



LEGAL STATUS OF CHILD MARRIAGE IN INTERNATIONAL HUMAN RIGHTS LAW AND THE LAW OF IRAN

SEYED YASER ZIAEE¹ | REYHANEH ZANDI²

1 Associate Professor of International Law, Department of International Law, Faculty of Law, University of Qom, Qom, Iran.

E-mail: yaserziaee@gmail.com

2 Ph. D. Candidate in Public International Law, Faculty of Law, University of Qom, Qom, Iran

E-mail: r.z.judge94@gmail.com

Article Info

Article type:

Research Article

Article history:

Received

2022-01-30

Received in revised form

2022-04-01

Accepted

2022-06-14

Published online

2023-02-18



https://ijicl.qom.ac.ir/article_2220.html

Keywords:

The Minimum Age of Marriage

Child

Forced Marriage

Law of Iran

International Human Rights Law.

ABSTRACT

Protection of the children is one of the most important concerns in international human rights law. Child marriage is recognized as one of the forms of child abuse. The first step for elimination of child marriage is legal definition of the child. Lots of treaties have tried to determine the minimum age of a person before which he or she cannot marry. This article examines the criteria for recognizing an individual as a child and consequently child marriage in the international human rights system and domestic laws of the Islamic Republic of Iran. Treaties relating rights of the child do not clarify a specified minimum age for marriage except the Convention on the Rights of the Child in which a child is defined as a person below the age of 18. This criterion is based on an age-oriented approach and is aimed at homogenization of girls and boys. In contrast, in the law of Iran it is based on an interest-oriented one and it is relied on a multiple-criteria approach comprised of legal (physical or sexual) maturity, mental growth, religious maturity and guardian consent which has resulted in a more rational and defensible approach.

Cite this article: Ziaee, S.Y and others. (2023). Legal Status of Child Marriage in International Human Rights Law and the Law of Iran, *Iranian Journal of International and Comparative Law*, 1(1), pp: 35-56.



© The Authors

doi:10.22091/IJICL.2022.7862.1011

Publisher: University of Qom

Table of Contents

Introduction

1. Concepts

2. International Approach towards Child Marriage

3. National Approach: Islamic Republic of Iran

4. A Comparative Study of IHRL and Law of Iran

Conclusion

Introduction

Marriage or family formation is one of the oldest, most enduring and complex human actions that has a long history. According to some authors, marriage has a positive function for the whole social system if it is done at the right time and with the right person. So, if the couple is not married at the right age and does not have the mental maturity necessary to form a life, he/she will certainly not be able to choose the right person and the result is both individual injuries and social influences that affect society as a result of this marriage, ranging from physical and mental illness and dissatisfaction with marital life to low rates of social participation and incomplete socialization.¹ Adolescent marriage is associated with factors that are very effective in the quality and reliability of married life, including: dissatisfaction with parents, social and economic weaknesses, low educational achievement, less experience and maturity and more. Social scientists believe that people who marry as teenagers are financially, psychologically, and educationally disadvantaged and less prepared to accept the role of mother.²

It appears that child marriage is contradicted with assumption of some international instruments on human rights including Article 16(2) of the Universal Declaration of Human Rights (UDHR) which states that “Marriage shall be entered into only with the free and full consent of the intending spouses”. Also, it is against lots of States’ legislations such as Iran in which child marriage in certain conditions is banned. According to the latest official statistics on child marriage, this issue in Iran is still a challenge, a phenomenon that, despite the legislature's efforts to protect children, continues in some cases.³

Conducting a comparative study, the present article seeks to answer this question that what is the minimum age of marriage in the international human rights system and law of Iran? In an-

1. Ali Ahmad Panāhi, 'Marriage in Islam; With a View to Educational and Psychological Functions', (2006), 104 Journal of Knowledge, Religions and Mysticism, 38. [In Persian]

2. PR Amato and others, *Alone Together: How Marriage in America Is Changing*, Massachusetts (Harvard University Press 2008), 18.

3. According to recent statistics released by the Statistics Center for the spring of 2021, the number of marriages of girls aged 10 to 14 in the April of 2021 increased by about 32% compared to the same statistics in the spring of previous year and has reached 9753 marriages. Based on the same statistics, 45,522 girls aged 15 to 19 were married in 2021. On the other hand, according to the mentioned statistics, the marriage of six boys under 15 years old and 6573 boys aged 15 to 19 years old has been registered in the April of 2021. For more information, see: <https://www.amar.org.ir>



swering this question, the assumption of this article, which has been written with a descriptive and analytical approach and using library and Internet resources and valid domestic and international documents and laws, is based on the fact that 'international instruments and institutions have been silent or have had an 18 age-oriented status contrary to law of Iran which seems to be based on a multi-dimensional approach that has led to a more logical and progressive one.

Doing so, the article is comprised of four main sections. Section 1 is dedicated to defining the key concepts used in the research. Because in this category of research, it is necessary to first consider the difference in the definition of each term in the legal systems under study. Since the subject of the article is mainly comparative, the issue of child marriage is discussed in terms of international human rights law in section 2. In this regard, the discussion is divided into two parts, the documentary and the institutional approach, and four key documents and other international documents of lower importance on the issue are discussed. In all these documents, the focus of the research is on free consent and the appropriate age for marriage. In the institutional approach, the relevant opinions issued by the most active treaty bodies in this regard and other international institutions have been mentioned. We will not enter into a judicial review of this issue because there is basically no significant judicial procedure on this issue but just in the field of protection of child soldiers which is beyond the scope of the article. Section 3 examines the subject of research in the Iranian legal system. The main focus of the article in this section is on the age criterion identified and the legal developments on this issue. The fourth and final section enters the main comparative discussion and makes a comparison between the two systems.

1. Concepts

The main reason for the ambiguity in many issues is the existence of words and expressions that are incorrectly defined. Therefore, at the beginning of each research, first and foremost, it is necessary to dedicate a section to the definition of key concepts.

1.1. Child

"Child" is defined as "a young human being below the age of puberty or legal age of majority" in the Oxford Dictionary. Despite all UN General Assembly's emphasis on the importance of respect for the rights and freedoms of child in Universal Declaration of the Rights of the Child (1959), this concept has been abandoned without an absolute definition. But in the Convention on the Rights of the Child (CRC) the term "child" is defined as follows: "...a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier" (Art. 1). So, if there is a prescribed age for maturity in domestic law of a member state this law will prevail.¹ The latter part of the Article can be flexibly changed according to different laws and does not provide a remarkable standard for all members.² Article 6(5) of International Covenant on Civil and Political Rights (ICCPR) (1966) and Article 6(4) of Protocol II to 1949 Geneva Conventions (1977) also stipulate that sentence of death shall not be imposed for crimes committed by persons below eighteen years of age. In Article 1(4) of 1957 Supplemen-

1. Rachel Hodgkin and Peter Newell, Implementation Handbook for the Convention on the Rights of the Child (third edition, UNICEF 2007), 4.

2. Akram Fazlī Khānī, 'Violation of Children's Rights in the United States', (2011), 18 Quarterly Journal of Women's Rights Studies, 57. [In Persian]

tary Convention on the Abolition of Slavery, Slave Trade and Institutions and Practices Similar to Slavery (CASSTIPSS) and Article 3 of the Worst Forms of Child Labor Convention (1999), the term "Child" refers to people under the age of 18 years. Although the above-mentioned documents set out a standard of 18 years for a child, the international standard for identifying a child is still variable and has not reached the nature of a uniform procedure. In the field of humanitarian law, Article 4 of Protocol II to Geneva Conventions and the Second Optional Protocol to the Convention on the Rights of the Child, the age limit of 15 years for the identification of a child are considered. Also, according to the Committee on the Rights of the Child, the most common age of criminal responsibility at the international level is 14 years;¹ therefore, it is difficult to believe that the age criterion of 18 years can be considered as a customary rule.

