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16 CHILD MARRIAGE IN AFRICA

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The United Nations Convention on the Rights of the Child (UNCRC)² has been ratified by all the states of the world, except one: the United States of America. Although the United States is not part of Africa, the decision not to put the UNCRC forward for approval by a two-thirds majority of the Senate of its ratification for signature by the President of the United States is relevant in the context of this survey, because the undertaking by the Senate Special Committee on Foreign Relations, chaired at the time by then Senator Jesse Helms, a Republican from North Carolina, not to put the UNCRC forward for ratification was based on religious reasons, namely insistence by the so-called “religious right” that it undermined the authority of parents and was therefore in conflict with basic principles of Christianity. It was also alleged that for the state to instruct parents how to raise their children would be a manifestation of communism.

The Convention on the Rights of the Child has, however, been ratified by all African states. The last ones to do so were South Sudan, which ratified the Convention on 23 January 2015, and Somalia, which ratified the Convention on 1 October 2015. Even so, it is unfortunate that many African customs that violate the rights of the child are still widely practised in tribal communities. This survey will focus on one such practices: marriage of children under the age of 18 years.

PROTECTION OF THE RIGHTS OF THE CHILD IN AFRICA

The African (Banjul) Charter on Human and Peoples’ Rights adopted in 1981 provides that states shall ensure “the protection of the rights ... of the child as stipulated in international declarations and conventions.”³ The Organisation of African Unity (currently called the African Union) furthermore adopted the African Charter on the Rights and Welfare of the Child (ACRWC),⁴ which contains an impressive list of children’s rights and “discourages”, amongst other things, “[a]ny custom, tradition, cultural or religious practice that is inconsistent with these rights” (art 1); promises protection of children against physical or mental injury or abuse, neglect or maltreatment including sexual abuse” (art 16); proclaims that “[n]o child should be separated from his or her parents against his or her will” (art 19); calls on governments to “do what they can do to stop

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2 Convention on the Rights of the Child, G.A. Res. 44/25 of November 20, 1989.

3 Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990.

4 African Charter on the Rights and Welfare of the Child (ACRWC), OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999.

harmful social and cultural practices, such as child marriage, that affect the welfare and dignity of children” (art 21); speaks out against the recruitment of child soldiers or letting them take an active part in hostilities (art 22); and much more.

The inclusion of children’s rights in the Constitution of the Republic of South Africa, 1996,⁵ can serve as a model for the world to follow. The South African Constitution proclaims that a child’s best interests are of paramount importance in all matters concerning the child (s 28(2)); it affords to every child the right to a name and a nationality from birth (s 28(1)(a)); every child has a constitutional right to family care, parental care, or appropriate alternative care when removed from the family environment (s 28(1)(b)), to basic nutrition, shelter, basic health care services, and social services (s 28(1)(c)), and to be protected from maltreatment, neglect, abuse and degradation (s 28(1)(d)); as a matter of constitutional obligation, every child must be protected from exploitative labour practices (s 28(1)(e)), and may not be required or permitted to perform work or to provide services that are considered inappropriate for a child of that age (s 28(1)(f)(i)), or would place at risk the child’s well-being, education, physical or mental health, or spiritual, moral or social development (s 28(1)(f)(ii)); the Constitution guarantees to everyone the right to basic education, and the right to further education (s 29(1)). It is perhaps important to note that while the social rights of persons enunciated in Sections 26 and 27 of the Constitution are subject to progressive implementation depending on the available resources at the disposal of the State, a child’s comparable rights to basic nutrition, shelter, and health-care services have been proclaimed in the Constitution as immediately enforceable rights.

The child, like everyone else, is also entitled to basic rights applying to the administration of justice, such as the rule against arbitrary arrests, the proscription of detention without trial, protection against violence, freedom from torture and from cruel, inhuman and degrading treatment or punishment (s 12(1)), and guarantees of the long list of basic norms of criminal procedure pertaining to persons arrested (s 28(g), read with s 35(1)), in detention (s 28(g), read with s 35(2)), and accused of a criminal offence (s 28(g), read with s 35(3)). Current South African law makes ample provision for alternative measures designed to avoid the detention of juveniles in a prison and to orchestrate the rehabilitation and re-integration in society of young offenders. In a recent judgment, the Constitutional Court noted that “the Convention on the Rights of the Child has become the international standard against which to measure legislation and policies, and has established a new structure, modelled on children’s rights, within which to position traditional theories of juvenile justice”.⁶

It is perhaps interesting to note that including children’s rights in the South African Constitution was initially quite controversial. When Tony Leon, leader of the Democratic Party and chair of the Parliamentary Committee on Fundamental

5 *Centre for Child Law & Others v MEC for Education, Gauteng, & Others*, 2008 (1) SA 203 (T) at 227 (S.Afr.).

