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INTERACTING LEGAL ORDERS AND CHILD MARRIAGES IN INDIA

DOMENICO FRANCAVILLA *

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I. INTRODUCTION

The rules on the legal age for marriage are an important indicator of general conceptions about marriage and the roles and duties within a marital relationship. These rules, as well as those concerning polygamy, for instance, define the conditions for entering into a marriage. The legal age for marriage is different in various legal orders. However, the establishing of this required age has two main points of reference: the attainment of the pubertal age, which is connected to sexuality and pregnancy, and the attainment of the age of consent, which is connected to individual choice. Within this framework, different legal orders have selected different rules in the course of history to regulate the minimum age for marriage. Even now, these rules are not uniform across the globe with respect to either official legal systems or unofficial laws.¹ Different rules

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1. In this article, I adopt the concepts of “official law” and “unofficial law” as defined in MASAJI CHIBA, *Introduction to ASIAN INDIGENOUS LAW IN INTERACTION WITH RECEIVED LAW* 1, 5-7 (1986) (“*Official law* is the legal system sanctioned by the

thus coexist at every level, and State law may be in conflict with traditional or other kinds of rules concerning the appropriate age for marriage.

Presently in India, the legal age for Hindu marriages is set at twenty-one for men and eighteen for women.² State law provides that all marriages under this age can be considered “child marriages.”³ Of course, nobody is actually concerned about a marriage between two persons both aged eighteen. In fact, when we think of child marriages in India, we think of marriages involving children who are significantly underage and who may not have even reached the pubertal age. The image of a child at the age of eight, for example, happily taking part in a real marriage that affects the child’s entire future without being fully aware of what this involves is perceived, from an external point of view, as a quintessential violation of a number of the child’s needs and rights.⁴ This practice, which generates much concern in India and profoundly hurts the sensitivities of many in India and elsewhere, is not surprising if one considers that underage marriages have been practiced and legitimated in legal history in many different contexts. Nonetheless, understandably, most observers would refuse to put things into this perspective because they feel that this practice is strikingly unjust.

In any event, child marriages seem to be at the crossroads of many theoretical couplings that are central in legal theory: tradition and modernity, religion and State, ancient and new, indigenous and western, and local and global. The diffusion of child marriages is not a unique feature of India, but for certain it is a prominent issue in the Indian context, and it is often addressed as a paradigmatic case of the obstinacy of traditional laws, particularly Hindu law, in modern societies. This article will focus on child marriage in India—considering specifically child marriage in Hinduism—but will frame the issue within a more general understanding of the complex processes of interaction between different

legitimate authority of a country *Unofficial law* is the legal system not officially sanctioned by any legitimate authority, but sanctioned in practice by the general consensus of a certain circle of people.”). Chiba’s analysis also adds the concept of legal postulate, meant as “a value principle or value system specifically connected with a particular official or unofficial law, which acts to found, justify, and orient the latter.” *Id.*

2. See The Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955 (India).

3. See WERNER F. MENSKI, HINDU LAW: BEYOND TRADITION AND MODERNITY 324 (2003) (remarking that such a broad definition makes the expression “child marriage” meaningless).

4. “External” in this case may mean many different things. It may even refer to people taking part in the marriage solemnization, perhaps even the spouses’ parents, who may well be in conflict with themselves, considering that human experience is rarely neat; it may refer to Indian activists and scholars, who devote much effort to eradicating this practice; and it may refer, as one expects, to Western scholars, including myself, who are not “exposed” to this practice and nonetheless know that, a few generations ago, early marriages were usual in their own environment.

cultures, regulations, and perspectives in the legal sphere.

In the first part of this Article I will analyze the evolution of Indian law on child marriages focusing on selected aspects of traditional Hindu laws, colonial intervention, and legal reforms in post-colonial times.⁵ This analysis is presented within a conceptualization of legal pluralism that is suitable to provide a fair account of the basic aspects of Indian family law and, at the same time, to avoid the risk of providing a stereotyped picture of child marriage in India. Through this analysis, I will address some general questions relating to the nature, or the image, of Hindu law and Hindu marriage with respect to modernity and tradition, highlighting how different rules concerning child marriage have evolved in the course of time and, at the same time, explaining different kinds of cultural legitimization that accompany this legal evolution.

In this context, I will highlight the interplay of different legal levels, conflicts between official law and unofficial law, and the attitudes of legal actors in shaping official responses to child marriages. Secondly, I will try to show how modernization and globalization have been resisted in modern Indian family law through a series of legal strategies. Remarkably, child marriages have been deemed valid, although punishable under criminal law, until recently. It was only in 2006 that a new regime was introduced, following the activism of movements for the rights of women and, generally, for international human rights, and due to a growing concern for the negative impact of child marriages on the living conditions of women and the social and economic development of the country.⁶ However, the questions underlying child marriages are still there: the effectiveness of State law, the diffusion of new rules, self-understanding, and identity.

