



Reflections on the Debate Between Universality of Human Rights and Cultural Relativism in the Context of Child Marriage in Africa

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Abstract

This article examines the relationship between human rights and culture in the context of child marriage and reflects on the debate between the universality of human rights and cultural relativism within African societies. Child marriage is a harmful practice that seriously affects the enjoyment of the fundamental human rights of all children, especially girls. Hence, this article discusses the contradictions that exist in the application of the rights of the girl-child and the practice of cultural traditions or religious beliefs as well as the challenge with implementation and enforcement of the rights of the girl-child. The article highlights key arguments in defence and against the universality of human rights and cultural relativism and considers how human rights and culture can co-exist to address the contradictions and end the practice of child marriage. This article argues that the practical application of the human rights of a girl-child can be enhanced if it becomes culturally legitimate and is supported by viable, sustainable strategies like dialogue, education and awareness to change cultural orientation and beliefs. In addition, the possibility of the codification of culturally legitimate human rights standards is considered as an additional strategy to strengthen the realisation of the human rights of the girl-child.

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1 INTRODUCTION

The Universal Declaration of Human Rights (UDHR) 1948, adopted by the General Assembly of the United Nations (UN),¹ more than sixty-six years ago, creates a foundation for all human rights instruments internationally, regionally and nationally. It emphasises the application of human rights principles as universal and sets a common standard for achieving such rights for all peoples and all nations as affirmed in the Vienna Declaration and Programme of Action.² This is aimed at creating a global society with full respect for human rights standards without any differentiation or distinction regarding a person's race, sex, language or religion.³

Culture, on the other hand, plays a crucial role in the life of the individual and the community.⁴ It represents customs, practices and beliefs which provide a sense of belonging, identity and continuity with past existing values for both the individual and the community.⁵ Different cultures exist around the world, and the diversity that exists among cultures is recognised and emphasised in the values of cultural relativism and specifically in the discourse on the relationship between human rights and culture.

Consequently, within African societies contradictions exist between the practical application of human rights standards and the promotion of customs and traditional practices. The discourse on the contradictions often results in a debate between the universality of human rights and cultural relativism. The challenge of child marriage is an often-cited example of the contradictions that exist between human rights and culture. Child marriage refers to a formal marriage or informal union of a person under the age of eighteen years.⁶ This practice affects both boys and girls, however, girls are more disproportionately affected.⁷ Recent reports show that in developing states one in three girls are married before the age of eighteen years and one in nine girls are married before the age of fifteen years.⁸

The practice of child marriage is deep-rooted in culture and religious beliefs.⁹ The age of marriage of a girl, for example, is a critical area of contradiction between human rights and culture. Article 21(2) of the African Charter on the Rights and Welfare of the Child (ACRWC) 1990¹⁰ sets the minimum legal age for marriage at eighteen years. However, there are cultural practices and religious beliefs in many African states that do not recognise the legal age of marriage, nor do they use age to determine a girl's maturity for marriage.¹¹

The practice of child marriage results in a serious violation of the fundamental human rights of the girl-child.¹² Such rights include the right to non-discrimination, survival and development, education, health, freedom from abuse, torture, inhuman and degrading treatment, and protection from harmful traditional practices.¹³ Once a girl is married, every aspect of her life is affected, including her health, her physical, psychological and emotional well-being, as well as her personal development.¹⁴ It is important to note that the physical and mental immaturity

1 Adopted 10 Dec. 1948, GA Res 217A, UN Doc A/810.

2 Adopted by the World Conference on Human Rights in Vienna on 25 June 1993 A/CONF.157/23, para 5.

3 See Arts 1(3) and 55(c) of UN, Charter of the United Nations, adopted 24 October 1945, 1 UNTS XVI.

4 Kaime *The African Charter on the Rights and Welfare of the Child: A Socio-Legal Perspective* (2009) 32.

5 Wadesango, Rembe and Chabaya "Violation of Women's Rights by Harmful Traditional Practices" 2011 *Anthropologist* 121-129.

6 See UNICEF "Early Marriage a Harmful Traditional Practice, A Statistical Exploration" 2005 UNICEF Publication 4. https://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf (accessed 19-09-2017).

