

RIGHTS VERSUS PROTECTION: LEGAL AGE MARRIAGE, CONSENT TO SEX, AND CONSENT TO MEDICAL TREATMENT

THE LEGAL AGE OF MARRIAGE

There is near-universal political commitment to ending traditional child marriage in Asia and the Pacific, and almost all countries have enacted legislation prohibiting marriage before the age of 18 years. However, laws in seven countries (Afghanistan, Iran, Pakistan, Democratic People's Republic of Korea (DPR Korea), Timor-Leste, Nauru and Papua New Guinea) still allow the marriage of girls less than 18 years (table 3). A further six countries have exemptions (usually on religious or cultural grounds) that allow the marriage of girls before the age of 18, some as young as 12 years or younger. There are considerable differences in the legal age of marriage between girls and boys, reflecting entrenched gender norms that drive the substantial gendered disparities in rates of child marriage in this region.

Understanding the different forms of early marriage and union in the context of adolescent development and agency, is critical to ensuring the implementation of child marriage legislation does not cause harm.

Formal marriage is a potentially life-long legal contract. Traditional, often arranged, child marriage has well documented harmful impacts on adolescents' health and well-being and future economic prospects. It generally does not reflect the free will or agency of adolescents, but is coerced or forced in the context of limited autonomy and power. It also disproportionately impacts on girls, and therefore fundamentally reflects gender inequality, girls' lower status, and entrenched discrimination. Legislation to prohibit forced marriage before the age of 18 years for both girls and boys is necessary to prevent the harms associated with traditional child marriage, and to stimulate action to address the sociocultural and gendered drivers of non-consensual early marriage.

However, not all adolescent unions are forced or coerced. There is increasing recognition, even in settings where traditional child marriage remains prevalent, that many adolescents choose to enter into consensual formal marriages or less formal romantic co-habitation relationships. These consensual unions are often between peers of a similar age and reflect agency on the part of young people with respect to their own sexuality.

Treating all unions under the age of 18 years as forced and invalid can have

harmful consequences. In settings where arranged, traditional arranged marriage is prevalent and there is strong sociocultural disapproval of sex outside of marriage, child marriage legislation may be used to punish adolescents who enter into self-arranged love marriages or unions. Rigid enforcement of legislation may also prevent adolescents in consensual formal or informal unions in other settings from accessing SRH and other services for fear of legal consequences.

Unintended consequences of the law: In the majority of cases in India where the child marriage legislation is being enforced, it is being used by parents to prevent consensual adolescent relationships and marriages that they do not approve of. This has included prosecution of boys for kidnapping and rape under the Penal Code and Protection of Children for Sexual Offences Act, and forced detention of daughters (as mandated for child victims of sexual assault).

Source: Mehra 2019⁴⁶

TABLE 3. CHILD MARRIAGE LEGISLATION IN ASIA AND THE PACIFIC

Country	Legal age of marriage girls	Legal age of marriage boys	Exemptions and exceptions
Afghanistan	16	18	15 for girls with permission from father or a judge
Bangladesh	18	21	Religious personal status laws apply, e.g. 15 for Muslim girl
Bhutan	18	18	
India	18	21	Some exceptions were taken to court under Mohammedan Law or sharia law
Iran	13	15	Marriage before puberty with permission from the guardian and a judge and if considered in the ward's interest
Maldives	18	18	
Nepal	20	20	
Pakistan	16	18	A marriage contracted after the attainment of puberty and before the age of 16 years for females and 18 for males is valid under Muslim law.
Sri Lanka	18	18	16 with parental consent or court order 12 for girls for Muslim marriages; under 12 for girls in Muslim marriage with authorisation of Muslim court;
China	20	22	
DPR Korea	17	18	

