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Trabajo Fin de Grado

**The clash between formal law and  
traditional social norms on child  
marriage in India (1929 – 2019)**

Estudiante: **Silvia Domínguez Moreno**

Director: Prof. Ariel James Trapero

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## **ABBREVIATION’S LIST**

CEDAW – Convention on the Elimination of all forms of Discrimination Against Women.

CMRA – Child Marriage Restraint Act (1929)

COI – Constitution of India (1950)

ICRW – International Center for Research on Women.

MWCD – Ministry of Women and Children Development (India)

NCPCR – National Commission for Protection of Child Rights (India)

NCRB – National Crimes Records Bureau

NPAC – National Plan of Action for Children (2016)

PCMA – Prohibition of Child Marriage Act (2006)

OHCHR – Office of the High Commissioner for Human Rights.

SC – Scheduled Castes

SDGs – Sustainable Development Goals.

ST – Scheduled Tribes

UN – United Nations.

UNICEF – United Nations International Children's Emergency Fund.

UNIFEM - United Nations Development Fund for Women.

UNFPA – United Nations Population Fund.

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## **THE CLASH BETWEEN FORMAL LAW AND TRADITIONAL SOCIAL NORMS ON CHILD MARRIAGE IN INDIA (1929 – 2019)**

**Abstract:** The prevalence of forced child marriages reinforces systemic gender inequality globally, forcibly ripping away young girls' opportunities for education, empowerment and a bright future. India once housed the highest number of child brides in the world, and, although child marriage is prohibited by Indian formal law, the reality, especially in the rural areas of the territory, is very different. The division between formal and consuetudinary laws result in the continuity of early marriages and in doing so exposes the ineffectiveness of progressive laws in India while traditional prejudices and conservative patriarchal beliefs are preferred and imposed. The primary objective of this paper is to analyze from a legal perspective the conflicts that arise from a cultural clash between formal law and entrenched social customs in several Indian states. Taking into account India's diversity, the paper will study the international norms and the evolution of the national legal framework and their confrontation with Indian traditions. The study will also analyze the institutional, socioeconomic and religious levels within Indian society that result in the poor enforcement of law leading to the prevalence of conservative patriarchal traditions. Through this analysis the paper will highlight that the issue of child marriage demands more than legal reform itself, it requires the incorporation of moral conceptions and social sensibilization.

**Key words:** Child marriage, tradition, formal law, social norms, women, human rights, children rights.

## **EL CHOQUE ENTRE LA LEY FORMAL Y LAS NORMAS SOCIALES TRADICIONALES EN EL MATRIMONIO INFANTIL EN LA INDIA (1929 – 2019)**

**Resumen:** La prevalencia de los matrimonios infantiles refuerza la desigualdad de género sistémica global, destruyendo oportunidades de niñas a la educación, el empoderamiento y un futuro brillante. India albergó el mayor número de niñas casadas en el mundo, y, a pesar de que el matrimonio infantil esté prohibido por la ley formal india, la realidad, sobretudo en las zonas rurales del territorio, es muy distinta. La desconexión entre las leyes formales y las leyes tradicionales consuetudinarias resulta en la permanencia de matrimonios infantiles y expone la ineficiencia de las leyes reformistas mientras que se imponen prejuicios tradicionales y creencias patriarcales conservadoras. El objetivo de este trabajo es analizar el conflicto entre la ley formal y las costumbres predominantes en la India sobre el matrimonio infantil para explicar la permanencia de esta práctica. El trabajo estudiará las normas internacionales y la evolución del marco legal nacional. El estudio también analizará niveles institucionales, socioeconómicos y religiosos en la sociedad india que resultan en la inaplicación de la ley produciendo la prevalencia de tradiciones conservadoras. A través de este análisis el trabajo resaltaré que las reformas legales no son suficientes para dar respuesta al problema del matrimonio infantil, se requiere la incorporación de concepciones morales y una mayor sensibilización social.

**Palabras clave:** Matrimonio infantil, tradición, ley formal, normas sociales, mujeres, derechos humanos, derechos de los niños.

## CHAPTER 1. EXECUTIVE SUMMARY.

### 1. Introduction.

*“My only hope was that my husband would let me complete my studies. But he got me pregnant even before I turned 17. Since then, I have hardly ever been allowed to step out of the house.”* – Komal, married at age 16.

Child marriage is internationally defined as a marriage or informal union where one or both of the parties are under 18 years of age<sup>1</sup> (Girls Not Brides, 2017). Some organizations, such as UNICEF, agree that child marriage can be considered as a form of “forced marriage”<sup>2</sup> due to the incapacity of one of the parts, the child, to give full or free consent of the union.

Nowadays, the total number of girls forced into early marriages is estimated at 12 million a year, according to new data from UNICEF, this means that globally 1 in 5 girls were married before they turned 18 (UNICEF, 2019). Globalization has made child marriage not just an internal state issue but rather a cross-regional phenomenon, especially accentuated among low-income and developing countries (Paul, 2020). This is most evident in Sub-Saharan Africa which constitutes the largest numbers of child marriages worldwide followed by South Asia and South East Asia (UNICEF, 2020, p. 1-2). Strikingly, South Asia has made the most progress in reducing the number of child marriage cases in the last decade. The risk of being married off as a child has dropped from 44% in 2018 (UNICEF, 2018) to just below 30% for a girl (UNICEF, 2020, p. 1-2).

The prevalence of forced early marriages reinforces systemic gender inequality globally, ripping away young girls’ opportunities for education, economic independence, empowerment and denying their childhood. When a girl is forced into an early marriage, she experiences immediate and lifelong repercussions. The possibility of finishing her educational or workplace career diminishes while her probability of facing domestic violence and neglect increases. Early marriages often result in adolescent or early pregnancies, risking young girl’s health and access to appropriate medical care since they are more likely to die due to complications during their pregnancy and after childbirth. Societies and communities fostering

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<sup>1</sup> The United Nations Convention on the Rights of the Child (UNCRC) defines a child as everyone under 18 unless, “*under the law applicable to the child, majority is attained earlier*” (article 1 of the UNCRC).

<sup>2</sup> According to the Office of the High Commissioner on Human Rights of the United Nations, forced marriages are those in which one or both parties have not given full, free and informed consent to the union (OHCHR, 2019). The European Union Agency for Fundamental Rights describe forced marriage as a form of domestic violence that violates the right to freely decide whether, when and whom to marry (FRA, 2014, p. 5).

the practice of child marriages also suffer negative consequences, because there is a higher risk of prolonging intergenerational cycles of poverty and women's economic dependency. The continuity and urgency of the issue of child marriage call for new and more urgent approaches to address the most critical gaps for effective change. Across the world, young girls and people who support them are appealing for international advocacy for basic human rights to freedom of choice and the universal right to childhood and education.

## **2. Purpose and motives**

Child marriage is a harmful practice that disproportionately affects girls, having serious repercussions on their health, equal access to education, economic independence, social empowerment and opportunities in life. Therefore, it is widely considered as a violation of human rights, child rights and a form of modern slavery and abuse against girls. Child marriage is also a source of psychological trauma as well as domestic and sexual violence. In its worst form, it leads to the exploitation of child brides as domestic servants or as victims of sex trafficking, both during and/or after the illegal marriage (Grijns & Horii, 2018).

Although the number of early marriages has been reduced in the last decade, the practice is far from being eradicated. The Sustainable Development Goals (SDGs) includes the elimination of child marriage by 2030 as a target highlighted in objective 5 on gender equality and women empowerment. Nevertheless, to achieve this goal with the reduction of this practice would need to be progressed upon 11 times faster than the rate observed over the last decade (UNFPA-UNICEF, 2021).

Within the South Asian region, India has traditionally been the leading country in number of child brides, accounting for a third of the global total child marriages in 2018 (UNICEF, 2018). Despite amended laws advocating 18 as the legal minimum age to marry in India, the practice of child marriage remains rooted in a complex system of religious traditions, social practices, economic factors and cultural prejudices (Lal, 2015). This situation is especially intriguing since Indian laws were one of the first prohibiting the practice in 1929 with the Child Marriage Restraint Act (popularly known as the Sharda Act, after its sponsor Har Bilas Sharda<sup>3</sup>), but serious progress was not made until the adoption of the Prohibition of Child Marriage Act in 2006. India also takes part in the main international treaties designed to protect

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<sup>3</sup> **Har Bilas Sharda** (1867- 1955) was an Indian politician elected as a Member of the Central Legislative Assembly in January 1924. As a legislator, he introduced various bills passed in the Assembly, for instance: The Child Marriage Restraint Act (passed in 1929) or the Ajmer-Merwara Court Fee Amendment Act.

children and women, which implies that the Indian government has agreed with the international position that child marriage is a violation of human rights.

Through this work, I intend to analyze the issue of child marriage in India<sup>4</sup> as it is one of the countries in South Asia with the higher number of legal provisions on the issue and has experienced the largest reduction of cases over the last two decades, going from being the country with the highest rate of child brides in the world to one with the greatest reduction of cases (UNICEF, 2020). Moreover, the situation in India regarding child marriage lies in the clash between laws enacted by the government prohibiting the practice and the social norms and traditions that accept and believe that early marriages to be appropriate. The division between formal law and regional cultural norms results in the continuity of early marriages and exposes the ineffectiveness of progressive laws in India. Therefore, it must be addressed in order to design effective actions and policies aimed at eradicating the widespread practice and acceptance of child marriages.

The continuity of this practice is also an example of the failings of international laws due to institutional neglect and the discordance of the underlying social relations with the adopted legal provisions. Therefore, the primary purpose of this study is to address the legal and social obstacles failing to address child marriage in India. Through an extensive analysis of the laws surrounding the issue and the socio-economic factors impacting regional areas of India, the paper aims to analyze the impact of child marriage on women rights and life opportunities in India on the backdrop of institutional and legal frameworks. Through analyzing this issue, the paper will raise awareness of the conditions of many girls in India and encourage direct action and thought-provoking discussions for the readers.

### **3. State of the question**

Through this section of the research, I shall introduce and summarize the main studies carried out to date on the role of law in modern women's struggles, the issue of child marriage in India and the gap between formal law and consuetudinary law or traditions.

Within women's worldwide struggle for equal rights and social status, the law can play a fatally dualistic role either serving to reinforce inequality and hinder social progress or to

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<sup>4</sup> It must be acknowledged that India has a multicultural society and to speak about Indian women plays directly into this diversity of cultures, religions, castes and economic backgrounds. As Chandra Talpade Mohanty has argued, the positing of the category of "women", and particularly, of "Third World women", sets up a false homogeneity (Crossman & Kapur, 1993, p. 283-284).

promote equality for social change. Feminist movements all across the world have advocated for laws that recognize their rights and liberties sometimes to no avail and other times to revolutionary change. A prominent example of this is the international Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) approved by the UN in 1979 and ratified by 187 states. This interaction between women, law and social change has been studied by many authors such as B. Sivaramayya (1983), S. Shamsh (1991), T. Brettel Dawson (2009). Moreover, feminist legal studies have illustrated the gender power interconnections in this domain, many scholars have demonstrated the detrimental underpinnings in the process of patriarchal law-making, the language of laws, and their interpretation, application, and consequences: Kapur 2002, Graycar and Morgan 2005.

Women worldwide still struggle and fight for equal rights and opportunities, and over time, more and more of the international community are becoming aware of the severe violations and aggressions against women, such as femicides<sup>5</sup> in Latin America, genital mutilation of girls<sup>6</sup> in Africa or child marriage in South and Southeast Asia. There are various forms of oppression and violence against girls still happening, however, this study will focus on the pervasive and heinous practice of child marriage. The practice of such early marriages violates the rights of the child bride, who, by law, is entitled to be free from all forms of discrimination, degrading treatment, slavery and exploitation (Red Elephant Foundation, 2013, p. 11).

Child marriage is a worldwide issue that prevails beyond geographical, cultural or religious borders. It is a common observation that early marriage is particularly accepted and practiced among rural and poor areas in developing countries (Mathur et al., 2003; Nour, 2009; Raj et al., 2009; UNFPA, 2012; Paul, 2020). Evidence of this assertion can be found in the latest UNICEF research in which the highest levels of child marriages are found in sub-Saharan Africa where 35% of girls are married before the minimum age of 18. This is closely followed by South Asia where girls who married between the ages of 13 to 18 accounts for almost 30%

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<sup>5</sup> **Femicide** is the term adopted for the killing of women and girls because of their gender (EIGE, 2017). Femicide can take many forms and can be committed due to various reasons, for instance, a type of femicide that occurs mainly in areas of the Indian subcontinent is dowry-related femicide. This dowry-related femicide usually involves newly married women being killed by in-laws over conflicts related to dowry, such as bringing insufficient dowry to the family (World Health Organization, 2012, p. 3).

<sup>6</sup> **Genital mutilation** refers to the practice or procedure of removing, partially or totally, the female genitalia or any other injury to female genital organs for non-medical reasons (World Health Organization, 2020). This procedure constitutes a violation of the human rights and fundamental rights of women and girls (UNICEF, 2020).



(UNICEF, 2020, p. 1-2)<sup>7</sup>. On the other hand, the lowest levels of child marriage are registered in Eastern Europe and Central Asia with 12% (UNICEF, 2020).

Research conducted in developing countries has found enveloping issues such as poverty, socio-cultural norms, dowry demand<sup>8</sup> and long-term discrimination against girls to be the leading causes of child marriage (Chowdhury, 2004; Nour, 2009; Ghosh & Kar, 2010; UNICEF & UNFPA, 2018; Paul, 2020).

Discrimination against girls and gender-based violence exists all over the world in different forms and levels. The definition of both concepts is internationally contested and continually evolving; however, they are recognized as human rights violations as stated by United Nations General Assembly in 2006. Gender-based violence is defined by the International Rescue Committee as “*any harm perpetrated against a person based on power inequalities resulting from gender roles. The overwhelming majority of cases involve women and girls*” (2019, p.6). The acknowledgement that girls and women suffer overwhelmingly from socially constructed, gender-based power inequalities is reflected in the related United Nations definition of Violence against Women as “*any act of gender based violence that is directed against a woman because she is a woman or that affects women disproportionately*” (United Nations General Assembly, 2006).

Women who have been traditionally linked with poverty, particularly in rural areas and developing regions are the most at risk of child marriage and gender-based exploitation. Poverty is a multidimensional concept defined and measured by income, basic needs, human development or social inclusion as UNIFEM (the United Nations Development Fund for Women) states in their 2005 report “*Progress of the World’s Women*”. Many authors have studied the gendered nature of the impact of poverty, particularly in the Sub-Saharan African and Southern Asia regions (Crossman & Kapur, 1993; Kaaber & Mahmud, 2003; Batos, Casaca, Nunes & Pereirinha, 2009; McFerson, 2010; Tucker & Lowell, 2016). These authors believe that poverty is not a gender-neutral condition, their studies share two common ideas: firstly, the sexual division of labour and the inaccessibility of women to the local labour

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<sup>7</sup> See Figure 2.

<sup>8</sup> The practice of **dowry** refers to “*the payment of cash/gifts by the bride's family to the bridegroom's family before marriage*” (Jeyaseelan, et al., 2015). The demand for dowry is prohibited by law in India (in the Dowry Prohibition Act 1961 and subsequent Sections 304B and 498A of the Indian Penal Code), however, it is widely practiced, and it often contributes to severe injuries and even death of young brides (Srivastava, Kumar, Govindu, & Muhammad T., 2018).

markets, and, secondly, the inferior socio-economic status of women usually imposed by patriarchal sociocultural rules.

The importance of sociocultural rules lies in their capacity to perpetuate harmful practices such as child marriage. Paluck and Ball in their report "*Social norms marketing aimed at gender-based violence*" define social norms as what people in a group believe to be normal, that is, believed to be a typical action, an appropriate action, or both (2010).

Focusing on the particular case of India, where child marriage has been in practice for a long time, culture and history have promoted child marriages as mechanisms of income and protection from immoral sexual behaviour before marriage. The combination of traditional culture, poverty, lack of access to education and the prevalence of patriarchal values has caused child marriage to be a deeply rooted issue in Indian society.

Authors such as B. Crossman and R. Kapur has focused on the economic factor as the main explanation or driver behind child marriage. In their article "*Women and Poverty in India: Law and Social Change*" (1993) they explain the link between poverty and Indian women based on the legal regulation of women in the family, in the labor force and in rural development. These laws reinforce Indian women unequal economic status, preventing them from achieving economic independence. These legal obstacles perpetuate the idea of women as dependent on their families and husbands.

A large part of the literature states that socio-economic factors are the main drivers of child marriage in India. Deepita Chakravarty explores the reasons for child marriage in West Bengal in the context of the state's social and economic conditions in the state throughout the article "*Lack of Economic Opportunities and Persistence of Child Marriage in West Bengal*" (2018). The main argument expressed in the study is that the unavailability of new employment opportunities for women in rural areas is the prominent reason why Indian parents decide to not invest in the education of their daughters. Therefore, child brides are usually a bargaining chip that families exchange for money, goods or even a wife for their son.

There is a famous saying in the Hindi language that says: "*Ladki paraya dhan hoti hai*", which means "a girl is someone else's property". Accordingly, it can be said that along with the economic factor, patriarchal sociocultural norms and tendencies have arisen among the literature as major driving forces of the practice of child marriage in India and other South Asian countries (Chowdhury, 2004; UNICEF & UNFPA, 2018; Jejeebhoy, 2019; Paul, 2020). The Indian sociologist Ravinder Kaur explained that for Indian families, daughters are

“dispensable” and “burdensome”, however, a daughter in law is needed for “family wellbeing and perpetuation” (Kaur, 2008).