6 *S v M (Centre for Child Law as Amicus Curiae)*, 2008 (3) SA 232 (CC) at 245 (S.Afr.).

Rights of the Constitutional Assembly was asked whether or not children's rights should be included in the Bill of Rights, he said: "Children's rights are like chicken soup, they can do no harm."⁷ This skeptical remark attracted severe criticism.⁸ It is perhaps also worth noting that an alumnus of the Emory University School of Law in the U.S., Michelle Morris, played a leading role in specifying the rights of the child that were to be included in the South African Bill of Rights.⁹

STATISTICAL DETAILS OF CHILD MARRIAGE

It has come to be widely accepted that 18 years is the age of majority and that marriages of persons under that age should not be allowed. However, child marriages, especially in sub-Saharan Africa, still occur on a large scale,¹⁰ and attempts to place legal restrictions on child marriages are not at all effective, largely because such marriages are based upon and receive the sanctioning of African customary law.

The United Nations Children's Fund (UNICEF) noted in a 2016 Report that about 15 million girls are married before the age of 18 years,¹¹ and further noted that a child deprived of protection against, amongst other things, early marriage and motherhood "may be physically and emotionally scarred for life, with profound consequences".¹² A global partnership of more than 1 300 non-governmental organisations, called Girls Not Brides, has estimated that every year 12 million girls marry before the age of 18 years. In sub-Saharan

7 "Report of the Theme Committee Declaration", special supplement on "Constitutional Talk", *The Argus*, 29 November 1995, 7.

8 See Sloth-Nielsen J. 1996, "Chicken Soup or Chainsaws: Some Implications of Constitutionalism of Children's Rights in South Africa", *Acta Juridica*, 6.

9 Michelle Morris was at the time a visiting scholar in the Child Law Clinic of the University of the Western Cape. Dullah Omar, who became the Minister of Justice following the political transformation of South Africa, was also on the faculty of the same university at the time, and while the inclusion of children's rights in the Constitutional Bill of Rights was still in dispute, Michelle Morris and Dullah Omar organised a conference in Cape Town that included children who were requested to inform the audience which rights of the child they would want to be included in the Bill of Rights. Ms. Morris was also instrumental in provoking instructions of the South African President F.W. de Klerk that children in detention while awaiting trial should immediately be released from prison.

10 As to child marriages in Zimbabwe, South Africa and Malawi, see Mwambene L. 2018. "Recent Legal Responses to Child Marriage in Southern Africa: The Case of Zimbabwe, South Africa and Malawi", *African Human Rights Law Journal* 18(2):527-550.

11 UNICEF. 2016. The State of the World's Children: A Fair Chance for Every Child, 31. Online at: <https://www.unicef.org/reports/state-worlds-children-2016>

12 UNICEF, The State of the World's Children, 11.

African countries, 39% of girls marry before they turn 18, and 13% before their fifteenth birthday.¹³ In Zimbabwe, one in three girls married before the age of 18 years.¹⁴

In South Africa, marriages are classified under three distinct headings: (1) civil marriages that are administered under the Marriage Act 25 of 1961, (2) customary marriage concluded under African customary law and which are governed by the Recognition of Customary Marriages Act 1998, and (3) same-sex civil unions which are governed by the Civil Unions Act 2006.¹⁵ Statistics show that in 2003, 14 bridegrooms and 172 brides were under the age of 18 years when they entered into a civil marriage.¹⁶ In the same year, 3 498 customary marriages were registered with the Department of Home Affairs,¹⁷ and in those marriages a mere 9 (0.3%) of the bridegrooms but 79 (2.3%) of the brides were younger than 18 years when they entered into the customary union.¹⁸ It is estimated that in 2016, 4 bridegrooms and 99 brides were under the age of 18 years when they got married.¹⁹ Customary marriages concluded in 2016 included 14 (0.4%) where the grooms were under the age of 18 years, and 252 (6.3%) where the brides were younger than 18 years.²⁰ These statistics indicate that child marriages entered into under customary tribal laws are on the increase in South Africa. Child marriages did not occur in civil unions that were registered under the applicable law.