In Iranian legal terms, a child is a person who has not attained the physical and mental development required by age; so, this term also covers the neonatal period. The 1979 Constitution of Islamic Republic of Iran (as amended in 1989) does not define a child, but it uses the word "orphaned children" in Article 21. The famous Imamiyah jurists refer to "child" as someone who has not reached the age of religious maturity.² According to Article 1210 (1) of the Iranian Civil Code (1961) and Article 147 of the Islamic Penal Code (2013) of Iran, the age of puberty (religious maturity)³ for a boy is 15 lunar years and for a girl is 9 lunar years. Thus, religious maturity is the main basis for defining a child and the religious and legal sign of it is reaching a certain age, which can be termed 'puberty'.⁴ Furthermore, in Article 1 of the Iran's Child and Adolescent Protection Law (May 2020), child is defined as any person who has not reached the age of religious maturity and in the definition of adolescent: "Any person under the age of 18 who has reached puberty".

Therefore, it seems that according to the principle of the rule of will, in determining the age of the child, the principle is the freedom of states which is also mentioned in the Convention on the Rights of the Child. However, the 18-year-old standard is apparently applied in countries where the law is silence as to the age of the child is silent.

1.2. Age of Consent

Merriam Webster Dictionary has defined "Age of Consent" as "the age at which one is legally competent to give consent especially to marriage or to sexual intercourse".⁵ In addition, according to some authors, age of consent is the age at which a person could be legally competent to consent to marriage/sexual acts. Therefore, when an adult engages in sexual activity with a person younger than the age of consent, could be accused by child sexual abuse or statutory rape.⁶ So, it could be concluded that forced marriages are cases in which one or both parties have not personally expressed their full and free consent to the union.⁷

1 .CRC, 'General Comment No. 24 on Children's Rights in the Child Justice System', CRC/C/GC/24 (18 September 2019), para 21.

2 . Ja'far ibn Hasan Mohaqqueq Hellī, *Riyāḍ al-Masā'il* (T- Al-Hadithah), Volume 8 (first edition, Institute of Ahl-al-Bayt 1984), 5. [In Arabic]

3 . Signs of puberty in male are completion of fifteen lunar calendar years of age, ejaculation through sexual intercourse, or seminal discharge while awake or asleep, the presence of pubic hair, of the rough type and the presence of hair on the face and above the lips and in females She is considered adult at the completion of nine lunar years. Available at <https://www.sistani.org/english/qa/01127/>

4 . Ātefeh Abbāsi Koleimānī, *The Rights of the Child in Iranian Legal System* (first edition, Mizān Publication 2016), 14 [In Persian]

5 . Webster, Merriam, *Academic Content Dictionary*, Available online at: www.merriam-webster.com

6 . Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (first edition, Palgrave Macmillan 2005), 85.

7 . Office of the United Nations High Commissioner for Human Rights, 'Preventing and Eliminating Child, Early and Forced Marriage' A/HRC/26/22 (2 April 2014), 4.



Although the ICCPR (Art. 23), the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR) (Art.12) and the 1969 American Convention on Human Rights (ACHR) (Art.17) use the term "age of marriage", the term "age of puberty" is mentioned in the UDHR. "Age of puberty" can refer to both 'religious puberty' and 'physical puberty'.

Iran, after Guinea, has accepted the lowest age of marriage for girls. In accordance with Article 1041 of the Iranian Civil Code, girls lower than 13 solar years and boys under 15 solar years are permitted to marriage with the consent of legal caretaker on the basis of child's expediency and with the permission of the court.¹ It should be mentioned that in Iran, sexual relationship out of marriage tie is forbidden for anyone in any age.

1.3. Child marriage

Child marriage, also referred to as an early marriage, has been defined by treaty bodies and international organizations as: '[...] any marriage where at least one of the parties is under 18 years of age'.² A child marriage generally expects young girls to enter simultaneously into a sexual relationship, which could be physically and psychologically harmful.³ The overwhelming majority of child marriages involve minor girls, although once in a while their spouses are below the age of 18 as well.⁴

It can be legally valuable to make a distinction between the marriage of two children who lack the full and free consent or sexual relationship and the marriage between a mature and a child. It seems that what is in the core concern of the international documents and jurisprudence is the latter one. It is the reason for using the term forced marriage instead of child marriage in some cases.

Child marriage, premarital marriage, early marriage and forced marriage are all interrelated but distinct terms at the same time. Although, they have been combined in every way possible and are used interchangeably without any explicit definitions or at least clarification as to the breadth of the ambiguity surrounding each label. But it seems that the CEDAW and CRC have agreed to use the term 'child marriage' and 'forced marriage' as the same concepts.⁵

A marriage arranged by the parents may not mean forced marriage in the literal sense. In this marriage, although the parents play a key role in the marriage arrangements, the child may not be forced into the marriage. However, in international documents it is assumed that child marriage is considered as an example of forced marriage even by direction of their parents because of lack of necessary ability of child to recognize and make decisions due to mental, emotional and social immaturity for a serious matter such as marriage.

2. International Approach towards Child Marriage

International human rights system provides a broad framework through which states can

1. Shādi Sharīfī, 'Studying the Phenomenon of Child Marriage and Its Relationship with Child Abuse and Mechanisms for Combating It', (2017), Third International Conference on Jurisprudence and Law, Law and Social Sciences 1, 8-9. [In Persian]

2. CEDAW and CRC, 'Joint General Recommendation/General Comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on Harmful Practices', U.N.Doc. CEDAW/C/GC/31-CRC/C/GC/18, (2014), 7.

3. R Gaffney-Rhys, 'International Law as an Instrument to Combat Child Marriage', (2011), 15 International Journal of Human Rights, 361.

4. CEDAW and CRC (no 13), 7.

5. European Institute for Gender Equality, 'Child Marriage' (2018); available at www.eige.europa.eu



operationalize their respect for human rights and pay particular attention to groups that are more vulnerable or marginalized.¹ Children in many countries face numerous difficulties including early marriage. In the past few decades, the international community has taken a number of measures to counter this phenomenon at the international level.

2.1. Approach of International Instruments

For a long period of time, the view to childhood and adolescence has been the look of a "big" man to a "small" one, a young man who is potentially an adult and should be credited. Numerous international supports for the child shows that this view has undergone a profound transformation. To reach the main goal of this research, we must evaluate the international instruments relevant to the study of the basis of states' obligations in this field.

2.1.1. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages

This Convention (CCM) was ratified in 1962, the preamble of which considers marriage and consent to it as a fundamental human right. Referring to the history of international activities concerning marriage, including Article 16 of UDHR and Resolution 843 (1954) of the UN General Assembly, the main objectives of this convention are the abolition of ancient laws and practices relating to marriage in contrast with principles set out in the UN Charter and the UDHR, the guarantee of complete freedom in choosing a spouse, the complete abolition of child marriages and the nomination of young girls before puberty and the imposition of appropriate punishments.²

Issues related to marriage in the Convention are divided into three categories: the need to determine the minimum legal age for marriage, the need for any marriage to occur with the consent of parties and the need to register all marriages in the appropriate notary. Article 2 of the Convention relating to minimum age for marriage reads: 'States Parties to the present Convention shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses'. "No marriage below this age should be legally registered by any person..."

In this regard, it should be noted that the Recommendation issued in 1965 by the General Assembly in form of Resolution No. 2018, states that 'member States should take the necessary legal measures to determine the minimum age for marriage, which in any case is not less than 15 years'.³ Although the resolution of the UN General Assembly is merely a recommendation and basically is not legally binding, it can be taken into account by the views expressed by some delegations and Agencies during the drafting of the Covenant.⁴

Therefore, this document does not stipulate the minimum age for marriage, but confirms

1. UNICEF, *Children's Rights in Impact Assessment: A Guide for Integrating Children's Rights into Impact Assessments and Taking Action for Children* (UNICEF and Danish Institute for Human Rights 2013), 6.