Although traditionally the literature has focused on the economic and institutional factors, there have been several studies in the last years about the importance and incidence of cultural traditions and religions on the issue. Regarding this aspect, Fitri Rofiyarti, in *“Early Child Marriage in India: For the Sake of Tradition or an ‘Unconscious’ Organized Crime?”* (2017), studies whether child marriages happening in India nowadays are still a manifestation of the persistence of cultural traditions or an organized crime due to the high number of cases with negative impacts that take place in the territory.

The customs and traditions leading to child marriage are also analyzed by Jaya Sagade in her book *“Child marriage in India: Socio-legal and Human Rights Dimensions”* (2011). She presents a powerful critique of the Indian law and its gaps, confusions, lack of congruence, and lack of gender sensitivity inherent in the provisions of various statutes and acts concerning the minimum age for marriage, for giving consent, and the validity of marriage. The book also covers an analysis of the human rights and rights every child is entitled to that this practice violates. Moreover, she highlights the role civil society has in changing the status quo and the importance of empowering young women.

While talking about the issue of child marriage, it is important to understand and recognize the problems, risk and negative implications suffered by young Indian girls. Underage marriage puts girls under serious health issues and challenges. Author Nawal M. Nour analyzed the main health challenges that young brides face such as increased risk for sexually transmitted diseases, cervical cancer, death during childbirth or obstetric fistulas (Nour, *Health Consequences of Child Marriage in Africa*, 2006). In a later article, Nour discusses the negative correlation between child marriage and women’s healthcare seeking in the article *“Child Marriage: A Silent Health and Human Rights Issue”* (2009). The problem with women not seeking healthcare is that it increases the risk of adverse physical and psychological health outcomes, especially with child marriages where young brides often experience early motherhood (Nour, *Child Marriage: A Silent Health and Human Rights Issue*, 2009).

In the worst and more extreme cases, child marriage can lead to sexual abuse and sexual trafficking, both during and after the marriage. In their work *“Love, Labour and Law: Early and Child Marriage in India”* (2020) Samita Sen and Anindita Ghosh draw the links between

child marriage and prostitution as both of them involve lack of freedom and violation of the child's rights. On the other hand, the author Rachel Kidman studies and evidence that child marriage is a strong risk factor for intimate partner violence in the article "*Child marriage and intimate partner violence: a comparative study of 34 countries*" (2017).

This study is going to focus on the analysis of the legal and social determinants that explain why population groups might engage in harmful behaviors for children, such as early forced marriages. Even though there are many other reasons and factors involved in the continuance of the practice in the rural areas and less developed countries, the legal and traditional social norms factors have been somewhat overlooked and less analyzed in development theory and practice.

#### **4. Objectives and questions**

The paper will:

1. Analyze the concepts of consuetudinary law and formal law as a mechanism of organizing societies and the possible conflicts between them.
2. Focusing on child marriage, the role of international and Indian national law prohibiting child marriage will be studied, highlighting their inefficacy and challenges faced over the years.
3. Furthermore, I will investigate the main historical, socio-economic, institutional and religious factors leading to the under-enforcement of those laws by domestic institutions.
4. Lastly, the paper will analyze the progress India has accomplished in the last decade promoting and protecting child rights while reducing child marriage cases. The role that judges and other agents of social change have played in that progress will also be highlighted.
5. With these, the paper will explain the gap between formal prohibition and the reality of substantive traditions resulting in the persistence of child marriages in many parts of regional India. It will be argued that law is a strong agent of social change, but ineffective by itself, it is required to go further into the core moral principles of Indian communities.

The analysis will focus on answering two main questions:

- How did India become one of the countries with the most progress in reducing child marriage cases in the last thirty years (specifically from the 1990s to 2020)?
- Is legislative reform a valid strategy for social change?

This paper will attempt to show that legislative reform might be effective but not enough to eradicate child marriage entirely. The severity of the issue demands the enforcement of a set of comprehensive measures, programs and states policies (both legal and economic) that are not only focused on the prohibition of child marriage but also on the promotion of gender equality and access of women to education, the labour market and social development.

## **5. Methodology**

The study and development of the central topic of child marriage in India were guided by the methodological framework of the qualitative research. In the development of the study, there have been two parallel investigations. Firstly, an investigation on the role of law in society and the theoretical concepts of formal law and consuetudinary law; and secondly, an investigation on the gap between formal law and reality as a result of the clash between formal law and traditions. The investigation is focused on a study case: the prohibition of Child marriage in India and its practice along the region. The research is limited to English and Spanish language publications.

In the first part of the study, the approach to the concept of Law is drawn upon different theoretical point of views: first, a legal perspective based on the positivism theory; secondly, from an anthropological perspective based on the theories of “primitive law” of Dr Lowie (1934) and “savage societies” of Malinowski (1927); and lastly, from a social psychologist’s perspective focusing on the social norms’ theories. To complete this theoretical approach to Law, I highlighted the homogenization tendency of women in law called by Chandra Talpade Mohanty (1991) and then, focused the analysis on the Indian Law based on the caste system and the hierarchy ideology developed by Dumont (1970).

The second part is focused on a practical and critical analysis of the issue of child marriage in India. The analysis was based on the information and data collected in reports and studies elaborated by agencies, information centers and institutions working on the issue in India, such as UNICEF, Nirantar, UNFPA or ICRW. The statistical data is also collected from the 2011 Indian Census (or the 15<sup>th</sup> Indian census), unfortunately, there is not more actualized

data because the 16<sup>th</sup> Indian Census will be taken this year, in 2021. The analysis also includes some programmes, actions and schemes developed by the governments in India (both the Union government and the state governments, mainly the West Bengal state government), and also programmes elaborated by international actors such as international agencies and NGOs.

Lastly, to materialize all the analysis and study carried out so far, the Supreme Court ruling on *Independent Thought v. Union of India (2017)* will be explained. I will elaborate on the implications and arguments of the Supreme Court in this concrete landmark case.

## **6. Structure**

The paper is divided into three main parts.

1. This first part describes and lays out the methodology, theoretical framework, purpose and main objectives of the study.
2. The second part is aimed to directly address and define some of the central terms of the study: ‘law’, ‘formal law’, ‘traditions’ or ‘consuetudinary law’ and ‘women’.
3. The third part will develop an analysis and discussion of the main topic: child marriage in India. For this, I will
  - 3.1. describe the main international laws prohibiting the practice and elaborated with the purpose to protect children and women from this abusive tradition.
  - 3.2. focus the national laws implemented by the Indian government throughout a historical analysis on the regulation of the prohibition of child marriages, from the British Raj (1858 to 1947) until the most recent legal act (2006, PCMA). This section will continue with the analysis of the main reasons why the laws have been proven inefficient and it will explain the under-enforcement of the law.
  - 3.3. After studying the origin of child marriage in India and the evolution of its legal prohibition, the paper will explain how the traditional customs and the formal law clashes through four levels: institutional, economic, religious and social.
4. Lastly, the paper will express the main conclusions and thoughts that have been reached through the previous parts. In the conclusion, the paper will elucidate some of the challenges India and its national institutions are currently facing, such as an economic crisis due to COVID-19 which is increasing the number of child marriages globally.

## **CHAPTER 2. LAW AND CUSTOM: A theoretical approach.**

Law is the most natural expression of humanity: “*Ubi societas, ibi ius*” (a maximum that means that law can be found in all forms of societies). Law impregnates the most various and heterogenous spheres of societies and, at the same time, it is a necessary element in every form of social life.

The Law can be defined as a set of rules that regulate human behavior (Prieto Sanchís, 2015, p.13). Throughout the study, the word “law” will be used in a very broad sense not only including the legal systems of nation-states but also smaller systems to be found in tribal, religious or cultural associations. There are different sources of Law in the literature, but for the purpose of this study, the analysis is going to focus on two confronting sources: formal law and consuetudinary law.

### **2.1. Consuetudinary law**

Consuetudinary law can be defined as the rules emerging from the customs and traditions of society. Therefore, consuetudinary law is not a set of written norms enacted by legislative institutions, but rather a set of common practices repeated over time by a group of people that accepts them as mandatory (Fuller, 1969). Generally, this group of people share a common culture, history and come from the same country or territory. Nowadays, consuetudinary law or customary law is a secondary source of law, which means that in today’s legal systems customary law will only be applied in the absence of applicable law as a subsidiary mean for the determination of rules of law (Fuller, 1969). However, in the international system, customary law represents a primary source of law for International Public Law (United Nations, 2018, p. 122).

Due to the importance of culture and its traditions to create and establish the consuetudinary law, it would be interesting to analyze this source of law from an anthropological point of view. In the making of societies, the legal order of the primitive tribes was customary. One of the most important authors on primitive law was Robert Lowie<sup>9</sup> whose analysis emphasized the importance of the moment when primitive societies set up the distinction between civil law and criminal law. Dr Lowie constructs his work on the important

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<sup>9</sup> **Dr Robert Lowie** (1883 - 1957) is considered one of the highest anthropological authorities in the United States. He was an expert in the American original nations and his contributions were fundamental in the development of modern anthropology. His most acclaimed works are: “Primitive Society” (1920), “An introduction to Cultural Anthropology” (1934) or “Social Organization” (1948). His 1934 work is going to be studied in this paper.

distinction between the notions of “tort” and “crime”: “*Crime is an offense against the community, a tort is a wrong against an individual. Primitive groups regard many of the crimes in our laws as mere torts, but they always consider certain actions intolerable and punish them collectively which is the test of the crime*” (Lowie, 1934, p. 285). Therefore, “tort” is the term used for the transgression of civil law which only involves individual harm or damage, while “crime” is the violation of criminal law which transcends the individual dimension that risks social stability. From this notion of crime, Lowie also extracts the notion of ‘taboo’ as a prohibition imposed by common social values and beliefs (Lowie, 1934).

Regarding the concept of ‘taboo’ B. Malinowski’s<sup>10</sup>, analyzed sexuality in “savage societies” as taboo and the repression of sexual tendencies among young people (1927). His studies focused on the notion of crime and customs in savage societies. He analyzed the factors that lead a “savage” to obey social norms writing: “*The force of habit, the awe of traditional command and a sentimental attachment to it, the desire to satisfy public opinion — all combine to make custom be obeyed for its own sake.*” (Malinowski, 1926, p. 16). The anthropological definition of law given by Malinowski is: “*Law is the specific result of the configuration of obligations, which makes it impossible for the native to shirk his responsibility without suffering for it in the future.*” (Malinowski, 1926, p. 18).

In regard to this, consuetudinary law is strongly linked with the idea of social norms, understood as common actions believed to be normal by a group of people or a typical and appropriate action (Paluck & Ball, 2010). The theory of social norms differentiates between personal attitudes and beliefs and the perceived community norms. This means that a person, as an individual, may have a positive attitude toward women and women’s rights and, as a result, believe that some behaviors, such as protecting those rights, are desirable. However, this same individual might perceive that the attitude towards women rights in their community is negative and that some actions are acceptable because they are normal for the community (for example, child marriage). In many cases, the perception of social disapproval is enough to discourage an action, or, vice versa, in which the social approval is enough to encourage action such as arranging child marriages (Paluck & Ball, 2010). Therefore, it is also interesting to

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<sup>10</sup> **Bronislaw Malinowski** (1884 - 1942) is considered one of the most influential anthropologists of the 20<sup>th</sup> century. He is the founder of the British social anthropology since his methodological renovation based on personal experience in the field and the functional consideration of culture (Firth, 2021). Some of his most acclaimed work includes: “*Argonauts of the Western Pacific*” (1922) or “*Crime and Custom in Savage Society*” (1926). The latter publication is going to be studied for the purpose of this paper.



make a brief reference to the study of social norms through a social psychological point of view.

Social psychologists have studied and acknowledged the influence of group identity on individual attitude and behavior (Paluck & Ball, 2010). Many scholars argue that individuals have a natural drive to “fit in” with valued and relevant social groups derived from their need for belonging. Out of this need individuals also avoid going against the standards and principles of the group. The context, culture and traditions of a society may vary the individual desires to conform to the standards of a group (Asch, 1956), the group pressure toward uniformity (Crandall, 1988) or the sanctions stated by the group for members that do not follow their standards (Paluck & Ball, 2010).

## **2.2. Formal law**

Formal law is defined as the enacted or declared law (Fuller, 1969). Formal law can be found in the statutes, judicial decision’s, bylaws, administrative decrees enacted by the legislative institutions of a state. Social norms, values, customs or tradition are socially instituted systems of regulation (as it was previously explained), however, it is formal law that gives shape to the social order dictating in black and white what is a permissible action and what is not, and, more importantly, it states the consequences of the infringement or transgression of the stated rules (Addlakha, 2014).

Formal law has its origins in the creation of states and in the development of sources of law and law-making institutions. Formal law became the principal legal instrument with the development of positivist ideologies<sup>11</sup>. Positive law is defined as a normative system that regulates the use of force through the creation of institutions that establish the conditions in which force can be used, along with other institutions that decide the application of norms to particular cases, being able to eventually order the application of coercive measures resorting to the organization of force that the system itself institutes (Prieto Sanchís, 2015).

On the creation of formal law, it must be remembered that culture is the substratum upon which social relations and dynamics develop (Addlakha, 2014). Therefore, law cannot be seen outside culture since it is rooted and immersed in the practices, values and beliefs of

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<sup>11</sup> **Positivism** was the process in which scholars become aware of the need to insert the rights and social norms into legal systems (Prieto Sanchís, 2015). The antecedent of positivism is the theory of the social contract of Thomas Hobbes, in which he explains the necessity of humans to write a social contract to transfer all the powers to a sovereign to guarantee safety and stability (his theory is mostly developed in his famous piece *Leviathan*, 1651).

society. For instance, the criminalization of sex work is linked to beliefs and values such as family honor and purity, female chastity or conjugality underlying traditional Indian society (Addlakha, 2014, p. 489).

Therefore, it is common for national formal law in states to have connections and links to various traditions, values and customs of its society, particularly in connection with women and sexuality (Addlakha, 2014). As a result, consuetudinary law is a subsidiary source of law in the majority of legal systems nowadays. But what happens when there is a disconnection between formal laws enacted by the state and social traditions or values? Moreover, what if there is a clash between formal law and consuetudinary law? And, more importantly, are there any victims of this clash? If there are, who?

If the formal and written law is in conflict with the rule, usually not written, that is still obeyed by a part of the community, often those who obey the former continue interiorizing, transmitting and sharing that practice, creating more conflicts with the formal legal discipline (Francavilla, 2012). In this process, the imitation of existing and implemented traditional practices plays a crucial role. The formal law needs some time to become part of the social practice because in many cases it must overcome an entire system of rules and beliefs that are interiorized by mechanisms much more “fundamental” that proceed with much more immediacy, such as religion. The effectiveness of law depends on a conflict of authority, nonetheless, the importance of the anthropological aspects on the process of norms diffusion must not be undervalued (Francavilla, 2012).

In the conflict between laws and traditions, social justice and the principle of equity are already involved and play an important role. The equity in the Law and the legal norms is the concrete justice or the Law “concretized” and actualized (Ollero, 1973, p. 173). The social justice is subset of equity, and equity in the legal system is administrated by the court decisions and jurisprudence that bring justice to the concrete cases or litigations (Kansal, 2015, p.13). This illustrates the role that the judge plays to bring law to the concrete case and administer equitable justice. In regard to the court’s role, the constitutional jurisprudence has established that Social Justice *inter alia* includes “*elimination of inequalities, ensuring equal access to justice, affirmative action through special provisions for women, children, the socially and educationally backward, among others*” (Kansal, 2015, p.5). These expressions of social justice are all deeply related to the conflict between formal law and consuetudinary law that is going to be studied in this paper through the concrete case of child marriage in India.

### **2.3. Women, Law and social structures.**

#### *a) The homogenization of women in the Law.*

Before continuing with the analysis of the topic, it must be taken into account that laws are often based on the assumption of the homogeneity of women which obscures the diversity of the group and results in inefficient measures. As Chandra Talpade Mohanty has argued, the use of the category of “women”, and particularly, of “Third World women”, sets up a false homogeneity: *“The assumption of women as an already constituted, coherent group with identical interests and desires, regardless of class, ethnic or racial location, or contradictions, implies a notion of gender or sexual difference or even patriarchy which can be applied unusually and cross culturally”* (Mohanty, 1991, pp. 51-56).

Referring and talking about “Indian women” is to play directly into this problem, assuming the homogeneity of this group would lead to homogenize their needs, forms of oppression and dependence to which they are exposed (Young, 2002). Hence, it is important to recognize the oppression of women takes many forms across class, caste, religion and region (Crossman & Kapur, 1993).

The high diversity in Indian women (and Indian society, in general) is especially relevant to child marriage because this practice is affected by numerous intersectional factors such as region, socio-economic status, caste and cultural community. The practice of early marriages in India are predominant in rural areas where young girls have little access to education and are deeply dependent on their families for social security, employment and finance. Moreover, the rural areas are the ones most affected by early marriages due to traditional views and under-enforcement of law in conservative and male-dominated communities (Nirantar, 2015). The condition of Indian women in rural areas will be explained and developed in the following sections, however, due to the extension limitation of this paper, the homogenization tendencies of the law regarding women will not be deeply studied. In any case, it was important to note and acknowledge the extreme diversity of Indian women, specifically regarding the issue of child marriage.