Statistics relating to Kenya, which was slated to be our host country for this ACLARS conference before the Covid-19 pandemic forced us to go virtual, are also quite alarming.²¹ In 2017, 23% of girls in this country married before reaching the age of 18, and 4% before the age of 15.²² According to UNICEF, Kenya ranks twentieth in the world as far as child brides are concerned, the number being 527 000.²³ The

13 See Girls Not Brides: The Global Partnership to End Child Marriage. Online at: <https://www.girlsnotbrides.org/>

14 Girls Not Brides. 2006. *In-Depth Review of Legal and Regulatory Framework on Child Marriage in Zimbabwe*, 20, para 2.2. Online at: https://www.girlsnotbrides.org/documents/502/PLAN_18_country_report_zimbabwe_final.pdf. See also Sloth-Nielsen J. 2016. "Child Marriage in Zimbabwe: The Constitutional Court Rules No", in Atkin B (ed.) *International Survey of Family Law* 2016 Edition B, Bristol, U.K: Jordan Publishing Ltd, 537-553.

15 See Van der Vyver JD. 2012. "Multi-Tiered Marriages in South Africa", in Nichols JA (ed.). *Marriage and Divorce in a Multicultural Context: Multi-Tiered Marriage and the Boundaries of Civil Law and Religion*. New York: Cambridge University Press, 200-202.

16 Statistics South Africa, Statistical Release P0307: Marriages and Divorces, 2013, para 2.1.4. Online at: <https://www.statssa.gov.za/publications/P0307/P03072013.pdf>

17 SSA, Statistical Release P0307: Marriages and Divorces, 2013, para 2.2.1.

18 SSA, Statistical Release P0307: Marriages and Divorces, 2013, para 2.2.3.

19 SSA, Statistical Release P0307: Marriages and Divorces, 2016, para 2.1.4.

20 SSA, Statistical Release P0307: Marriages and Divorces, 2016, para 2.2.3.

21 See Girls Not Brides, Kenya. Online at: <https://atlas.girlsnotbrides.org/map/kenya/>

22 Girls Not Brides, Kenya.

23 Girls Not Brides, Kenya.

National Plan of Action for Children in Kenya (2015-2022) acknowledged that child marriage leads to physical, sexual and emotional abuse of children.²⁴

THE NEGATIVE IMPACT OF CHILD MARRIAGE ON THE BRIDE

UNICEF has established that child marriage of girls has a negative impact on the child bride, noting particularly that, "Child marriage often compromises a girl's development by resulting in early pregnancy and social isolation, interrupting her schooling, limiting her opportunities for career and vocational advancement and placing her at increased risk of domestic violence."²⁵ Although UNICEF has not extensively studied the impact of child marriages on the male partner, it estimated that "marriage may similarly place boys in an adult role for which they are unprepared and may place economic pressures in them and curtail their opportunities for further education and advancement."²⁶ It concluded: "Child marriage is a violation of human rights, but is all too common."²⁷ It found that child marriages amongst girls most commonly occur in sub-Saharan Africa, "where 4 in 10 young women were married before the age of 18".²⁸ As far as boys are concerned it established that, globally, 115 million boys were married before the age of 18 and that, although child marriage of boys occurs with vastly less frequently than child marriage of girls, boys "similarly experienced a rights violation that cuts short their childhood."²⁹

Child marriage also has an impact on problems associated with the current population explosion throughout the world, particularly tribal communities in Africa. Since the turn of the century, the South African population has increased by more than 10 million people. The South African Demographic Profile of 2018 estimated the South African population to be almost 55 million people. Most relevant in the present context is that 28 per cent of the South African population is under the age of 14 years.³⁰ If child marriage continues to be practised and to have negative effects on young people, then this is a recipe for disaster!

24 National Plan of Action for Children in Kenya, (2015-2022), para 3.1.10 (at 29). Online at: http://www.childrencouncil.go.ke/images/documents/Policy_Documents/National-Plan-of-Action-for-Children-in-Kenya-2015.pdf

25 UNICEF. 2021. Child Marriage, October. Online at: <https://data.unicef.org/topic/child-protection/child-marriage/>

26 UNICEF, Child Marriage.

27 UNICEF, Child Marriage.

28 UNICEF, Child Marriage.

29 UNICEF. 2019. "Child marriage among boys in high-prevalence countries: an analysis of sexual and reproductive health outcomes", October. Online at: <https://data.unicef.org/resources/child-marriage-among-boys-in-high-prevalence-countries/>; Gastón CM, Misunas C and Cappa C. 2019. "Child marriage among boys: A global overview of available data", *Vulnerable Children and Youth Studies* 14(3):219-228.

