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A Religious, Cultural, and Economic Overview of Arranged Marriages in India and Saudi Arabia

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Part I: Introduction

The general act of arranging someone’s marriage is not a practice that inherently violates human rights. However, certain practices associated with arranged marriages are more prone to human rights violations. Such practices are susceptible to human right violations due to the highly oppressive influences that form them. These repressive influences are expressed through: India’s non-enforcement of its own marriage laws and women’s human rights, and Saudi Arabia’s complete absence of codified marriage laws and its failure to implement women’s human rights. The lack of both a de-jure and de-facto realization of human rights contributes to the confirmation of discriminatory marriage practices in India and Saudi Arabia.

In India, child marriages and dowry deaths continue to run rampant in spite of many laws protecting against these criminal acts. In Saudi Arabia, the system of male guardianship coupled with the absence of codified laws generates a recipe that is conducive to legitimizing repressive conduct associated with arranged marriages. The unification of these practices with the act of arranging a marriage violate human rights because: (1) they undermine a female’s capacity to consensually and freely choose a partner for marriage and (2) inevitably lead to social and economic exploitation.

In order for India and Saudi Arabia to comply with their human rights obligations established in the ratification of The Convention on the Elimination of all Forms of
Discrimination Against Women (CEDAW),\(^1\) the Universal Declaration of Human Rights (UDHR),\(^2\) the International Covenant on Civil and Political Rights (ICCPR, except Saudi Arabia),\(^3\) the Convention on the Rights of the Child (CRC),\(^4\) and the International Covenant on


Economic, Social and Cultural Rights (ICESCR, except Saudi Arabia),\textsuperscript{5} each State must take legal action to rectify their cultural discriminatory practices that have become integrated with arranged marriages and understand that enacting and enforcing legislation works in tandem.

Part II of this article will begin by discussing CEDAW and other international instruments that provide universal standards with respect to marriage and women’s human rights. This section will provide an overview of India’s legal system, primarily focusing on the principles set forth in its Constitution,\textsuperscript{6} enacted legislation and case law relating to marriage. This segment will also assess whether India’s obligations under CEDAW have been met by examining India’s CEDAW report. Followed by Saudi Arabia’s legal system, which includes the Basic Law of Governance (Constitution),\textsuperscript{7} and Shari’ah Law.\textsuperscript{8} This section will further determine whether Saudi Arabia’s legal system complies with the minimum standards set forth in CEDAW by analyzing Saudi Arabia’s CEDAW report and other international instruments that Saudi Arabia has ratified.


\textsuperscript{6} \textit{INDIA CONST.} (1950)

\textsuperscript{7} \textit{SAUDI ARABIA CONST.} at ch. 1 [hereinafter \textit{SA Constitution}].

\textsuperscript{8} \textit{Id.} at art. 8.
Part III of this essay will address how the religious, cultural, and economic practices that drive India's and Saudi Arabia's respective social systems create the unabating cycle of human right violations associated with arranged marriages.

Part IV of this paper will discuss the incompatibility between CEDAW’s non-discriminatory objectives, and India’s and Saudi Arabia’s social structure that buttress inequality between men and women.

**Part II: Laws Governing Marriage**

**A. International Laws Governing Marriage**

India and Saudi Arabia have signed and ratified CEDAW,\(^9\) UDHR,\(^10\) ICCPR (except Saudi Arabia),\(^11\) CRC,\(^12\) and ICESCR (except Saudi Arabia).\(^13\)

Although the aforementioned treaties are of equal value and importance, CEDAW is the primary international treaty that seeks to eliminate discrimination against women in all forms. By ratifying\(^14\) CEDAW, India and Saudi Arabia have committed themselves to undertake a series of obligations.

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\(^9\) *UN Treaties Status of Ratification, supra* note 2 (India ratified CEDAW on July 9\(^{th}\), 1993 and Saudi Arabia joined CEDAW on September 7\(^{th}\) 2000); U.N. Declarations, Reservations and Objections to CEDAW, available at [http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm](http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm) [hereinafter *UN Reservations*] (India does not consider itself bound to Article 29 and Saudi Arabia does not consider itself bound to any article of CEDAW which contradicts Islamic law and paragraph 2 of article 9 and paragraph 1 of article 29 of the Convention).

\(^10\) *UDHR, supra* note 2.

\(^11\) *ICCPR, supra* note 3.

\(^12\) *CRC, supra* note 4.

\(^13\) *ICESCR, supra* note 5.
measures to end discrimination against women. Therefore, India and Saudi Arabia must at a minimum: (1) incorporate the principle of equality in their legal system;\footnote{Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 Jan. 1980, 115 UNTS 331, reprinted in 8 ILM 679 (1969), available at \url{http://untreaty.un.org./ilc/texts/instruments/english/conventions/1_1_1969.pdf}. 108 state parties at art. 2(1)(b), 14(1), 16 (ratification defines the international act whereby a state indicates its consent to be bound to a treaty and agrees to enact the necessary legislation to give domestic effect to that treaty).} (2) abolish all discriminatory laws and adopt ones which prohibit discrimination;\footnote{CEDAW, supra note 1, at art. 2} (3) establish courts and other public institutions to ensure the effective protection of women;\footnote{Id. at art. 2-3.} and (4) ensure the elimination of customary practices that are based upon inferiority or superiority of stereotyped roles.\footnote{Id. at art. 2-4.}

Because India and Saudi Arabia ratified CEDAW, they have explicitly agreed to be bound by all of CEDAW’s provisions, including Article 16,\footnote{Id. at art. 16 (“1. State 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.”).} absent any reservations. Article 16 provides equal rights to marry for both sexes and does not recognize a child’s formal agreement to marry or the marriage of a child. The CRC defines a child as any person below the age of
eighteen unless otherwise specified by law.\textsuperscript{20} Correspondingly, the CRC states that persons legally responsible for a child, must provide for them “in a manner consistent with the evolving capacities of the child,” and must guide them in an appropriate direction in the exercise of the rights recognized in the CRC. Additionally, under the CRC, each State must act in accordance with their duty to protect children from all forms of mental, physical/sexual abuse, and prohibit practices that are inconsistent with the evolving capacity of a child.\textsuperscript{21}

Furthermore, the UDHR,\textsuperscript{22} the ICCPR,\textsuperscript{23} the ICESR,\textsuperscript{24} and CEDAW,\textsuperscript{25} state that men and women shall have the same right to: (a) enter into marriage only with their free and full consent

\textsuperscript{20} CRC, supra note 4, at art. 1 (“For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”).

\textsuperscript{21} CRC, supra note 4, at art. 5 (“State parties shall respect the responsibilities, rights and duties of parents, members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”); Law Commission of India: Proposal to Amend the Prohibition of Child Marriage Act, 2006 and Other Allied Laws, No. 205 (2008) at 30-1 [hereinafter Proposal to Amend the Child Marriage Act] (this inevitably happens in a child marriage).

\textsuperscript{22} UDHR, supra note 2, at art. 16 (“(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”).

\textsuperscript{23} ICCPR, supra note 3, at art. 23. (“1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized. 3. No marriage shall be
and (b) choose a spouse. To ensure these rights, CEDAW mandates each Member State to enact legislation that specifies a minimum age for marriage. Therefore, in order to determine whether India’s and Saudi Arabia’s practices associated with arranged marriages violate human rights, each practice must be scrutinized in light of all the aforementioned treaties.