2. Joseph Jackson, 'Consent of the Parties to Their Marriage', (1951), 14 *Modern Law Review* 1, 12.

3. UNGA, 'Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages' (1 November 1965) A/RES/2018(XX), para 4.

4. Māhrū Ghadīrī, 'Age and Consent to Marriage in Light of International Human Rights Law', (2017), 12 *Journal of Family Research*, 121. [In Persian]



its determination by member States. Member states are obliged to legislate the minimum age of marriage and make marriage registration mandatory.

2.1.2. International Covenant on Civil and Political Rights

Having followed Resolution 2200, the ICCPR was ratified by UN General Assembly on 1966 and entered into force on 1976.¹ The most important feature of the Covenant is that it is a universal instrument containing binding legal obligations.²

Article 23 (2) of the ICCPR specifies the right of marriage for men and women who have reached the age of marriage. This article reiterates that 'No marriage shall be entered into without the free and full consent of the intending spouses'. During the drafting of the Covenant in the Third Committee of the General Assembly, several delegations referred to the CCM. CCM requires State Parties to determine the minimum age of marriage by law. Therefore, it appears that the Covenant member states should set a minimum age for the right to marry. Although the Covenant mentions terms of child, juvenile and adult, without distinguishing between them, it just emphasizes the acquisition of free and full consent.

2.1.3. Convention on the Elimination of all Forms of Discrimination against Women

The General Assembly adopted Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) in 1979. The main objective of the Convention is to guarantee de jure and de facto equality between women and men.³ It could be said that "the only global human rights instrument that explicitly prohibits child marriages is CEDAW".⁴

Article 16 of CEDAW is the focus of this sub-section. The mentioned Article, without specifying an age, includes *prohibition of betrothal and the marriage of a child* (our emphasis). So, only adults should be permitted to enter into marriage. Also, child marriage is banned through the CEDAW's Committee's statements in condemning forced marriages in its General Recommendation no. 21. Article 16 includes equal legal rights related to matrimony and to family relations, including the right of women to freely get married, to decide the number and timing of their children, and to exercise their rights to administer property without interference.⁵

The treaty only mentions the commitment of states to eliminate discrimination against women in all matters relating to marriage and family relations. Avoidance of this document to deal with the essential discussion of the definition of family indicates an awareness of the fact that the family is a culture-based concept and can vary from community to community, despite the commonalities.

2.1.4. Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC) was adopted by the UN General Assembly on 1989 and entered into force on 1990. The truth is that the Convention on the Rights of the Child has not paid any direct and effective attention to the issue of child marriage. Howev-

1. Reyhaneh Zandi, A Comparative Study of the Right to Proper Nutrition for Children in International Human Rights Law and Law of Iran (MA Dissertation in International law, The University of Qom 2016), 58. [In Persian]

2. Aulona Haxhitaj, 'The Covenant on Civil and Political Rights', (2013), 3 Juridical Tribune, 314.

3. de Silva de Alwis Rangita, Child Marriage and the Law: Legislative Reform Initiative Paper Series (UNICEF 2007), 9.

4. CEDAW, 'General Recommendation No. 21: Equality in Marriage and Family Relations', U.N. Doc. HRI/GEN/1/Rev.9. (1994), para 36.

5. Rangita (no 23), 11.

er, what we can say is that the CRC defines a child as *every human being below the age of 18 years*.¹ Furthermore, it obliges States Parties to protect child against domestic violence, war and prostitution and take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or *sexual abuse*, torture or any other form of cruel, inhuman or degrading treatment or punishment (Art. 19) (our emphasis). States Parties shall take all effective and appropriate measures with a view to abolishing *traditional practices* prejudicial to the health of children as well (Art. 24, para. 3) (our emphasis). This provision implies that persons under 18 years old (children) couldn't marry because it can be defined as a 'sexual abuse' or 'traditional practice'.

As Price Cohen states it, "while the CRC, alone, cannot be expected to eradicate years of discrimination against girls, it is, however, providing the framework for the possibility of world-wide change...despite the fact that all human rights treaties contain the principle of non-discrimination, it is only in the Convention on the Rights of the Child in which both genders are given true equality in the exercise of their rights".²

In general, and in the international approach, forced and early marriages are recognized as human rights violations. The international legal instruments discussed above condemn forced and early marriage. Both CCM and CEDAW require the consent of both parties, recommend determination of a minimum age for marriage, and the need to register marriages to better investigate the occurrence of forced and early marriages and to ensure that both parties have equal rights and protections. Although CRC does not contain specific principles regarding consent and registration of marriage, it specifically defines children as persons under 18 years of age.

Generally speaking, it seems that the tendency of CRC to determine the equal age for girls and boys for marriage results from non-consideration of the criterion of the age of physical, psychological and social maturity which can be the basis for a significant difference in marriage age for girls and boys.

2.1.5. Other Instruments

Besides the above mentioned instruments, early marriages have been taken into consideration in some of other international human rights treaties. For instance, CASSTIPSS implicitly prohibits early marriage, as it requires State Parties to abolish certain practices associated with child marriages. Under Article 1(c) the abolition of any institution or practice whereby 'a woman [...] is promised or given in marriage on payment [...] to her parents, guardian, family or other person or group' is stipulated. On the other hand, Article 2 recalls urges states, *inter alia*, to *determine a suitable minimum age of marriage* with a view to eradicate the practice mentioned in Article 1 (our emphasis).³ "The principle of free, full and informed consent also provides critical insight into the conceptual links that may exist between slavery and child marriage" and proves how a child spouse can be an example of forced child slavery.⁴

As for the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treat-

1. Ghadiri (no 20), 118.

2. Cynthia Price Cohen, 'The United Nations Convention of the Rights of the Child: A Feminist Landmark', (1997), 3 William & Mary Journal of Women and the Law, 45 and 47.

3. Gaffney-Rhys (no 14), 363.

4. Eliana Riggio Chaudhuri, Thematic Report: Unrecognized Sexual Abuse and Exploitation of Children in Child, Early and Forced Marriage (ECPAT International 2018), 18.



ment or Punishment (CATOCIDTP), Committee against Torture, has specifically criticized laws that permit child marriage, since it considers this as violence against child as well as inhuman and degrading treatment.¹ The Committee has recognized *child marriage as a harmful practice* which leads to the infliction of physical, mental or sexual harm or suffering and negatively affects the capacity of victims to realize the full range of their rights.²

In addition, regarding United Nations Resolution on Recommendation on Marriage Consent,³ marriage registration requires the consent of both parties, and *15 years is set as the minimum recommended age for marriage* (our emphasis). However, similar to CCM convention, this recommendation allows exceptions for this minimum age.

2.2. Approach of Treaty Bodies

Considering that states have made various commitments to curb the phenomenon of child marriage over the years, in the following, we will outline some of the most important measures taken by treaty bodies on child marriage.

2.2.1. Human Rights Committee

There is no specific age limit in ICCPR, but according to the Committee, the age should be such that each spouse can make a free and full decision. It emphasizes that States parties' reports should indicate whether there are restrictions or impediments to the exercise of the right to marry based on special factors such as degree of kinship or mental incapacity.⁴

Although the Covenant does not determine a specified age for definition of childhood, CCPR implicitly uncovers its intention about concerned age. It states that 'the Covenant does not indicate the age at which he attains his majority. This is to be determined by each State party in the light of the relevant social and cultural conditions... However, the Committee notes that the age for the above purposes should not be set unreasonably low and that in any case *a State party cannot absolve itself from its obligations under the Covenant regarding persons under the age of 18*, notwithstanding that they have reached the age of majority under domestic law' (our emphasis).⁵

It reveals an uncertain tendency of CCPR for normalizing 18-year-old as a legal age of consent contrary to obligatory provisions of the Covenant. Maybe the psychological reason is that this commentary was issued in the year in which CCR was concluded i.e. 1989.