Therefore, in the second part of the article I will remark on the logic of legal change that, in my view, could be useful to understand what could happen in the present situation and the limit of State intervention. I will add a further layer to the analysis by including a dynamic perspective on the processes of the diffusion of rules within a society. Then, I will elaborate on the existence of a “conflict of cultures” within the Indian legal system. I do not use the phrase “conflict of cultures” pejoratively, but as a theoretical tool to provide an account of the interaction of different kinds of

5. See MENSKEI, *supra* note 3 (describing in detail the evolution of Hindu law through these epochs). It is worth remembering that Indian law cannot be identified with Hindu law and that child marriages are diffused also among non-Hindus. As we will see, Hindu family law is an official part of Indian family law, which includes also Islamic law, Christian law, and other laws applied on a personal basis.

6. See JAYA SAGADE, *CHILD MARRIAGE IN INDIA: SOCIO-LEGAL AND HUMAN RIGHTS DIMENSIONS* 4-7 (2005). Child marriages affect both women and men, but, as a matter of fact, female children are those more involved in this practice and, more significantly, are those who usually suffer a major impact on their lives. Therefore, this issue concerns children’s rights and women’s rights at the same time. *Id.*

laws. In this regard, the complex relationship between human rights law and socio-legal concepts still operating in India, which can essentially be traced back to the concept of *dharma*, must be taken into account. This requires a nuanced understanding of *dharma* that avoids simplistic dichotomies between concepts which, although irreconcilable in theory, are often equally significant in the concrete lives of people.

This Article aims at pointing out that the issue of child marriage in India can be understood within the more general and competing processes of uniformization and pluralization in Hindu law and Indian law. In addition, the age for marriage could be the basis for a case study that analyzes different legal systems and the way they influence each other from a comparative perspective. However, this article will not enter into intricate details of circulation and uniformization of rules concerning the age for marriage as part of the hypothetical regime of a forthcoming global family regulated by an equally hypothetical global law, but will simply suggest that this could be a fruitful endeavor.

A very diffused form of Hindu marriage is the *saptapadi*,⁷ that is to say, the taking of seven steps by the bride and the bridegroom before the sacred fire. This image suggests to me the existence of three metaphorical circles of child marriage. The first one includes the spouses and their community, the second one the wider Indian family, and the third one the global family. They may be seen as one including the other and molding their form on each other. This article focuses on the interaction between the first two circles but is shadowed by the third one.

II. CHILD MARRIAGE, LEGAL PLURALISM, AND THE EVOLUTION OF HINDU LAW

A. Traditional Hindu law

Indian family law is historically pluralist to the extreme. Pluralism, understood as a fact, simply means the coexistence in a given context of a plurality of cultures and, strictly legally, of different sets of rules of behaviour, conceptions related to those rules, and institutions. In India, this pluralism may be seen as the outcome of the coexistence of different social groups and cultures since ancient times. These people and cultures developed their distinctive legal orders, which in many, but not all, cases had a religious character. Among legal orders having a prominent place in Indian legal history, we can discern, for instance, Hindu law, Islamic law,

7. See MENSKI, *supra* note 3, at 286-88 (discussing the relevance of *saptapadi* and presenting some interpretations by several authors about the necessity or less of this ritual).

Buddhist law, tribal laws, and so on.⁸ Furthermore, each legal order normally contains an inner plurality, so that, for instance, Hindu law can be seen as including a set of different micro-legal systems. These legal orders have interacted in several ways in different Indian contexts. Generally speaking, pluralism-as-fact may or may not be joined to a pluralist theory of law, which acknowledges different rules and conceptions as legitimated.⁹ In the Indian legal tradition as a whole, pluralism-as-fact has been widely legitimated, particularly in Hindu law, which developed a pluralist theory that made room for different rules and conceptions and then tied them together.

Within this framework, different local legal systems have established their own marriage rules during Indian legal history from Vedic times to the present. Therefore, the requirements that have to be satisfied in order for a couple to get validly married, including those concerning the age for marriage, may vary among epochs, parts of Hinduism, and even by geographical areas. Having this situation in the background, I will provide a brief history of child marriage through different epochs in India, trying to indicate some tendencies and select some particular contexts.¹⁰

Most scholars agree that in Vedic times (c. 1500-600 BC), child marriages were not diffused.¹¹ They did, however, make their appearance in classical sources. This does not mean that child marriages were unknown in Vedic times or that they were the general rule in classical times. The fact that a low marriage age eventually came to be favored appears from *dharmasutra* and *dharmashastra* literature, a series of doctrinal works stating the dharmic rules.¹² These works normally include several rules on the age of marriage, according to which a girl should be married a few months after puberty begins and even before. It is worth remembering that authors of *dharmashastras* normally rely on a series of sources, including Vedic texts, other *dharmashastras*, *sadacaras* (models

8. These legal orders appeared in different phases of Indian legal history, interacted in several ways and are still relevant in modern India. It is impossible to give here a detailed account of those interactions and to discuss the problems connected to periodization. However, one could consider the following approximate points of reference. The origin of the Hindu legal tradition may be traced back to 1500 BC, while the Buddhist legal tradition developed in the Indian subcontinent starting from 500 BC. Islamic law became a substantial part of Indian law in 1100 AD. Tribal laws are mainly aboriginal laws, which developed at the margins of other Indian laws.

9. For “theory,” in this case, I mean not only the theoretical works of scholars, but also the more general underlying assumptions about the character of the law developed within a given legal system or a given legal culture. In this sense, theory here includes the mentality of judges, lawyers, politicians, and also common people.