B. Indian Laws Governing Marriage

a. Indian Constitution: Principle of Equality

The formation and structure of the Indian Constitution was heavily influenced by the UDHR; therefore, principles of gender equality, equal protection, and prohibition of entered into without the free and full consent of the intending spouses 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.”).

The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses...3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law.”).

CEDAW, supra note 1, at art. 16.

26 Id. at art. 16, § 2.
discrimination in all forms serve as the cornerstone of its creation.\(^{29}\) Moreover, in order to ensure the effective protection of women, the Indian National Commission for Women Act\(^ {30}\) established a representative body that focuses on women’s rights in the Central Government of India. This body is responsible for investigating and reviewing all matters relating to the legal safeguards provided for women under the Constitution and other Indian laws.\(^ {31}\)

b. Indian Parliamentary Legislation Enacted to Eliminate Discriminatory Customary Practices

   i. Indian Marriage Acts

   The Hindu Marriage Act (HMA)\(^ {32}\) enacted in 1955 codifies marriage customs\(^ {33}\) and establishes the following prerequisite conditions for a valid marriage: (i) at the time of the

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\(^{27}\) **INDIA CONST.** art. 39 (provides certain principles of equality that should be followed by the State: (a) men and women equally have the right to an adequate means of livelihood; (d) equal pay for equal work; (f) protect children against exploitation and moral and material abandonment).

\(^{28}\) *Id.* at art. 14-5 (the state shall not deny to any person equality before the law or equal protection. Equality before the law is defined in Art. 15 and prohibits discrimination on grounds of religion, race, caste, sex or place of birth).

\(^{29}\) Consideration of Reports Submitted by State Parties under Article 18 of the Convention on the Elimination of all Forms of Discrimination Against Women: Combined Initial and Second Periodic Reports of India (10 Mar. 1999), at 5, 23 [hereinafter *India’s CEDAW Report*].

\(^{30}\) The National Commission for Women Act, No. 20 of 1990; India Code.

\(^{31}\) *India’s CEDAW Report, supra* note 29, at 6.
marriage, neither party is incapable of giving valid consent, and (ii) the male has completed the age of twenty-one, and the female the age of eighteen.\textsuperscript{34}

The Child Marriage Restraint Act of 1929, revised in 1976\textsuperscript{35} and in 2006\textsuperscript{36} (CMRA) is a combination of acts enacted to prevent child marriages. These acts codify that: (1) a child is any male under the age of twenty-one and any female under the age of eighteen,\textsuperscript{37} and (2) a parent\textsuperscript{38} or guardian who contracts their child or negligently fails to prevent their child’s marriage shall be imprisoned for up to three months.

\textsuperscript{32} The Hindu Marriage Act, No. 25 of 1955; India Code, \textit{available at} \url{http://indiacode.nic.in/fullact1.asp?tnm=195525} [hereinafter HMA]

\textsuperscript{33} \textit{Id.} at art. 3 (a "custom" signifies any practice which has been continuously and uniformly observed for a long-time, and has obtained the force of law among Indian communities).

\textsuperscript{34} \textit{Id.}; \textit{see} Family Courts Act, No. 66 of 1984; India Code (gives family courts jurisdiction in marriage and divorce proceedings. Furthermore, this act was passed in order to ensure the need to protect and preserve the institution of marriage, and to give women preference in the settlement of disputes); \textit{India’s CEDAW Report, supra} note 29, at 24.

\textsuperscript{35} The Child Marriage Restraint Act, No. 19 of 1992; India Code (2006) \textit{available at} \url{http://indiacode.nic.in/} [hereinafter CMRA]; \textit{India’s CEDAW Report, supra} note 29, at 77 (1976 raised the minimum age of marriage of girls to 18 from 15 years and for boys to 21 years in order to prevent child marriages).

\textsuperscript{36} CMRA, \textit{supra} note 35 (CMRA of 2006 was enacted because there were few convictions and courts where reluctant to find adults guilty under the old Act).

\textsuperscript{37} Law Commission of India: Report on Sale of Women and Children, No. 146 (1993) at 4 (a minor who is contracted to marry constitutes a sale in exchange for illicit intercourse due to the lack of valid consent of the child).

\textsuperscript{38} The Hindu Minority and Guardianship Act, No. 32 of 1956; India Code (the natural guardian for both unmarried boys and girls is first the father and then mother).
ii. Dowry Acts

The Dowry Prohibition Act (DPA)\(^{39}\) provides penalties for giving, taking, or demanding a dowry.\(^{40}\) “Dowry” is defined as (i) a demand for any property, (ii) having an inextricable nexus with the marriage, (iii) given or agreed to be given either directly or indirectly, (iv) by one party to a marriage to the other (v) at, before or after the marriage.\(^{41}\) A dowry is essentially a form of consideration from the side of the bride's parents to the groom for the agreement to wed the bride-to-be.\(^{42}\)

Indian Penal Code section 304-B\(^{43}\) institutes criminal sanctions for deaths related to unsatisfied dowry demands. A dowry death occurs when a woman’s death is caused by burns or under unnatural circumstances within seven years of her marriage.\(^{44}\) It must be shown that soon

\(^{39}\) The Dowry Prohibition Act, No. 28 of 1961; INDIA CODE (1993) [hereinafter DPA]
\(^{40}\) Id. at §3-4 (the penalty for giving or taking dowry is imprisonment for a term no less than five years, and with fine of at least fifteen thousand rupees or the amount of the value of such dowry, whichever is more. The penalty for demanding dowry shall be punished with six months maximum imprisonment, or with fine which may extend to 5k rupees, or both).
\(^{41}\) Id.

\(^{42}\) Y.K. Bansal v. Anju, All L.J. 914 (a husband demanded a sum of 50,000 rupees some days after the marriage from his father-in-law and on not being given became angry, tortured the wife and threatened to go for another marriage. It was held that the amount was being demanded in connection with the marriage); see State of Karnataka v. M.V. Manjunathgowda & Anr, (2003) AIR 1530-31 at 1; see also Baldev Krishan v. The State of Haryana, I.A. (1997) at 2.
\(^{43}\) INDIA PEN. CODE § 304-B; DPA supra note 39.
\(^{44}\) INDIA PEN. CODE § 11 (inquiry by an Executive Magistrate is mandatory in all post-mortem cases where a woman within seven years of her marriage either committed suicide or died in circumstances raising a reasonable suspicion that some other person has committed the offence).
before her death, her husband or any relative of her husband subjected her to cruelty\textsuperscript{45} in connection with a demand for dowry.

c. India’s CEDAW Report: De-Jure Protection v. De-Facto Status of Women

Despite constitutional and legislative provisions for marriage, child marriages, and dowry deaths, the CEDAW Committee has observed a substantial deviation between the de-jure protections and the de-facto realization of these rights.\textsuperscript{46} The source of the disparity between India’s legal efforts in eliminating prejudicial behavior and its continued practice, is due to India’s ancient socialization process that is culturally entrenched in discriminatory behavior and stereotyped roles.\textsuperscript{47}

Weak Indian enforcement agencies exacerbate gender biases by allowing the legal protections provided for women to be redefined, reasserted, and threatened through the lack of implementation.\textsuperscript{48} This is illustrated in India’s response to Article 16(1) of CEDAW. Although India makes no reservations under Article 16(1), India comments that it will follow the

\textsuperscript{45} DPA, supra note 39, at 12 (any willful conduct of such a nature that is likely to drive a woman to commit suicide or cause danger to her life, limbs or health, or harassment, whether mental or physical in order to coerce her or any person related to her to meet any unlawful demand for dowry).

\textsuperscript{46} India’s CEDAW Report, supra note 29, at 6.