2.2.2. Committee on the Elimination of all Discrimination against Women

This is the body that monitors the implementation of CEDAW. Acknowledging that marriage makes men and women take serious responsibility, this Committee considers full maturity to be a prerequisite for marriage and *the minimum age for both men and women is 18 years and has banned all forms of formal and legal marriage under this age* (our emphasis).⁶

Interpreting article 16 of the Convention, the Committee has recognized that *the minimum*

1. CRR, 'Fact Sheet: Accountability for Child Marriage', Centre for Reproductive Rights, (2013), 27.

2. CAT, 'Concluding Observations on Bulgaria', CAT/C/BGR/CO, (2011), 4-5.

3. A/RES/2018(XX).

4. CCPR, 'General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses, Adopted at the Thirty-ninth session of the Human Rights Committee (27 July 1990), para 4.

5. Ibid.

6. CEDAW (no 26), para 36.

age for marriage should be 18 years for both men and women (our emphasis).¹ The Joint General Recommendation issued by the CRC and the CEDAW Committees on harmful practices establishes that states parties have a “due diligence” obligation to ban child marriage through legislation and supplement legal prohibitions “with a comprehensive set of measures to facilitate its implementation, enforcement, follow-up, monitoring and evaluation of the results achieved”.² The Committee also emphasizes the right to register marriages in order to have the necessary support in the domestic judicial system.³

It is obvious that contrary to the main instrument i.e. CEDAW, the Committee asserts the 18-year-old criterion as a basic test for a legal marriage. Legitimacy of this kind of recommendation regarding to Committee’s competency should be challengeable.

2.2.3. United Nations Committee on the Rights of the Child

This body was established by Article 43 and is responsible for examining the member state's progress in achieving the obligations arising from CRC. In 2011, the Committee expressed concern about child marriage and urged Bangladesh “to take all appropriate measures to end the practice”. In recommendations issued by the Committee, little trace of problem of child bride can be found; however, in its consideration of the combined third to fifth periodic reports of Niger and its initial report on the implementation of the obligations under the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (25 September 2018) admitted that despite the fact that National Strategic Plan to End Child Marriages by 2018 was in place, the Spotlight Initiative addressed violence against women, including child marriages, Niger still needed to prohibit child marriage, *raise the age for marriage for girls to 18*, and lift its reservations to the Convention, including on polygamy (our emphasis).⁴

Although it seems that the issue of child marriage has been a matter of concern from the point of view of the CRC Committee, it neglected to address this issue properly and has only taken note of this in its brief references to the periodic reports. The lack of any formal, comprehensive and independent comment on this issue is one of the criticisms that can be made to the Committee in this regard.

2.2.4. Other Bodies

The UN High Commissioner for Human Rights states that forced marriage could be considered under certain circumstances an act of slavery and slavery-like practices.⁵ Furthermore, the Special Rapporteur on Torture and Other Cruel or Inhuman or Degrading Treatment or Punishment maintains that child marriage constitutes torture or ill-treatment, especially where states fail to establish a minimum age for marriage that complies with international standards or allow child marriage despite the existence of such laws.⁶

The Assembly of the Council of Europe urges the national parliaments of the Council of Europe Member States to adapt their domestic legislation so as to fix at or raise *the minimum*

1. CEDAW, 'Supplementary Information on the Bangladesh', Scheduled for Review, 65th Session (October 3, 2016), 1.

2. CEDAW and CRC (no 13), 7.

3. CEDAW (no 35), 5.

4. CRC, 'Public reports from children's rights defenders- Niger' (July 26, 2018), 4; available at www.childrightsconnect.org

5. OHCHR (no 11), 3.

6. UN Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', UN-Doc A/HRC/31/57, (2016), 18 and 23.



statutory age of marriage to 18 years (our emphasis). Moreover, the Assembly encourages States to refrain from recognizing forced marriages and child marriages contracted abroad.¹

In addition, UN Security Council has passed a number of resolutions regarding sexual violence against children. Resolution 1612 'welcomes... Secretary-General's zero-tolerance policy on sexual exploitation and abuse' and resolution 1882 identifies sexual violence against children during armed conflict as a top priority and requires parties to the conflict to create and enact plans to stop these crimes.² Furthermore, Human Rights Council Resolution 7/29 condemns child sexual abuse and exploitation during armed conflict.³

3. National Approach: Islamic Republic of Iran

The Iranian legal regime has undergone many changes in terms of determining minimum age of marriage, limits of mandatory, legal caretaker of child authority and the penalties of his negligent. The article examines these different pieces of legislation.

3.1. Civil Laws

In 1934, the Iranian legislator ratified Article 1041 of Civil Code that set the minimum age of marriage 15 solar years for girls and 18 solar years for boys. But under special circumstances the court could have reduced the age to 13 for girls and 15 for boys. In 1982' reforms after the 1979 Islamic Revolution, Article 1041 was recognized to be in conflict with Sharia and pre-puberty marriages held possible by the permission of legal caretaker. The draft amendment was submitted to the Parliament in 2002, and finally, as amended by the Expediency Discernment Council it was amended as follows: "The marriage contract between girl before reaching the age of 13 and boy before reaching the age of 15 is subject to the permission of guardian, provided that there is expediency at the discretion of a competent court".⁴ Furthermore, articles 1034 to 1206 of the Civil Code of Iran define the rules governing family and describes in detail the legal effects and consequences of marriage and the rights and obligations of couples.⁵ In fact, the minimum age for marriage was reduced and more credit was given to the decision of the child's legal guardian.

According to the Iranian legal system, what makes an adult person able to distinguish between true and wrong in personal and social life is the principle of [mental] growth; so that he/she can handle his/her finances in a conventional way.⁶ If rational and customary balance between the child's age of marriage and the child's development is not maintained, then surely from the beginning, the property and financial rights of the married child will be subject to de-

1. Anne Wijffelman, 'Child Marriage and Family Reunification: An Analysis under the European Convention on Human Rights and Dutch Forced Marriage Prevention Act', (2017), 35 Netherlands Quarterly of Human Rights, 109.

2. UNSC Resolution 2122 [on women and peace and security] S/RES/2122, (2013), (18 October 2013).

3. UN High Commissioner for Human Rights, 'Preventing and Eliminating Child, Early and Forced Marriage' UN-Doc A/HRC/26/22, (2016).

4. Ghadiri (no 20), 124.

5. These issues are represented in the Iranian Civil Code in some parts of its Seventh Book (marriage and divorce- Articles 1034 to 1157), Eighth Book (children- Articles 1158 to 1194) and Ninth Book (family- Articles 1195 to 1206), including important issues such as: request for marriage, barriers to marriage, rights and obligations of spouses to each other and children, the right to form a family, age at marriage, custody, alimony, guardianship in marriage, dissolution of marriage, divorce and other cases are mentioned.

6. Seyed Mahdi Shahidi, Civil Law: Obligations (ninth edition, Majd Publication 2006), 126. [In Persian]



struction. Therefore, due to insufficient growth, child does not have the right to take possession of her/his property. How can he/she pay alimony and dowry and other rights to his spouse or even claim and receive financial rights?