30 Index Mundi. 2018. South African Demographic Profile, Age Structure. Online at: <https://bit.ly/3mznJIA>

INTERNATIONAL CONDEMNATION OF CHILD MARRIAGE

Several international instruments have taken a stand against child marriages.³¹ International instruments, such as the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and the Convention on the Elimination of All Forms of Discrimination against Women have stipulated that all marriages require the free and full consent of the spouses.³² In 1962, the General Assembly of the United Nations adopted the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, which confirmed “the full and free consent of both parties” entering into marriage,³³ and instructed States Parties to “take legislative action to specify a minimum age of marriage”.³⁴

In 2014, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child issued a joint General Recommendation/General Comment on harmful practices, which included an instructive section on child and/or forced marriage as a manifestation of harmful practices.³⁵ The General Recommendation/Comment proceeded on the assumption that “child marriage” is one where at least one of the spouses is under the age of 18 years,³⁶ but based on the right of a child to make decisions that affect his or her life depending on his or her evolving capacities,³⁷ also made allowance for a marriage “of a mature, capable child below the age of 18 years” to marry “in exceptional circumstances”, provided the child is at least 16 years of age and the marriage is sanctioned by a decision of a judge “based on legitimate exceptional grounds defined by law and on evidence of maturity”.³⁸

31 See Mwambene, “Recent Legal Responses to Child Marriage in Southern Africa”, 3-4.

32 See Universal Declaration of Human Rights, art 16(2), G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948); International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976; Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981.

33 Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages, art 1(1), G.A. Res. 1763 A (xvii) of 7 November 1962, 521 U.N.T.S. 231, *entered into force* Dec. 9, 1964.

34 Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages, art 2.

35 Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child. 2014. Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices, para VI. B., U.N. Doc. CEDAW/C/GC/31-CRC/C/GC/18.14 November.

36 CEDAW/CRC Committees, Joint General Recommendation No. 31/General Comment No. 18, para 20.

37 See UNCRC, art 12(1).

38 CEDAW/CRC Committees, Joint General Recommendation, No. 31/General Comment No. 18, para 20.

The African Union has also addressed the problem of child marriage. The African Charter on the Rights and Welfare of the Child (ACRWC) proclaimed that “a child means every human being below the age of 18 years”, and it called on States Parties to prohibit and to take effective action, including legislation, “to specify the minimum age of marriage to be 18 years” and to make the registration of all marriages compulsory.³⁹ In 2003, at the Second Ordinary Session of the Assembly of the African Union held in Maputo, it on 11 July 2003 adopted a Protocol to the African Charter on Human and Peoples’ Rights of Women in Africa (the Maputo Protocol), which stipulated that no marriage shall take place without the free and full consent of both parties,⁴⁰ and that the minimum age of marriage “shall be 18 years”.⁴¹ In 2015, it submitted itself to the eradication of harmful practices and included in such practices “early marriage”.⁴²

In 2017, the African Commission on Human and Peoples’ Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) issued a Joint General Comment, which contained an elaborate road map for the ending of child marriage.⁴³ It defined “marriage” as “formal and informal unions between men and women recognised under any system of law, custom or religion”,⁴⁴ “child” as “a human being aged below 18 years of age, even if majority is attained earlier under national law”,⁴⁵ “child marriage as one “in which either one of the parties, or both, is or was under the age of 18 at the time of union” and “free and full consent as “a non-coercive agreement to the marriage with full understanding of the consequences of giving consent”.⁴⁶ It emphasised the provision in the Maputo Protocol that required States Parties to enact legislation that will guarantee that a marriage requires free and full consent of both parties and that the minimum age of marriage for women will be 18 years without exception.⁴⁷ The Southern African Development Community (SADC) also

39 ACRWC, arts 2 and 21(2).

40 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol), Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 Afr. Hum. Rts. L.J. 40, *entered into force* Nov. 25, 2005, art 6(a), f.