\textsuperscript{47} Id.

\textsuperscript{48} Id. at 27.
provisions of Article 16(1) to the extent that it conforms to its policy of non-interference in the personal affairs of any community. A community’s consent is required before India can enforce any provisions under Article 16(1) that run counter to a community’s current cultural practices.\(^{49}\) India’s policy of non-interference with communal cultural practices condones and perpetuates violations of CEDAW and other international treaties because it allows these practices to continue without any penalty.

The CEDAW Committee observed that although Indian marriage laws require consent and prohibit child marriages, India’s tradition of arranging a female’s marriage by her parents presumes her consent.\(^{50}\) This observation coupled with India’s claim on Article 16(1) and its policy of non-interference violates the UDHR (art. 16),\(^ {51}\) ICCPR (art. 23),\(^ {52}\) ICESCR (art. 10),\(^ {53}\) and CEDAW (art. 16)\(^ {54}\) because: (1) consent to a marriage can never be presumed, (2) females lack the ability to choose their own spouse, and (3) India’s legislation does not ensure the elimination of discriminatory practices that violate a female’s human rights.\(^ {55}\) Because India

\(^{49}\) *Id.* at 2.

\(^{50}\) *Id.* at 98; Law Commission of India: The Hindu Marriage Act, 1955—Irretrievable Breakdown of Marriage as a Ground of Divorce, No. 71 (1978) at 2.

\(^{51}\) *UDHR, supra* note 2; *see supra* text accompanying note 22.

\(^{52}\) *ICCPR, supra* note 3; *see supra* text accompanying note 23.

\(^{53}\) *ICESCR, supra* note 5; *see supra* text accompanying note 24.

\(^{54}\) *CEDAW, supra* note 1; *see supra* text accompanying note 19.

\(^{55}\) *India’s CEDAW Report, supra* note 29, at 98.
ratified CEDAW and all international treaties stated in the aforementioned, India has the
obligation and duty to ensure that any violations of these treaties within certain Indian
communities do not occur. Therefore, until India implements its constitutional provisions,
legislation, and articles set forth in its ratified treaties, the discrepancy between the de-jure and
de-facto realization of Indian marriage rights will continue.

C. Saudi Arabian “Laws” Governing Marriage

   i. Saudi Arabian Constitution/Basic Law of Governance and the Formation of
   Shari’ah Law

   Saudi Arabia is a sovereign Arab state with Islam as its state religion. The Government
and Constitution of Saudi Arabia derive their power from religious Islamic texts. Specifically,
Articles 1, 7, and 48 of the Saudi Constitution exclusively draw from the Qur'an, Hadith,

56 SA Constitution, supra note 7, at art. 1, 7, 48.
57 Id.
58 Id. at art. 1 (“The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its
   religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are
   its constitution, Arabic is its language and Riyadh is its capital.”).
59 Id. at art. 7 (“Governance in the Kingdom of Saudi Arabia derives its authority from the Book
   of God Most High and the Sunnah of his Messenger, both of which this Law and all the laws of
   the State.”).
60 Id. at art. 48 (“The courts shall apply to cases before them the provisions of Islamic Shari’ah,
   as indicated by the Qur’an and the Sunnah, and whatever laws not in conflict with the Qur’an
   and the Sunnah which the authorities may promulgate.”).
61 Id. at art. 1.
and actions of Muhammad.\textsuperscript{63} The Saudi Constitution, Qur’an, Hadith, and the actions of Muhammad form the substance of Shari’ah Law. All courts in Saudi Arabia must apply the rules of Islamic Shari’ah Law,\textsuperscript{64} and the State must protect human rights\textsuperscript{65} in accordance with what is indicated under Shari’ah Law. Therefore, in order to understand what constitutes a marriage in Saudi Arabia, one must look solely at the Qur’an, Hadith, Muhammad’s actions,\textsuperscript{66} and the interpretation of Shari’ah Law by religious-legal scholars in Saudi Arabia.

\textbf{ii. Shari’ah Law}

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\textsuperscript{62} \textit{Id.;} Dawoud Sudqi El Alami & Doreen Hinchcliffe, Islamic Marriage and Divorce Laws of the Arab World (1996) at xiii [hereinafter El Alami & Hinchcliffe] (Hadith or Sunnah is the recorded words and deeds of Prophet Muhammad which constitutes the second source of the Shari’ah after the Qur’an).
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\textsuperscript{64} \textit{SA Constitution, supra} note 7, at art. 32, 48 (Shari’ah courts shall have jurisdiction in all \textit{in rem} cases dealing with real estate, \textit{i.e.} recording marriages, divorce, and marrying off women who have no guardians. Cases related to women are heard in courts which have jurisdiction over property and thus implies that once a woman is married she is considered property); Dr. Abdullah F. Ansary, A Brief Overview of the Saudi Arabian Legal System (2008) at 8 [hereinafter Ansary]; \textit{El Alami & Hinchcliffe, supra} note 62, at 3-4 (there are four schools of thought: Hanafi, Maliki, Shafi’I and Hanbali in respect to Islamic Law but all work within the framework of Islamic Legal principles. In Saudi Arabia, Shari’ah law is interpreted by the Hanbali school of thought).
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\textsuperscript{65} \textit{SA Constitution, supra} note 7, at art. 26.
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\textsuperscript{66} \textit{El Alami & Hinchcliffe, supra} note 62, at 3; Ansary, supra note 64, at 4; Anonymous Interviewer, Saudi Arabian Attorney, in S.D., Cal. (Oct. 9, 2008) [hereinafter Interviewer]
\end{flushright}
According to Islamic beliefs, Shari’ah Law is the law of God, and God alone is the giver of law.\textsuperscript{67} The primary source of Shari’ah Law is divine and it is not revealed as a body of law, but as a “foundation of wisdom from which the solution to any question could be derived.”\textsuperscript{68} Although there are judges in family courts and religious-legal scholars (\textit{ijtihad})\textsuperscript{69} who are qualified to interpret Shari’ah Law, their judicial opinions and interpretations are never officially published;\textsuperscript{70} rather, their interpretations of Shari’ah Law become part of Saudi customary law.\textsuperscript{71} Therefore, in order to determine whether an arranged marriage under Shari’ah Law is a violation of human rights, one must examine the application of Shari’ah Law in light of Saudi Arabia’s marriage practices.

\textbf{iii. The Marriage Contract under Shari’ah Law via the Qur’an and Hadith}

\textsuperscript{67} \textit{El Alami & Hinchcliffe, supra} note 62, at 3; \textit{Interviewer, supra} note 66.
\textsuperscript{68} \textit{El Alami & Hinchcliffe, supra} note 62, at 35.
\textsuperscript{69} \textit{Id.; Ansary, supra} note 64, at 26.
\textsuperscript{70} \textit{Interviewer, supra} note 66; \textit{El Alami & Hinchcliffe, supra} note 62, at 35.
Marriage under Shari’ah Law is not a sacrament but a civil contract.\textsuperscript{72} The formation of the marriage contract is as follows: (i) it must take place in the presence of either two males, four females or one male and two females;\textsuperscript{73} (ii) the prospective husband must make an offer (\textit{ijab} or dowry)\textsuperscript{74} in the form of money to show he is financially responsible, and the female’s marriage guardian\textsuperscript{75} must accept the offer on her behalf (\textit{qabul});\textsuperscript{76} (iii) the male guardian must ask the female if she consents to the marriage in front of a marriage officiant. If the female is a virgin and remains silent on hearing the offer, acceptance is implied;\textsuperscript{77} if she cries it is seen as a sign that she regrets leaving her parents and not as a refusal of the offer;\textsuperscript{78} (iv) the male guardian must