Mongolia	18	18	Under 18 if girl or boy declared a person with full legal capacity
Cambodia	18	18	16 with parental consent and if other party is at least 18;
Indonesia	21	21	19 with parental consent. Lower with a court order
Lao PDR	18	18	15 under special circumstances 18 for males and females with parental consent non-Muslim marriages; 16 for girls if granted by the chief minister with
Malaysia	21	21	parental consent for non-Muslim marriages; 16 for girls in Muslim marriages; under 16 for girls with permission of sharia court Muslim marriages
Myanmar	18	18	18 with parental consent; 15 (puberty) for Muslim marriages
The Philippines	21	21	in Mindanao; 12 for girls who have reached puberty with order of sharia court for Muslim marriages
Thailand	20	20	Under 20 with parental consent; under 17 with court order
Timor-Leste	17	17	16 with parental consent or authorisation from the civil registrar
Viet Nam	18	20	
Federated States of Micronesia	18	18	16 for girls with parent consent (Kosrae, Chuuk, Pohnpei states;
Fiji	21	21	18 with parental consent or commissioner / magistrate consent
Kiribati	21	21	17 with parental consent or licence provided by a minister
Marshall Islands	18	18	
Nauru	18	18	
Papua New Guinea	16	18	14 for girls and 16 for boys with court order
Samoa	19	21	16 for girls and 18 for boys with parental consent
Solomon Islands	18	18	15 with parental consent or judge / magistrate consent
Tonga	18	18	15 with parental consent
Tuvalu	21	21	18 with parental consent or judge / magistrate consent
Vanuatu	21	21	16 for girls and 18 for boys with parental consent

Sources: UNFPA 2020289

Much of the regional and global response to child marriage frames early marriage in the context of forced child marriages. However, there needs to be a distinction between an early consensual union between peers of a similar age, non-consensual union (at any age), and child marriage (marriage of very young adolescents who developmentally do not have the capacity to consent to marriage). There also needs to be recognition, reflected in legislation, that in some cases, such as early pregnancy, it may be in the best interests of the young person to marry. Currently, 12 countries in the region permit marriage of girls and boys under the age of 18 years with parental consent, or permission from an authority (typically a magistrate or minister), often on grounds such as pregnancy, and with the consent or assent of the young person.

Eleven countries in the region have the minimum age of marriage above 18 for females, extending to the age of 21 in seven countries. Whilst these laws have the intention of protection, a higher age of marriage may have unintended consequences in contexts where premarital sex, informal unions and single mothers are stigmatized. Provision of education and employment opportunities to young women are likely to be more effective ways to delay marriage, compared to legislative approaches.

THE LEGAL AGE OF CONSENT TO SEX

Unlike marriage, there is no international agreement on the minimum legal age of consent to sex. Instead, there is recognition of the need to protect children from sexual abuse while also respecting the rights and evolving capacity of young people to self-determination. Legislation concerning age of consent to sex varies in the region (between 12-19 years) and differs for boys and girls within the same country in some settings (table 4). In 15 countries, consensual same-sex activity is criminalized. Some countries have a lower age of consent (China, Philippines) or allow exemptions for consensual sex between young people that are close in age (Vietnam, Timor Leste, Marshall Islands and Nauru).

In five countries, premarital sex is prohibited and criminalised, creating a significant barrier for unmarried young people to access SRH information and services.



TABLE 4. LEGAL AGE OF CONSENT TO SEX AMONG LMIC IN ASIA AND THE PACIFIC

Country	Legal age consent to sex		Legal age consent to same sex	
	Female	Male	Female	Male
Afghanistan	After marriage	After marriage	Illegal	Illegal
Bangladesh	14	Not specified	Not specified	Illegal
Bhutan	18	18	Not specified	Illegal ^b
India	18	18	18	18
Iran	After marriage	After marriage	Illegal	Illegal
Maldives	After marriage	After marriage	Illegal	Illegal
Nepal	18	18	Not specified	Not specified
Pakistan	16 (After marriage)	After marriage	Illegal	Illegal
Sri Lanka	16	16	Illegal	Illegal
China	14	14	14	14
DPR Korea	15	Not specified	Not specified	Not specified
Mongolia	16	16	16	16
Cambodia	15	15	15	15
Indonesia ^a	18	18	Not specified	Not specified
Lao PDR	18	18	18	18
Malaysia	16 (After marriage)	After marriage	Illegal	Illegal
Myanmar	16	16	Not specified	Illegal
The Philippines	12	12	12	12
Thailand	15	15	15	15
Timor-Leste	16 or 14 if not taken advantage of	16 or 14 if not taken advantage of	16 or 14 if not taken advantage of	16 or 14 if not taken advantage of
Viet Nam	16 Sex between 13-15 year old adolescents is not an offence.	16 Sex between 13-15 year old adolescents is not an offence.	16 Sex between 13-15 year old adolescents is not an offence.	16 Sex between 13-15 year old adolescents is not an offence.
Federated States of Micronesia	16 to 18	16 to 18	Not specified	Not specified
Fiji	16	16	16	16
Kiribati	15	15	Not specified	Illegal
Marshall Islands	16 or 14 close in age			
Nauru	16 or 13 close in age			
Papua New Guinea	16	16	Not specified	Illegal
Samoa	16	16	16	Illegal
Solomon Islands	15	15	Illegal	Illegal
Tonga	15	15	Not specified	Illegal
Tuvalu	15	15	Not specified	Illegal
Vanuatu	15	15	18	18