7 This is because the impact of the practice greatly affects a girl's physical, psychological and emotional wellbeing as well as social and economic development. See Girls Not Brides "Information Sheet: Child Marriage Around the World" 1 <http://www.girlsnotbrides.org/wp-content/uploads/2017/01/Child-marriage-around-the-world-Nov-2016.pdf> (accessed 14-09-2017); United Nations Population Funds (UNFPA) "Child Marriage" 1 <http://www.unfpa.org/child-marriage> (accessed 19-09-2017).

8 See, for example, Girls Not Brides "Information Sheet: Child marriage Around the World" 1 and UNFPA "Child Marriage" 1.

9 Other factors that reinforce the practice of child marriage in Africa are briefly highlighted in part two of this article.

10 Adopted by the Organisation of African Unity (OAU) now African Union (AU) 11 July 1990, entered into force 29 November 1999.

11 Himonga "The Right of the Child to Participate in Decision Making" in Ncube (ed) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* (1998) 100.

12 UNICEF "Early Marriage: Child Spouses" March 2001 *Innocenti Digest* No. 7 2-3 <https://www.unicef-irc.org/publications/pdf/digest7e.pdf> (accessed 15-09-2017).

13 See Arts 3, 5, 11, 14, 16(1) and 21(1) of the ACRWC respectively.

14 *Ibid.*

of a girl-child makes her vulnerable to violence, abuse and exploitation. The critical situation of child marriage is confirmed in the United Nations Children's Fund (UNICEF) 2014 report entitled "Progress and Prospects on Ending Child Marriage".¹⁵ The report notes that Africa will have the highest number of child brides in the world by 2050 due to two factors: the slow rate of reducing the prevalence of child marriage and population growth.¹⁶

In view of the above, this article examines the relationship between human rights and culture and how these concepts can co-exist to address the conflicts or contradictions regarding harmful cultural practices like child marriage. Alternatively, suggestions to eliminate the practice are explored. We argue that the practical application of the fundamental human rights of a girl-child can be enhanced if it becomes culturally legitimate within African societies and it is supported by sustainable strategies to change cultural orientation and beliefs.

Part two of this article presents a brief global snapshot of the current trends and possible future prevalence of child marriage. This provides a background for part three where we examine the contradictions between human rights and culture in the context of child marriage. The debate between the universality of human rights and cultural relativism with arguments in defence and against, as well as examples and illustrations to further strengthen the discourse is considered. This section also briefly draws on the work of several African scholars on the debate between universality and relativism and the effort to strike a balance between the two through the cultural legitimacy of human rights. As a contribution to this discourse, the possibility of codifying the outcomes and goals from cultural legitimacy of human rights is examined. We argue that codification can play an important role in strengthening culturally legitimate human rights standards. Part four briefly discusses practical strategies like education, internal dialogue and awareness and the role of such strategies to change perceptions and cultural attitudes. Part four provides a conclusion to this article.

2 BRIEF GLOBAL SNAPSHOT OF CURRENT TRENDS AND POSSIBLE FUTURE PREVALENCE OF THE PROBLEM OF CHILD MARRIAGE

The term 'child marriage' is often used interchangeably with 'early marriage' or 'forced marriage' when describing marriage under the legal age of eighteen years.¹⁷ However, not all early and forced marriages are child marriages because the practice also affects adults. In relation to child marriage, the term 'early' refers to marriage under eighteen years. However, using 'early' to describe child marriage does not directly emphasise the young nature of the girl-child.¹⁸ Forced marriage, on the other hand, occurs when marriage is entered into without the free and full consent of both parties as clearly provided for in Article 1 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 1964.¹⁹ Therefore, all child marriages are perceived as forced marriage because the child lacks the legal capacity to give free and full consent. In addition, in forced marriages, girls are often threatened or coerced into marriage.²⁰

15 UNICEF "Ending Child Marriage: Progress and Prospects" 2014 UNICEF, New York, 1–8 https://www.unicef.org/media/files/Child_Marriage_Report_7_17_LR..pdf (accessed 16-09-2017).

16 *Ibid.*

17 United Nations Population Fund (UNFPA) "Marrying Too Young: End Child Marriage" 2012 UNFPA Publications 1 <https://www.unfpa.org/sites/default/files/pub-pdf/MarryingTooYoung.pdf> (accessed 18-09-2017).