10. See generally MENSKI, *supra* note 3, at 322-70.

11. See, e.g., RAJ BALI PANDEY, *HINDU SAMSKARAS* 200 (2d rev. ed. 1969).

12. See ROBERT LINGAT, *THE CLASSICAL LAW OF INDIA* 3-14 (1973) (providing details on the concept of *dharma* and these texts).

of behavior and practices accepted as dharmic), and on their own learned opinion. Moreover, in many cases, these texts provide evidence of the rules actually followed in practice. *Dharmashastras* are not strictly binding, but their authority was taken into account in practice. Their description of what *dharma* is for a Hindu is an authoritative one and, in this sense, it clearly appears that, at least in mainstream Hinduism, the prevalent view is that an early marriage is considered a duty. This means that early marriage is perceived as the appropriate form of marriage and its accomplishment is part of cosmic and social ordering, that is to say, of *dharma*. In this view, child marriages have positive effects on the maintenance of cosmic order, the preservation of the society, and the spiritual merits of those involved.

However, as Menski points out, the basic dharmic obligation was to find a suitable spouse. Child marriages were legitimated to the extent they helped to fulfill this goal. Therefore, the view emerging from texts was that a father should wait if he did not find a suitable spouse for his daughter.¹³

If what was said above can be assumed as a simplified account of the dharmic implications of child marriage, it is worth remarking that those dharmic rules legitimated some original social facts. From a sociological point of view, many theories have been suggested to explain the diffusion of child marriages. Arguably, the main function of early marriage may be envisaged in the need to ensure control of female sexuality and to limit illicit sexual intercourse outside the institutionalized context of marriage. Another explanation may be envisaged in the logic of caste. If the marriage is a necessary passage in the life of Hindus, and if a good marriage has to be tested against a series of requirements that concern caste, social status, and so on, then, an early marriage might be a strategy to resolve all these issues in an efficient way. Moreover, the Hindu bride becomes part of the bridegroom family, and thus child marriage might be seen as a functional way to make the bride's passage to the new family easier before she can question it. Some authors also suggest that child marriage is not an original Hindu practice and was diffused during the Muslim period in order to create unions between Hindus as soon as possible.

Therefore, the origin of the practice and its social role are debated. Some explanations are related to the function early marriages have played in all societies, while others are more strictly connected to Hindu culture. In fact, the same rules may be justified with very different terms in different cultures, depending on basic cultural tenets that influence an

13. See MENSKI, *supra* note 3, at 330-33 (offering several theories on why Hindu girls were married at childhood, including the desire to find the most suitable groom).

entire worldview. In other words, even though child marriages have been widespread in different contexts, while the rules may be strikingly similar, the way in which they are culturally legitimated may be different. As a result, from a theoretical point of view, the important thing is not just the existence of this social phenomenon, but its legitimization within a legal culture or tradition.

In classical times, and even now from a strictly socio-legal point of view, the rules on child marriage are dharmic rules: child marriages are dharmic marriages. However, the fact that child marriages are endorsed in some basic texts does not necessarily mean that the rules on child marriages were living law, resulting from the interplay of different sources. Furthermore, dharmic rules are not fixed once and for all, and they can be different for different people. Concerning child marriages, this means that, at least in principle, the dharmic character of child marriage was not meant as absolute, and other rules on the age for marriage (a higher age, for example) could be considered as equally dharmic, depending on the context. As a conclusion, if it is an overstatement that child marriage is the positive general rule in traditional Hindu law, it is equally overstated that child marriage is somehow alien to Hinduism. Independently from their origin, child marriages were legitimated and institutionalized in the Hindu legal tradition, and, although not uniformly followed, they have been diffused in many areas of India and parts of Hinduism.

B. Colonial Intervention

The cluster of dharmic conceptions and rules surrounding the practice of child marriage inevitably continued to be significant to Hindus in the colonial period and, as we will see, also after Indian Independence. But starting with the colonial period, Hindu law interacted with new conceptions and legal rules having a different origin. Considering the impact of British rule on the practice of child marriage in India, it is worth remembering that the British colonial government generally decided not to intervene in the family laws of ruled subjects. A decision was made that colonial courts should apply Hindu law to Hindus and Muslim law to Muslims as far as family matters were concerned.¹⁴ So, while codifying and uniformizing criminal law and other laws as territorial general laws, the British colonial government adopted a plural system of family laws applied on a personal basis. Considering the existence of many different and potentially conflicting communities, each one with its own family law system, it was inconvenient and also likely unfeasible to intervene radically on family laws. In Indian legal history, as well as in other colonial

14. *See id.* at 161.

experiences, what is thus observable is the exceptionalism of family law, a part of law perceived as separate and peculiar due to its strict connection with cultural and community identity.

Notwithstanding the introduction of the system of personal laws, which acknowledges the characters and rules of traditional indigenous laws, eventually official colonial organs intervened on Hindu law. First, official courts misunderstood the nature of Hindu family law and picked up some texts as if they were legal codes. Second, these courts acknowledged customs but introduced very strict conditions for their judicial application. Third, through the interpretive principle of “justice, equity and good conscience,” these courts introduced new concepts and rules that were alien to traditional Hindu law.¹⁵ As a result, the British judges actually impacted Hindu family law but, paradoxically, they did so by generalizing a Sanskritic orthodox legal model while outlawing local legal systems, particularly customs that in fact were more “modern,” and by introducing their own system of values through “justice, equity and good conscience.”