The other question is whether it is possible to stipulate in the marriage contract that the husband should not have a marital relationship with his wife? Some Islamic thinkers and jurists have argued that the main purpose of marriage is procreation which requires the existence of a marital relationship, so such a condition is an invalid one which also invalidates the contract because is contrary to its nature.¹ In contrast, some religious scholars and jurists have pointed out that marriage has several purposes; the marital relationship is not the only goal and it is based on the participation, empathy and harmony. So, the condition of not having a marital relationship in marriage is not contrary to the nature of marriage and is not considered an illegitimate condition.²

In the Iranian Civil Code, this issue is not explicitly stated and the judicial procedure is silent about it. Therefore, according to Article 167 of the Constitution, the judicial authority must refer to reliable Islamic sources. The principle of the validity of contracts and agreements requires the correctness of the condition. If a woman stipulates with her husband for an important interest or purpose, for example, that they do not have a marital relationship for a certain period of time or temporarily, such a stipulation seems to be equal to the principle of the rule of will (Article 10 of the Civil Code).³

3.2. Criminal Laws

The first law to address this subject is Article 3 of the Marriage Act Adopted in 1931 which states that: "It is forbidden to marry someone who has not yet been physically able to marry. Everyone who marries a person, who is not yet physically fit, will be sentenced to 1 to 3 years in prison. In addition, the offender may be sentenced to a fine ranging from 200 to 2000 Rials". In 1937, this law was amended as: "Anyone who marries a person, who has not reached the legal age of marriage in violation of Article 1041 of the Civil Code, will be sentenced to imprisonment of 6 months to 2 years. Husband is sentenced to at least 2-3 years of imprisonment if the girl is not over 13 years... the registrar and other persons involved in the crime shall also be subject to the same punishment or penalty provided for the assistant of the crime...".⁴

This article was also repealed by the adoption of article 646 of the Islamic Penal Code, approved in 1996 which holds premarital marriage is prohibited without the permission of the caretaker. If a man marries a girl who has not reached the age of majority in violation of Article 1041 of the Civil Code, he will be sentenced to imprisonment from 6 months to 2 years.⁵

Article 50 of the Family Protection Act adopted in 2013 provides for punishment resulting from organ failure and death in a marital intercourse with anyone contrary to Article 1041 of the Civil Code, as well as punishment for father, mother, legal caretaker and the registrar. In

1. Seyed Hossein Safāi and Assadollāh Emāmī, *Introductory Course in Civil Law*, Volume 2 (tenth edition, Mizān Publication 2010), 190. [In Persian]

2. Zayn al-Dīn ibn Ali Shahīd Thānī, *Al-Rawḍah al-Bahiyyah fī Sharh al-Lama'ah al-Damashqiyyah* (Islāmiyyah Publication 1988), 164. [Arabic & Persian]

3. Safāi and Emāmī (no 47), 190.

4. Law on Marriage (1973).

5. Islamic Penal Code (1995).



addition, pursuant to Article 660 of the Islamic Penal Code paragraph B "Whenever the spouse is [religiously] immature and has been severely harmed by sexual intercourse, in addition to the full dowry and full blood money, also the alimony would be on the husband to the time of one mate's death, even if the woman has been already divorced..."¹ In addition, regarding to Article 224 of the Islamic Penal Code, in some conditions death penalty would be executed if an adult have a forced intercourse with a [religiously] immature girl, like with intimidating, defrauding, raping etc.

The Child and Adolescent Protection Act, which was passed in 2020, also defines a child as a person who has not yet reached the age of religious maturity, and adolescent as any person a person under the age of 18 who has passed the age of religious maturity in Article 1. It lists punishments such as imprisonment and fines for any sexual assault (not marriage) of a child or adolescent. Such a crime is limited to child abuse and not forced marriage.

4. A Comparative Study of IHRL and Law of Iran

After a brief review of international and domestic approaches to child marriage, this section is devoted to a comparative study of the issue between international legal system and the Law of Iran.

4.1. Rules

The rights of the child are those rights that a person enjoys as a child. The basic principles governing children's rights in this regard are as follows:

4.1.1. Preserving the Best Interests of the Child

According to Article 3 of CRC, "the best interests of the child shall be a primary consideration in all actions affecting children". OP-CRC(I)² and OP-CRC(II)³, the HCCH⁴, Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect to Parental Responsibility and Measures for the Protection of Children, 1996; African Charter on the Rights and Welfare of the Child, 1990; ILO Conventions No. 182 (1999) and No. 138 (1973) have considered this principle. This is a fundamental legal principle developed to limit the extent of adult authority over children.⁵ This principle is relative and in any case should be interpreted and implemented according to its specific time, place and facilities.⁶

Legal exceptions to minimum age regulations based on parental consent and customary or religious law reduce the legal minimum age for marriage to under 18 in many countries.⁷

1. Islamic Penal Code (2013).

2. Optional Protocol to the Convention on the Rights of the Child (I) (2000) on the sale of children, child prostitution and child pornography, 2000

3. Optional Protocol to the Convention on the Rights of the Child (II) (2000) on the involvement of children in armed conflict, 2000

4. Convention on the Civil Aspects of International Child Abduction, (1980)

5. Jean Zermatten, Jean, 'The Best Interests of the Child Principle: Literal Analysis, Function and Implementation', (2010), 18 The International Journal of Children's Rights, 488.

6. Mostafā Mir Mohammadi, Child Rights (Mofid University Press and UNICEF 2013), 41. [In Persian]

7. In Afghanistan, for example, the minimum legal age for marriage is 16, which can be reduced to 15 with parental consent; In Andorra the minimum legal age of marriage is 16 years for both women and men and as early as 14 years with judicial authority. In 2014, the most recent year for available data, authorities did not record any marriages below the age of 18 years; In Angola the legal age for marriage with parental consent is 15 years. The government did not enforce this restriction effectively, and the traditional age of marriage in lower income groups coincided with the onset of puberty; In Antigua and Barbuda the legal minimum age for marriage is 18 years for both men and women and persons between 15 and 18 could marry with parental



In Iran, as an example, the age of religious maturity is 9 years for girls and 15 lunar years for boys, but because of the incompatibility of marriage and puberty age with psychological and sociological realities due to early childhood marriage, children may be exposed to a great deal of harms. That is why the Iranian legislature increased the age of marriage for girls to 13 and for boys 15 full solar years. In addition, marriage before that age is permitted subject to the permission of the father or paternal ancestor, but provided that the expediency of the child is recognized at the discretion of the competent court. It can be said that the interests of the child as to marriage before 13 or 15 years old have been largely left to the judges of the competent courts and there are no clear criteria for recognizing this expediency in the laws. The judge's diagnosis and the reasons he has accepted in this regard are different in each case. Studies show that in practice, judges often find the absence of harm (negative expediency) sufficient to issue a marriage license. However, a case regarding the consideration of a positive expediency meaning "no harm plus personal benefit to the child" is less considered. Judges also often consider customary interests, and the child's personal interests are often overshadowed by other interests.¹

Also, criminalization of some injuries like harm by sexual intercourse or incompatible treats like intimidating, defrauding and raping with an immature spouse which even can result to death penalty, indicate the Iranian legislature's concern for protecting the interest of children who are not mature in the time of marriage.

4.1.2. Respect for Views and Opinions of the Child

According to Article 12 of CRC, a child who is able to form her/his own idea and opinion has the right to freely express her/his views on all matters affecting her/him and these opinions must be valued according to her/his age, maturity, and intellectual development. Article 19 of UDHR provides that everyone has the right to freedom of opinion and expression. Article 21 of the Islamic Declaration of Human Rights (as amended in 2020), also stipulates the right to freedom of expression for human beings. Article 19 of the ICCPR, Article 13 ACHR, and Article 9 of ACPHR² also address freedom of expression.

Paying attention to child as a human being and giving her/him an active role in determining her/his own destiny requires accepting this kind of rights for her/him. Therefore, all actors involved in child protection should consider children as able to make choices and involve them when making decisions affecting them.³ Marriage is one of the most important of them.