#### *b) Women in the caste system.*

In relation to the role of Indian women within the Law, it must be taken into account the Indian caste<sup>12</sup> system and the kinship system of rules behind it.

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<sup>12</sup> Beginning with the word “caste”, is of Portuguese and Spanish origin: ‘casta’, something not mixed, from the Latin ‘castus’, ‘chaste’ (Dumont, 1970, p. 21). It seems that “caste” was used in the sense of race by the Spaniards, and then it was applied in India by the Portuguese in the middle of the fifteenth century (Dumont, 1970).

For Louis Dumont<sup>13</sup>, the castes are an institution and not an anomaly in the system, his work revolves around the principle of hierarchy to explain the social philosophy and ideology in India. Dumont states in one of his publications that: “*the castes teach us a fundamental social principle, hierarchy*” (1970, p. 26). To fully understand Indian ideology and the caste system, it is necessary to contrapose modern society with the traditional societies, or what is the same the *principle of equality* against the *principle of hierarchy*, according to Dumont. Therefore, the starting point for any comparative sociology is to recognize that the only angle to understand traditional societies is through the apperception of man as a social being, because, as opposed to modern societies, traditional ones do not recognize equality and liberty (cardinal ideals for modern societies), yet they have a collective idea of man (Dumont, 1970, p. 6).

The principle of hierarchy drifts, therefore, from the idea of organizing of society as a whole with respect to its ends, as in Plato’s Republic every man in his hierarchical place must contribute to the global order, and justice consists in ensuring that the proportions between social functions are adopted to the whole (Dumont, 1970). Regarding this hierarchical ideology, Dumont contends: “*man does not only think, he acts. He has not only ideas, but values. To adopt a value is to introduce hierarchy, and a certain consensus of values, a certain hierarchy of ideas, things and people, is indispensable to social life*” (Dumont, 1970, p. 20). On the contrary, modern societies are constructed on the belief that the life of each man is the end, while the ‘society’ is the mean, Dumont writes: “*in modern times the society or nation is conceived as a collective individual, which has its 'will' and its 'relations' like the elementary individual, but unlike him is not subject to social rules.*” (Dumont, 1970, p. 10). This means that if the notion of humanity is present in each human being, each man should be free and all men are equal, therefore the ideal of liberty and equality fall directly from the conception of man as an individual (Dumont, 1970).

The caste system is, thereby, profoundly based on the principle of hierarchy and the idea of common social ends. There are different definitions and theories of the caste system, Bouglé<sup>14</sup> determines that caste systems divide the whole society “*into a large number of hereditary groups, distinguished from one another and connected together by three*

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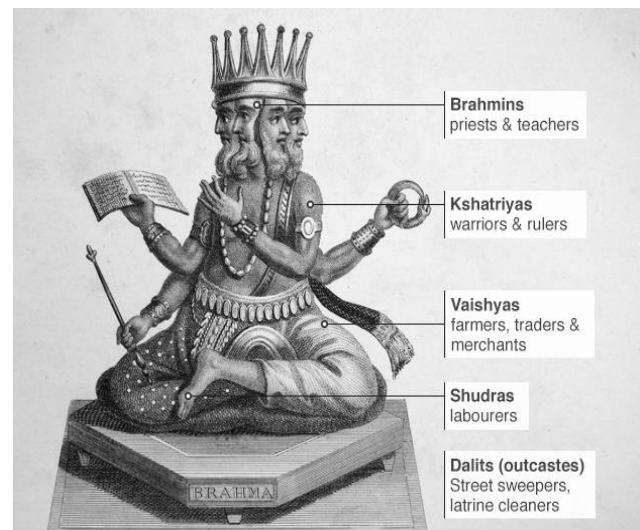
<sup>13</sup> **Louis Dumont** (1911 – 1998) was a French anthropologist that specialized in Indian culture and societies. Throughout his work, he studied the social philosophy and ideology of the occidental culture. His most famous publication is “Homo Hierarchicus” (1966), which is going to be studied and analyzed for the purpose of this paper.

<sup>14</sup> **Célestin Bouglé** (1870 – 1940) was a French philosopher and a theorist on anthropological and social sciences. One of his most famous books is “Essays on the caste system” (1908), which will be studied for the purpose of this paper.

*characteristics: separation in matters of marriage and contact, whether direct or indirect; division of labour, each group having, in theory or by tradition, a profession from which their members can depart only within certain limits; and finally hierarchy, which ranks the groups as relatively superior or inferior to one another”* (Bouglé, 1971, p. 53). This system is characterized by hereditary, specialization, hierarchal organization and reciprocal repulsion, and all these elements are observed in India in an exceptionally pure way, to the extent that many scholars speak of the caste system as a phenomenon particular to India (Bouglé, 1971).

To talk about the caste system in India is to talk about the varnas and their hierarchy. The Varna system in Dharma-shastras divides and classifies society into four varnas<sup>15</sup>: Brahmins, Kshatriyas, Vaishya and Shudras, each represents a role in society. The group known as Dalits were historically excluded from the varna system and were repudiated as untouchable or Scheduled Castes (SC) (Jaffrelot, 2006). Dumont (1970) defends that the dominant criteria of the caste system is the relationship to ritual purity, so those at the higher castes were the pure and the ones at the lower castes were impure.

**Image 1.** The traditional varna system.



Source: BBC, *How the British reshaped India's caste system*,

The caste system has organized the rural communities for a long time, and it has granted the higher castes privileges while allows the repression and discrimination towards the lowest ones. However, despite the obstacles some Dalits (or outcastes) and Hindus from other low castes have occupied prestigious position, such as Kocheril Raman Narayanan that became the first Dalit president of the Indian republic (between 1997 and 2002).

This social stratification penetrates also the culture, traditions, ideology and power in India. Even though the traditional varna system has encountered with modern society, the Indian society, as an overall framework, has not changed (see *Annex I*). The castes are still present, and untouchability still effective, although it has been declared illegal by the Indian Constitution.

<sup>15</sup> **Varna** is a Sanskrit word that refers to class or order, used in the text of Hinduism to refer to social classes. The traditional varna system classification can perdure until today in India (see *Annex I*).

As child marriage is the main topic of this paper, the analysis of the caste ideology and Indian philosophy is going to be focused on the institution of marriage. Marriage is the principal institution that structures and organizes society, it is the fundamental union from which kinship and social structures develop. Moreover, marriage dominates the Hindu's social life and plays a large part in religion. It is generally agreed that caste is characterized by the obligation to marry within the group as an expression of the principle of separation promoted and imposed by Hinduism (Dumont, 1970, p.109). To this matter, by nature, marriage constitutes to a large measure the link between the domain of caste and that of kinship, and the kinship rules relating to it are as elaborated as others (Dumont, 1970). Some of these rules include child marriage, the prohibition of remarriage of widows and even the absence of divorce.

Therefore, marriage is a principal element in societies, mainly in the Indian system as it is regulated by both kinship rules and caste customs. As Dumont states: *"it is inaccurate to claim that caste and kinship are two utterly distinct domains: they are united through the importance of marriage, an importance which is obvious in the case of caste and which, in the case of kinship, is from the structural point of view sometimes explicit and sometimes implicit."* (1970, p. 112). Even though marriage customs and traditions are different according to each caste, the inequality between the man and the woman in the marriage is a predominant condition in all of them. This inequality is reflected in the rights the man or groom has respect their wife in regard to the distinction of *"primary and secondary marriages"* (Dumont, 1970). Lastly, marriage is deeply influenced by hypergamy, which refers to the situation in which the daughter marries into a superior family (she "marries up") (Miers Elliot, 1845). As the woman is in general considered inferior to the man, the pattern would seem natural within the Indian society. That is how hierarchy, in the form of hypergamy, penetrates to the very core of the institutions of marriage and kinship (Dumont, 1970, p. 124)

The Indian traditions and conservative ideologies fall deeply in the varna system. The hierarchal ideology and Hindu values have permeated all the Indian society levels Although child marriage practices are prohibited by the national formal law, it is still a common practice for the rural communities governed by conservative traditions.

## **CHAPTER 3. CHILD MARRIAGE AS A HUMAN'S RIGHTS VIOLATION.**

### **3.1. International Legal provisions on child marriage.**

Early marriages have been a common cultural practice through history, however, over the past century with the development of states, the increasing households' incomes and the access to education the age of marriage has risen globally (Lemmon & ElHarake, 2014). Moreover, with the development of Human Rights and the adoption of the Convention on the Rights of the Child (1989), the international community agreed to set a limit age to marriage according to maturity, in order to protect those rights. In regard with these human rights agreements, the marriage of a person under 18 years-old is widely considered as a harmful practice (UNICEF, 2018). Yet, child marriages are still undertaken in numerous countries across the world, despite numerous legal prohibitions, local programs or international initiatives carried out to eradicate it (Arthur, et al., 2018).

International governmental scholars and supporting intervenors have demanded nation states to constitute legislative frameworks that prohibit child marriages and close legal gaps or ambiguity that could permit those early marriages (Human Rights Watch 2011, 2013; Odala, 2013; Raj, 2010; Arthur, et al., 2018). In addition, the international community has created several legal mechanisms (Burris, 2014), particularly international treaties and international norms, to eradicate child marriage:

- (a) Firstly, the Universal Declaration of Human Rights (1948) recognizes in article 16(2): *“Marriage shall be entered into only with the free and full consent of the intending spouses”* (UN General Assembly, 1948). This milestone international document was created as a recognition of the inherent dignity and equal inalienable rights of all humans. Particularly, article 16 refers to the right to marry and form a family, and its second paragraph clarifies that this right shall be exercised freely implying that forced marriages are a violation of human rights.
- (b) Secondly, the United Nations' Convention on the Rights of the Child (1989) was created to protect the welfare of children. This document is internationally recognized as one of the most successful treaties due to its nearly universal ratification. The CRC declares the right of children to *“protection from harmful practices, abuse, and exploitation”* (United

Nations, 1989). Although it does not directly address the issue of child marriage, its practice violates several of the convention articles and recognized rights.

- (c) Thirdly, the Convention on the Elimination of all forms of Discrimination against Women (1979) promotes women's and girl's equal rights. Created with the purpose of advancing women's rights, it is considered the central document of its kind. The CEDAW specifically addresses child marriage on article 16:

*“1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*

- (a) The same right to enter into marriage;*
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;*
- (c) The same rights and responsibilities during marriage and at its dissolution;*
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;*
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;*
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;*
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;*
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.*

*2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”* (United Nations, 1979).



This is a very important article not only because it defends the equality of women and men in the marriage, which is not adhered to in most of child marriages, but it does not recognize at all the efficacy of child marriages at all. Paragraph 2 of the article clearly states that child marriages have no legal effect and requires states to amend legislation in order to ensure a minimum legal age for marriage and an official registry. This is especially important in the case of India, because even though there is a legal prohibition against child marriage, if the ceremony is completed the marriage is not illegal, just merely voidable (Red Elephant Foundation, 2013, p. 8). Another problem in India is that the majority of child marriages are not officially registered, and national institutions cannot control the practice of those marriages in many rural areas (Ghosh, 2011).

Lastly, the International Covenant on Civil and Political Rights (1976) indirectly addresses the issue of child marriage when in article 23.3 states: “*No marriage shall be entered into without the free and full consent of the intending spouses.*” (United Nations, 1976). There is a general consensus in the international community that child marriage can counts as a form of forced marriage, in which the young bride or groom is pressured and coerced to agree to a marriage arranged by their families.

### **3.2. International action: The Global Programme to End Child Marriage.**

Along with legal provisions and conventions, the international community has developed a series of actions plans with the objective of reducing, and ultimately eradicating the practice of early marriages and to a further extent, forced child marriages. Moreover, child marriage is now firmly in the global development agenda, most prominently through its inclusion on the SDGs target 5.3, which aims to eliminate the practice by 2030 (UNICEF, 2019, p. 3).

In regard to this, it is especially significant the labour of UNICEF, working to eradicate child marriage and empower adolescent girls and boys worldwide. Its action especially focuses on interventions to promote adolescents as agents of change, social mobilization among parents and within communities, education for children and links with employment opportunities (UNICEF, 2018). In order to implement the actions and plans designed, the agency collaborates with national Governments and relevant ministries at all institutional levels, social communities and with civil society organizations. These partnerships aim to produce scalable and meaningful change, for that UNICEF works to build the “*capacities of governments and non-government organizations while engaging with civil society for more harmonized action*”

*and accountability*” (UNFPA, 2020). It is this inter-state and transitional collaboration where the importance, innovation and the value of the actions taken by UNICEF lies.

Nowadays, is especially relevant the Global Programme to End Child Marriage launched by UNICEF alongside the United Nations Population Fund (UNFPA) in 2016. This initiative works with many partners to promote and support practical actions to end child marriage and advocate gender equality and the empowerment of adolescent girls (UNICEF-UNFPA, 2020, p. 2). The Global Programme is funded by the Governments of Belgium, Canada, the Netherlands, Norway, the United Kingdom and the European Union and Zonta International. The main purpose of the Programme is to achieve results for girls bringing together the sectors of education, child protection, communication for development, gender, health and water and sanitation (UNFPA, 2020). The plan is divided into two phases:

- i. Phase I, which is already concluded, from 2016 to 2019, had notable results especially in the ability to reach teenagers in India (UNFPA-UNICEF, 2019, p. 8). The efforts made by the Global Programme resulted in the intervention of 5,573,066 adolescent girls in programme areas in India in 2019, in at least one targeted intervention (UNFPA–UNICEF, 2019, p. 7). The first interventions developed in phase I resulted in some “lessons learned”, for instance, they observed that engaging with girls that are out of school is a challenge because most of them are working, some of them in exploitative work conditions (UNFPA–UNICEF, 2019, p. 9).
- ii. The Global Programme has moved on to Phase II, from 2020 to 2023. This phase is incorporating the learnings from pilot interventions to elaborate more effective and compelling actions. For instance, in India the interventions with girls within communities are going to mainly focus on extending support to strengthen the outreach of national and state-level actions, such as the Scheme for Adolescent Girls and the National Adolescent Health Programme in states such as Rajasthan or Odisha (UNFPA–UNICEF, 2019, p. 9). Moreover, during this phase, there will be placed specific emphasis on building linkages for vocational skills opportunities in institutional and community-based programmes with girls (UNFPA–UNICEF, 2019, p. 9).

The Global Programme has helped more than 8 million adolescent and young girls and more than 5 million community members, with information, skills and services (UN, 2020). Therefore, it is fair to conclude that it has been a successful action to empower girls and raise awareness in countries such as Bangladesh, Mozambique, Burkina Faso and India.

## **CHAPTER 4. STUDY CASE: The perpetuation of child marriage in India**

West Bengal, once a state-leading innovative and liberal reforms, is now one of the leading states for the highest number of child marriage cases in India (see: *Annex II*). Within West Bengal, Malda is one of the least developed districts of the state and remains at the core of many discussion on child marriage with more than half of the young girls living there being married off as child brides (Gosh, 2011). The practice of child marriage is especially accentuated in the surrounding rural areas due to factors such as social acceptance, religious conservative beliefs and vulnerability of young girls being the victim of smuggling, trafficking and coercion occurring on the border with Bangladesh.

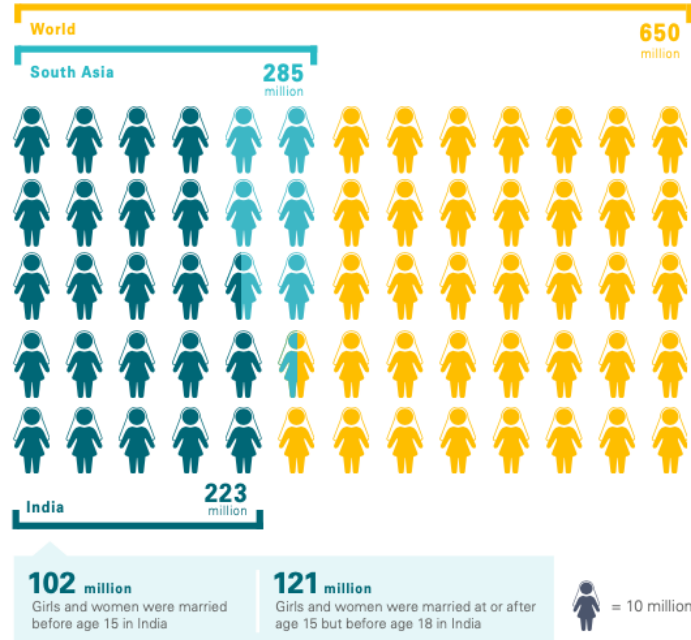
This is where Priyanka lives, a 15-year-old girl studying 9<sup>th</sup> grade in the school of Dalla village (*Child Marriage in India: Teenage Girls Forced to Marry*, 2019, 03:15–05:21). She lives with her grandparents who pressured her to marry a 25-year-old man from a wealthy family. Her family believed that marriage was her only option due to the early death of her parents, but she did not want to marry and had no one to turn to for help but the school authorities. After the Headmaster of the school stopped the marriage, her family didn't want her living with them and started abusing her for choosing her studies and wanting to marry after turning 18-years-old.