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\item \textsuperscript{72} Al Qasas, Verse 27, The Kingdom of Saudi Arabia: Ministry of Islamic Affairs, Endowments, Da’wah and Guidance, \textit{available at} \url{http://quran.al-islam.com} (Muhammad said: “I intended to wed one of these my daughters to thee, on condition that thou serve me for eight years; but if thou complete ten years, it will be grace from thee.”).
\item \textsuperscript{73} \textit{Interviewer, supra} note 66; \textit{El Alami & Hinchcliffe, supra} note 62, at 5, 8 (proof of the marriage contract is shown by two sane adult male witnesses of the highest moral probity who were present at the formation of the contract).
\item \textsuperscript{74} \textit{Supra} note 72, at An-Nissa, Verse 3 (the offer is termed as dowry. And give the women [on marriage] their dower as a free gift; but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer).
\item \textsuperscript{75} \textit{Interviewer, supra} note 66; \textit{El Alami & Hinchcliffe, supra} note 62, at 6; Hadith no. 805, The Kingdom of Saudi Arabia: Ministry of Islamic Affairs, Endowments, Da’wah and Guidance, \textit{available at} \url{http://hadith.al-islam.com/bayan/display.asp?Lang=eng&ID=805} (order of guardianship: father, grandfather, brother, uncle [on either the father’s or mother’s side], cousin or judge. Note that a woman can never serve as a guardian).
\item \textsuperscript{76} \textit{Interviewer, supra} note 66; \textit{El Alami & Hinchcliffe, supra} note 62, at 5.
\item \textsuperscript{77} \textit{Interviewer, supra} note 66.
\item \textsuperscript{78} \textit{El Alami & Hinchcliffe, supra} note 62, at 6; \textit{supra} note 75, at Hadith no. 805.
\end{enumerate}
\end{footnotesize}
sign and conclude the female’s marriage contract\textsuperscript{79} on her behalf; (v) there is no minimum age to contract a marriage but both parties must be mentally sane and physically ready (i.e. puberty) for marriage;\textsuperscript{80} and lastly (vi) the marriage contract is considered void if it is not publicized to the community.\textsuperscript{81}

\textbf{iv. Saudi Arabia’s CEDAW Initial Report and Reservations}

\textbf{a. Saudi Arabia Lacks a Codified Minimum Age for Marriage}

In response to Saudi Arabia’s compliance with Article 16 of CEDAW, the CEDAW Commission reports that under Shari’ah Law a woman’s marriage contract can only be finalized if she expresses consent to the marriage.\textsuperscript{82} In view of the fact that female consent is required, the CEDAW Commission concludes that Saudi Arabia is in conformity with Article 16 of CEDAW.

Under this reasoning, the CEDAW Commission makes the assumption that because consent is a prerequisite for a valid marriage contract, a female must also have the right to freely and consensually choose a spouse.\textsuperscript{83} The CEDAW Committee never addresses or takes into account Saudi Arabia’s lack of a codified minimum age for marriage and the prevalence of child marriages. Although actual consent may be obtained from an adult, a child’s formal agreement to

\textsuperscript{79} \textit{Interviewer, supra} note 66 (conversely, the groom signs the contract himself).

\textsuperscript{80} \textit{Id.; El Alami & Hinchcliffe, supra} note 62, at 5.

\textsuperscript{81} \textit{El Alami & Hinchcliffe, supra} note 62, at 15; \textit{Interviewer, supra} note 66.

\textsuperscript{82} \textit{Saudi Arabia’s CEDAW Report, supra} note 63, at 47-8.

\textsuperscript{83} \textit{Id.} at 46-8.
marriage is not recognized as valid. Therefore, the mere absence of a minimum age for marriage violates the UDHR (art. 16), CEDAW (art. 16), and the CRC because (1) a child can never give free and full consent, and (2) each member State must specify through legislation an age of majority.

b. Saudi Arabia’s CEDAW Reservations

Saudi Arabia makes reservations to any terms of CEDAW that run counter to the norms of Shari’ah Law.  This type of reservation, which does not specify the contents and consists of general references to religious law, does not clearly define the extent to which Saudi Arabia commits itself to its obligations under CEDAW.  According to the CEDAW Commission, under Shari’ah Law there is generally no discrimination against women in the laws of Saudi Arabia.  The CEDAW Commission asserts that Shari’ah Law is not based upon discrimination, but is in line with the physiological and biological nature of man and woman.  It concludes that Shari’ah Law has committed itself to achieving gender equality in the public rights realm and has provided women with full rights for more than 1,400 years.

84 Id. at 8.
86 Saudi Arabia’s CEDAW Report, supra note 63, at 8, 46.
87 Id. at 20.
88 Id. at 13; see infra note 141.
CEDAW’s response to Saudi Arabia’s current fulfillment of its obligations under the treaty, along with Saudi Arabia’s vague but allegedly compatible reservation to CEDAW, not only undermines the treaty, but also condones women’s current unequal social stance in Saudi Arabia. As will be discussed below, certain cultural, religious, and economic practices associated with arranged marriages violate Saudi Arabia’s obligations under its ratified treaties.


Introduction

Culture, religion, and the inherent economic aspect of marriage in India and Saudi Arabia are frequently used to warrant the failure to take “all appropriate measures to modify” the discriminatory practices directly related to marriage.

Cultural relativism is regularly used as a justification for violating human rights and serves as a scapegoat to abuse women under the façade of culture. Cultural relativism

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90 CEDAW, supra note 1, at art. 5.
92 Christina M. Cerna and Jennifer C. Wallace, Women and Culture, in 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 623, 629 (Kelly D. Askin & Dorean M. Koenig ed.,
legitimizes certain cultural practices that clearly violate human rights. This is partly due to a society’s unwillingness to assume international human rights obligations in their private sphere unless they are considered *jus cogen* in their own code of religious and traditional conduct.\(^9\)

Religious fundamentalism\(^4\) in both India and Saudi Arabia is committed to the authority of ancient scriptures and is inseparable from politics, law, and culture.\(^5\) The implementation of religious customary laws in India and Saudi Arabia reflect patriarchal structures that perpetuate discriminatory practices associated with arranged marriages.\(^6\) Religious fundamentalists exert discriminatory ideologies that permeate the legal infrastructure. Their quest to repress female sexuality is so dire that modesty codes\(^7\) have been created to explicitly enforce a woman's religious duty of chastity and male control of her sexuality.\(^8\) This control is illustrated through

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\(^9\) *Id.* at 629.

\(^4\) *Courtney, W. Howland, Women and Religious Fundamentalism, in 1 Women and International Human Rights Law* 533, 568 (Kelly D. Askin & Dorean M. Koenig ed., 2002) [hereinafter *Howland*] (a movement within the religion which is oppressive to women).

\(^5\) *Id.* at 534, 538 (UN Charter and UDHR makes clear that entitlement to human rights is not to be determined by any religious law. A state which enacts into its legal system religious laws that subordinate women, or that creates under state law a zone of autonomy for religion to impose such religious laws upon women is a violation of the Charter).

\(^6\) *Id.*

\(^7\) *Id.* at 541 (requires the segregation of women from men in public. This is achieved by the common practice of women staying primarily in their homes or when in public women must dress with their entire body covered).