Considering the Anglo-Hindu case law on child marriages, the first thing to note is that courts accepted the Hindu concept of *samskara*, that is to say, sacrament. Marriage as a sacrament means that it is a sacred tie, a religious duty, and a ritual that transforms status, role, and position. From this perspective, what is important for the validity of marriage is that the rituals are duly performed. For instance, in *Venkatacharyulu v. Rangacharyulu*, it was held:

There can be no doubt that a Hindu marriage is a religious ceremony. According to all the texts, it is a *samskaram* or sacrament, the only one prescribed for a woman and one of the principal religious rites prescribed for purification of the soul. It is binding for life because the marriage rite completed by *saptapadi* or the walking of seven steps before the consecrated fire creates a religious tie, and a religious tie when once created cannot be untied. It is not a mere contract in which a consenting mind is indispensable. The person married may be a minor or even of unsound mind, and yet, if the marriage rite is duly solemnized, there is a valid marriage.¹⁶

This judicial approach is clear evidence of the commitment to the sacramental nature of Hindu marriage, in which marriage is independent from consent, and it thus legitimated child marriage. In this sense, the court here seems to rely on Hindu traditional law as it emerged from mainstream Hinduism. In other cases, official courts disacknowledged some specific customary rules, which may not have been supportive of child marriages, because they failed to appreciate the inner pluralism of the

15. *See id.* at 156-85.

16. *Venkatacharyulu v. Rangacharyulu*, 1891 I.L.R. 14 (Mad.) 318.

Hindu legal tradition, allowing different marriage rules and conceptions.¹⁷

A separate important and general aspect of the colonial attitude and policy towards the personal laws of Indian subjects must be considered. Although formally respecting the personal laws' system, in some cases colonial authorities directly intervened on limited aspects of family law by statutory legislation, which in most cases was territorial in character but affected personal laws in an indirect way. This is precisely what happened in the case of child marriage. Colonialists were reluctant to intervene in this field, but in the late nineteenth century, Indian social activism was emerging in addition to public concern in the homeland for some practices that were perceived as unacceptable.¹⁸ As remarked by Menski, instead of trying to eradicate these practices, "the focus fell on curtailing the worst excesses to alleviate the suffering of Indian women. The resulting legal regulation took the shape of 'restraint' rather than 'prohibition.'" ¹⁹ This was done by criminalizing child marriage without intervening on private family law. The legitimating framework of this kind of intervention, which separated the criminal and the private legal spheres, was thus arguably the need of preventing early motherhood and sexual abuse in the context of child marriage rather than child marriage itself.

One example is provided by the Indian Penal Code of 1860, section 375, a norm on rape which may apply to sexual intercourse in child marriages:

A man is said to commit rape who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances following any of the five following descriptions: . . . Fifthly: with or without her consent, when she is under ten years of age. . . . Exception; sexual intercourse by a man with his own wife, the wife not being under ten years of age is not rape.

In 1891, the age was raised to twelve.²⁰ Menski highlights that some criticism by Hindu movements arose not as much out of the provision itself, but out of a negation of the legitimacy of British interference in Hindu social practices. In fact, Hindus desired that the reform come from

17. See MENSKI, *supra* note 3, at 180-81 (describing the process of judicial recognition of custom and highlighting that unrecognized customs could continue to exist in social reality).

18. See *id.* at 335.

19. See *id.*

20. Menski comments:

After much debate, a Bill was finally introduced in 1891 to raise the minimum age for marital cohabitation from ten to twelve years. This became the so-called Age of Consent Act, 1891 (Act X of 1891), which Banerjee . . . saw as a "poor substitute for prohibition of early marriage of girls" and Sarkar . . . depicts as 'an unbelievably messy and impractical measure.

Id. at 337 (also reminding that the official name of the Act was the Indian Criminal Law Amendment Act).

within instead of being imposed from the outside. The impact of these provisions does not seem to have been significant. As of 1921, about 218,000 girls were married below the age of five, and about 8,500,000 were married before the age of fifteen.²¹ However, the opposition discouraged other colonial interventions.²² In this sense, Hindus did not legitimate colonial intervention because they felt it was an attack on the system of personal laws.

In 1929, the British undertook a new initiative with the Child Marriage Restraint Bill.²³ This Bill proposed that a marriage be deemed invalid when the girl's age at the time of marriage was below twelve or the boy's age below fifteen, but ultimately this provision was set aside. The Child Marriage Restraint Act of 1929 followed the same path by simply establishing a criminal penalty of detention, fine, or a combination of both.²⁴ The British tried to intervene in the practice of child marriage through criminal norms aimed at restraining and controlling the worst effects that were connected to the practice, but they did not question the validity of child marriages.²⁵ The personal law of Hindus was, thus, formally safe.

C. Independent India

Independent India had to cope with the difficult issues arising from the system of personal laws. The Constitution of India laid down a directive principle of State policy in Article 44, which provided for the State to adopt a uniform civil code.²⁶ But this constitutional provision has not been implemented and, according to some authors, will not be implemented in the foreseeable future.²⁷ Soon after independence, many argued that a uniform civil code would be a complement to Indian laicism. Nonetheless, the legal diversity in reality and the dangerous potential conflict between different Indian communities resulted in the adoption of Article 44, simply

21. 1921 CENSUS (India).