Source: UNFPA 2020^a, and ILGA 2019^b.

In some settings, governments have also introduced, or are considering introducing, legislation to increase the legal age of consent to sex to 18 years or higher, similar to the legal age of marriage. In India, for example, the Protection of Children from Sexual Offenses Act (2012) criminalizes all sexual activity of young people under the age of 18 years. It requires mandatory reporting by all health providers. This includes mandatory reporting of pregnant adolescents as victims of sexual abuse, even if sex was consensual and with a boy of a similar age. Such actions are commonly framed around ‘protecting’ girls from early pregnancy and sexual violence, however, they are firmly rooted in traditional, conservative attitudes that seek to prohibit sex outside of marriage and limit girls’ agency with respect to their own sexuality and SRH. Increasing the legal age of consent to sex can have a number of harmful consequences (box 5).

BOX 5. IMPACTS OF HIGH LEGAL AGE OF CONSENT

- High age of consent to sex **fails to recognise the agency of adolescents**, including girls, with respect to their sexuality and SRH, and does not reflect normal adolescent development, or the reality of adolescents’ lives
- Punitive laws and other actions to prevent adolescents from engaging in sexual activity are **not effective at reducing premarital sex**, but rather increase the likelihood of risky behaviour and poor SRH outcomes
- Criminalising and stigmatising consensual sex between young people of a similar age and/or premarital sex **creates a substantial barrier to accessing SRH information and services**, that disproportionately impacts on girls and contributes to poor SRH outcomes such as unintended pregnancy, unsafe abortion, and STIs
- Stigmatising (or criminalising) adolescent sexual activity may **contribute to child marriage**, as young people may seek (or be coerced into) marriage as a way of legitimising an intimate relationship and/or avoiding social or legal sanctions

Source: Petroni 201944 Girls Not Brides 2019.49

The Convention on the Rights of the Child recognizes the evolving capacity and maturity of adolescents, and their agency with respect to their sexual lives. In particular “States should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity.” Therefore, the purpose of the legislation is to protect children from sexual abuse and exploitation, and to protect all young people (regardless of age or marital status) from sexual violence, while also respecting the capacity of young people of similar ages to consent to non-exploitative sexual activity. **Legislation should not criminalize consensual sexual activity or romantic relationships between young people less than 18 years who are similar in age (i.e. less than three years difference), nor criminalize behaviour or discriminate on the basis of sexual orientation or gender identity.**

LEGAL AGE OF CONSENT TO MEDICAL TREATMENT, INCLUDING SRH SERVICES

As the age of first marriage increases and more young people engage in sex before marriage, action is required to remove legislative, regulatory and other barriers that limit access to comprehensive SRH information and services – for both married and unmarried young people. In most countries in the region, the legal age of consent to medical treatment is 18 years. Prior to this, young people require the consent of a parent or guardian to access health services, including SRH services. In some settings, married girls may also require the consent of their spouse, religious leader, or other community authority. Such requirements violate young people's right to privacy and confidentiality, and create substantial barriers to accessing SRH services. In the context of significant sociocultural disapproval of premarital sex and/or use of SRH services (such as contraception), young people may not be willing or able to obtain parental consent. Such barriers disproportionately impact on young people who are disengaged from or lack family support, and who are most at risk of poor SRH outcomes.