41 Maputo Protocol, art 6(b).

42 African Union. 2014. Common African Position (CAP) on the Post 2015 Development Agenda, art 43. Online at: <https://sustainabledevelopment.un.org/content/documents/1329africaposition.pdf>

43 African Commission on Human and Peoples’ Rights and African Committee of Experts on the Rights and Welfare of the Child (ACERWC) Ending Child Marriage. 2017. Joint General Comment of the African Commission on Human and Peoples’ Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) Ending Child Marriage.

44 ACHPR and ACERWC, Joint General Comment, para I [6].

45 ACHPR and ACERWC, Joint General Comment, para I [6].

46 ACHPR and ACERWC, Joint General Comment, para I [6].

47 ACHPR and ACERWC, Joint General Comment, para III [16] (with reference Maputo Protocol art 6(a) and (b)). See also the ACHPR and ACERWC, Joint General Comment,

added its voice to the matter. It did not place a total embargo on child marriages but called on States Parties to enact legislation that would expressly permit marriages of persons under the age of 18 years, and therefore made child marriage dependent on express statutory sanctions.⁴⁸

THE RESPONSES OF AFRICAN COUNTRIES

Several African countries have indeed enacted legislation in accordance with the above directives. For example, in 2015, Malawi amended its Constitution to delete a provision that authorised the marriage of children between the ages of 15 and 18 years provided the parties to the marriage had paternal consent.⁴⁹ It retained a provision in the Constitution that provides: "No person over the age of eighteen years shall be prevented from entering into marriage."⁵⁰ The Constitution of Malawi therefore currently set the age of marriage in all instances at 18 years for both male and female partners. In 2015, the Constitutional Court of Zimbabwe outlawed child marriage concluded under any law.⁵¹

South Africa has been less accommodating of the obligations in relation to child marriages stipulated in the Maputo Protocol, the Africa Children's Charter and the Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). The Recognition of Customary Marriage Act of 1998, read with the Marriage Act of 1961, make allowance for minors to marry provided only that they have acquired the necessary consent; that is, the consent of parents, guardians, or the Commissioner of Welfare/Minister of Home Affairs.⁵²

Prior to the entry into force of the Recognition of Customary Marriages Act of 1998, customary unions of Africans (and also those of Hindus and Muslims) were not recognised as marriages under South African law, because the South African Marriage Act of 1961 regarded a marriage as a union between one man and one

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para IV [18] (again emphasising Maputo Protocol art 6(b) and ACRWC, art 21(2) proclaiming the minimum age of marriage to be 18 years) and para IV [21] (proclaiming the obligation of States to enact legislation that will require the full and free consent of both parties to marriage).

48 Southern African Development Community. 2008. SADC Protocol on Gender and Development, 17 August, art 8. See also Munalula MM. 2011. "SADC Protocol on Gender and Development: Road Map to Equality?", *SADC Law Journal* 1:194.

49 Constitution of Malawi, 1994, s 22(7) (deleted from the Constitution by Act 17 of 2015).

50 Constitution of Malawi, 1994, s 22(6) (providing: "No person over the age of eighteen years shall be prevented from entering into marriage.").

51 *Mudzuru & Another v Ministry of Justice, Legal and Parliamentary Affairs (N.O.) & Others* (Constitutional Application No. 79/14, CCZ 12/2015), [2015] ZWCC 12 (20 January 2016); and see Sloth-Nielsen J. 2016. "*Mudzura & Others v Minister of Justice, legal and Parliamentary Affairs & Two Others: A Review*", *African Human Rights Law Journal* 16(2):554-568.

52 See Recognition of Customary Marriage Act [No. 108 of 1998], ss 3(a) and (b) (read with the Marriage Act [No. 25 of 1961], s 25).

woman, and African customary unions (and also those concluded under Hindu and Muslim customary laws) could be, and in the case of African (and Muslim but not Hindu) marriages more often than not were polygamous.⁵³ The Recognition of Customary Marriages Act of 1998 afforded legality to all existing and future customary marriages of Africans (not of Hindus or Muslims) irrespective of whether they were or were not polygamous. The 1998 Act required that all marriages entered into after the Act's entry into force will only be valid if the respective spouses were both over the age of 18 years and have consented to be married.⁵⁴ However, the Minister of Home Affairs or the Commissioner of Child Welfare can grant permission for a person under the age of 18 years to enter into a customary marriage "if the Minister or the said officer considers such marriage desirable and in the interest of the parties in question".⁵⁵ If the requirement has not been satisfied, the Minister or Commissioner may *ex post facto* nevertheless declare the marriage a valid customary marriage "if he or she considers the marriage to be desirable and in the interest of the parties in question."⁵⁶ The Marriage Act of 1961 pronounced a boy under the age of 18 years and a girl under the age of 16 to be incompetent to contract a valid marriage except with the written permission of the Minister of Home Affairs, which permission could be granted if the Minister regarded the marriage to be "desirable".⁵⁷