22. See MENSKI, *supra* note 3, at 340 (discussing the failure of a 1924 bill to increase the minimum age of cohabitation to fourteen years due to strong public opposition).

23. See *id.* (presenting the basic views that emerged during the debates on the bill).

24. See The Child Marriage Restraint Act, 1929, No. 19, Acts of Parliament, 1929 (India) (providing for different penalties depending on age, gender, and the role played in marriage solemnization).

25. See MENSKI, *supra* note 3, at 341-42 (noting that the Act clearly states that it is designed to "restrain the solemnization of child marriages"); see also LINGAT, *supra* note 12, at 263-66 (discussing the British gradual approach to introducing reform legislation in India).

26. See INDIA CONST. art. 44.

27. See generally Werner Menski, *The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda*, 9 GERMAN L.J. 211, 250 (2008) (discussing the debate concerning the uniform civil code).

a directive principle, and the renunciation of more ambitious plans. Parliament then promulgated a series of acts aimed at simplifying and amending at least Hindu personal laws, which seemed more feasible: the Hindu Marriage Act of 1955, the Hindu Minority and Guardianship Act of 1956, the Hindu Adoptions and Maintenance Act of 1956, and the Hindu Succession Act of 1956.²⁸

Modern Hindu law, as an official part of the Indian legal system, is thus partly regulated by State legislation and judged by State courts, but is still largely based on a pluralistic approach, albeit simplified and uniformized. For instance, customs, which are manifestations of local laws and can be seen as “spontaneous law” or as “law from below,” are largely acknowledged in modern Hindu law. Customs are official law to the extent that they are applied by State organs such as judges. However, some State requirements exist to enforce customary law; namely, a custom should be followed for a long time, in a continuous and uniform way, and should be certain, not contrary to public policy, and not unreasonable.²⁹

Norms concerning child marriages specifically are found in section 5 of the Hindu Marriage Act of 1955, which lays down the conditions for a Hindu marriage: “A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely [. . .] the bridegroom has completed the age of eighteen years and the bride the age of fifteen years at the time of marriage.”³⁰ The age requirement later became twenty-one and eighteen years, respectively.³¹ But what happened in case of violation of this norm? According to section 18:

Every person who procures a marriage for himself or herself to be solemnized under this Act . . . shall be punishable—(a) in the case of a contravention of the condition specified in clause (iii) of section 5, with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both.³²

Nonetheless, the violation of this provision does not make the marriage invalid, that is to say, void or voidable. In fact, sections 11 (void

28. See The Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955 (India); see also The Hindu Minority and Guardianship Act, 1956, No. 32, Acts of Parliament, 1956 (India); The Hindu Adoptions and Maintenance Act, 1956, No. 78, Acts of Parliament, 1956 (India); The Hindu Succession Act, 1956, No. 30, Acts of Parliament, 1956 (India).

29. See The Hindu Marriage Act, *supra* note 28. The legal definition of custom is variable and concerns State acknowledgement, that is, acknowledgement by a competing system of sources of law. A custom need not be followed for a long time; it may be discontinued and moreover may be against public policy. Nonetheless, it will be a binding rule on those taking part in that customary legal system. *Id.*

30. *Id.* § 5.

31. *Id.* (amended by The Child Marriage Restraint (Amendment) Act of 1978 (Act 2 of 1978)).

32. *Id.* § 18.

marriages) and 12 (voidable marriages) do not contemplate the case of violation of section 5.3.³³ In other words, the Hindu Marriage Act provides no explicit solution, as it does with monogamy and other conditions for marriage,³⁴ and this has been interpreted to mean that the marriage remains valid. Thus, until 2006, the official modern Hindu law prohibited this practice by establishing a minimum age for marriage and a criminal punishment for marrying before that age. But from the point of view of private law, an underage marriage, even involving someone aged eight, would have been perfectly valid.

What are the reasons for this legal outcome? The Hindu Marriage Act saving child marriages could be seen as the outcome of a compromise due to the diffusion of this institution, which should be seen as a normative one, and not simply as a habit. In other words, many thought that making child marriage void or voidable would have produced a large amount of litigation and legal uncertainty. In a context where marriages are unregistered and administered at the community level, the risk for exploitation of the weak was high. Men could theoretically say that they wanted the marriage to be declared void rather than obtain a divorce, irrespective of the fact that the marriage was accepted as a valid one in social reality. Secondly, to intervene radically on child marriages would have meant to move against a practice that Hindus felt was religiously legitimate and dutiful in many contexts.

Therefore, after independence, Indians felt that the practice was so much diffused that it would have been counterproductive to introduce some strict regulation on the private legal sphere, and criminal punishment appeared as an adequate policy option.³⁵ However, it is worth considering that the punishment was not heavy and had a very limited deterrent effect, so that in a sense, it could be considered simply as an additional expense of marriage.

In recent years, the agenda of social reformism has come a long way. Many activists have struggled against child marriages at different levels. Social welfare is at stake, along with the human rights of women. Child marriages may cause multiple violations of international human rights, including the right to health and the right to equality.³⁶

The official regime of child marriage in India has recently changed with

33. *See id.* §§ 11, 12.