To exercise full, free and informed consent when getting married, Article 16 of CEDAW provides that a woman needs to have the capability to understand the meaning and responsibility of marriage; access to full information about her future spouse; knowledge of the institution of marriage and her rights to make a choice as to whether or not to marry, who to marry and when to marry.⁴ Children's rights to have their views heard reinforces the status of a children as an active participant in promotion, protection and monitoring of their rights.⁵ According to Article 12, older children have the right to participate in decisions about whom and when they

consent. See US Department of State, '2015 Country Reports on Human Rights Practices- Sri Lanka' (13 April 2016) <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport>

1. Hajar Azari and Monireh Mirahmadi, 'Judicial Approaches to Determining the Expediency of Child Marriage', (2020), 10 Journal of Women and Society, 5-6. [In Persian]

2. African Charter on Human and Peoples' Rights, (1981).

3. Roberta Bosio, 'Children's Right to Be Heard: What Children Think', (2012), 20 The International Journal of Children's Rights, 141.

4. Rangita (no 23), 22.

5. Jane Fortin, Children Rights and the Developing Laws, (second edition, Bulterworths 2003), 102.



marry as soon as they have the maturity to understand the implications of their decisions.¹ However, the devil is in the detail. There are challenges in recognizing the age of a child before she/he can 'consent' fully and freely to marriage and sexual relations. In this regard, the CCR stipulates that no marriage shall take place without free consent of the parties. Such consent must be expressed personally in the presence of the authoritative power according to national law. Member States must pass national laws on the minimum age for marriage. CRC determine implicitly age of 18 as the age of consent. In addition, the General Assembly, in the Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (1965), advised member states that the minimum age for marriage should be 15 and no marriage shall take place below that age. Except in cases where the authority grants this age exemption for serious reasons and for the benefit of the parties to the marriage.

In Law of Iran, Civil Liability Law regarding the legal consequences of forced marriage states: "a girl who has accepted illegitimate cohabitation due to tricks or threats or abuse of subordination can also claim spiritual damages from the perpetrator in addition to financial losses" (Art. 9). However, the compatibility of this rule with the child marriage is limited to two cases of threat or abuse of subordination. One of the problems that can be raised regarding the compatibility of forced marriage with the provisions of this article is the issue of the girl's unwillingness to have illicit intercourse.²

It is unclear that why international instruments take an age-oriented criterion for the acceptance of a full and free consent of a person, while, besides the legal (physical or sexual) maturity, mental growth, religious maturity guardian consent by the guardian and *et.* can be supposed as main factors in approving that consent. So, it seems that a 'mixed approach' would work better. The law of Iran took this method by indicating a specific age of 13 and 15 years old (as the legal age of consent),³ mental growth (as the age of financial affairs⁴), religious puberty (lack of consent in the harm resulting from sexual intercourse)⁵ and guardian consent by the guardian (before the age of consent)⁶. It appears that this view is generally more progressive than a mere age-oriented view.

4.1.3. Prohibition of Child Abuse and Exploitation

The Council of Europe Convention on Action against Trafficking in Human Beings and articles 2, 5, 10 and 11 of CEDAW have addressed this issue. Articles 34, 35 and 36 of CRC and OP-CRC(I) oblige member states to protect children from all forms of sexual abuse and exploitation. State Parties shall take all appropriate measures to protect the child against all forms of exploitation that are contrary to any aspect of child's welfare. According to above, early marriage without the consent of the child can be considered as an example of sexual abuse of the child.⁷

1. Human Rights Watch, 'This Old Man Can Feed Us, You Will Marry Him, Child and Forced Marriage in South Sudan', (2013); available at www.hrw.org

2. Mahmūd Rezā Ābed Khorāsānī, An Introduction to the Rights of the Child (first edition, Mizān Publication 2010), 206-207. [In Persian]

3. Article 1041 of the Civil Code.

4. Articles 1207, 1210, 1212 and 1214 of the Civil Code.

5. Articles 2, 9 and 10 of the Law on the Protection of Children and Adolescents.

6. Article 1043 of the Civil Code.

7. Sharīfī (no 12), 16.



It seems that these topics to some extent are acceptable in the Iranian criminal law as well. It is important to distinct between child abuse resulting from lack of consent and child abuse resulting from lack of marital relationship. In other words, international instruments, like a notable number of countries,¹ simply prohibit child abuse because of deficiency in child consent;² but, in law of Iran it is forbidden because of lack of a true marital tie, so if there is a marital relationship between them respecting the legal framework, the term of child abuse and exploitation are not relevant.

In Iranian legal system, sexual intercourse between individuals beyond the scope of marriage contract is prohibited and punishable even by their consent. Articles 114(2), 221(2), 224(2), 228, 244, 658(2) and 660 of the 2013 Islamic Penal Code provide that sexual intercourse with children is punishable in different ways such as imprisonment and execution if there were not a marriage relationship.

4.2. Domestic Concerns

Like many Islamic states, the main basis of Iranian law is Islamic law. According to Article 167 of the Constitution, the judge is obliged to try to find the verdict of any lawsuit in the codified laws and if he does not find it, he should issue his judgment based on valid Islamic sources or orders. The content of Article 167 has been repeated many times in other cases and has resulted to the invocation of Sharia in all cases including criminal and civil ones. The Islamic legal system has certain characteristics, sources and goals that are different from other legal systems. In the first place, the text of the Holy Qur'an and Sunnah is considered as written laws, and in the second place, the consensus of jurists and rational reason. One of the most important methods of Islam to deal with the new situation is *Ijtihad* or trying to extract and deduce the rules of jurisprudence.³ Therefore, as in examining the laws of any country, it is necessary to first assess the origin of those rules in examination of the laws and regulations of the Islamic Republic of Iran on the issue of minimum age for marriage.

Resolving the conflict between individual rights and collective interests has always been a point of contention and the absolute priority of one over the other is questionable. The supremacy of public interests over individual rights and freedoms leads to dictatorship and violates human rights, and disregarding the interests of society and the public interest leads to chaos and disintegrates the collective life.⁴ Therefore, a balance must be struck between the two necessities. Discretion of states in this regard is defined as margin of appreciation. Although this doctrine has been widely considered in the European Court of Human Rights, it has become a growing practice in interpreting of human rights by other courts and States.⁵ In the question of the minimum age required for marriage the question is whether the doctrine of margin appreciation can be applied in this regard? Therefore, the next section is devoted to examining the margin of appropriation in analyzing the principles of the Iranian legislator in determining the minimum age different from international documents.

1. For example: England, Germany, Japan, France, Spain and the Netherlands.

2. Exceptionally Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962) has mentioned both sides: legal age for marriage and consent of the parties.