The Committee on the Rights of the Child calls for legislation, policies and regulations to recognize and respect evolving capacities during adolescence, and adolescents' increasing agency to take responsibility and exercise their rights. This includes their right to confidential and time-sensitive SRH information and services (see panel below) without limitations of parental consent or age restrictions. Reflecting this, many countries in the region have introduced legislation or regulations that allow access to SRH services without parental consent. A number of countries have enacted, or are proposing, legislation to allow adolescents to access HIV testing independently of their parent or guardian, including Afghanistan, Bangladesh, Cambodia, Fiji, Iran, Lao PDR, Marshall Islands, Papua New Guinea, the Philippines, Micronesia, Sri Lanka, Thailand and Viet Nam. (table 5). There are fewer examples of national guidance or legislation removing parental consent for other SRH services, such as contraception. Where laws or regulations exist that support provision of services to 'mature minors', they may not be implemented by health providers who fear ramifications from parents or community, or who are unaware of their legal obligations. This is particularly true in the absence of clear guidance around adolescents' legal rights to access SRH services.

TABLE 5. LEGAL AGE OF CONSENT TO HIV TEST

Country	Legal age consent to HIV test
Afghanistan	16
Bangladesh	Under 18 for adolescents at risk
Iran	15 for boys 13 for girls if mature minor
Nepal	16
Sri Lanka	16
Cambodia	Under 18 if in best interests of the young person
Lao PDR	14

The Philippines	15, under 15 if high risk with social worker/health worker
Thailand	15
Viet Nam	16
Federated States of Micronesia	Over 14
Fiji	Under 18 if mature minor
Marshall Islands	14
Papua New Guinea	12
Vanuatu	Under 18 if mature minor

BOX 6. CRC GENERAL COMMENT NO. 20 ON THE IMPLEMENTATION OF THE RIGHTS OF THE CHILD DURING ADOLESCENCE. 2016⁵⁰

39. States should review or introduce legislation recognizing the right of adolescents to take increasing responsibility for decisions affecting their lives. The Committee recommends that States introduce minimum legal age limits, consistent with the right to protection, the best interests principle and respect for the evolving capacities of adolescents. For example, age limits should recognize the right to make decisions in respect of health services or treatment, consent to adoption, change of name or applications to family courts. In all cases, the right of any child below that minimum age and able to demonstrate sufficient understanding to be entitled to give or refuse consent should be recognized. The voluntary and informed consent of the adolescent should be obtained whether or not the consent of a parent or guardian is required for any medical treatment or procedure. **Consideration should also be given to the introduction of a legal presumption that adolescents are competent to seek and have access to preventive or time-sensitive sexual and reproductive health commodities and services.** The Committee emphasizes that all adolescents have the right to have access to confidential medical counselling and advice without the consent of a parent or guardian, irrespective of age, if they so wish. This is distinct from the right to give medical consent and should not be subject to any age limit.

40. The Committee reminds States parties of the obligation to recognize that persons up to the age of 18 years are entitled to continuing protection from all forms of exploitation and abuse. It reaffirms that the minimum age limit should be 18 years for marriage, recruitment into the armed forces, involvement in hazardous or exploitative work and the purchase and consumption of alcohol and tobacco, in view of the degree of associated risk and harm. States parties should take into account the need to balance protection and evolving capacities, and define an acceptable minimum age when determining the legal age for sexual consent. **States should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity.**

Key actions to ensure a balance between protecting adolescents from harm and respecting their SRH rights and agency

Adolescents and their agency need to be at the centre of efforts to develop and implement legislation that impacts on their lives.

BOX 7. KEY ACTIONS

- Ensure age of consent to sex is set an age that recognizes many young people commence sex during adolescence, so that consensual sexual activity between adolescents who are similar in age is not criminalized
- Enact legislation to prohibit forced marriage and remove exemptions that allow non-consensual child marriage (<18 years)
- Careful enforcement of age of marriage legislation to recognize the agency of older adolescents of similar age to consent to marriage or union under the age of 18
- Enact legislation to prevent child sexual abuse and exploitation
- Enact legislation to prevent sexual violence at all ages, including within marriage
- Decriminalize consensual sex between young people close in age (<3 years)
- Decriminalize consensual same-sex sexual activity
- Remove mandatory requirements for parental consent and ensure legal presumption of competency to access preventive and time-sensitive SRH counselling, commodities and services
- Develop clear policy, regulations and implementation guidance to support health workers to provide confidential SRH services to adolescents