34. *See id.* § 13. In 1955, monogamy was elevated to a general rule for all Hindus, in spite of the fact that significant Hindu communities were in fact polygamous. The violation of the requirement of monogamy makes a following marriage void. *Id.*

35. *See* MENSKEI, *supra* note 3, at 345 (discussing child marriage in independent India).

36. *See* SAGADE, *supra* note 6, at 132-33, 181 (discussing the right to equality as stated in U.N. Charter and the right to physical and mental health as stated in the Universal Declaration of Human Rights).

the Child Marriage Prohibition Act of 2006, which for the first time establishes that underage marriages are voidable or void in some particularly serious cases, for instance when a child marriage is connected to child abduction.³⁷ This Act is territorial law and as such, it is applicable to all Indians, even though it clearly affects family law. In this sense, a uniformization of law is happening within the framework of the system of personal laws.

It has been accepted, in line with other national legal systems, that child marriages cannot be merely criminalized but must be voidable or void to allow the interested party to end the marriage relationship. New norms give women more legal devices to decide their own lives.

It may be asked if this new legal regime mirrors a new Indian family. Once again the problem is legitimization, explicit or implicit. Certainly, new factors are now operating against child marriages, particularly an increasingly widespread awareness of social welfare and the need for India to invest in girls' education. Family wealth has always been important in marriage, even in child marriage, because the girl became part of her husband's family and assumed a series of duties in family affairs. Now a relevant change is that modern economic life is pushing towards the rise of the marriage age, in India and elsewhere, in order to increase family wealth through the contribution of the wife.

Factors supporting child marriages still exist. From a religious point of view, the belief that a child marriage produces spiritual merit and that a family has a duty to find an appropriate husband for its daughters, along with implications connected with control of women's sexuality, are still very much diffused in India. Some Hindu movements clearly contest this recent shift in legislation, which is perceived as dangerous for the structure of the Hindu family and core values of Hinduism.

Significantly, traditional factors are also still there. That is to say, child marriages have acquired legitimization from the fact that they have been an established practice since a distant past. In other words, in certain contexts, the most natural option is to follow the rule the mother followed, which was the rule followed by the grandmother. This means that child marriages can count on a sort of presumption of appropriateness.

The resulting picture is that child marriages are no longer legitimized in Indian law, including official Hindu law, while they are legitimate from the point of view of religious authorities and specific communities at an unofficial level. In this sense, one could say that they are legitimated in some parts of traditional, unofficial Hindu law.

37. See The Prohibition of Child Marriage Act, 2006, No. 6, Acts of Parliament, 2007 (India).

As we are going to see in the next part, the Child Marriage Prohibition Act of 2006 has in fact generalized a new rule on the marriageable age for all Hindus and all Indians. Even so, after 2006, a conflict may occur between an official Hindu law rule, which makes child marriages void or voidable, and an unofficial Hindu law rule, which considers them valid, if not obligatory. I will now further elaborate on the relationship between official and unofficial law and the limits of State intervention. State law-making, on the one hand, and social ordering and self-regulation, on the other, could be assumed as the poles of this analysis. Therefore, I will also introduce a conceptualization of the “conflict of cultures” underlying these different kinds of laws.

III. OFFICIAL LAW, UNOFFICIAL LAW, AND LEGAL CHANGE

A. Uniform law and the diffusion of innovation

The distinction between official law and unofficial law, and more analytically, between official custom and unofficial custom, may be particularly useful to understand what could happen to child marriages after 2006. Before then, one might have viewed child marriage as part of official Hindu law to the extent that, setting aside criminal punishment and symbolic proclamation, child marriage was legally perfectly valid. The complex legal situation for the practice of child marriage was prohibited at one level, the criminal one, and admitted at another level, the private law one. This could be read as evidence of a special kind of conflict and accommodation between different legal cultures resulting in a compromise. Furthermore, it is evidence of complex intertwining of territorial law and personal laws in India. It is significant that criminal law provisions are basically territorial laws while the Hindu Marriage Act is personal law. In this sense, modern Hindu law, until 2006, has followed the path of colonial law.

Remarkably, the Child Marriage Prohibition Act is territorial law and applies to all Indians in an important, albeit limited, aspect of family law. The Act represents a significant move from previous regimes preserving the principle of different family laws applied on the basis of one’s membership in a specific community and the principle of limited intervention in family matters.

Even though this reform is recent, one could ask whether this significant shift could have an effect and, particularly, whether the practice of child marriage is going to be overcome. The answer to this question requires a conceptualization of the limits of State intervention on private law. The fact is that the law applied by official State organs and the law followed at the level of community may still diverge. After 2006, an Indian judge

could declare a child marriage void or voidable, and in this sense child marriage is no longer a part of official Hindu law. However, social ordering may preserve child marriages because State intervention in family matters is not necessary.