3. George Curzon, *Persia and the Persian Question*, (Longman, Green & Co 1892), 454.

4. Ayyūb Abdī and Seyed Qāsem Zamānī, 'Margin of Appreciation in Freedom of Religion in the Light of the European Court of Human Rights', (2016), 19 Quarterly Journal of Public Law Research, 78. [In Persian]

5. Onder Bakircioglu, 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases', (2007), 8 German Law Journal, 713.



4.2.1. Islamic Approach

According to the popular belief among Islamic jurists, the child's legal guardian can marry his immature daughter or son to another. Jurists do not have the same opinion on the scope of this ruling and the guardian's ability. While some of them believe that this guardianship power is dedicated only to father and paternal grandfather, others generalize it to the child's executor and legal protector too.¹ Considering the meaning of the word “permission” in Islamic literature, it can be said that the opinion based on the right of a child to refuse marriage, formed by father and grandfather, after reaching the age of puberty has been more accepted.²

However, assuming that the Qur'anic Ayahs³ implying the permission to marry a minor do not have an encouraging tone, they only indicate the current situation in the early Islamic society. First, because marriage is a social and interpersonal topic. In order for a subject to be the source of legal effects, it must have rational validity. Nowadays, rational people do not consider marriage relationship between two children or one child and one adult to be valid. Marital credibility must be rational and the source of the effect. In particular, the marriage of minors is not one of the foundations of Islam. Islam has adopted a number of common practices of that time due to the urgency and impossibility of sudden change. These affirmations cannot be considered a sign of Islam's satisfaction with those practices. Second, since the essence of all the guardianships that have been legislated in Islam is to observe the interests of the person under guardianship, maintenance legislation is never for the benefit of guardian or trustee. Therefore, if the minor marriage was decided by guardian, it has been for the purpose of observing minor interest. With expulsion of this expediency, that guardianship will also be eliminated.⁴

4.2.2. Margin of Appreciation

One of the questions that have been raised is whether the doctrine of margin of appreciation can be used to justify non-compliance of international rules with domestic law? The dynamic interpretation of human rights treaties is not unrelated to the sources of will and opinion of legitimate democratic institutions such as the legislature.⁵ The term ‘margin of appreciation’ was first used in 1958 report of European Commission of Human Rights in the *Cyprus v. Britain*, and has since been widely used. Some authors argue that this doctrine refers to the powers given to states. Because they are in charge of assessing the real situation and implementing rules listed in convention.⁶

The reasons for using this doctrine are in line with the reasons that can be mentioned in the justification of relativism. The right of every society to have a degree of freedom in resolving conflicts arising from moral issues related to religious teachings, cultural backgrounds and the common denominator of any society and the need to respect the social, economic, cultural and political traditions of any society can be mentioned in justifying the acceptance of relativism.⁷

1. Mostafā Mohaqqueq Dāmād, *Family Law*, (twentieth edition, SAMT 2021), 86. [In Persian]

2. Assadollāh Emāmī, *Family Law*, (sixth edition, Mizān Publication 2019), 78. [In Persian]

3. *The Women/6; Hūd/78; The Stories/27.*

4. Mohsen Kadivar, *The Rights of the People: Islam and Human Rights*, (fifth edition, Kavīr 2014), 290. [In Persian]

5. Mohsen Mohebbī and Esmā'īl Samāvi, 'The Contribution of Precedent of the European Court of Human Rights to Dynamic Interpretation of Human Rights Treaties', (Spring and Summer 2018), 35 *International Law Review*, 28. [In Persian]

6. Abdī and Zamānī (no 75), 64.

7. Hossein Sharīfī Tarāzkūhī and Javād Mobīnī, 'The Application of the Margin of Appreciation Doctrine in the Jurisprudence of the European Court of Human Rights', (2014), 16 *Quarterly Journal of Public Law Research*, 79. [In Persian]

Nevertheless, the fact is in the margin of appreciation doctrine, interpretation is mixed with practice and usually when it comes to doctrine, the issue of interpretation and performance is raised simultaneously, to the extent that the authors can say this doctrine is considered as the practice of interpretation in the executive position.¹

It is possible for member states of the related conventions to define age of consent in their domestic legal framework if that age is not explicitly forbidden in those conventions. As was mentioned previously, without determining of a specified age, most of the treaties refer to some interpretable terms. For example, CCM refers to '*interest of the intending spouses*', ICCPR stipulates '*free and full consent of the intending spouses*', and CEDAW provides '*prohibition of betrothal and the marriage of a child*' (our emphasis). Interpretation of these terms can be subject to a margin of appreciation. It seems that emphasis of Iranian legal policy makers, and indeed Islam, on interest of the child in any treatment which include marriage of children can make the accusation of child abuse or prejudice to the health of the child baseless. Anyway, a legal margin of interpretation of these provisions remains for Iran.



1. Alastair Mowbray, 'The Creativity of the European Court of Human Rights', (2005), 5 Human Rights Law Review, 63.



Conclusion

Finally, using this standard and not paying attention to the standards of Islamic countries which have more than a quarter of the world's children, despite the fact that the minimum age for marriage is not specified in international documents, would be problematic. Ambiguity in several international instruments such as CCM, ICCPR, CEDAW in which a minimum age of consent has not been identified and the authority for determination of the age of consent of a child rests with states parties has led to the elimination of the possibility of the formation of *erga omnes* obligations, *jus cogens* or customary rules regarding the age of consent of children. The only instrument in which age of marriage is determined is CRC that expresses 18 as a minimum age for marriage.

It can be said that identifying a child with a purely one-dimensional age-oriented attitude has several negative effects. On this basis, providing a purely age-oriented definition of a child, although its scope is broad and tolerant in setting positive criteria, is incomplete and lacks scientific validity and therefore is criticized.

In most societies where the age of puberty is the legal age for marriage, the age of marriage and consent to that for girls is usually lower than for boys since physical, behavioral and emotional changes in girls usually begin earlier than boys. Given that in addition to the age of sexual maturity, mental maturity and intellectual understanding are necessary to enter into cohabitation, it would be more reasonable and logical if a country differentiates between the age of marriage of a girl and a boy. Owing to the fact that puberty is a gradual and occasional process, accepting the absolute age criterion for the age of consent and without considering other conditions is not logical, because it cannot be said that a person is ready to get married on the day he/she has reached a certain age!

Hence, the mixed approach of Iran can be defensible which include a specific legal (also physical or sexual) age of 13 and 15 years old (as the legal age of consent), mental growth (as the age of financial affairs), religious maturity (as the age of consent for sexual intercourse) and guardian consent by the guardian before legal age (as approved age of interest of child without sexual intercourse). It appears that this view is generally more progressive than a mere age-oriented view.

International instruments just prohibit child abuse because of deficiency in child consent, but in the law of Iran it is forbidden because of lack of a true marital tie; so, if there is a marital relationship between them, the term of child abuse and exploitation are not relevant anymore. Therefore, the difference is in the criteria of definition of abuse. It should be noticed that preventing persons, for example, under 18 age from marriage can cause to a practically social abuse, while permitting such persons to get married, with respecting their interests, do not necessarily lead to their abuse.