18 Nour "Child Marriage: A Silent Health and Human Rights Issue" 2009 *Reviews in Obstetrics and Gynaecology* 51–52.

19 UN General Assembly Resolution 1763 A (XVII) (1962), entered into force 9 December 1964.

20 *Prosecutor of the Special Court v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Special Court for Sierra Leone SCSL-2004-16-A, Appeals Chamber, Judgment, 22 February 2008. This judgment was the first of the Appeals Chamber since the United Nations and Sierra Leone established the SCSL in January 2002 http://hrlibrary.umn.edu/instree/SCSL/SCSL-04-16_Files/SCSL-04-16-A-675.htm (accessed 18-09-2017).

Child marriage is identified as an inter-generational practice that usually begins at the birth of a girl-child (in some communities it begins from the womb/foetus) and continues through her entire life.²¹ Child marriage legitimises human rights violations and abuse of the girl-child. The various violations of the rights of the girl-child and the high risks associated with the practice create growing global concern for the present and future generations of girls.²²

According to the UNICEF 2014 report, globally more than 700 million women that are alive today were married before their 18th birthday. If this trend continues, millions of future generations of girls will be at risk of child marriage.²³ This report states that

If there is no reduction in the practice of child marriage, up to 280 million girls alive today are at risk of becoming brides by the time they turn 18. Due to population growth, this number will approach 320 million by 2050. The total number of women married in childhood will grow from more than 700 million today to approximately 950 million by 2030 and nearly 1.2 billion by 2050. The number of girls under age 18 married each year will grow from 15 million today to 16.5 million in 2030 to over 18 million in 2050.²⁴

Even more concerning is the number of child marriages that will double by 2050 due to population growth.²⁵ Although the global prevalence of child marriage is reducing, the rate of reduction is slow and uneven across countries and regions.²⁶ The reduction rate is barely keeping up with population growth, especially in the African states where child marriage is common.²⁷

It is important to point out that different interconnecting factors reinforce the practice of child marriage, such as poverty, lack of education, gender discrimination, culture/religion, political instability, and conflict situations, including war²⁸ or attack from Islamic extremist groups.²⁹ Cultural and religious practices, including those linked to protection against early sexual activity, family honour, financial benefits gained from the payment of a bride price, and the belief that the adolescent period is alien as every girl-child that has reached puberty is a woman,³⁰ affect the human rights of the girl-child. These include the right to non-discrimination, education, health, freedom from abuse, torture, inhuman and degrading treatment, and protection from harmful traditional practices.³¹

These rights are provided for in various international and regional human rights instruments, including the UDHR, the Convention on Elimination of All Forms of Discrimination against Women (CEDAW),³² the UN Convention on the Rights of the Child (CRC),³³ the ACRWC, and

21 For example, reports show that in traditional Masai culture in Kenya girls are given in marriage from the womb and this is referred to as "booking." Simply, booking is when a man wants to marry a girl from a certain family, he will approach the family to book available girls and if one of the wives in the family is pregnant with a girl-child, he is allowed to book the womb. Another example is in Cameroon where girls, still in womb, are given in "promise marriage" to settle debts. See Equality Now "Protecting the Girl Child: Using the Law to End Child, Early and Forced Marriage and Related Human Rights Violations" 2014 7 https://www.equalitynow.org/sites/default/files/Protecting_the_Girl_Child_1.pdf (accessed 18-09-2017). Equality Now is an international human rights organisation established in 1992 and is also a member of the Girls Not brides (GNB) global advocacy group.; Craig "Masai Woman Makes Rescuing Girls from Early Marriage Life Mission" VOA News, 18 July 2012 <https://www.voanews.com/a/masai-woman-makes-rescuing-girls-from-early-marriage-life-mission/1418744.html> (accessed 18-09-2017); *The Guardian* "Child Brides: Crackdown on Marriages to Appease Gods and Settle Debts" <https://www.theguardian.com/global-development/2014/jul/18/child-brides-crackdown-marriages-international-girl-summit> (accessed 18-09-2017).

22 Girls Not Brides "Information Sheet: Child marriage Around the World" 1; UNFPA "Child Marriage" 1.

23 UNICEF "Ending Child Marriage: Progress and Prospects" 2014 1.

24 *Ibid.* 5–8.

25 *Ibid.*

26 *Ibid.*

27 An example is Nigeria, the report shows that the reduction rate of child marriage is slow and only at one percent per year between 1985 and 2010. Similarly, in Burkina Faso, the rate of prevalence remained constant during the same period. See UNICEF "Ending Child Marriage: Progress and Prospects" 2014 1-8.