\(^8\) *Id.*
obliging a woman to submit to the authority of her husband or father, and by classifying a marriage as an act of female submission.\textsuperscript{99}

Obedience and the duty to submit is intrinsic in the practice of arranged marriages—the marriage serves as the transfer of the female from the control of her father to the control of her husband.\textsuperscript{100} This control and the economic aspect of arranged marriages is used as an exchange of a female’s sexuality for her husband’s duty to provide her with basic material and financial support and/or by payment in the form of a dowry.\textsuperscript{101} Control and the economic perception of arranged marriages is a practice that is based upon inferiority and stereotyped roles. This core belief will persist due to India’s lack of enforcement of its marriage laws and Saudi Arabia’s discriminatory religious “laws.”

Therefore, until this dichotomy between a State’s obligations established under its ratified human rights treaties, and its fixed cultural, religious, and economic practices associated with arranged marriages are integrated, India and Saudi Arabia will continue to violate their duties under CEDAW for failing to eliminate discriminatory practices that are based upon inferiority

\textsuperscript{99} Id. at 533, 540. (\textit{talaq}: is a male’s unilateral right to divorce i.e. the right to divorce only belongs to the husband).

\textsuperscript{100} Id. at 560.

\textsuperscript{101} Id. at 542.
and stereotyped roles (art. 1-4),\textsuperscript{102} and for failing to take all appropriate measures to modify the discriminatory practices directly related to marriage.\textsuperscript{103}

**A. India**

Laws governing marriage in India were established in reaction to religious and customary traditions. Although there are many religions in India, this section solely focuses on Hinduism. Hinduism supports the traditions of arranged marriages and dowry. In India, the tradition of arranged marriages engenders the practice of child marriages\textsuperscript{104} because a female’s value (i.e. dowry) and the likelihood of marriage are conditioned upon her virginity. This practice inevitably leads parents to marry their children at an early age in order to guarantee chastity.\textsuperscript{105}

The following sections will show that this tradition violates UDHR (art. 16),\textsuperscript{106} ICCPR (art. 23),\textsuperscript{107} ICESCR (art. 10),\textsuperscript{108} CEDAW (art. 16)\textsuperscript{109} and the CRC (art. 1,5)\textsuperscript{110} because: (1) a child is unable to give valid consent, (2) a child’s marriage serves as an early constraint on a his/her

\begin{itemize}
  \item \textsuperscript{102} CEDAW, \textit{supra}, note 1; see \textit{supra} text accompanying note 19.
  \item \textsuperscript{103} \textit{Id.} at art. 5.
  \item \textsuperscript{104} Cerna & Wallace, \textit{supra} note 92, at 634.
  \item \textsuperscript{105} Howland, \textit{supra} note 94, at 556.
  \item \textsuperscript{106} UDHR, \textit{supra} note 2; see \textit{supra} text accompanying note 22.
  \item \textsuperscript{107} ICCPR, \textit{supra} note 3; see \textit{supra} text accompanying note 23.
  \item \textsuperscript{108} ICESCR, \textit{supra} note 5; see \textit{supra} text accompanying note 24.
  \item \textsuperscript{109} CEDAW, \textit{supra} note 1; see \textit{supra} text accompanying note 19.
  \item \textsuperscript{110} CRC, \textit{supra} note 4.
\end{itemize}
freedom to choose a spouse, and (3) entering into a marriage at an early age is inconsistent with a child’s evolving capacity.\textsuperscript{111}

\textbf{a. Religious Fundamentalism: Hinduism}

Hindu fundamentalism views women as possessing a dangerous sexuality,\textsuperscript{112} which they themselves cannot control. Hindu fundamentalists believe that in order to combat this fear and reduce a female’s potential to disgrace her family by engaging in premarital affairs, she must always be subjected to external controls. The control begins with her father or male guardian and continues by marriage to her husband. This paradigm creates an environment where families are anxious to arrange their daughter’s marriage at a young age in order to preserve her chastity and will pay for this privilege in the form of a dowry.\textsuperscript{113}

\textbf{b. Culture}

Customary practices that arise from an oppressive patriarchal tradition\textsuperscript{114} are arranged child marriages and dowry demands. The underlying discriminatory structure creates a de-facto

\begin{itemize}
  \item \textsuperscript{111} \textit{Id.}; see supra text accompanying note 21.
  \item \textsuperscript{112} \textit{Howland, supra} note 94, at 556.
  \item \textsuperscript{113} \textit{Id.}
  \item \textsuperscript{114} \textit{India’s CEDAW Report, supra} note 29, at 86.
\end{itemize}
restriction on the implementation of the laws that prohibit these practices and perpetuates gender inequality in India’s institutional arrangements. These practices are so entrenched in India’s culture that Indian laws prohibiting these acts cannot prevent them from occurring.

i. Arranged Child Marriages

The phenomenon of child marriages continues to be a widespread social evil in India. The oppressive influences of Hindu fundamentalism and the view that a female in India’s patriarchal society is believed to be parki thepan (somebody’s property) and a burden fuel the practice of child marriages. This view leads parents to relieve themselves of this burden by marrying their daughter off as early as possible.

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115 Proposal to Amend the Child Marriage Act, supra note 21, at 36 (recent research reveals that there is a complete lack of awareness of the law relating to child marriage); India’s CEDAW Report, supra note 29, at 48.
116 India’s CEDAW Report, supra note 29, at 13-16.
117 World Marriage Patterns, Department of Economic and Social Affairs, Washington: UN Population Division available at http://www.un.org/esa/population/publications/worldmarriage/worldmarriage.htm (last visited Nov. 2007) (in 2000, the UN Population Division recorded that 9.5% of boys and 35.7% of girls aged between 15-19 were married; Proposal to Amend Child Marriage Act, supra note 21, at 36.
118 Proposal to Amend Child Marriage Act, supra note 21, at 17.
This cultural practice\textsuperscript{119} does not take into account that a child marriage is both a violation of the UDHR (art. 16), ICCPR (art. 23), ICESCR (art. 10), and CEDAW (art. 16); and is also considered an act of child abuse, as it compromises the development of girls with the views of a patriarchal system.

Child marriages violate the aforementioned human rights treaties due to the following: (1) a child can never give their full and informed consent due to their age,\textsuperscript{120} (2) a child is usually forced into this type of marriage, because ordinarily they must obey and accept their parent’s choice of spouse and have no say in the decision-making,\textsuperscript{121} (3) prevents children from enjoying their adolescence,\textsuperscript{122} and (4) restricts their social and personal freedom and development.\textsuperscript{123}

Therefore, until India enforces its de-jure protections established by its Parliament, and acts against the deeply-rooted cultural practice of arranged child marriages, India will continue to violate its obligations under its ratified human rights treaties.

\textbf{c. The Economic Transaction of Marriage}

\textsuperscript{119} \textit{Id.} at 18 (texts like \textit{Manu Smriti} which state that the father or the brother, who has not married his daughter or the sister who has attained puberty, will go to hell are sometimes quoted to justify child marriage).

\textsuperscript{120} \textit{Id.} at 20 (young married girls lack bargaining power in the marriage and are thus vulnerable).

\textsuperscript{121} \textit{Id.} at 17, 18, 24.

\textsuperscript{122} \textit{Id.} at 10.