The South African Law Reform Commission has recommended a bill, the Prohibition of Forced and Child Marriage Bill, "to introduce an expanded crime of forced marriage; to prohibit child marriage; to provide for competent verdicts in relation to forced marriages; to criminalise an attempt, conspiracy or incitement to commit an offence relating to forced marriage; to make provision for civil remedies; and to provide for matters connected therewith".⁵⁸

CUSTOMARY PRACTICES ATTENDING TO CHILD MARRIAGE

It must be noted that child marriage is quite often accompanied by quite unbecoming ethnic or cultural practices. One such practice that has attracted much attention and condemnation is known as *ukuthwala*, which in essence comprises a forced marriage and occurs fairly often in the tribal areas in the Eastern Cape and in KwaZulu-Natal.⁵⁹ Before a customary marriage takes place, a girl generally between

53 See Van der Vyver, "Multi-Tiered Marriages in South Africa".

54 Recognition of Customary Marriages Act, s 3(10)(a).

55 Recognition of Customary Marriages Act, s 3(4)(a).

56 Recognition of Customary Marriages Act, s 3(4)(c).

57 Marriage Act, s 26(1).

58 Mudarikwa M, Roos E and Mathibela N. 2018. "Girls must not be brides: An evaluation of South Africa's compliance with international, regional and national obligations towards protecting children from child and forced marriages in its current legal framework of civil and customary marriages". Legal Resource Centre. Online at: <https://bit.ly/3sCc6o6>

59 As to the meaning of *ukuthwala*, see Koyana DS. 1980. *Customary Law in a Changing Society* Cape Town/Welton/Johannesburg: Juta & Co, 1-2. See also Mabosu D. 2015. "Ukuthwala:

the ages of 12 and 15 years is abducted and held in captivity for a period of time by an adult man wishing to marry her. The girls will always simulate resistance, but they are more often than not willing parties to the abduction. Messengers will be sent to the girl's home to inform her parents that she is safe, and negotiations will thereafter commence to determine the dowry (*lobola*) to be paid to the girl's father or guardian. It might be noted that since the payment of dowry by a groom to the bride's father or guardian renders the child marriage in the financial interest of the father or guardian, fathers almost invariably give consent for the marriage to take place and put pressure on the girl to enter into the marriage.

Ukuthwala did feature in a judgment of the High Court of the Western Cape in a matter where a man 28 years of age abducted a 14-year-old girl in order to arrange a marriage with her family.⁶⁰ The girl managed to escape and to return to her village, but she was subsequently apprehended by her uncle and returned to the man who had abducted her in the *ukuthwala* process. She was thereupon locked in the house and beaten and raped eight times. The girl eventually jumped over a fence and sought help from the police. The man was prosecuted, convicted and sentenced to imprisonment for 22 years, probably not on account of *ukuthwala* per se, but for trying to force the girl to marry without her consent and for raping her in the process.

In 2015, the South African Law Reform Commission proposed legislation that would criminalise forced and child marriages resulting from practices such as *ukuthwala*.⁶¹ However, the prohibition of child marriage has been opposed by persons seeking to preserve and uphold African customs, as well as being obstructed by certain religious predilections. It has been established, for example, that the Apostolic Faith Mission in Zimbabwe encourages girls between the ages of 12 and 16 years to get married in order not to sin by having extramarital sexual relations.⁶²

UNIVERSALISM VERSUS CULTURAL RELATIVISM

It should be noted that international instruments have urged States Parties to counteract customs, traditions, and cultural or religious practices that contradict generally accepted principles of propriety that have come to be identified with the basic rights of, for example, children and women. The African Charter on the Rights and Welfare of the Child thus call on States Parties to "discourage" "[a]ny custom, tradition, cultural or religious practice that is inconsistent with the rights, duties

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Is It Culturally Relative?", *De Rebus* 2(August):554; Scheepers A. 2016. "Ukuthwala – Forced Child Marriages in SA", *News 24*, 4 February.

