond child marriage. For instance, imagine you have a teenage daughter who goes out frequently with her new boyfriend. One day, she is invited to his house for dinner, and his parent calls you and asks if you agree with her staying overnight. On the one hand, you want to give her freedom and to trust her, and do not want to be seen as paternalistic or conservative. On the other hand, you worry about her. Will she be alright, does she know enough, is he the right kind of boy for her, and isn't she too young? When you want to protect her, sometimes you limit the freedom she could enjoy.

Balancing this dilemma is difficult and uncomfortable. Life is easier when things are binary, but the reality is often non-binary. Like the parent who wanders the thin line between giving and limiting their daughter's freedom, the discussions and policies on child marriage should also strive to balance protection and empowerment. The current protection-focused approach should focus more on empowerment to achieve human rights and development goals. Towards this end, it is crucial to know when rights act as a resource and a constraint. Both human rights scholars and practitioners should acknowledge that the child marriage framework could function in both ways. Therefore, they should continue to ask whether the child marriage framework and programmes function as a resource or constraint towards local rights-holders.

That concludes my theoretical considerations, which illuminate points of practical relevance. For instance, what does the empowerment-focused approach mean in a more concrete sense? First, it involves more collaborative and informed decision-making. Policies for child marriage should be designed to encourage children's participation in and collaboration with adults in decision-making, where they are informed of their decision's consequences. CSO programmes can better educate children to allow them to make more informed life decisions. That education includes focusing on what marriage would mean in their life, and how to manage their romantic and sexual lives in a way that does not unintentionally limit their choices and opportunities.

Second, empowerment means providing resilience-based support for married children. Advocacy for child marriage should invest in stimulating children's resilience towards improving their life after marriage. For instance, most schools in Indonesia do not accept married or pregnant students. One of the main reasons for campaigns against child marriage is that it deprives children of educational opportunities. Changes could occur so that married children can continue their education. Post-marital support includes vocational training, reproductive health support, and whatever else helps them lead the kind of lives they want.

On the last note, the empowerment-focused approach should go hand in hand with the community-based approach, which focuses on dialogues and awareness interventions with community leaders, parents, and peer groups.³ In a society where children are actually 'forced' to marry, structural changes are necessary to foster children's choices. Therefore, I propose the empowerment-focused approach not as the sole approach to go forward, but as a very important additional one. Only with such an approach can children, both married and not married, lead the lives they wish to live.

3 For community-based approach, see for instance: (Freccero and Whiting 2018; Jones et al. 2015; Karolus, Dewi, and Partini 2019).