\textsuperscript{123} \textit{Id.} at 24 (children are severely affected because they unavoidably suffer irreparable damage to their physical, mental, psychological and emotional development).
i. The Dowry System Encourages Child Marriages

Despite prohibitive legislative provisions, another social evil directly related to arranged marriages is the common practice of dowry paid to the groom, by the bride’s family for marriage.\textsuperscript{124} The combination of ensuring a female’s chastity and decreasing the cost of dowry has generated the practice of arranged child marriages. India’s traditional practice of arranged marriages is essentially a form of marriage that contains elements of a direct endowment, and which closely resembles a purchase and sale.\textsuperscript{125} The father pays money to have his daughter married in exchange for the husband receiving all rights over his bride—including the right to her sexuality.\textsuperscript{126} Because marriage is seen as the only acceptable choice for females, the bride’s family must find someone willing to marry her and at times this can only be done with the promise of a large dowry. The absence of a large dowry is generally attributed to arranging a marriage of a younger child bride.\textsuperscript{127}

The economic aspect of marriage in India creates an incentive for families to engage in child marriages often because of poverty and indebtedness. The practice of child marriages has

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{124}] \textit{India’s CEDAW Report, supra} note 29, at 99.
\item[\textsuperscript{125}] \textit{Jack Goody, The Oriental, the Ancient and the Primitive Systems of Marriage and the Family in the Pre-Industrial Societies of Eurasia} (1990) at 496.
\item[\textsuperscript{126}] \textit{Cerna & Wallace, supra} note 92, at 634-35.
\item[\textsuperscript{127}] \textit{Proposal to Amend the Child Marriage Act, supra} note 21, at 15-7.
\end{enumerate}
\end{footnotesize}
in effect created greater societal demands for younger brides\(^\text{128}\) because the marriage of a child reduces the amount of dowry that would otherwise have to be made for an older bride.\(^\text{129}\)

The practice of dowry and arranged marriages reinforces the view that women and female children are objects and commodities that “men control and dispose of like chattel.”\(^\text{130}\)

Until India fully implements the HMA, CMRA, DPA, and its ratified human rights treaties, these practices and discriminatory views will continue to serve as the main source of human right violations in India, and will persist to prevent the realization of the rights contained therein.

### ii. Dowry Deaths

Arranged marriages can further be classified as an economic transaction due to the frequency of dowry deaths (\textit{i.e.} murders) that go unprosecuted.\(^\text{131}\) Dowry deaths can either occur due to a satisfied or unsatisfied dowry demand; in either case a male can obtain a new wife and/or another dowry by murdering the current wife.\(^\text{132}\) Dowry deaths have become more prevalent due to the rising expectations of dowry—families of the groom are now demanding a cash dowry or expensive items.

\(^{128}\) \textit{Id.}\n
\(^{129}\) \textit{Id.} at 17.

\(^{130}\) \textit{Howland, supra} note 94, at 560.

\(^{131}\) Asmita Basu, Violence Against Women: a Statistical Overview, and Challenges and Gaps in Date Collection and Methodology and Approaches for Overcoming them (Geneva: U.N. Division for the Advancement of Women, 2005) at 8 (reported 14,506 dowry deaths in 2002).

\(^{132}\) \textit{Howland, supra} note 94, at 560; \textit{Cerna & Wallace, supra} note 92, at 635.
Despite legal safeguards with respect to dowry and dowry deaths,\(^\text{133}\) de-facto restrictions prevent the realization of these rights. The de-facto restriction is revealed through the lack of enforcement of laws and is a production of cultural biases reproduced at the state level. The pervasiveness of India’s cultural bias and lack of enforcement of its laws that protect women from dowry deaths is illustrated by State police classifying murders as accidents or suicides without any corroboration or investigation.\(^\text{134}\) The absence of police enforcement not only acts as a pseudo form of decriminalization, but also violates India’s duties under CEDAW (art. 1-4).\(^\text{135}\) Under CEDAW, India has failed to ensure the effective protection under its public institutions (i.e. police enforcement and under the Indian National Commission for Women Act) and eliminate customary practices that are based upon stereotyped roles.\(^\text{136}\)

To conclude, certain practices directly linked to Indian arranged marriages completely erode any beneficial purpose that could be attributed to the tradition of arranging a marriage. The adverse practice of child marriages and dowry deaths inherently violate international human rights treaties because children are unable to consent to marriage, and are used as an economic

\(^{133}\) **INDIA PEN. CODE § 304-B; DPA, supra note 39.**

\(^{134}\) *Howland, supra* note 94, at 560; Law Commission of India: Dowry Deaths and Law Reform Amending the Hindu Marriage Act, 1955, the Indian Penal Code, 1860 and the Indian Evidence Act, 1872, No. 91 (1983) at 3 (the lack of corroboration and investigation occurs due to the husband claiming that his wife was killed in a kitchen accident or that she committed suicide).

\(^{135}\) **CEDAW, supra** note 1.

\(^{136}\) *Id.* at art. 1-4.
asset in exchange for marriage.\textsuperscript{137} India’s tradition of arranged marriages can conform with its duties and obligations set forth in its ratified human rights treaties if: (1) parents choose the most suitable spouse for their adult child who freely and consensually consents to the marriage, and (2) dowry deaths are investigated, and prosecuted in order to mitigate the economic aspect of marriage and potential gain and abuse by the groom and/or his family.

**B. Saudi Arabia**

**Introduction to Saudi Arabia’s Subservient Culture**

Saudi Arabia being the birthplace of Islam and named after the ruling patriarchy has generated a highly conservative cultural environment.\textsuperscript{138} By strictly adhering to a narrow and inconsistent interpretation of Shari’ah Law,\textsuperscript{139} the tradition of male guardianship and the absence of codified laws have legitimatized an extremely oppressive way of life. The Saudi social system encourages segregation and discriminatory roles\textsuperscript{140} for women, which is replicated at the State

\textsuperscript{137} Cerna & Wallace, supra note 92, at 634.

\textsuperscript{138} US State Dept’t, Background Note: Saudi Arabia, (Bureau of Near Eastern Affairs, Feb. 2008) at 1, available at [http://www.state.gov/r/pa/ei/bgn/3584.htm](http://www.state.gov/r/pa/ei/bgn/3584.htm) [hereinafter US State Dept.].

\textsuperscript{139} Id.

\textsuperscript{140} Anne H. Heindel, Issues Affecting Middle Eastern Muslim Women: Self-Determination and Development in Turkey, Egypt, Iran, Iraq, and Saudi Arabia, in 3 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 513, 552-53 (Kelly D. Askin & Dorean M. Koenig ed., 2002) [hereinafter Heindel]
level and enforced by religious police (Mutawa).\textsuperscript{141} The legitimacy of the political order derives from the implementation of Saudi Arabia’s discriminatory social system (which is inseparable from Saudi familial values), and not by written laws.\textsuperscript{142} Therefore, the absence of a legal framework with respect to marriage,\textsuperscript{143} coupled with the repressive tradition of male guardianship and the lack of authoritative oversight of the interpretations of Shari’ah Law create

\textsuperscript{141} The Special Rapporteur of the United Nations Human Rights Council on Violence Against Women, its Causes and Consequences: UN Human Rights Expert on Violence Against Women Concludes Visit to Saudi Arabia, delivered at UNG (Feb. 14, 2008), available at http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/9E46364A1CD1DF62C12573EF0031E7F2?OpenDocument [hereinafter Special Rapporteur UNOG]; US State Dep’t, Saudi Arabia Country Specific Information, at 1, 4, 6, available at http://travel.state.gov/travel/cis_pa_tw/cis/cis_1012.html (women must: (1) wear full hejabs and ankle-length dresses with long sleeves when leaving the house; (2) get the permission of their father/male guardian or husband to work; (3) not drive cars or ride bikes; and (4) be segregated in education, the workplace and at the mosque. Women who socialize with a man who is not a relative may be charged with prostitution. In public, dancing, playing music and showing movies are forbidden. Until 2001, women were not allowed to obtain identification cards. However, they are still required to get permission from their guardian. Furthermore, the standards of conduct are enforced by an independent and extremely conservative religious police (Mutawa) who are responsible for arresting and harassing women who deviate from the accepted norm.); Heindel, supra note 140, at 534-5.