60 *Jezile v S* (National House of Traditional Leaders intervening as *amice curiae*), 2016 (2) SA 62; [2015] 3 All SA 301 (WCC).

61 South African Law Reform Commission. 2015. "Project 138: Revised Discussion Paper on the practice of Ukuthwala", in *SALC Report 2015/2016*, 49-51. Online at: <https://bit.ly/3z0HPQQ>

62 Smaak A and Varia N. 2015. "Ending Child Marriage in Africa", *Human Rights Watch*, 9 December.

and obligations contained in the present Charter.”⁶³ These, I am afraid, are voices crying in the wilderness.

The problem that confronts law enforcement agencies is that basic principles of human rights in developing countries have been imposed from the top down and did not emerge from the bottom up. That is to say that the principles of good governance are not based on the perceptions of right and wrong of a cross section of the population or all factions of the community, but rather have been designed by an elitist group of legal designers based on what they perceived to be the dictates of moral directives. One is reminded of the realistic directive of Justice Yvonne Mokgoro in one of the earliest judgments of the South African Constitutional Court, in which she referred to the “delicate and complex” challenges embedded in efforts to accommodate African customary law with the values imbedded in the constitutional Bill of Rights. Specifically, Justice Mokgoro maintained, “The harmonization will demand a great deal of judicious care and sensitivity ... Although harmonisation will inevitably be an incremental process – no one should expect customary law to be transformed overnight- the delicate and complex nature of the task cannot justify courts in avoiding their responsibility to accommodate customary law to the “values which underlie an open and democratic society based on freedom.”⁶⁴

This also raises the question whether international standards of human rights protection apply universally or should be subjected to the notion of relativity. Universality versus relativity of human rights featured prominently at the United Nations World Conference on Human Rights that was held in Vienna, Austria in June 1993.⁶⁵ The Conference supported the universality alternative. The Vienna Final Act accordingly proclaimed:

All human rights are universal, indivisible and interdependent and inter-related. The international community must treat all human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights.⁶⁶

Abdullahi Ahmed An-Na'im, a contemporary proponent of relativism, has denounced universalism as a manifestation of colonialism or imperialism: a matter of Western countries wanting to impose their perceptions of human

63 ACRWC, art 3. See also ACHPR and ACERWC, Joint General Comment, para III [16], third note; CEDAW/CRC Committees, Joint General Recommendation No. 31/General Comment No. 18, para C. I.

64 *Du Plessis & Others v De Klerk & Another*, 1996 (3) SA 850, para 174 (CC).

65 See Van der Vyver JD. 1998. “Universality and Relativity of Human Rights: American Relativism”, *Buffalo Human Rights Review* 4:45-46.

66 Vienna Declaration and Programme of World Conference on Human Rights, U.N. GAOR, 48th Sess., U.N. Doc. A/CONF 157/24 (1993), at Part I, s 5.

rights on the entire world.⁶⁷ Instead, in typical relativism rhetoric, An-Na'im argues that the obligation of states to "enact laws, adopt policies, allocate material and human resources" within the paradigm of human rights must be conditioned by "cultural transformation and political mobilization for each society in its own voice and context".⁶⁸

It might be noted that although relativism is commonly attributed to predominantly Muslim states, the U.S. is just as much committed to its own perceptions of human rights. It will always, without exception, add to its instruments of ratification of human rights treaties a package of reservations, understandings and declarations (RUDs) that will ensure that it will not contract international obligations that deviate from its Constitution or from existing laws and practices.⁶⁹ Furthermore, the international community of states has committed itself, under the rubric of human rights protection, to encourage all of its members to abide by basic principles of human rights and to counteract cultural or religious practices within their confines that are in conflict with those principles. That has come to pass because the international community of states has come to accept basic human rights and fundamental freedoms as the norm of good governance and peaceful co-existence throughout the world. Given the deeply imbedded cultural practices are in conflict with international human rights' standards with an impact on child marriage, Africa still has many miles to run on an extremely slippery slope.

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67 An-Na'im AA. 2016. "The Spirit of the Law is Not Universal: Alternatives to the Enforcement Paradigm of Human Rights", *Tilburg Law Review* 221:255-274.

68 An-Na'im, "The Spirit of the Law is Not Universal", 274.

69 Van der Vyver, "Universality and Relativity of Human Rights", 67-72. As to the ratification policy of the United States is concerned, see Henkin L. 1995 "U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker", *American Journal of Human Rights* 89:341.