Ismoarah of 15-years-old also lives in Malda. She was forced to marry at 14-years-old by her family. The marriage was set up after Ismoarah and a boy from her neighbourhood fell in love, but their families did not want them to be together. Her family was scared they would run away together. Eloping is becoming a common trend in young Indian people to escape the forbiddance of their families (Ghimire & Samuels, 2014). To prevent them from eloping, Isamoarah's family pressured her to into a marriage they arranged, "*they asked me if I wanted to bring disrespect to my family, I said 'no'.*" (Ismoarah in an interview for VICE Asia). She divorced one year after because her husband's family stopped her education and started to abuse and harass her.

Child marriage has been enforced generation after generation and now it is assumed as a common practice in many rural communities around India (and around the world). UNICEF research showed that almost half (45%) of all women aged 20-24 years in South Asia reported

being married before the age of 18, and almost one in five girls worldwide (17%) are married before the age of 15 (UNICEF, 2017, p. 2).

**Figure 1.** Number of girls and women who were married before turning 18-years-old, India, South Asia and the world in 2019.



Source: UNICEF, *Ending Child Marriage: A profile of progress in India*, 2019, p. 6.

One in three of the world’s child brides live in India, where this practice has been illegal for more than three decades, with exceptions for religious law (Wodon & Nguyen, 2012). In 2019, India was home to 223 million child brides from which 102 million were married before even turning 15 (UNICEF, 2019, p.4). The continuance and practice of early marriages vary across states and union territories in India, for instance, more than 40% of girls living in rural and northern states were married before they turned 18-years-old like Bihar (43% of girls) and West Bengal (42% of girls); in contrast with less than 5% in Lakshadweep (UNICEF, 2019, p.9). More than half of the child marriages occur in five Indian states (see: *Annex II*): Uttar Pradesh (with 36 million brides has the largest population of child brides), Bihar (22 million child brides), West Bengal (22 million child brides), Maharashtra (20 million brides) and Madhya Pradesh (16 million child brides).

Although the number of child brides remains high, India has made a lot of progress in the last decade and the practice of underage marriages in India is less common today than in prior generations. Actually, India’s progress in the past decade is one of the strongest among countries in South Asia with a 5.5% annual rate of reducing child marriage (UNICEF, 2019, p.19). This improvement suggests the legislation enacted by the Indian government and the policies, campaigns and schemes adopted have been partially successful. Notwithstanding, the

legal prohibition of the practice by the national law and the humanitarian aid programs have not been able to eradicate the tradition, and child marriages are still practiced and accepted socially in many parts of India. The continuity of early marriages reinforces existing inequalities among the different economic classes, castes, and religious and ethnic groups across India.

To elaborate on the gap between formal law and social reality in this chapter, the analysis will focus on the evolution of the prohibition of child marriage and the inheritance of British colonialism on the issue of women rights. Secondly, the other section of the chapter will study how the law and social customs clash with focusing on the impacts at an institutional, economic, religious and social level.

#### **4.1. Evolution of the prohibition of child marriage in India.**

##### *a. The origin of child marriage in Indian traditions*

There is not a clear date of origin for child marriage, though the practice dates back several centuries, the term itself did not come into existence until the XVII century. Before that, children or under 18-year-olds married older spouses as a common practice worldwide and it was not a crime nor an internationally unacceptable custom. The prohibition and awareness against child marriages came with the notion of Human Rights and the protection of children. However, gender discrimination and patriarchal traditions can be observed in India since the Middle Age. According to Saraswat (2006), child marriages came into existence in feudal societies (Suresh Lal, 2013).

In the Middle Ages, Indian women were subject to family discipline and the honour of their clan. They had no rights or freedoms and their role within their communities was to obey the rules. The Sultan of Delhi (1206-1526) spread the doctrine that “*unmarried women caused disaster*” (Rofiyarti, 2018). During these ages, young women were considered irresponsible and irrational, so their parents or guardians had to marry them early before they were caught in a scandal. Research by Bhagat Singh concluded that the practice of early marriage was initiated around 600 A.D. due to the influence of Sanskrit writings like the Dharma-sutra<sup>16</sup> and the

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<sup>16</sup> **Dharma-sutra** (Sanskrit for: “righteousness thread”) is a genre of Sanskrit theological texts and refers to the treatises of Hinduism on dharma. The maxims deal with the human conduct and the practical rules of caste and of human beings in their social, economic, and religious relations (Encyclopaedia Britannica, 2011).

Smritis<sup>17</sup> that warned families to “*not keep unmarried girls after attaining menarche because they would end up in hell*” (Young lives & NCPCR, 2017, p.2). Furthermore, religions such as Hinduism and Islam supported this view and condemned sexuality out of marriage, thence religions promoted early marriages of girls to prevent them from experimenting with their sexuality out of the sacrament of marriage (Jaya, 2005). Religious and Sanskrit text focused on the importance of virginity, introducing the idea that “*transgressing virginity meant disgrace to the family and village*” (Young lives & NCPCR, 2017, p.3). The rise of a patriarchal and conservative social structure resulted in the marriage of girls at an early age, ideally before puberty. Subsequently, towards the Medieval period, brides become younger, and it became common for girls as young as 6 or 8-years-old to get married in Indian society (Bhagat, 2016).

Additionally, Medieval times were characterized by an unstable political climate and the nonexistence of law and order. Feudal lords ruled India’s vast territories and regions, imposing their will and threatening many times village people who stood out of line. Political instability and constant threats from warring clans lead to profound poverty and high social vulnerability for rural societies. During this period, the feeling of insecurity lead to changes within the social system, including parents transferring the burden of care of their daughters to husbands and in-laws as early as possible (Young lives & NCPCR, 2017, p.13). Moreover, the social role of women relegated to the household and they become increasingly unable to work in the rural fields, which caused unmarried daughters to become a burden for their families rather than an asset. The poor socio-economic conditions resulted in early and child marriages as a method of protection of young girls and economic gains for the family. Especially since the practice of dowry, a young girl’s family would receive an economic or any other type of compensation for the marriage.

The patriarchal, conservative and religious structures developed during Medieval times have survived until modern days and child marriages are still a predominant issue in modern India (Herklotz, 2017). The religious and patriarchal beliefs that resulted in the implementation of early marriages are still rooted in rigid societal norms, serving to perpetuate longstanding social inequalities (Young lives & NCPCR, 2017, p.3).

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<sup>17</sup> **Smritis** (literally “that which is remembered”) refers to a body of sacred Hindu texts based on human memory. They aim at defining and picturing how to live life in a way to fulfil its purpose, thus make life meaningful (Bharadwaj Khandavalli, s.f.).

*b. The inheritance of colonialism and the national movement*

To talk about Indian laws is to talk about the inheritance of British colonialism and the nationalist movement reforms. The *British Raj* refers to the period between 1858 and 1947 when the Indian subcontinent was ruled by the British East India Company. During India's colonial period the European governments justified their role in India as civilizers of "*barbaric practices*" (Nirantar Trust, 2015, p.26). In response, Indian social reformers engaged with the issue of early and child marriage to defend the rest of Indian culture from Western influence and conversion. Indian reformers upheld that "*Indian cultural and traditional practices were superior to Western, and that child marriage was a practice popularized due to ignorance*"; they hoped that by eradicating the harmful customs "*the glory of the former Indian culture could be restored*" (Nirantar Trust, 2015, p.26).

The first efforts for legal prevention of early marriages in India started during the British colonization in the 1880s with the release of a campaign aimed to raise the age of consent for the offence of rape under Section 375 of the Penal Code (Gosh, 2011). The campaign and subsequent debate lead to the Age of Consent Act (1891) or the Act X of 1891 (Gosh, 2011) in which the age of consent for sexual intercourse for girls, married or unmarried, was raised to 12 years in all jurisdictions. Even though the 1891 Act was not particularly significant, the Act did give the reform movement "*national recognition, and the question of child marriage became an inescapable part of nationalist ideologies*" (Nirantar Trust, 2015, p.27).

The Indian political class realized the dimensions of the practice of child marriage in 1921 when the Census reported that "*there were 600 brides aged one year or below*" (IPU & WHO, 2016, p. 42). The shocked political class urged Harbilas Sarada, as a member of the Central Legislative Council, to introduce a Bill restraining the practice. The examination into the issue of child marriage finally led to the enactment of The Child Marriage Restraint Act 1929 (CMRA). The Act of 1929, commonly known as the Sharda Act, was the first effort made in India to control child marriage (Ghosh, 2011). The Act of 1929 restrained the arrangement of marriages of boys below the age of 18 or girls below of 15-years-old. However, this Act did not establish such marriages to be illegal or invalid, it only imposed penalties such as "*imprisonment for up to 3 months or a fine of Rs. 1,000 to anyone who performed such acts, including the guardian of the child bride*" (Ghosh, 2011). The main objective of imposing these negligible sanctions was to prevent and discourage Indian families from arranging child

marriages. Consequently, the Sharda Act did not focus on the status of marriage or the rights of the parties once they were married, nor did it make the practice illegal or voidable. The CMRA was flawed since the procedures laid down in the law to act against the solemnization of child marriages were difficult to manage and time-consuming. Furthermore, the minimum age to consent to marriage was set at 15-years-old for girls, much lower than the international legal age of 18-years-old.

During the time of independence, Gandhi and other nationalists realized the huge potential of women's involvement and contribution to the fight for sovereignty, even if the means were just for instrumental reasons in expanding the movement and its strength in numbers (Nirantar Trust, 2015, p.26). That is the reason why the Constitution of India (1950) states gender equality and women empowerment through articles 14<sup>18</sup>, 15<sup>19</sup>, 39<sup>20</sup> or 51A. This last article refers to certain duties all Indian citizens shall comply with and in paragraph e) it states as a citizen duty: *"to renounce practices derogatory to the dignity of women"* (art. 51A COI). Once women were heard, they challenged child marriage as one of the most oppressive practices imposed on girls by the patriarchal social structure (Nirantar Trust, 2015).

After independence child marriage was relegated and became a shadow issue in the women's movement. The only measure taken concerning the issue was the amendment of the legal text in 1978, fixing the minimum age of marriage at *"21-years-old for boys and 18-years-old for girls, and that offences under the Act were made cognizable"* (IPU & WHO, 2016, p. 42). But the Act's provisions still only restrained and did not invalidate such early marriages. The Act also did not identify the authorities responsible for preventing child marriages (Ministry of Women and Child Development & UNICEF, 2006). Due to all these shortcomings, the Child Marriage Restraint Act was not successful, and a great number of child marriages still occurred in India post the CMRA's enforcement.

The legal and governmental provisions implemented to reduce child marriages were focused on health issues, age and legal prohibitions. These resulted in the detachment from the role of women's empowerment, women's rights, issue of consent and choice beyond age and

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<sup>18</sup> Article 14 of the Constitution of India dictates that *"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."* (art. 14 COI).

<sup>19</sup> Article 15 of the Constitution of India refers to the prohibition of gender discrimination stating: *"The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."* (Art. 15 COI).

<sup>20</sup> Article 19 of the Constitution of India details certain principles of policy to be followed by the State, dictating: *"The State shall, in particular, direct its policy towards securing: (a) that the citizens, men and women equally, have the right to an adequate means of livelihood; (...)"* (art. 19 COI).



the question of engaging with child marriages as a social and political issue rather than an entirely legal or state-centric one (Nirantat Trust, 2015). This is one of the reasons why the political movements in India, especially the women's and feminist movement<sup>21</sup>, did not have any engagement or action with child marriage at all (Nirantat Trust, 2015).

The British colonialism legacy and the post-independence struggles did not match the cultural traditions which resulted in the rejection of those reforms and the risen of a protectionist and conservative ideology by the rural and lower-income Indian population. During that period rural tribes heavily based on patriarchal and religious social structures spread the myth that women's rights violate tradition, belief and culture (OHCHR, 2014). Therefore, to talk about women's rights and the eradication of child marriage in India falls into this deep rejection of colonialism inheritance and the protection of traditional Indian values and customs. Women's rights and women empowerment movements were driven by other factors such as domestic violence or family laws, feminist movements remained, and the law was a central focus in women's struggles for social change.

### *c. The Prohibition of Child Marriage Act of 2006*

The ineffectiveness of the CMRA of 1929 to reduce or provide an adequate solution to the practice lead to the formulation of the Prohibition of Child Marriage Act in 2006 (henceforth, PCMA). The PCMA defines child marriage as “*a marriage to which either of the contracting party is a child*” (Section 2 (b) of the PCMA, 2006). This law defines a child or minor as someone “*under 18-years-old in the case of girls and under 21-years-old for boys*” (Section 2 (b) of the PCMA, 2006). This provision following the minimum legal age to marry set by the international community and human rights agreements. The provision entails an increase on the minimum age to marry in contrast with the Child Marriage Restraint Act that prohibited child marriages of girls under the age of 15 years and of boys under the age of 18 (Bajpai, 2017, p. 220).

The PCMA also appoints, to every state, full-time “*Child Marriage Prohibition Officers*” (Section 16 (1) of the PCMA, 2006), their main duty is to police instance of child marriage. They have the authority to prevent and interrupt child marriages, as well as: “*(b) to collect evidence for the effective prosecution of persons contravening the provisions of this*

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<sup>21</sup> The women's movement risen during the independence period was primarily constituted by privileged women, that received an education beyond school and that come from wealthy families. Therefore, child marriage was not an issue that affected them directly.

*Act; (c) to advise either individual cases or counsel the residents of the locality generally not to indulge in promoting, helping, aiding or allowing the solemnisation of child marriages; (d) to create awareness of the evil which results from child marriages (...)*” (Section 16 (3) of the PCMA, 2006). Therefore, the Officers are authorized to charge offenders which can include the arrangers of the marriage or the participants. The possibility to make the arrangers (such as the child’s parents) accountable for the crime is introduced for the first time by the PCMA. While previous legislation only sanctioned the adult marrying a child, the PCMA stipulates punishment for *“whoever performs, conducts, directs or abets any child marriage”* (Section 10 of the PCMA, 2006) as well as *“for promoting or permitting solemnisation of child marriages”* which includes *“any person having charge of the child, whether as parent or guardian or any other person or in any other capacity, lawful or unlawful, including any member of an organisation or association of persons who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, including attending or participating in a child marriage”* (Section 11 (1) of the PCMA, 2006).

However, the main problem with this law is that it does not make child marriage illegal, only merely voidable (Red Elephant Foundation, 2013, p. 8). This means that once the child is married and the ceremony ended, the marriage is considered legal, therefore, there is no punishment or sanction to any party. The grounds for the declaration as void are laid down in sections 3, 12 and 14. Section 3 allows the minor of the union to declare the marriage void, however, they can only exercise this petition for annulment *“until two years after reaching adulthood”* (Section 3 (3) of the PCMA, 2006). Section 12 provides a list of circumstances under which child marriage is null and void, for instance, if the child has been *“abducted, kidnapped, trafficked, or been compelled to marry under force or coercion”* the marriage can be declared as void even before the child turns 18-years-old (Section 12 (a), (b) & (c) of the PCMA, 2006).

All these provisions regarded in the PCMA try to eliminate child marriage with the criminalization of the practice through the protection of the child; the prevention of the execution by making certain actions punishable and by appointing certain authorities responsible for the prevention and prohibition of child marriages. Lastly, the prosecution of offenders is laid down by sanctions and punishments with the mechanisms of enforcement. However, the PCMA fails to respond to the main question of declaring child marriage illegal. This issue should have been addressed since the Supreme Court of India already declared in

2017 that sexual intercourse with a minor is considered rape even after marriage (Rajagopal, 2017), but the marriage itself is still considered legal.

On that account, even after amending the colonial law, efforts to educate and create awareness about the dangers and problems of child marriages are still undertaken inside the territory. The practice is particularly predominant in the rural areas and among socially marginalized population such as Muslims (Bihar, West Bengal, Assam), Sikh in North West India, Muslims in Bangladesh (NE), Scheduled Castes (SCs) or Scheduled Tribes (STs) in which traditional prejudices and conservative patriarchal beliefs are preferred and imposed (Gosh, 2011). Moreover, considering that there have been many cases of child marriage but only a few have been reported, it could be assumed that the laws on the mandatory registry have not been successful (Red Elephant Foundation, 2013). In summary, Indian institutions have failed to prevent child marriage and to protect the rights of vulnerable children and child brides even after the passing of the PCMA. Therefore, the law needs revision given its failure to address the central controversy of not declaring child marriage illegal.

#### **4.2. How do traditions and formal law clash?**

Thus far, there has been an extensive analysis on the issue of child marriage in India and its legal criminalization both, internationally and nationally. The previous sections show that several laws have been regarded as an instrument of social and legal change in India in order to bring social justice and universal rights for their diverse populations. First, during the colonial time, the paradigm of social reform was the ideological framework for legal change. Nowadays, the legal discourse and debate are driven by the human rights paradigm and ideas of gender justice. However, severe disconnections between formal law and social reality prove that the legal regime is not being an efficient or sufficient agent for social change.

The following part is going to analyze the clashes or gaps between the formal laws previously studied and the traditional concerns or conservative social norms persistent in India. The analysis will develop in four levels: Institutional, where the focus will be on the governmental institutions and their work. Secondly, an economic level analysis centered on the clash between the rural under-developed regions and the urban centers. Thirdly, a religious level in which the prevalence of religious personal laws will be studied. And, lastly, a social level where the social validation of child marriage will be explored.