\textsuperscript{142} Heindel, supra note 140, at 539.

\textsuperscript{143} Minister of Education Head of the Delegation of the Kingdom of Saudi Arabia: On the Occasion of the Special Session of the General Assembly on Children (May 10, 2002) (statement by H.E. Dr. Mohammed A. Rasheed) available at www.un.org/ga/children/saudiE.htm (the justification given for the absence of codified laws is that rights are not solely legalistic or contractual dimension based on materialistic mutual benefits, but rather should be found in faith, a system of beliefs and values, love and compassion).
a major obstacle for women in obtaining judicial fairness. The following will discuss how religion, culture and the lack of legal redress promote human right violations in Saudi Arabia.

a. Islamic Fundamentalism in Saudi Arabia

Fundamentalist beliefs originate from male bias and local custom. Islamic fundamentalism is a type of belief system that is associated with Islam when in fact it has little or no connection to the Qur’an. A central belief in Islamic fundamentalism is that “women harbor the seeds of destruction of all society,” and to reduce this fear a woman’s sexuality must be vigilantly controlled. The underlying notion is that the sight of a woman or contact with her inevitably stirs up sexual desires in men, which can lead to infringements in the code of morality. Saudi Arabia’s interpretation of sexual morality may be understood by virtue of its long list of social rules that operate to suppress men’s sexual temptations by protecting them from contact with unrelated women. The system of male guardianship is an outgrowth that acts to implement Saudi Arabia’s discriminatory social rules. This system is a manifestation of

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144 US State Dept., supra note 138, at 6 (there are no political parties or national elections); Special Rapporteur UNOG, supra note 141.
146 Howland, supra note 94, at 562-563.
147 Id. at 373.
Saudi Arabia’s very strict understanding and enforcement of sexual morality that strives to control females through an arranged marriage in an effort to protect men.\textsuperscript{148}

b. The System of Male Guardianship and Control in Saudi Arabia

In Saudi Arabia an arranged marriage is a practice that arises from the system of male guardianship. Male guardianship is a system that inherently exerts complete control over a woman’s marriage by not recognizing that a female has the legal capacity to solely enter into her own marriage.

The social structure in Saudi Arabia is the catalyst for the repressive system of male guardianship (\textit{wali}). A female in Saudi Arabia needs a \textit{wali} (who must be male)\textsuperscript{149} to contract her marriage on her behalf.\textsuperscript{150} A female must always act through the representation of a \textit{wali} in contracting her marriage contract even though she possesses full legal capacity.\textsuperscript{151} In effect, this type of system can sometimes lead to the complete eradication of a female’s freedom to freely and consensually choose a spouse.\textsuperscript{152}

\textsuperscript{148} \textit{Howland, supra} note 94, at 562-563.
\textsuperscript{149} \textit{al-Hibri, supra} note 71, at 387-8.
\textsuperscript{150} \textit{Mayer, supra} note 145, at 374.
\textsuperscript{151} \textit{Howland, supra} note 94, at 567; \textit{Interviewer, supra} note 66.
\textsuperscript{152} \textit{Special Rapporteur UNOG, supra} note 141.
i. The Execution of the Marriage Contract as an Extension of Male Guardianship in Saudi Arabia

The marriage contract essentially transfers a woman from the control of the wali, which is usually the father, to the protection and control of her husband. The social structure in Saudi Arabia legitimizes this practice by adhering to its moral code that prevents female exposure to men outside her family. Due to a female’s lack of contact with men outside her family, a wali is supposed to be in the best position to find her the most suitable spouse. In reality, the wali at times can act more like a controller then a guardian, who has the legal power to initiate a divorce on an unwilling or happily married woman.

The structure of the system of male guardianship, and the procedure in executing a female’s marriage contract, rests upon the fundamental belief in inferiority between roles. By ratifying CEDAW, Saudi Arabia has committed itself to ensure the elimination of customary

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153 al-Hibri, supra note 71, at 387.
155 Amnesty Int’l, Women Forced to Divorce, available at http://asiapacific.amnesty.org/pages/sau-160307-action-eng (in 2005, a 34-year-old mother of two children, was forced to divorce her husband following a court order initiated by her half-brother using his powers as her male guardian. The court granted this decree on the grounds that he failed to disclose that he was from a tribe of lower status than hers when he married her. The court’s decision is based on a customary rule known as Takafu or Kufu. She chose to be in prison with her one-year-old son for fear of being forcibly returned to her brother’s home).
practices that are based upon inferiority or superiority of stereotyped roles.\textsuperscript{156} Instead, the continued practice of arranged marriages and male guardianship serve as an incessant control over a female’s ability to freely and consensually exercise her right of marriage, and obliterates the notion of female independence.

Saudi Arabia has, therefore, failed to comply with its duties and obligations set forth in the UDHR (art. 16),\textsuperscript{157} and CEDAW (art. 16)\textsuperscript{158} because the general practice of male guardianship: (1) eliminates a female’s freedom to enter into her own marriage contract, (2) promotes unequal rights during marriage seeing that a \textit{wali} can initiate a divorce, and (3) undermines a woman’s right to choose a spouse as a result of her lack of bargaining power inherent in the system of male guardianship.

c. No Minimum Age for Marriage\textsuperscript{159}

Although specifying minimum age requirements for marriage or an age of majority does not run counter to any principle of Shari’ah Law,\textsuperscript{160} Saudi Arabia refuses to enact such laws. The

\textsuperscript{156} CEDAW, supra note 1, at art. 1-4.
\textsuperscript{157} UDHR, supra note 2; see supra text accompanying note 22.
\textsuperscript{158} CEDAW, supra note 1; see supra text accompanying note 19.
lack of marriage laws creates an order in society that is more conducive to human rights violations due to the absence of criminalization. A common practice that is not criminalized due to the absence of a minimum age for marriage is a *wali’s* arrangement of a nonconsensual child marriage.\(^{161}\) Despite the fact that the marriage contract must be formed in the presence of a marriage officiant in order to be legally valid, the prevalence of child marriages is partly due to these officials overlooking the consent requirement and marrying girls without their actual consent.\(^ {162}\)

According to Saudi Arabia’s CRC Second Periodic Report,\(^ {163}\) Saudi Arabia claims that the legal age for marriage was set at 18 for both boys and girls.\(^ {164}\) Conversely, two years later, a


\(^{161}\) *El Alami & Hinchcliffe, supra* note 62, at 7.

\(^{162}\) *Sheikh, supra* note 154 (in some cases, the official can be tricked when another woman family member poses as the bride. And since women don’t generally have photo IDs, it can be hard to confirm that the woman giving consent is indeed the bride-to-be); *Father was ‘Swapping’ her for a 13-year-old Bride: Saudi Girl Drinks Bleach to Escape Marriage*, Aug. 17, 2008, available at http://www.alarabiya.net/articles/2008/08/17/55012.html.


\(^{164}\) *Id.*
Saudi Marriage Officiant Dr. Ahmad al-Mubi stated in an interview that a *wali* has the right to contract their infant in marriage without consent:

Marriage is actually two things, the marriage contract itself [and] consummating the marriage. There is no minimal age for entering marriage [and] you can have a marriage contract even with a one-year-old girl. This is merely a contract [indicating] consent. The Prophet Muhammad is the model we follow. He took Aisha to be his wife when she was six, and he consummated the marriage, by having sex with her for the first time, when she was nine. If the guardian is the father, and he marries his daughter off to a man of appropriate standing, the marriage is obviously valid.  