State-driven change works differently depending on the social phenomena the State aims to tackle. In a pluralist environment, where different rules are followed, State legal regulation will be more significant to some people than others. To understand this, recall that, although a diffused practice, child marriage is not diffused in the majority of Indian states. Child marriage is mainly concentrated in Gujarat and Rajasthan, while other states, for instance Kerala, are not affected.³⁸ In addition, these marriages are more diffused among some castes and, enlarging the picture, they are more diffused among Hindus.³⁹

From a private law point of view, before 2006, under official Hindu law there was no requirement for the marriageable age (all underage marriages were valid), and different local rules could be followed. After 2006, underage marriages were void or voidable, depending on the circumstances. The important theoretical point here is that the introduction of this rule at the State level made generally applicable to all Hindus age requirements that were already observed in practice by many Hindus as part of their specific rules.⁴⁰ This means that those who had already adopted the rule in which the appropriate marriageable age is twenty-one for men and eighteen for women were not affected by this change in formal State regulation. In other words, the Child Marriage Prohibition Act impacts Rajasthan much more than Kerala.

One could also argue that the State can make this kind of intervention when it is reasonable to assume that the majority of the population will smoothly accept the new rule. Generally speaking, the State can also decide to lay down a formal legal regulation that is more “advanced” than that followed by the majority of people in order to stimulate social change

38. See *Gujarat, AP Top List of Child Marriages*, THE TIMES OF INDIA, Mar. 30, 2010, available at <http://timesofindia.indiatimes.com/india/Gujarat-AP-top-list-of-child-marriages/articleshow/5742216.cms> (stating that 23 cases of child marriage were reported in Gujarat in 2008); see also SAGADE, *supra* note 6, at 4-6 (noting that women in Rajasthan marry at age 15.9 on average, and women in Kerala marry at age 20 on average).

39. See SAGADE, *supra* note 6, at 4 (observing that child marriage has prevailed particularly among Hindus in India).

40. In this regard, one should preserve a distinction between rules and practices or habits. Practice may be evidence of legal rules but may also be a violation of legal rules. What is important is the existence of different rules and not simply of different practices. A community may accept an underage marriage rule independently from the fact that in legal practice no one makes recourse to that rule. If everyone, for instance, marries at eighteen this does not mean necessarily that one could not marry at eight. However, if nobody marries at a lower age, after a lapse of time, the rule could be deemed as changed.

by introducing new regulation. But lawmakers usually foresee the efficacy of their legal intervention. Even colonial rulers did not have the presumption of changing the social ordering of their subjects. In this regard, it is worth remarking that legal change is pursued by generalizing, at the formal level, the rules followed by a part of the society in order to stimulate processes that could eventually uniformize those rules more generally.

The process of diffusion of new rules in social practice requires further examination. Even if new formal regulation might be seen as the authoritative formulation of a rule that was already followed in some parts of Indian society and is now generalized, this rule, in order to be effective, needs to be diffused to social groups that, before formal legislation, followed different rules and accepted underage marriage. This process is a complex one.

If the formal written rule is in conflict with the rule that is followed by a part of society, normally an unwritten rule, it often happens that those who observe the unwritten rule will continue to learn, transmit, and diffuse that practice, creating conflict with formal legal regulation. In this process, imitation of existing practices plays a crucial role. A formal rule needs time to enter into practice because in some cases it has to overcome an entire system of rules and beliefs that are learned through much more basic and immediate mechanisms. The ineffectiveness of law certainly depends on a conflict of authorities, but one should not underestimate the relevance of the anthropological aspects of the process of diffusion of rules, that is to say, the way we learn and, ultimately, the way we are made.

Where models of behavior are sources of law, in the sense that legitimate forms of behavior are embodied in the social practices of some people and others learn from them, legal change is unlikely to happen through legislative instruments. The Child Marriage Prohibition Act of 2006 in India is certainly an important piece of legislation, but far more efficient would be relevant Hindu circles acting as innovators: following new rules and transmitting and diffusing them. This is because the more people there are who follow a new rule, the greater the chance of imitation and of diffusion of legal change. Of course, considering the inner plurality of Hinduism, change should be triggered within those contexts where child marriage is solemnized. Furthermore, the qualitative aspect of the authoritativeness of people acting as innovators is at least as important as the quantitative aspect. In this process, the key is still legitimization. Many Hindu circles are still actively against prohibition of child marriages, which is seen as a peril for the Hindu social order, and this allows the resilience of child marriages at the unofficial level. On the other hand, the majority of Hindus will smoothly follow the new formal regulation simply because it is coherent with the practices and rules they were already

following their living law.

B. Human rights, dharma, and the State

Child marriages may be seen as an example of the conflict between traditional laws and modern State laws. In this regard, it is worth recalling that studies on Hindu law and specifically on the legal condition of Hindu women are often carried on from two irreconcilable perspectives. Reformist authors tend to criticize Hindu law from the viewpoint of the International Human Rights movement, while other authors are more concerned with the justification of practices affecting Hindu women within their specific cultural tradition. A third view is developing that does not dismiss Hindu law as a backward law, but rather suggests that it is now in a postmodern phase, beyond the opposition between tradition and modernity.⁴¹ Under this view, Hindu law is a lively law that is evolving through interaction with other kinds of law, including State law, but on its own terms.