It is important to bear in mind that none of these levels is exclusive from the other, but rather complementary and accompanying of one and other to explain the intersectionality of the issue of child marriage.

a. *Institutional level: The un-enforcement of law at the union government vs. state and local governments.*

India is a federal republic in which administration institutions are divided among its states and regions. Therefore, the Constitution of India divides its authority competencies between its Union Government<sup>22</sup> (as a central branch of the nation powers) and state governments. The lists of powers included in the Constitution's seventh schedule establishes the areas in which the Union and State governments may legislate (Britannica, n.d.). In 1992, India witnessed a wave of decentralization founded upon the idea of making governance more participatory and inclusive, which led to the amendment of the Indian Constitution creating a third level of government: municipalities or local governments (India Development Review, 2020). This reform aimed to strengthen base-level democracy by decentralizing governance and empowering local political bodies, that better knew the needs and issues within the communities. The enactment of the 73<sup>rd</sup> and 74<sup>th</sup> constitutional amendments, obliged every Indian state to “*establish rural and urban local governments, and to create mechanisms to support them*” (Constitutional Acts, 1992). These amendments also laid down a government term of five years from the date of appointment, after which the administration has to call on local elections (74<sup>th</sup> Constitutional Amendment Act, 1992).

The creation of this new system of local governance provided constitutional status to rural and urban local bodies, ensuring a degree of uniformity in their structure and functioning across the country (India Development Review, 2020). In many cases, local governments have proved to be more effective in resolving and addressing a concrete issue of the community in the municipality. For example, on child marriage, there was established at village levels in Malda a 'Convergence Model' called “*Poorna Shakti Kendra*” (Young Lives & NCPCR, 2017, p. 26). The model aims to cross the gap between the demand and supply of the services related to women by undertaking realistic estimate of the demand, it also brings “*awareness of the*

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<sup>22</sup> The **Union Government** in India is formed by the three branches that represent the sovereign powers of nation-states. Firstly, the executive branch consists of the president, vice president and a Council of Ministers that is led by the Prime Minister. Secondly, the legislative branch is formed by two houses of parliament: the lower house of Lok Sabha (House of the People) and the upper house of Rajya Sabha (Council of States). Lastly, the judicial branch mainly consists of the Supreme Court. (Commonwealth Local Government Forum, 2019, pp. 86-90).

*women-based schemes and programmes of the Government”* (Government of West Bengal, n.d.).

However, the municipalities face many obstacles and challenges that make them unable to wield their governance structures and to solve the complex needs of their citizens (Kapoor & Kumal, 2021). One important challenge faced by municipalities is that the power to devolve functions to local governments rests with the state government, but most of the states’ governments do not devolve adequate functions to local bodies (India Development Review, 2020). This creates a functional challenge that affects the governance system’s efficiency and effectiveness. As a matter of fact, on many occasions, state governments have been creating parallel structures for *“the implementation of projects about agriculture or education which undermines the areas for which local governments are constitutionally responsible”* (India Development Review, 2020).

On the issue of child marriage, state governments have implemented programs and plans to ease and mitigate some of the root economic and social causes of the issue. For instance, as poverty is one of the factors that lead a family to marry off their daughter before maturity, the Government of West Bengal launched in 2018 “Rupashree Prakalpa”, a *“one-time cash endowment scheme for low-income families for when a daughter gets married after she turns 18-years-old”* (Government of West Bengal, 2018). However, the scheme is aimed at mitigating the difficulties that poor families face in bearing the expenditure of their daughters’ marriages, for which they often have to borrow money at very high-interest rates (Darjeeling, 2019).

On the national level, the Union government has also taken measures and developed campaigns and schemes to prevent the practice of child marriages. For instance, in 2005 the National Commission for Women started a nationwide campaign against child marriage called *“Bal Vivah Virodh Abhiyan”* (Young Lives & NCPCR, 2017, p. 26). This campaign focused on raising awareness against child marriage, its negative consequences and the harmful effects it has in the communities in long term. The campaign was mainly directed to the states where there were higher incidences of child marriages, such as Rajasthan, Bihar, Chhattisgarh, Madhya Pradesh, Jharkhand and Uttar Pradesh. Another important governmental initiative is the National Plan of Action for Children (NPAC) 2016, which will be described in the next section.

Although governments have taken several causes of action to combat child marriage, some of the measures do not directly address the main issue of early marriages, and it has been criticized that the measures only tackle some of the factors that explain the prevalence of child marriage such as poverty or access to education. In the study on child marriage elaborated by Nirantar (2016), the discourse around the issue of child marriage has often come from a “protectionist” perspective that centers attention on increasing the age of marriage or palliates the economic causes, without addressing the issues of consent, right of choice or the desires of adolescents, including the structural issues that make marriage a disempowering institution for women (Nirantar, 2016).

To sum up, there are two main issues or challenges in the administrative and governance institutions of India. Firstly, the ineffectiveness of local governments to respond to the community needs due to functional and financial obstacles. Secondly, the programs and actions taken by the states and Union Governments do not address the issue of child marriage in an effective way nor from an adequate perspective. Therefore, it needs to be strengthened of the capacities of local governments that can better implement and enforce the law within their communities. Moreover, local governments can better know and understand the complex needs of their citizens, which result in more effective and enduring solutions (local problems are best resolved by local solutions).

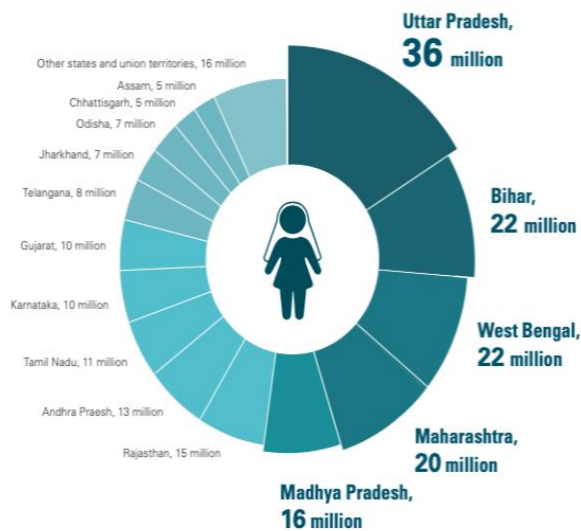
*b. Economic level: The importance of development in rural areas vs. metropolitan centers.*

Child marriage is an issue especially accentuated among low-income and developing countries (Paul, 2020). This fact can be observed at the national level as well, inside the developing countries there is also the tendency of a higher number of child brides in the less developed or rural areas of the territory. However, even though the national statistics reflect high rates of child marriage in the country, there are great regional disparities across the country, and it is important to acknowledge that there are “*inter-state anomalies*” (Srinivasan, Khan, Verma, Giusti, Theis & Chakraborty, 2015).

In the less developed areas of the country resources are limited, so gendered social risks become more profound and severe, and women’s opportunities are more constrained, which force families to make decisions that mainly disadvantage their children in the long term (Young Lives & NCPCR, 2017, p. 81). In many cases, the marriage of young daughters can be seen as a “*survival strategy*” for short-term financial benefit and security, the marriage might

take place in exchange for livestock and other goods and resources to support the survival of the family while the daughter is sold off to be cared for by her husband, lessening the financial burden on the family (Young Lives & NCPCR, 2017, p. 82).

**Figure 2.** Number of girls and women married before turning 18-years-old, by state.



Source: UNICEF, *Ending Child Marriage: A profile of progress in India*, 2019, p. 7.

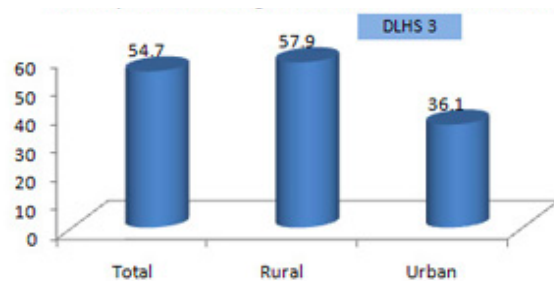
This is reflected in the data collected by UNICEF where the rural states are the ones with a higher rate of child marriage. The graph shows Uttar Pradesh and Bihar to have high and sustained levels of child marriage among females and continue to rank in the top 10 states with the highest percentage of child marriage in India (see: *Annex II*). These two states are also in the top 10 states with a higher percentage of people below the poverty line in 2012 with 33.74% in Bihar and 29.43% in Uttar Pradesh (see: *Annex III & IV*).

To fully understand the socioeconomic factors, under development in rural areas must be analyzed with the understanding of issues around gender and education (Nirantar, 2015). Poverty compels families to stop girls' education and marry them off earlier, which is likely to push them into domestic and sexual violence, within or outside the marriage (Young Lives & NCPCR, 2017, p.82). This poses a major barrier to girls' empowerment, impeding the economic progress of the family or community they live in. Being out of school *"increases risk of marriage for girls, and pressures to marry for cultural and economic reasons also increases rates of school dropout"* (Young Lives & NCPCR, 2017, p.82). Furthermore, dropouts are higher among excluded groups (such as scheduled castes, SC, and scheduled tribes, ST) and these groups also display a lower median age for child marriage (UNICEF, 2012). Thus, the under-schooling of girls promotes the perpetuation of the cycle of poverty within the family and the community (Young Lives & NCPCR, 2017, p.82). In addition, many programmes developed by UNICEF have found that engaging with girls that are out of school is a challenge because most of them are working, and more likely, *"in dangerous and exploitative work conditions"* (UNFPA–UNICEF, 2019, p. 9). Research developed by

UNICEF in 2019, shows that the largest disparities in the prevalence of child marriage are found across women with different levels of education (see: *Annex V*).

Young Lives data collected from Undivided Andhra Pradesh and Telangana have provided enough evidence to support this institutionalized gender bias, particularly in the matter of education for developing girls (2019). Girls from the poorest households were twice as likely to be married before 18 as those from the higher-income households (Young Lives & NCPCR, 2017, p.83). Furthermore, research has shown that women in the higher economic strata are likely to get married “*more than four years later than those in the lower economic strata*” (Sharma, et al., 2015). Additionally, the gap in the median age at marriage across wealth quintiles has widened over time. For instance, in the state of West Bengal, one of the states with a higher prevalence of child marriage, 54.7% of the currently married women (age 20-24), were married before 18 and 57.9% of the cases were young girls from rural backgrounds. This, in opposition to 36.1% of girls from urban areas (according to the data collected by the Indian 2011 Census).

**Figure 3.** Married women age 20-24 who were married before turning 18 in West Bengal, 2011.



Source: Indian Census, Indian Government, 2011.

Severe lack of resources and the inaccessibility to a full education in rural areas inevitably result in a higher rate of child marriage, although those are not the only factors or explanations to the preponderance of the practice in such areas. For instance, due to the insecurity in some of these rural areas on account of the trafficking or sexual assaults occurring, many parents feel obliged to “*marry off their daughter earlier to ensure their daughter’s physical safety and safeguard her chastity*” (Verma & Srinivasan, 2014). However, there have been many programmes directed at empowering poor women through microfinance to ensure economic independence from their families and lay an economic base to pursue opportunities (Sengupta, 2013).

*c. Religious level: The existence of religious laws alongside the formal law in India.*

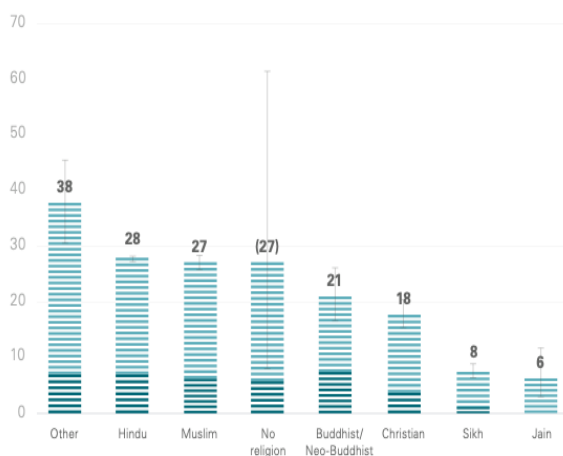
The Indian legal system recognizes alongside the formal law, personal laws of Hindu and Muslim religions. These personal laws govern the dimensions of social and familial life, in which, it must be said, formal equality has not been guaranteed (Crossman & Kapur, 1993).



Regarding the Muslim personal law, though it is un-codified in India, establishes puberty, presumedly reached at 15-years-old, as the minimum age of marriage (Sagade, 2005). Since marriage is considered a contract under Muslim law, the marriage of a girl above this age without her consent is legally void (Young Lives & NCPCR, 2017, p.18). Families are allowed to arrange marriages on behalf of young girls under 15-years-old, but girls can utilize the “*option of puberty to render the marriage void*” (Young Lives & NCPCR, 2017, p.18). The “Shah Bano Case” (1978) was a case of vital importance in which, for the first time, the tension between religious Muslim rights and women’s rights emerged. This landmark case is known for its fight in defence of a divorced wife against the male-dominated society, which brought about tangible change in the system.

As for Hindu Law, it continues to be a vital law and an official element within the family law of contemporary India (Francavilla, 2012). Personal Hindu Law was modernized and reformed by the Indian government after independence, yet only changed the parts in which the Hindu personal law was not coherent with the values and principles stated in the Constitution of 1950 (Francavilla, 2012). In the traditional Hindu Law, child marriage was considered an appropriate form of marriage and its practice was seen as part of the *dharma* (social and cosmic order). Child marriage has been legitimized and institutionalized in the legal Hindu tradition, and the practice was spread to many Indian regions by Hinduism (Francavilla, 2012). Many scholars believe that the set of dharmic conceptions surrounding the practice of child marriage are still very relevant for Hindus nowadays (UNFPA, 2018). Taking a religious point of view, it is still relevant to most Hindus that early marriage produces spiritual merits and that a family has the moral duty to find a good and adequate husband for their daughter (Francavilla, 2012).

**Figure 4.** Number of girls and women married before turning 18-years-old, by religion.



Source: UNICEF, *Ending Child Marriage: A profile of progress in India*, 2019, p. 12.

Additionally, there are still implications connected with the control of female sexuality and the taboo of premarital sexual intercourse.

In 2019, UNICEF collected data regarding the percentage of girls belonging to such religious communities and found that 28% of girls married before the age of 18 were Hindu and 27% Muslim, against 27% of girls not belonging to any dominant religion. Therefore, the disparities in child marriage among women from different religious groups are smaller

(UNICEF, 2019). However, these religious laws still uphold religious traditional gender norms, which result in early marriages as a prevention to sexual awakening and sexual intercourse before marriage.

Interestingly, some studies have identified several auspicious occasions for the entrenchment of child marriage (European Commission, UNICEF & ICRW, 2011). The research findings demonstrated that on certain auspicious days throughout the Hindu calendar, child marriages are performed in higher numbers (European Commission, UNICEF & ICRW, 2011, p. 17). These festivities serve to affirm the traditional acceptance of child marriage and its perpetuation.

Traditionally, “Akha Teej” was the one day on which the marriage ceremonies were usually performed, mainly because “it falls in the post-harvest period, when people have more resources, such as money or time to arrange the marriage and ceremony for their maturing children”

**Table 1.** Auspicious days for marriage.

Serial Number	Auspicious days for marriage	Months (Hindu Calendar Month)
1	Basant Panchami	January/February/March (Falgun)
2	Akha Teej	April/May (Baisakh)
3	Besakh Purnima	May (Baisakh)
4	Badla Navami	May (Jaishtha)
5	Gangadasami	June (Jaishtha)
6	Devuthani Gyaras	August (Shravan)
7	Navratri	September/October (Ashwin)

Source: European Commission, UNICEF & ICRW. *Delaying Marriage for Girls in India: A Formative Research to Design Interventions for Changing Norms*. 2011, p. 18.

(European Commission, UNICEF & ICRW, 2011, p. 17). However, in the last few years, five more auspicious days have become popular for performing marriages without a mahurat or priest.

Hinduism represents 79.80% of the Indian population (according to the 2011 census. See: *Annex VI*). Moreover, data shows that girls within the Hindu community are the ones most affected by early marriages. This is why Hindu Law is very important regarding the issue of child marriage, because Hindu beliefs, personal law, values and the traditions they hold, ultimately influence the majority of the Indian population. Even though since 2006, child marriages were by law illegitimate in the Hindu official Law, some Hindu movements rejected this recent legislative reform because it is perceived as dangerous for the Hindu family structure and for some fundamental values of Hinduism. Therefore, in some religious authorities and communities, child marriages are still legitimated at the level of the not official traditional law (Francavilla, 2012). Consequently, a conflict can be observed between an official Hindu law, that considers the marriage of a child to be voidable, and a non-official Hindu rule that perceives child marriage as not only valid but also mandatory (Francavilla, 2012).

d. Social level: Popular legitimacy and social validation.

Despite several legal reforms since independence, social life in rural India centers mostly around the institutions of family, kinship, caste, and religion. Historical traditions and customary law have continued to be interiorized transmitted and shared in the rural areas and under-developed states of India where the formal law enacted by the Government is hard to be promoted and enforced. The lack of authority in these rural areas which act to impose obedience to the formal norms is instead guided by religious traditions, conservative and patriarchal values and institutions. This customary system is so strong that even though child and forced marriage are prohibited, families continue to practice it: *“The parents always lie about the child's age, families know what they are doing is not right but because of culture and facts, the parents will marry their children off at a young age.”* (Dabi, quoted from George, 2012).