References

- Abbāsi Koleimānī A, *The Rights of the Child in Iranian Legal System* (first edition, Mizān Publication 2016) [In Persian]
- Abdi A and Zamani S Q, 'Margin of Appreciation in Freedom of Religion in the Light of the European Court of Human Rights', (2016), 19 *Quarterly Journal of Public Law Research*, 61 [In Persian]
- Ābed Khorāsānī M R, *An Introduction to the Rights of the Child* (first edition, Mizān Publication 2010) [In Persian]
- African Charter on Human and Peoples' Rights (adopted on 28 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M., 58 (1982)
- African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) OAU Doc. CAB/LEG/24.9/49 (1990)
- Ahmad Panāhi A, 'Marriage in Islam: With a View to Educational and Psychological Functions', (2006), 15 *Journal of Knowledge, Religions and Mysticism*, 34 [In Persian]
- Amato P R; Booth A. J and Rogers, S J, *Alone Together: How Marriage in America Is Changing* (HUP 2008)
- American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123
- Azari H and Mīrahmadī M, 'Judicial Approaches to Determining the Expediency of Child Marriage', (2020), 10 *Journal of Women and Society*, 1 [In Persian]
- Bakircioglu O, 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases', (2007), 8 *German Law Journal*, 711
- Bosisio R, 'Children's Right to Be Heard: What Children Think', (2012), 20 *The International Journal of Children's Rights*, 141
- CAT, 'Concluding Observations on Bulgaria', CAT/C/BGR/CO (2011)
- CCPR, 'General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses, Adopted at the Thirty-ninth session of the Human Rights Committee (27 July 1990)
- CEDAW and CRC, 'Joint General Recommendation/General Comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on Harmful Practices', U.N.Doc. CEDAW/C/GC/31-CRC/C/GC/18 (2014)
- CEDAW, 'General Recommendation No. 21: Equality in Marriage and Family Relations', U.N. Doc. HRI/GEN/1/Rev.9., (1994)
- CEDAW, 'Supplementary Information on the Bangladesh', Scheduled for Review, 65th Session (October 3, 2016)
- Chaudhuri ER, *Thematic Report: Unrecognized Sexual Abuse and Exploitation of Children in Child, Early and Forced Marriage* (ECPAT International 2018)
- Child and Adolescent Protection Law of the Islamic Parliament of Iran (May 2020)
- Civil Code of the Islamic Republic of Iran (23 May 1928) available at <https://www.refworld.org/docid/49997adb27.html>
- Civil Liability Law of the Islamic Republic of Iran (17 May 1960)
- Constitution of the Islamic Republic of Iran (24 October 1979, as amended in 8 July 1989) available at <https://www.refworld.org/docid/3ae6b56710.html>
- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (adopted 10 December 1962, entered into force 9 December 1964) UN Treaty Series, vol. 521, p. 231
- Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect to Parental Responsibility and Measures for the Protection of Children (adopted 19 October 1996, entered into force 1 January 2002) <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>
- Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UN Treaty Series, vol. 1577, p. 3
- CRC, 'General Comment No. 24 on Children's Rights in the Child Justice System', CRC/C/GC/24 (18 September 2019)
- CRC, 'Public reports from children's rights defenders- Niger' (July 26, 2018); available at: www.childrightsconnect.org
- CRR, 'Fact Sheet: Accountability for Child Marriage', Centre for Reproductive Rights (2013)
- Curzon G, *Persia and the Persian Question* (Longman, Green & Co 1892)
- Declaration of the Rights of the Child (20 November 2009) U.N. Doc. A/4354
- Emāmī A, *Family Law* (sixth edition, Mizān Publication 2019) [In Persian]
- European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS 5
- European Institute for Gender Equality, 'Child Marriage' (2018); available at www.eige.europa.eu



- Fazlī Khānī A, 'Violation of Children's Rights in the United States', (2011), 18 Quarterly Journal of Women's Rights Studies, 55 [In Persian]
- Fortin J, *Children Rights and the Developing Laws* (second edition, Bulterworths 2003).
- Gaffney-Rhys R, 'International Law as an Instrument to Combat Child Marriage', (2011), 15 International Journal of Human Rights, 359
- Ghadīrī M, 'Age and Consent to Marriage in Light of International Human Rights Law', (2017), 12 Journal of Family Research, 115 [In Persian]
- Haxhitaj A, 'The Covenant on Civil and Political Rights', (2013), 3 Juridical Tribune, 308
- Hodgkin R and Newell P, *Implementation Handbook for the Convention on the Rights of the Child* (third edition, UNICEF 2007)
- Human Rights Watch, "This Old Man Can Feed Us, You Will Marry Him" Child and Forced Marriage in South Sudan', (2013); available at www.hrw.org
- International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)
- Iran's Law on Protection of Children and Adolescents (12 December 2002) IRN-2002-L-91493
- Islamic Penal Code of the Islamic Republic of Iran (21 April 2013)
- Jackson J, 'Consent of the Parties to Their Marriage', (1951), 14 Modern Law Review, 1
- Kādīvār M, *The Rights of the People: Islam and Human Rights* (fifth edition, Kavīr 2014) [In Persian]
- Law on Marriage, approved in (1961, as amended in 1973)
- Mir Mohammadī M, *Child Rights* (Mofid University Press and UNICEF 2013) [In Persian]
- Mohaqqeq Dāmād M, *Family Law* (twentieth edition, SAMT 2021) [In Persian]
- Mohaqqeq Hellī J H, *Riyāḍ al-Masā'il (T- Al-Hadithah)*, Volume 8 (first edition, Institute of Ahl-al-Bayt 1984) [In Arabic]
- Mohebbī M and Samāvi E, 'The Contribution of Precedent of the European Court of Human Rights to Dynamic Interpretation of Human Rights Treaties', (2018), 35 International Law Review, 7 [In Persian]
- Mowbray A, 'The Creativity of the European Court of Human Rights', (2005), 5 Human Rights Law Review, 57
- Office of the United Nations High Commissioner for Human Rights, 'Preventing and Eliminating Child, Early and Forced Marriage' A/HRC/26/22 (2 April 2014)
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 16 March 2001, entered into force 18 January 2002) A/RES/54/263
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002) A/RES/54/263
- Price Cohen C, 'The United Nations Convention of the Rights of the Child: A Feminist Landmark', (1997), 3 William & Mary Journal of Women and the Law, 28
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609
- Rangita S A, *Child Marriage and the Law: Legislative Reform Initiative Paper Series* (UNICEF 2007)
- Safāi S H and Emāmī A, *Introductory Course in Civil Law*, Volume 2 (tenth edition, Mizān Publication 2010) [In Persian]
- Shahīdī S M, *Civil Law: Obligations* (ninth edition, Majd Publication 2006) [In Persian]
- Sharīfī Tarāzkūhī H and Mobīnī J, 'The Application of the Margin of Appreciation Doctrine in the Jurisprudence of the European Court of Human Rights', (2014), 16 Quarterly Journal of Public Law Research, 73 [In Persian]
- Sharīfī S, 'Studying the Phenomenon of Child Marriage and Its Relationship with Child Abuse and Mechanisms for Combating It', (2017), Third International Conference on Jurisprudence and Law, Law and Social Sciences, 1 [In Persian]
- The Hague Convention on the Civil Aspects of International Child Abduction (adopted 25 October 1980, entered into force 1 December 1983) Hague XXVIII
- UNGA Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1 November 1965) A/RES/18(XX)
- UN High Commissioner for Human Rights, 'Preventing and Eliminating Child, Early and Forced Marriage' UN-Doc A/HRC/26/22 (2016)
- UN Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', UN-Doc A/HRC/31/57 (2016)
- UNICEF, *Children's Rights in Impact Assessment: A Guide for Integrating Children's Rights into Impact Assessments and Taking Action for Children* (UNICEF and Danish Institute for Human Rights 2013)
- UNSC Resolution 2122 [on women and peace and security] S/RES/2122 (2013) (18 October 2013)
- US Department of State, '2015 Country Reports on Human Rights Practices- Sri Lanka' (13 April 2016) <http://www.state.gov/j/>



[drl/rls/hrpt/humanrightsreport](https://drl.rls/hrpt/humanrightsreport)

- Waites M, *The Age of Consent: Young People, Sexuality and Citizenship* (first edition, Palgrave Macmillan 2005)
- Webster M, *Academic Content Dictionary*, Available online at: www.merriam-webster.com
- Wijffelman A, 'Child Marriage and Family Reunification: An Analysis under the European Convention on Human Rights and Dutch Forced Marriage Prevention Act', (2017), 35 *Netherlands Quarterly of Human Rights*, 104
- Worst Forms of Child Labor Convention (adopted 17 June 1999, entered into force 19 November 2000) C182
- Zandi R, *A Comparative Study of the Right to Proper Nutrition for Children in International Human Rights Law and Law of Iran* (MA Dissertation in International law, The University of Qom 2016) [In Persian]
- Shahīd Thānī ZA, *Al-Rawḍah al-Bahīyyah fī Sharh al-Lama'ah al-Damashqīyyah* (Islāmiyyah Publication 1988) [Arabic & Persian]
- Zermatten J, 'The Best Interests of the Child Principle: Literal Analysis, Function and Implementation', (2010), 18 *The International Journal of Children's Rights*, 483