According to this marriage officiant, there is no transgression of Shari’ah Law if: (1) a one-year old infant is contracted to marry, (2) the marriage is consummated when the girl is at least nine-years old, and (3) if the guardian is the father, then consent and the validity of the marriage is presumed. The difference between the minimum age to enter into a marriage in Saudi Arabia’s CRC Second Periodic Report and the marriage officiant’s statements is a clear illustration of the arbitrary and discriminatory application of Shari’ah Law towards women and young girls.

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Furthermore, this unpredictable utilization of Shari’ah Law combined with Saudi Arabia’s CEDAW reservation creates uncertainty as to the scope of its dedication to the provisions of CEDAW. Pursuant to Saudi Arabia’s reservation to CEDAW, Saudi Arabia claims that it is not bound to the extent that it is inconsistent with the application of Shari’ah Law. If Saudi Arabia’s interpretation of Shari’ah Law is inherently incompatible with the provisions of CEDAW, then Saudi Arabia must not be permitted to create the façade on the international stage that due to its ratification it abides by its principles. The complete lack of implementing and acknowledging the rights, goals, and purpose of CEDAW, CRC, and UDHR not only undermines the power of these treaties and declaration, respectively, but also stagnates their recognition and effectuation.

Child marriages and the discriminatory application of Shari’ah Law, provides females with no public institution to ensure the effective protection of their human rights established through the ratification of CEDAW, CRC, and adoption of the principles set forth in the UDHR. Saudi Arabia’s practice of child marriages violates CEDAW and CRC because Saudi Arabia has failed to: (1) enact and enforce a minimum age for marriage, (2) implement

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167 UN Reservations, supra note 9.
168 Mayer, supra note 145, at 372 (a man’s testimony is weighted two times the value of woman’s).
169 CEDAW, supra note 1, art. 1-4, 16.
principles of equality in their legal system, (3) invalidate a child’s consent in his/her marriage,\textsuperscript{170} and (4) take steps to end the practice of child marriages.\textsuperscript{171} Saudi Arabia can rectify these human right violations by depriving a \textit{wali} of guardianship over his female child\textsuperscript{172} who conspires to marry her without her consent or knowledge.\textsuperscript{173}

d. Economic Nature of Marriage in Saudi Arabia

i. Child Marriages Are a Profitable Sale

Child marriages continue to be an accepted practice that prizes a girl’s virginity due to the belief that sexual intercourse outside of marriage is considered to be one of the most heinous crimes in Saudi Arabia (\textit{zina}).\textsuperscript{174} As a result of this long-standing custom, a father can promise to

\begin{footnotesize}
\textsuperscript{170} CRC Committee, supra note 159, at 7.
\textsuperscript{171} Saudi Arabia: Saudi Human Rights Commission Seeks End to Child Marriages, Women Living Under Muslim Laws, Aug. 27, 2008, available at http://www.wluml.org/english/newsfulltxt.shtml?cmd%5B5D=x-157-562331 (“The Saudi Human Rights Commission (HRC) has called on government agencies to take necessary steps to end the practice of child marriages by adopting a clear and unambiguous position on such weddings.” However, no provisions have adopted).
\textsuperscript{172} Sheikh, supra note 154 (a Saudi girl, 16, was admitted to the hospital after trying to end her life when she was forced by her father to marry a 75-year-old man. The girl was a part of an exchange deal between two fathers involving their two daughters).
\textsuperscript{173} Abdo, supra note 160 (10-year-old child also became a divorcee. The mother of an eight-year-old girl filed a suit to divorce her daughter, who was married to an old man by her father without the child’s knowledge).
\textsuperscript{174} Heindel, supra note 140, at 549 (Islamic Law treats sexual intercourse outside of marriage as one of the most heinous crimes—\textit{zina}).
\end{footnotesize}
marry his daughter while she is a child\textsuperscript{175} in order to guarantee her virginity.\textsuperscript{176} Hefty dowries are given in exchange for this promise,\textsuperscript{177} and families are willing to make this promise in order to reduce a girl’s potential to disgrace her family through premarital sex.

The Saudi Human Rights Commission is concerned with child marriages where young girls are forced to marry elderly men essentially for profitable gains.\textsuperscript{178} This type of arranged marriage usually occurs between an indebted family and an old groom. The indebted family will contract the marriage of their young child in order to settle their debts by receipt of a high dowry from the old groom.

The exchange of a large dowry for a child’s marriage violates CEDAW (art. 16), the principles of the UDHR, and CRC because a marriage of a child to an elderly man exceeds the capacity of a child to consummate and enter into marriage, and inevitably causes severe mental, physical, and psychological abuse.\textsuperscript{179} This type of marriage also obstructs a female’s right to consensually marry someone of their own choosing and appropriate age. Likewise, under the CRC, Saudi Arabia has committed itself to prevent any form of child exploitation.\textsuperscript{180} The use of

\textsuperscript{175} Supra note 165.
\textsuperscript{176} Heindel, supra note 140, at 549.
\textsuperscript{177} Id.
\textsuperscript{179} Mayer, supra note 145, at 374.
\textsuperscript{180} CRC, supra note 4, at art. 39.
a child’s marriage in exchange for a large dowry is a clear form of economic exploitation when used for the sole purpose to settle the contracting family’s debt.

**Part IV: Conclusion**

India’s and Saudi Arabia’s discriminatory social system and its expression through the practices associated with arranged marriages violate their obligations established in their human rights treaties. The type of social structure in India and Saudi Arabia intrinsically victimizes females, and is so powerful that even laws prohibiting prejudicial behavior are unable to effectuate change. In India, the Indian National Commission for Women Act, the HMA, the CMRA, the DPA section 304-B of the Indian Penal Code have proven ineffective in combating the practices of child marriages and dowry deaths. In Saudi Arabia, the absence of codified laws regarding marriage and its total disregard to its obligations established in its ratified treaties and UDHR, has created an environment that is conducive to the practice of male guardianship and child marriages.

The implementation and realization of fundamental human rights in India and Saudi Arabia are at a standstill due to social practices that are subconsciously engrained in the minds of men and consequently indoctrinated in women. Until the social structures in both India and Saudi Arabia are changed, Indian laws enacted to protect women will continue to go
unimplemented, and Saudi Arabia’s arbitrary interpretations of the Qur’an will persist. The only solution is to change people’s mindsets and bring about a “societal re-orientation in all sectors and at all levels of oppression and subordination,” starting with the family. Families in India and Saudi Arabia are a mere reflection of the repressive practices linked to arranged marriages, and have therefore become the source of discrimination and human right violations.181

181 India’s CEDAW Report, supra note 29, at 18.
Research Log

A. UN Treaties


B. UN Reports and Documents


C. Indian Reports


D. Indian Statutes and Constitution

INDIA CONST. art. 39, part IV; INDIA CONST. art. 14; INDIA CONST. art. 15


The Dowry Prohibition Act, No. 28 of 1961; India Code

The Family Courts Act, No. 66 of 1984; India Code

The National Commission for Women Act, No. 20 of 1990; India Code

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E. Cases

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F. Books


G. International Non-Governmental Organizations


H. US State Department Materials


I. Newspaper Articles


J. Saudi Arabia Constitution and Shari’ah Law

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