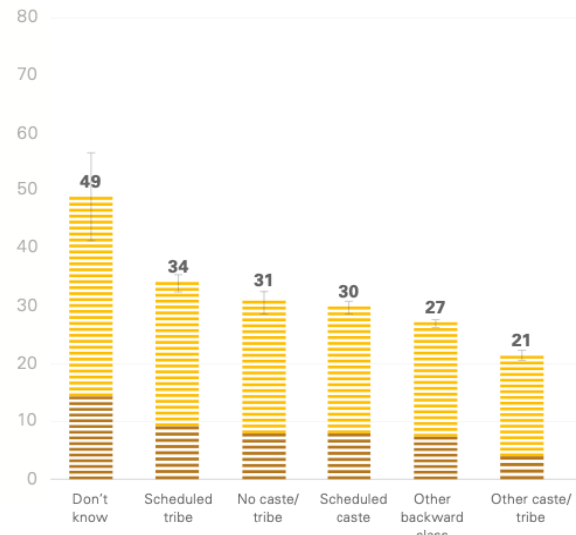
There are even cases in which NGO's and humanitarian aid agencies have experimented with the rejection of the communities and families when trying to stop these early marriages. Srila Roy describes an event that occurred in the course of her fieldwork in West Bengal when the local NGO with whom she worked tried to stop a child marriage from taking place in a nearby village (2017). When they arrived at the village to prevent the young girl from getting married, the community turned against the NGO demanding them to leave and calling them *“home breakers”* (Roy, 2017, p.868). In the end, the marriage of the young girl took place in the weeks that followed. These *“anecdotes”* or events are evidence of the prevailing patriarchal and conservative social structures in many rural communities.

One of the factors that have a profound influence on early marriages of girls in these regions of India is the strong cultural emphasis on female modesty and chastity. Early marriage of the daughter aims to avoid the potential scandalous situations and incidences that undermine the conservative religious virtues that bring dishonour to the family unit (Srinivasan, et. al, 2015). Moreover, in communities where the chastity of girls is so *“highly desirable and safeguarded, many parents feel compelled to marry off their daughters earlier to ensure their safety and chastity”* (Verma & Srinivasan, 2014), especially in areas with high levels of sexual crimes. Interestingly, these areas with a higher level of sexual assaults against women coincide with high levels of under-development. Child marriage is more predominant along with northern border states because they are *“convenient hubs for interstate trafficking of children and women, prostitution and forced marriage”* (Hindu, 2013) (see Annex VII, VIII and IX).

Due to real or perceived security risks for girls and women, families arrange marriages at an early age to ensure the protection of their daughters (Young Lives & NCPCR, 2017, p. 28).

Another cultural practice deeply ingrained in Indian society is arranged marriages within the same caste. As it was previously studied, the caste system in India organizes society around a hierarchical ideology, in which there are different levels of castes and subcastes that determine people’s role and rank in the society. In this system, it is common for the selection of a bride or a groom to be from within the same caste. This habit has serious implications for the age of marriage for Indian girls, because “*it is the traditional and customary practice among many castes to marry off the daughter at puberty*” (Young Lives & NCPCR, 2017, p. 25). In the 2019 data research gathered by UNICEF, disparities in child marriage prevalence across castes were not especially significant, founding the ST upholding the highest rate with 34% (UNICEF, 2019).

**Figure 5.** Percentage of girls and women married before turning 18-years-old, by caste.



Source: UNICEF, *Ending Child Marriage: A profile of progress in India*, 2019, p. 12.

Analyzing the data of child marriage rates within India’s 29 states, significant variations can be observed in the prevalence of child marriage, especially between northern and southern states (see map *Annex II*). The northern states have a higher rate of child marriages such as Uttar Pradesh, Madhya Pradesh, Rajasthan, Bihar and Chhattisgarh. The difference between the North and the South can be explained from the previous point about insecurity which leads to higher rates of human trafficking and sexual assault. However, many scholars have argued district disparities in the rate of child marriage are likely to exist because of “*the way the states and districts within them were created*” (Nirantar, 2019). Karve (1990) conducted in-depth studies in the levels of patriarchy, marriage systems and kinship structures between Northern and Southern states, stating how “*regional differences in demographic behaviors and outcomes influence rates of child marriage*” (Young Lives & NCPCR, 2017). Other researchers have built on the extensive work of Karve to also explain why the pace of fertility decline was quicker in the South than in the North of India. Regional disparities in child marriage and fertility will be explored below in relation to this complicated social factor.

Patriarchal values are less rigid in southern communities when compared to northern communities, and southern women in general “*enjoy greater levels of autonomy and freedom than northern women do in many different aspects of their life*” (Jejeebhoy, 2001; Kazi & Sathar, 2001). Therefore, communities that share a common cultural, religious and linguistic heritage construct their state-land and the divisions of the districts within it. Even in a state with an overall high rate of child marriage, it is likely that some of its districts would have a lower prevalence of child marriages because of their distinct cultural, social or demographic characteristics that set these districts apart from the rest of the state.

Accordingly, with these social factors, it can be assumed that the district-distinct cultural and social practices override educational and economic considerations. This means that although measures directed at improving India’s rural economic situation promoting the continuation of girls’ education can be successful and effective in preventing early marriages in some cases. To eradicate the practice of such marriages the formal law and economic measures have to be accompanied by campaigns of social sensibilization, community awareness and women empowerment.

#### **4.3. “What is the Indian Government doing?”**

India is a young nation; children constitute 39% of the country’s population (Indian Census, 2011). Indian children are acknowledged by policymakers and government institutions as a supreme national asset, therefore they deserve the best in national investment, for their survival, good health, development opportunity, security, and dignity. Over the years, the awareness of children protection has arisen in the Indian public sphere, and state governments have enacted and taken legislative and policy measures to assure opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity (see: *Annex X*). On child marriage, state and national governments have taken measures and implemented policies to eliminate and sanction this practice, many of which have already been mentioned. The more recent initiatives try to address the issue more globally and the Indian Government has undertaken both policy initiatives and assistance programmes aimed at changing social norms and mindsets of communities to prevent child marriages, especially in the rural areas of the state.

Firstly, I wanted to call attention to a recent measure to promote girls’ empowerment and provide young girls with role models established by the Indian Central Government, The

National Bravery Award. The award goes to children who perform outstanding deeds of bravery and selfless sacrifice and are rewarded as a mechanism of public recognition for positive role models. In 2003, HAQ: Centre for Child Rights recommended 5 girls from the Karnal district (Haryana) who “*had stopped two child marriages despite opposition from their community leaders*” (Young Lives & NCPCR, 2017, p. 26). Since then, the conception of 'bravery' was expanded so it would include those actions, several children have received the award for preventing child marriages in their district or local areas (National Commission for Women, Annual Report, 2006, chap. 10).

The National Plan of Action for Children (NPAC) initiated in 2016, is a declaration of foundational investment, strategies and actions to ensure a safe, dignified and fruitful life for all children (MWCD, 2016). The NPAC of 2016 is structured around four key priorities recognized nationally and internationally to make the world a better place for children. These priorities are: “*Right to Survival, Right to Development, Right to Protection and Right to Participation as envisaged in various UN conventions and national policies including the National Policy for Children of 2013*” (MWCD, 2016). Each of these priorities has been further sub-categorized with specific measurable goals and objectives. Child marriage constitutes one of the key concerns of the protection priority area, which is why the Plan includes some strategies to prevent child marriage and promote the protection of children such as:

- “*Public advocacy on value of girl child and ill-effects of child marriage.*”
- *Raise public awareness on PCMA (2006).*
- *Identify and build capacity of community role models (leaders or frontline workers).*
- *Establish and run safe spaces and groups for adolescent girls and boys to discuss about sensitive issues, child marriage and other protection risks*” (MWCD, 2016).

However, even though the plan is meant to serve as a practical expression for commitment to national progress, many have criticized it for delivering “*un-fulfilled promises*” (Singh, 2017). Therefore, the National Plan was not as successful as it was meant to be and the main problem is that child marriage, as it has been proved, is a very difficult, diverse and intersectional issue. Hence, the national measures give a very homogeneous and general response to a very heterogeneous and diverse issue, resulting in a lack of effectiveness and tangible results. That is the reason why, in the previous section, I advocated for state or local

governments plans and initiatives that address more directly the needs and gaps of the districts and rural communities. Such as microfinance, cultural-based education, young girl awards or local training programmes.

Alongside the National Plan and many different programmes promoted by the Union Government, state governments have also elaborated and implemented programmes and policies of their own. As it has been previously argued, state and local governments bring more efficient and direct actions to solve their community's needs (Darjeeling, 2019). Regarding successful state measures, the Kanyashree programme of West Bengal must be highlighted. This particular program was initiated and promoted by the West Bengal government as a “*conditional cash transfer scheme with the aim of improving the status and well being of young girls in rural communities on the brink of leaving school*” (Kanyashree Prakalpa, 2014). The program's main purpose was to keep girls in schools to continue with their education, preventing them from getting married off at a young age. Almost 31 *lakh*<sup>23</sup> girls have benefitted from this scheme since its launch in October 2013 (Young Lives & NCPCR, 2017, p. 26). Kanyashree has been appreciated both nationally and internationally, being shortlisted among “*the best projects for final evaluation by the United Nations Committee of Experts in Public Administration (2014- 2015)*” (Contai Municipality, 2017). Moreover, it was introduced as one of the “*best practices*” at the “Girl Summit 2014” organised by the Department for International Development, UK and UNICEF in London.

Finally, simultaneously with various governmental actions, ONGs, agencies and public centers are developing programmes, actions, studies and reports on child marriage to ameliorate India's situation. I, personally, would like to highlight the action taken by the Nirantar Trust, a center for gender and education focused on education processes as a way to enable women to empower themselves in their everyday lives (Nirantar, 2019, p. 4). The organization is strongly embedded in community-based work that supports “*training, research and advocacy on issues related to education, gender and sexuality*” (Nirantar, 2019, p. 17). As a resource organization, Nirantar understands its role as a bridge between the community and the processes of policy and decision-making at state, national and, even, international levels.

Their approach to these issues is taken from a feminist perspective, whereby they create spaces and processes of teaching-learning that encourage and develop gender equality for

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<sup>23</sup> **Lakh** is a unit in the Indian numbering system equal to one hundred thousand (Cambridge Dictionary, 2021).

women in rural communities. Their work also focuses on child marriages, closely working with grassroots policymakers and organizations. They focus on gender and sexuality issues in young people, especially “*sexually related taboos, stigmas and age-based hierarchies as those are the deepest-seated social norms that young people and young girls confront in their daily lives*” (Nirantar, 2019, p.11). To shake these social norms, Nirantar believes in the “*transformative potential of enabling people to access learning opportunities and building their critical perspectives towards social justice and equity*” (Nirantar, 2019, p.21). Therefore, their efforts are being put into education, formal or non-formal, to highlight inherent disparities based on underlying social structures along with discrimination categories such as “*gender, sexuality, caste, class, age or religion and to critically understand lived realities*” (Nirantar, 2019, p.4). As a resource organization, they have conducted training and workshops on gender and sexuality and their intersections with caste, religion and economic class, for government programs and other agencies (see the conducted training: *Annex XI*). These programs prepare government institutions with the knowledge, skills and capacities necessary in the decision-making process that directly impact young Indian people.

Although many of the measures, schemes and action plans developed in India have been proven to not be as successful as intended, there has been, between NFHS-3 (2005–06) to RSOC (2013–14), a considerable decline in the percentage of women, between the ages 20–24, who were married before the age of 18 from 47.4% to 30.3% over the last decade. Therefore, it can be said that global action by the union government alongside the states’ governments combined with support from grassroots organizations, is what makes an effective and deep transformation in communities and young girl’s lives in India.



## **CHAPTER 5. CONCRETE CASE AND CRITICAL ANALYSIS.**

Child marriage remains an ever-present issue in many regions and districts in India despite laws and state efforts to eradicate the practice. However, a lot of progress has been made in the past decade with an overall reduction of child brides at a 5.5% annual rate (UNICEF, 2019, p.19). Alongside this success, has been a steady rise of awareness and advocacy for child's rights and protections led by NGOs, state governments and legal institutions. The Supreme Court of India, the leading legal institution, has the power to not only implement and enforce laws on states and individuals involved in the practice but also shape the social attitudes and norms that must accompany laws for them to be widely accepted.

The role of judges within a state and its legal system is essential because they are the link between the laws and social reality, with their main responsibility being to bring justice within the limits of the constitutional legal framework. Therefore, their mission focuses on the interpretation of formal laws and social values to manifest a formal conception of justice and apply it to a concrete case. However, sometimes their responsibility to do justice leads them to make decisions in which the morally good prevails to the formal laws. This is what happened in the landmark case *Independent Thought v. Union of India (2017)*, in which the Supreme Court of India declared that sexual intercourse with a minor, even if it was within a legal marriage, was considered rape. This has marked a big step forward in the fight against the sexual exploitation of minors and child brides.

Before the ruling, an exception to Section 375 of the Indian Penal Code (IPC), which defines various circumstances of rape, legally protected men who engaged in sexual relations with girls aged between 15 and 18 (legally considered minors), as long as they were married to them (Bhardwaj, 2011). This exception clause to rape, included in the IPC, allowed the husband to have sexual intercourse with his girl bride without being concerned about her willingness or consent. This clause was an exception to Section 375 itself under which sex with “*a girl under 18-years-old (a child), with or without her consent, was statutory rape*” (Rajagopal, 2017). This marital exception allowed the cruel sexual exploitations of minors in India because it turned an eye to the trafficking of the minor girls in the disguise of early marriages. This situation was especially accentuated in those regions where child marriages are widely accepted and practiced. However, against what the formal law established, the Supreme Court held that the exception clause created an unnecessary and artificial distinction between a married girl and an unmarried girl, taking away the right of a girl wife to her bodily integrity and sexual choice. In the words of Bench of Justices Madan B. Lokur and Deepak Gupta:

*“Human rights of a girl child are very much alive and kicking whether she is married or not and deserve recognition and acceptance”* (cited by Rajagopal, 2017).

With this landmark ruling, the Supreme court is stating that the protection and safeguarding of minors are above formal law, above traditions and above the desires of any man. Moreover, the Bench Judges state the ruling did not create a new criminal offense, in fact, the court merely protected the natural rights of the child and recognized the unconstitutionality of the exception clause. The Court, hence, held that the exception clause to Section 375 of IPC was arbitrary, irregular, impulsive, cruel and violated various articles of the Indian Constitution (Bhardwaj, 2011).

The natural rights of every child and the natural human rights must prevail predominant and formal law conceptions. As the Natural Law theory states, the positive Law brings cause from a ‘superior’ source of law, which is natural law, and the natural rights of human beings are for their natural condition (Atienza, 2018). Therefore, formal laws not only have to be enacted after the natural rights of every human being but also have to protect and promote those rights. In the case that a formal law goes against or violates any of those natural rights, the law should not be applied and the conception of morally good should prevail. That is what the court decision represents, the prevalence of good and what is good for the child against anything else.

The repercussions of this judicial decision are infinite. Within the legal tier, the Supreme Court decision resulted in the passing of a Bill declaring child marriages as ‘*void ab initio*’ by the Haryana Assembly (the unicameral state legislature of Haryana state in India).

Across the social tier, the judicial criminalization of sexual intercourse with the minor bride meant a step forward regarding child rights and women’s rights. This case represents a situation in which many other Indian minor girls find themselves, and it entails a victory for all the child or early brides, feminist activists and advocates of human rights within India (Sinha, 2017). This landmark decision has made its impact and permeated among the social population initiating a social movement fighting for children’s rights and their protection. The ruling had such a strong impact that when, years later, the Justice of the Supreme Court of India, Sharad Bobde, asked in a court hearing: ‘*could sex between a married couple ever be considered rape?*’, he received immediate response and criticism from the general Indian society (Pandey, 2020, p.50). More than 5.000 feminists, rights activists and citizens have criticized Justice Bobde and asked for an apology and to retract those comments with a letter addressed to him

in 2019. Campaigners say “*Justice Bobde's comments are 'extremely problematic' in a country where women have been constantly fighting a regressive mindset that accepts and normalizes sexual violence against them, especially within the home*” (Pandey, 2020, p.50).

In this case, justice transforms into dignity not only for the child but for all the girls in that terrible situation. It implies a transformation of the concept of formal justice to true and actual social justice. The *Independent Thought v. Union of India (2017)* court ruling proves that the issue of child marriage goes beyond the formal law and cannot be solved solely with the implementation of formal laws. The problem of child marriage demands a further solution including elements and principles based on virtuous conduct. Through this case, it can be observed how the morally good transcends formal law and Indian conservative traditions, the critical case of sexual intercourse with a minor within a marriage which was once legal and socially acceptable, is now a marker for the protection of children's rights and freedoms. What is ultimately good for human beings should prevail formal justice, especially when it does not incorporate mechanisms or tools that confront and challenge abuses, cruelty and inequity.

## **CHAPTER 6. CONCLUSIONS.**

Practices like early, child and forced marriage continue to impede the total fulfilment of better health and living conditions for children and young adults worldwide. Child marriage does not only violate the basic and fundamental rights of children, but it also prevents young girls from obtaining proper education, equal opportunities and a better future. Therefore, child marriage ultimately results in the repression of women and girls' development as an individual.