The conflict between traditional Hindu law and State law may be also seen as a conflict between cultural underpinnings embodied in the concepts *dharma* and human rights. Even on this point, there are opposite views. Some authors think that the concept of *dharma* could be used as a foundational concept for human rights in India.⁴² According to other authors, many of the problems afflicting Indian society depend on the rigidity of its traditional normative system, which is at the basis of gross violations of human rights. A representative opinion of this second perspective is that formulated by V.S. Naipaul in *India: A Wounded Civilization*.⁴³ In his view, *dharma* can justify every form of injustice in India, and so State law, to have a dynamic role, should struggle against *dharma*.⁴⁴

The idea of a struggle of State law against *dharma* seems often to be justified by the representation of its traditional, dharmic-founded, normative system as unchangeable.⁴⁵ But is this representation based on a

41. See MENSKI, *supra* note 3, at 546-47 (arguing that Hindu law is an example of a non-Western legal system that does not adhere to a state-centered approach to law).

42. See Mahendra P. Singh, *Human Rights in the Indian Tradition: Alternatives in the Understanding and Realization of the Human Rights Regime*, 63 HEIDELBERG J. INT'L L. 551, 579 (2003) (discussing the concept of *dharma* and its potential role in protecting human rights).

43. See V.S. NAIPAUL, *INDIA: A WOUNDED CIVILIZATION* 142 (1977).

44. See *id.*

45. As Menski states:

The frequently stated Hindu belief that Hindu law as an eternal ordering system (*sanātānadharmā*) is rooted in religion and ultimately based on some form of divine revelation has led to scholarly assumptions that as a religious law, Hindu law could be modernized, secularized and ultimately deconstructed

deep understanding of Hindu law? In its deepest sense, the dharmic system is a cultural complex that cannot be easily identified with specific norms. It provides the basic conceptual structures for emerging forms of life without identifying with them. This makes the system extremely flexible and open to change without losing its continuity. Even though local legal systems may be static, new rules may be integrated.

Secondly, the conceptual underpinnings of *dharma* cannot be limited to a set of norms. Menski remarks:⁴⁶

If the basic Hindu conceptual rule was and is that every individual is unique and different, and that every situational context has its peculiar features, requiring a situation-specific response and solution, an appropriate law must of necessity be something different from positivist state laws that prescribe how all people must act in certain situations.

The predominant understanding of the Hindu model, focusing on some norms that seem to be highly culpable, has led to a decrease in acknowledgement of its culture-specific basic concepts, which, on the contrary, are very relevant to understanding how law works in this context.

A positivist approach would suggest that in order to change something in a society, it is necessary to centralize and uniformize the laws, laying them down according to some rationalistic concept of justice, to stop every non-state normative production and to give to the lawmaker the task of adapting law to new social exigencies. But this approach clashes with basic tenets of the Hindu model. As the evasion of State law and the persistent characters of informality show, some basic conceptual structures cannot simply be superseded. If we take seriously the existence of a Hindu model, with its basic concepts and its bounds in organizing the complexities of social life, we must take seriously the problem of change in *this* model.

Private law is about social ordering, and State family law in India has normally intervened on some limited aspects while leaving the overall structure of social ordering up to individuals and groups. Child marriages have been legitimated until recently within modern Hindu family law through the State's recognition of different social orders. Now that a major change has occurred with the Child Marriage Prohibition Act, we must observe the reactions in social reality. Generally speaking, the problems

as a thing of the past. In reality, as a chthonic legal system, Hindu law is much closer to African laws and informal East Asian laws than to the major monotheistic legal traditions coming from the Middle East. But a desire to be grouped with 'advanced' legal systems and scholarly inability even among Hindus to explain the roots of Hindu law within their culture-specific environment have combined to lead the general public astray when it comes to grasping the essence of Hindu law.

MENSKI, *supra* note 3, at 38.

46. *Id.* at 85.

that Indian society must resolve are activating a push-and-pull mechanism in search of creative, suitable solutions. This process is inevitably carried on by several normative agencies in accordance with the pluralistic structure of Indian society. The State plays an important part in this process. However, the outcome will depend on the quality of its interaction with other kinds of law.

IV. CONCLUSION

The problem of child marriages in India can be understood from the perspective of uniformizing trends in Hindu law, Indian law, and, more generally, global law. If the tension between uniformity and diversity is real, an investigation into these trends, and more generally into the logic of uniformization, could help illuminate the nature and limits of legal change.

The Child Marriage Prohibition Act does not easily solve the problem of child marriages in India. Even now that official Indian family law does not acknowledge the validity of child marriage, one must not underestimate the fact that many Hindus live under unofficial Hindu law, that is to say, they follow rules that may conflict with State law. Therefore, to understand Hindu law in context and the evolution of child marriage, one has to analyze the interaction of several legal orders: traditional customary laws, State legislation, judgments of the courts, and international sources. In this context, State laws and traditional laws should not be envisaged as two neatly separate bodies of law. In many cases, they are intertwined by Hindus, who pick up rules and principles from both State laws and traditional laws, depending on their needs, constraints, and aspirations.

Therefore, modern Hindu family law emerges from complex interactions between different legal orders, basic assumptions about law and the State, and socio-legal factors. This plurality requires a theoretical framework capable of articulating these differences. In fact, change in one of these legal orders also affects other legal orders. A better understanding of these interactions can help policy makers be aware of the effects that legal intervention may actually have on the concrete lives of Hindus. This should be seen as a two-way process and, in fact, it is too easily assumed that change may derive only from State legal intervention, while what is crucial is the diffusion of change, which requires the cooperation of traditional legal mechanisms and concepts.