Although child marriage is prohibited by Indian law it is still practiced and imposed on young girls, especially among the rural communities in the northern states of India. This situation reflects a clash between formal law, which prohibits child marriage, and religious and cultural customary law, that accepts and enforces the practice as a method to protect young girls' sexuality. If the formal and written law conflicts with the customary law, usually not written, that is still obeyed by a part of the community, often those who obey the former continue interiorizing, transmitting and sharing that practice, creating more conflicts with the formal legal discipline. As it was previously argued, formal law needs some time to become part of the social practice because in many cases it must overcome an entire system of rules and beliefs that are interiorized by mechanisms much more "fundamental" that proceed with much more immediacy, such as religion. These mechanisms appeal directly to the personal sphere of the individuals and the fundamental beliefs of the community, that is why it is harder to question and eradicate those practice that falls in what is seen as the core values of society.

The practice of early marriages became popular during Medieval times in India. However, efforts to reduce child marriages in India did not start until British colonialism when the CMRA was enacted (1929). Although it was the first time a law introduced a minimum age to marry, the legal provisions did not truly reduce or combat child marriages, so young girls keep being married off in many Indian regions. The real change came in 2006 with the passing of the PCMA that prohibited child marriage and declared it voidable. Nevertheless, this Act does not ultimately declare child marriage illegal, which means that once the child is married and the ceremony ended, the marriage is considered legal, and there is no punishment or sanction to any party.

Child marriage is a predominant practice within rural areas, especially affecting girls from poor economic backgrounds. The analysis of the main aspects and elements of child marriage, lead to conclude that action and response mechanisms should be promoted combining institutional and eco-social efforts. Local and state governments can reach the

communities directly and give a response to their needs more effectively. Child marriage also requires an intersectional response in which economic and social policies must be enforced. For instance, campaigns on boarder education, social sensibilization, community awareness and women empowerment have proven to be the most effective. The intersectionality of child marriage corresponds to the need for global response by the union government alongside the states' governments combined with support from grassroots organizations. These efforts could lead to an effective and deep transformation in communities and young girl's lives in India.

However, India is at crossroads. On the one hand, a modern and global, increasingly expanding section of the population is questioning core values and norms of society, especially those violating the natural rights of every human. While, on the other hand, a conservative, historically rooted formation is fighting back. It is hard to anticipate which group will have the last word and persuade the Indian society as far as the gender power affair is concerned. That is why, in this polarized context, the formal law and the traditional consuetudinary law should not be seen as two separate sets of norms. Formal law has an important role in promoting social change, but it is crucial to spread this change in society that, at the same times, requires the cooperation of ideas and traditional legal mechanisms.

Therefore, the law is a strong agent of social change, but ineffective by itself. The issue of child marriage cannot be solved only at the level of formal law, it requires to go further into the core moral principles of Indian communities. In order to achieve this, judges have an important role to bring equity and advocating for moral good over formal or consuetudinary law. Moreover, on the institutional level, the Indian administrations need to develop cross-sectional interventions that address the different drivers and effects of child marriage. However, nowadays, these interventions are not being implemented on the scale that is needed and with the detail required by the different communities within the Indian states.

Going further into the problem, it is not enough to bring action into eradicating child marriages. Due to the high number of women affected by early marriages, the Indian administration must find a way to help them. As Kriti Baharti, an Indian activist and public defender of children' rights said, "*Child marriage is like a disease: It's important to prevent it, but when so many are infected, you have to find a way to cure them.*". Therefore, government and institutional action should also work on the situation of child wife's and early mothers.

The fight against child marriage in India is an ongoing battle, especially now that with COVID-19 the child marriage cases among Indian communities are rising again (Pathak & Frayer, 2020). The prevalence of forced early marriages reinforces systemic gender inequality globally, ripping away young girls' opportunities for education, economic independence, empowerment and denying their childhood. The division between formal law and regional cultural norms results in the continuity of early marriages and exposes the ineffectiveness of progressive laws in India. It is the responsibility of the governmental institutions and the international community to protect young girls and guarantee their right to an education, to their childhood and a legitimate future.

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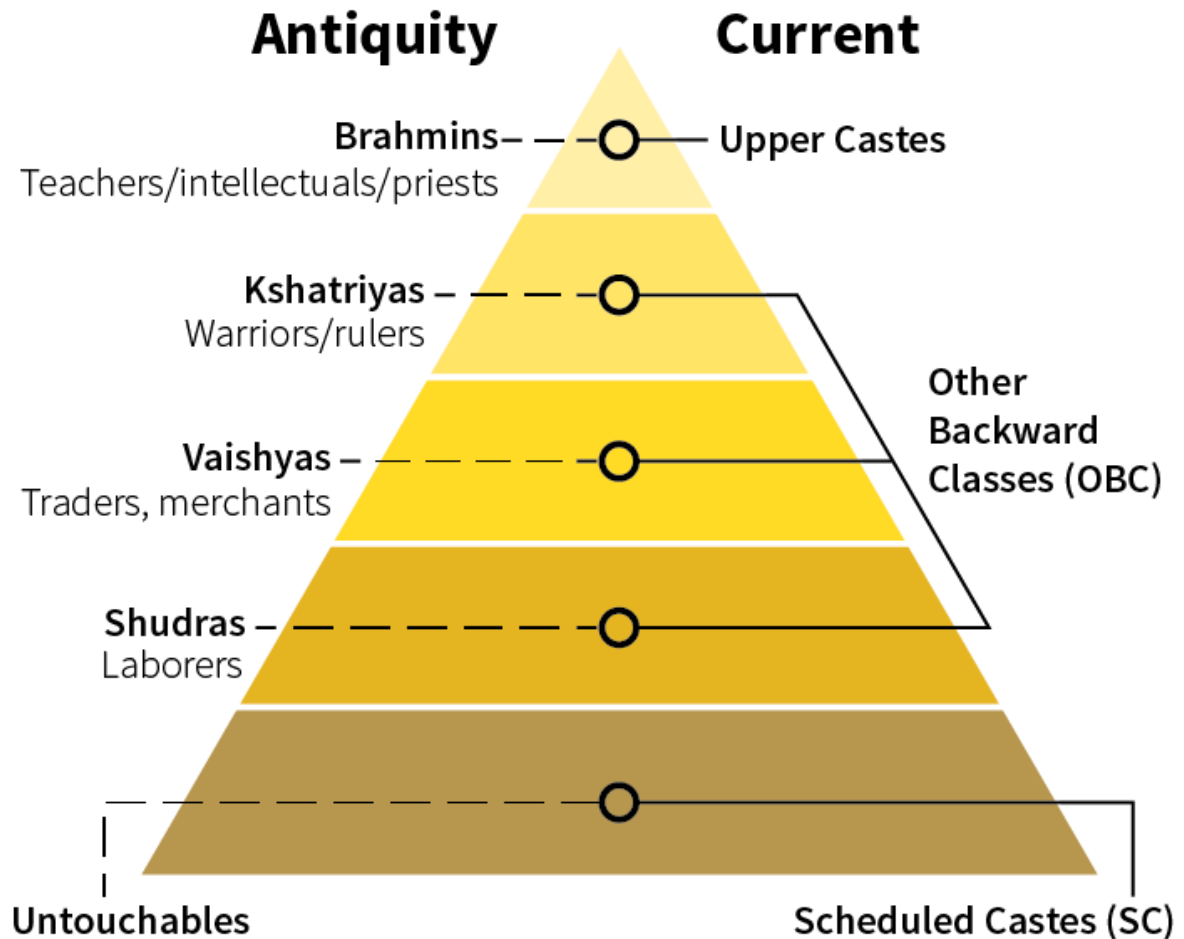
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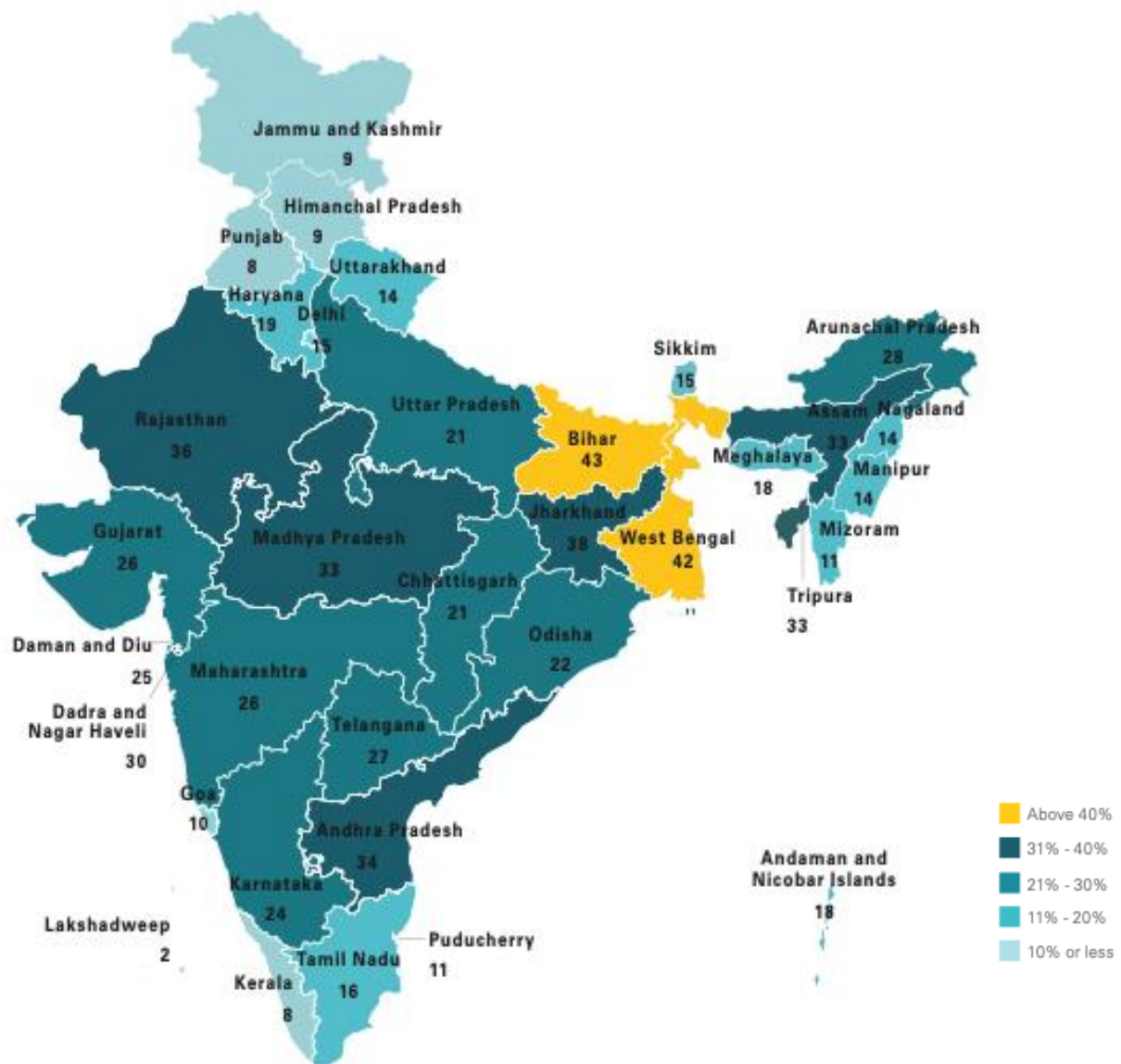
## CHAPTER 8. ANNEXURES.

**ANNEX I.** The Indian caste system: traditional varnas and the actual castes.



Source: Reuters Graphics, *Caste Politics*, 2014. Available at: <http://fingfx.thomsonreuters.com/gfx/rngs/INDIA-ELECTION/010031Y54EE/index.html>

**ANNEX II.** Map of Indian states according to percentage of women aged 20 to 24 years who were first married or in union before turning 18-years-old, by state or union territory in 2019.



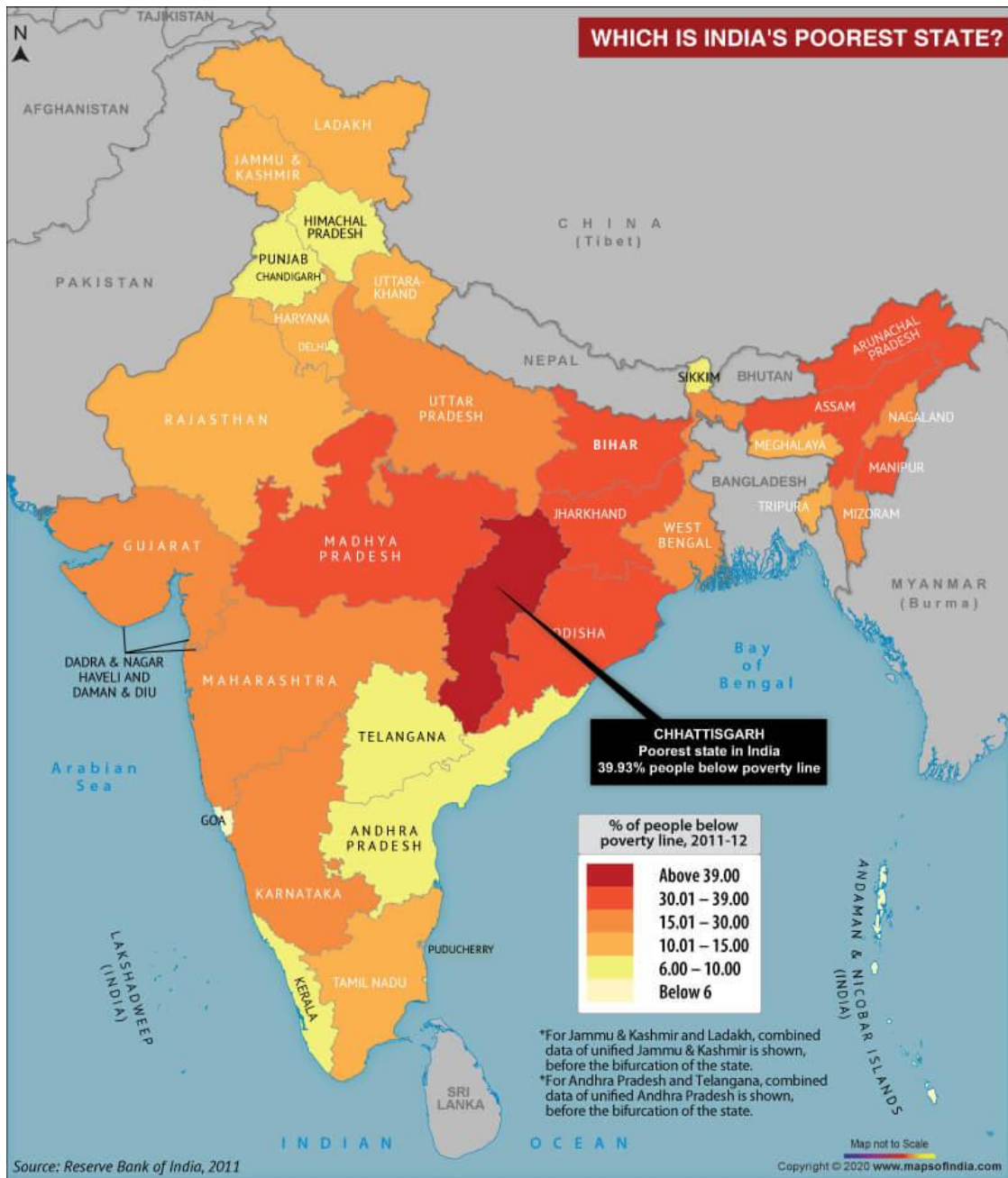
Source: UNICEF, *Ending Child Marriage: A profile of progress in India*, 2019, p. 9.

**ANNEX III.** List of 10 poorest Indian states according to the percentage of people below the poverty line.

<b>S. N°.</b>	<b>State / Union Territory</b>	<b>% of People Below Poverty Line, 2011-12</b>
1	Chhattisgarh	39.93
2	Jharkhand	36.96
3	Manipur	36.89
4	Arunachal Pradesh	34.67
5	Bihar	33.74
6	Odisha	32.59
7	Assam	31.98
8	Madhya Pradesh	31.65
9	Uttar Pradesh	29.43
10	Dadra & Nagar Haveli and Daman & Diu	28.79

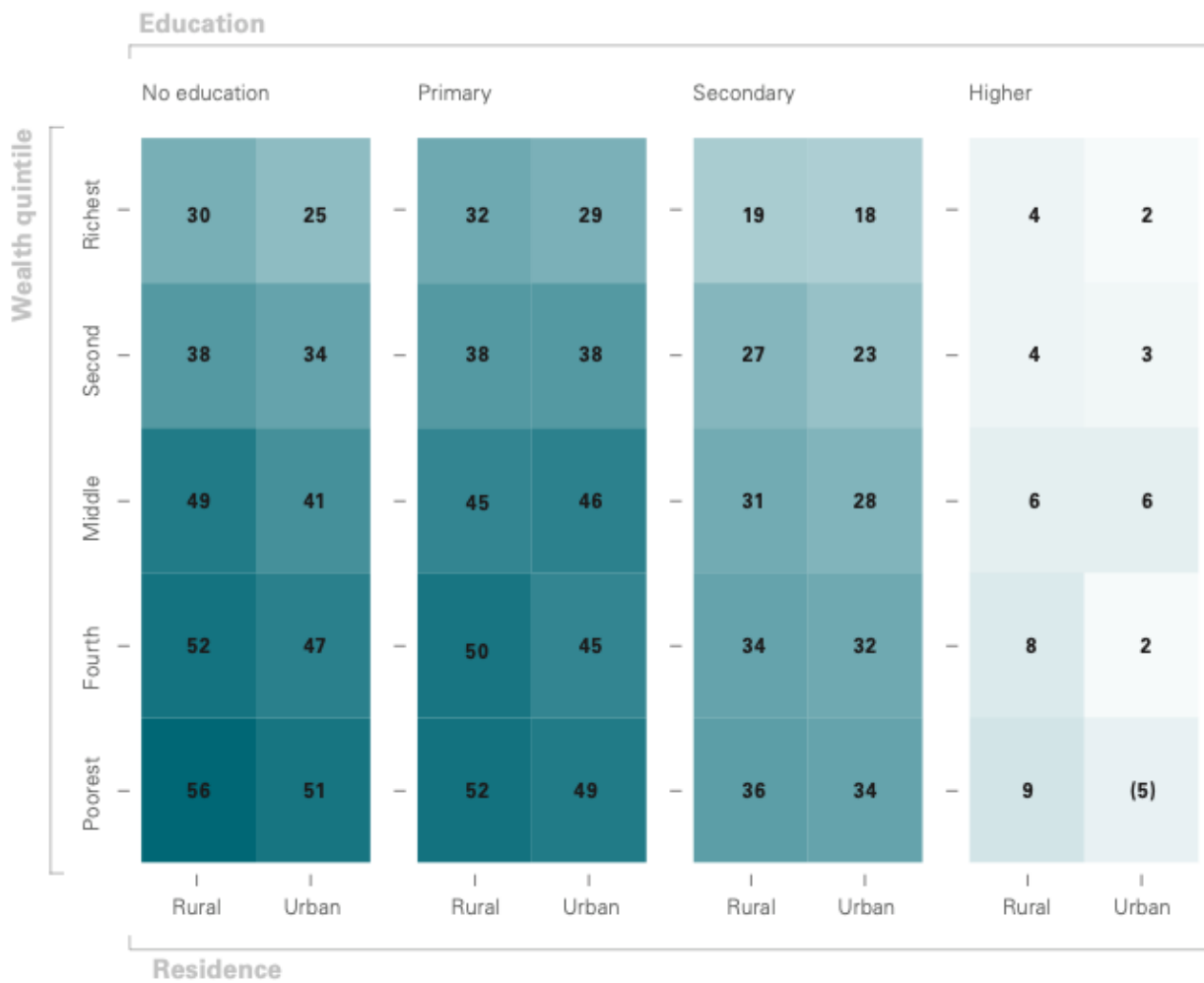
Source: Maps of India, *Which is India's poorest state?*. 2020. Available at: [www.mapsofindia.com/answers/states/which-is-the-poorest-state-in-india/](http://www.mapsofindia.com/answers/states/which-is-the-poorest-state-in-india/)

**ANNEX IV.** Map of Indian states according to the percentage of people below the poverty line.



Source: Maps of India, *Which is India's poorest state?*. 2020. Available at: [www.mapsofindia.com/answers/states/which-is-the-poorest-state-in-india/](http://www.mapsofindia.com/answers/states/which-is-the-poorest-state-in-india/)

**ANNEX V.** Percentage of women aged 20 to 24 years who were first married or in union before age 18, by education, wealth quintile and residence.



Source: UNICEF, *Ending Child Marriage: A profile of progress in India*, 2019, p. 11.

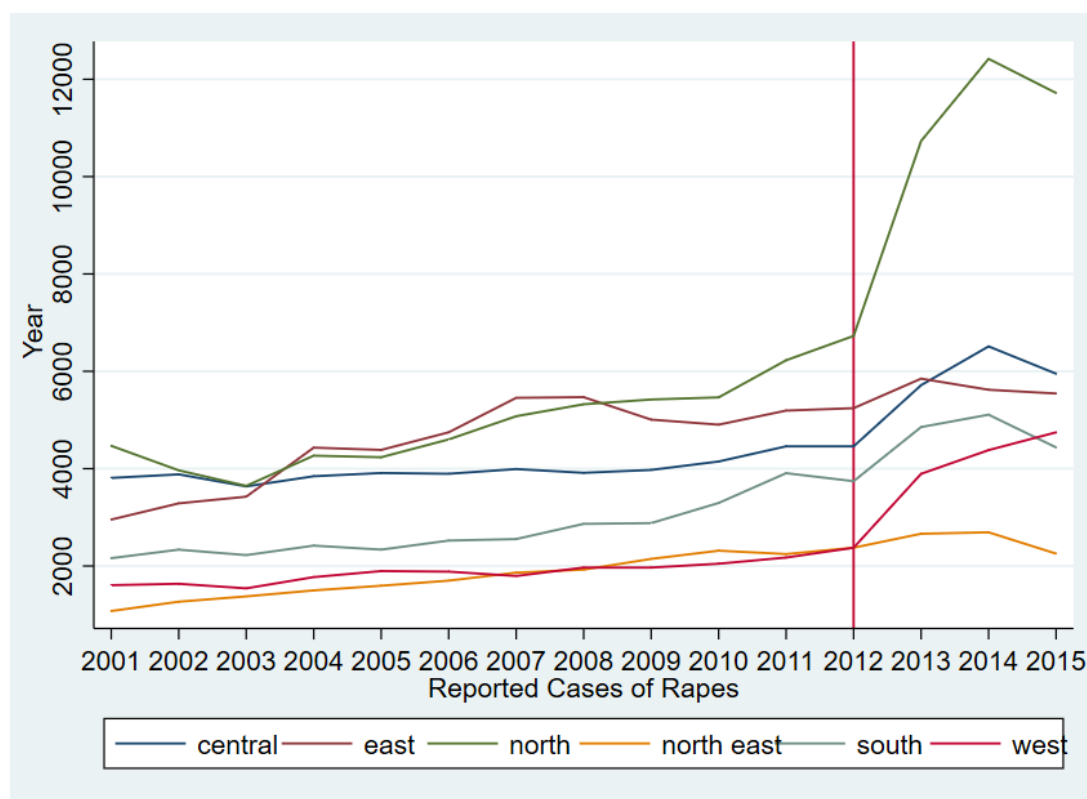
**ANNEX VI.** Table of Indian population according to religious groups and communities.

RELIGION	Population (2011) %	Population	Growth (2001 – 2011)
Hinduism	79.80%	966,257,353	16.8%
Islam	14.23%	172,245,158	24.6%
Christianity	2.30%	27,819,588	15.5%
Sikhism	1.72%	20,833,116	8.4%
Buddhism	0.74%	8,442,972	6.1%
Jainism	0.46%	4,451,753	6.1%
Other / not specified	0.90%	10,805,037	n/a

Source: [https://censusindia.gov.in/census\\_data\\_2001/census\\_data\\_finder/c\\_series/population\\_by\\_religious\\_communities.htm](https://censusindia.gov.in/census_data_2001/census_data_finder/c_series/population_by_religious_communities.htm)

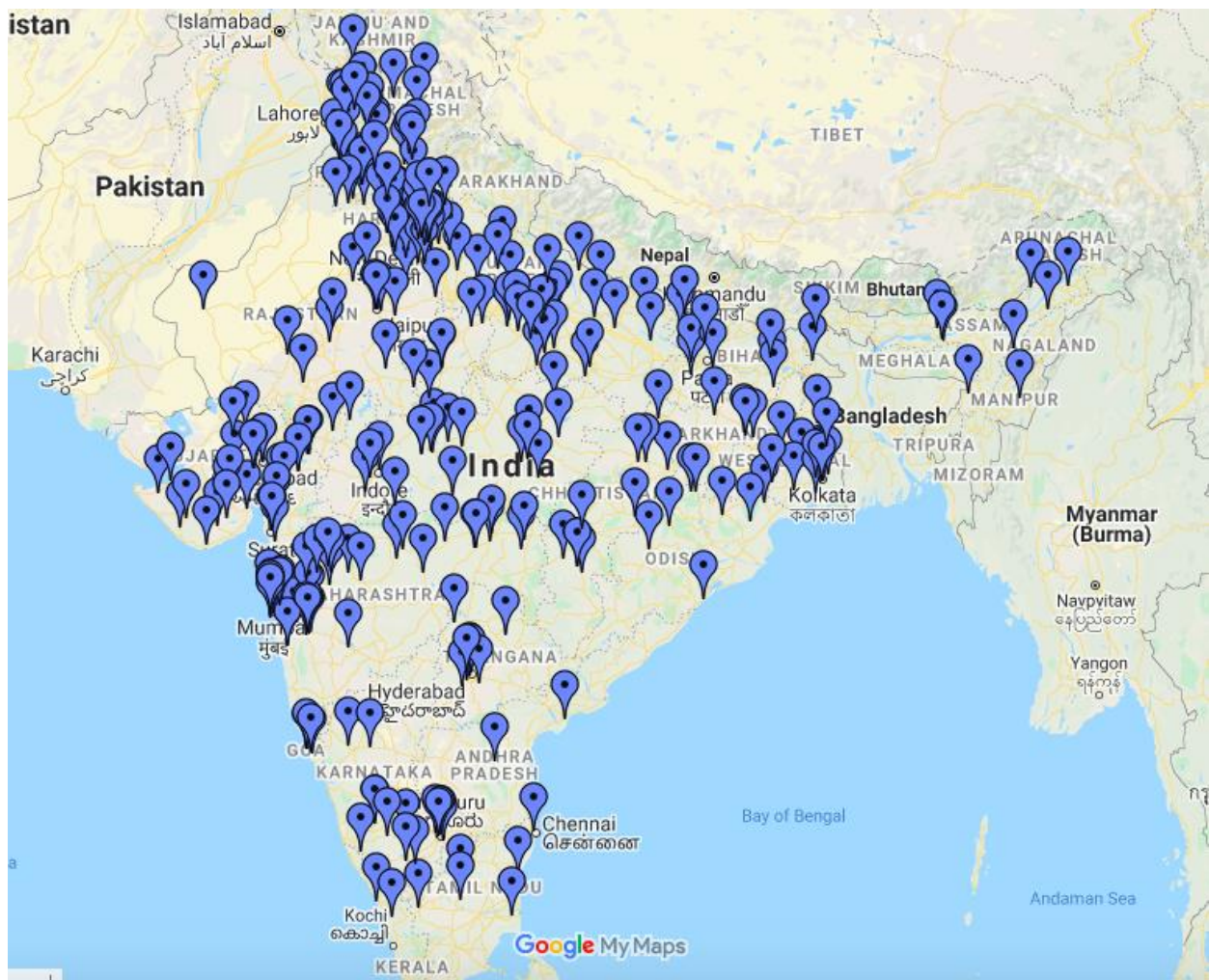
Source: <https://www.census2011.co.in/religion.php>

**ANNEX VII.** Region-wise break up of reported cases of rape over 2001-2015.



Source: National Crimes Records Bureau (NCRB), 2016. Available at: <https://ncrb.gov.in/en/search/node/Rape>

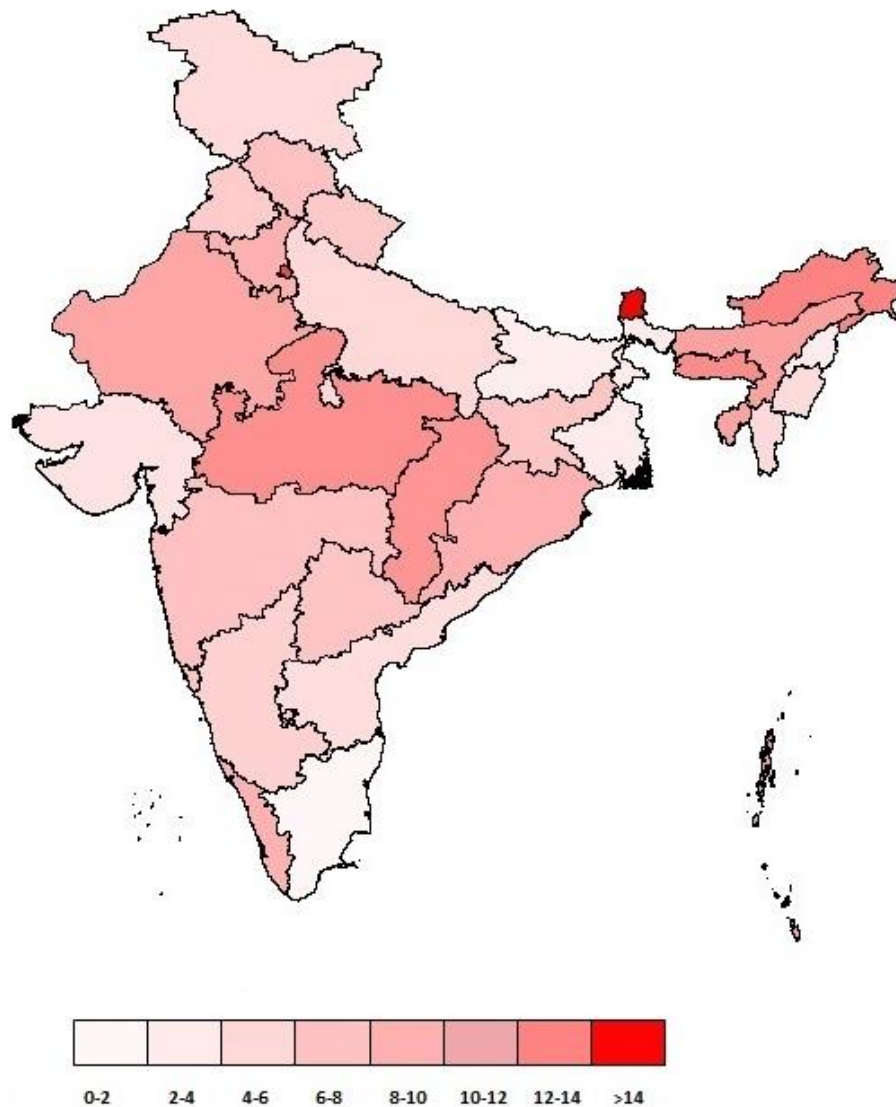
**ANNEX VIII.** Map of all sex-crimes reported on national news since 1<sup>st</sup> of January 2013.



Source: Google Maps, *Sex-crime map of India*, 2019. Available at: <https://www.google.com/maps/d/u/0/embed?mid=ICLRiKtC3wb4hmRQUIT-7jGqswU4&msa=0&hl=en&ie=UTF8&t=m&ll=23.160562999999999%2C82.08984400000001&spn=28.049468%2C36.210938&z=5&output=embed>

## ANNEX IX. Heat Map of Reported Rape Cases, 2016.

Reported Rape Cases , 2016 (per 100,000 of the Population)



Source: *National Crimes Records Bureau (NCRB)*, 2016. Available at: <https://ncrb.gov.in/en/search/node/Rape>



## **ANNEX X. Policy and Legislative Framework for Children in India (Key Milestones).**

### **Policies**

- National Policy for Children, 1974
- Promotion and adoption of International Year of the Child (IYC), 1979
- National Policy for Education, 1986
- Adoption of 1990s' World Child Survival and Development Goals, 1990
- Accession to UN CRC, 1992 • National Nutrition Policy 1993
- National Health Policy, 2002
- National Charter for Children, 2003
- National Plan of Action for Children, 2005
- National Policy for Children 2013
- National Early Childhood Care and Education (ECCE) Policy 2013
- National Early Childhood Care and Education (ECCE) Curriculum Framework 2014
- India Newborn Action Plan 2014

### **Legislations**

- Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act, 1994
- Commission for Protection of Child Rights Act, 2005
- Prohibition of Child Marriage Act, 2006
- Food Safety and Standards (FSS) Act, 2006
- The Right of Children to Free and Compulsory Education Act, 2009
- The Protection of Children from Sexual Offences Act, 2012
- National Food Security Act, 2013
- Juvenile Justice (Care and Protection of Children) Act, 2015
- The Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016
- Child Labour (Prohibition and Regulation) Amendment Act, 2016

**ANNEX XI.** Table of Training or Workshop conducted by Nirantar in 2018 and 2019.

Sl. N°	Training/workshop conducted	Organization location	Dates	N° participants
1.	Gender and Sexuality Training	Mahita, Hyderabad	18th 19th April, 2018	30
2.	Teacher Training on Gender and Sexuality	Sardar Patel Vidyalaya, New Delhi	27th June, 2018	40
3.	Teacher's Training on Literacy and education pedagogy	Vanangna, Chitrakoot	12th July to 16th Jul, 2018	15
4.	Gender Training	Jan Sahas, Dewas, Bhopal	23rd to 25th July, 2018	40
5.	Gender and Sexuality Training	Sardar Patel School, New Delhi	3rd and 4th August, 2018	35
	Gender and sexuality training with B.EL.Ed students	Gargi college, University of Delhi, New Delhi	26th September 2018	40
	Gender training	Tata Steel, Orissa	10th to 11th January 2019	30
	Basic Gender Training	Sampark, Varanasi	5th to 7th February, 2019	100
	Gender and Sexuality training	Room to Read, New Delhi	28th March 2019	25

Source: Nirantar, *Annual Report 2018-19*, 2019, pp. 21-22. Available at: <http://www.nirantar.net/uploads/report/annual-report-2018-19-0372487001584609345.pdf>