28 UNFPA *Marrying Too Young: End Child Marriage* (2012) 12; UNICEF *Early Marriage: Child Spouses* (2001) 5–6.

29 Mark "Missing Nigerian School Girls: Boko Haram Claims Responsibility for Kidnapping" *The Guardian* <http://www.theguardian.com/world/2014/may/05/boko-haram-claims-responsibility-kidnapping-nigeria-schoolgirls> (accessed 02-07-2014).

30 UNFPA *Marrying Too Young: End Child Marriage* (2012) 12; UNICEF *Early Marriage: Child Spouses* (2001) 5–6.

31 See Arts 3,11,14,16(1) and 21(1) of the ACRWC respectively.

32 Adopted UN General Assembly Resolution 34/180 of 18 December 1979, entered into force 3 September 1981.

33 Adopted by UN General Assembly Resolution 44/25 of 20 November 1989, entered into force 2 September

the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol or Maputo Protocol).³⁴

3 CHILD MARRIAGE WITHIN THE UNIVERSALISM AND CULTURAL RELATIVISM DEBATE

3.1 Contradictions in the Practical Application of the Rights of a Girl-child and the Promotion of Culture

There are three main issues that highlight the contradictions between the practical application of the rights of the girl-child and the promotion of culture. The first relates to the minimum legal age of marriage. Article 1 of the CRC defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." Article 2 of the ACRWC defines a child as "every human being below the age of 18 years." In addition, Article 21(2) of the ACRWC specifies eighteen years as the minimum legal age for marriage. Despite the implication of interpreting the provision in Article 1 of the CRC to mean that the age of majority can be attained earlier, strong recommendations have been made by different committees – such as the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) and the UN Committee on the Rights of a Child – that the minimum age for marriage should be set at eighteen years for both men and women (or boys and girls).³⁵

However, there are still states with customary practices and religious beliefs that do not recognise the legal age limit,³⁶ neither do they use age to determine the maturity of a girl-child.³⁷ For example, the African Child Policy Forum (ACPF) in its report entitled "The African Report on the Child Wellbeing 2013: Towards Greater Accountability to Africa's Children"³⁸ states that

[a] total of 33 African countries have set the minimum age of marriage at 18 for both girls and boys,³⁹ while a further four have set it above the age of 18 for both.⁴⁰ In the remainder of African countries, the minimum age is either discriminatory or below 18.⁴¹

1990.

34 Adopted by AU in Maputo 11 July 2003 and entered into force 25 November 2005.

35 Equality Now "UN CEDAW and CRC Recommendations on Minimum Age of Marriage Laws around the World as of November 2013" 1 https://www.equalitynow.org/sites/default/files/UN_Committee_Recommendations_on_Minimum_Age_of_Marriage_Laws.pdf (accessed 18-09-2017).

36 Equality Now "Protecting the Girl-Child" (2014) 15.

37 Himonga *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* (1998) 100.

38 African Child Policy Forum (ACPF) "The African Report on Child Wellbeing 2013: Towards Greater Accountability to Africa's Children" 2013 Addis Ababa 33–34 <http://www.africanchildforum.org/africanreport/> (accessed 19-09-2017).

39 These are Angola (also provides exception set at fifteen years for girls with permission of a person who has authority over a minor), Benin, Botswana, Cape Verde, Central African Republic, Congo, Comoros, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Kenya, Liberia, Madagascar, Mali (eighteen years for boys but sixteen years for girls), Mauritania, Mauritius, Morocco, Mozambique, Namibia, Nigeria, São Tomé and Príncipe (also provides exception set at fourteen years for girls with permission of a parent or legal representative), Sierra Leone, Somalia, South Africa (also provides exception for girls older than fifteen years for parental consent, and under fifteen years with permission of Minister of Home Affairs) South Sudan, Togo, Tunisia, Uganda and Zimbabwe. See ACPF "The African Report on Child Wellbeing 2013: Towards Greater Accountability to Africa's Children" 2013 33–34 and Girls Not Bride "Minimum Age of Marriage in Africa" 1 compiled by ACPF March 2013 <https://www.girlsnotbrides.org/wp-content/uploads/2013/04/Minimum-age-of-marriage-in-Africa-March-2013.pdf> (accessed 04-03-2018).

40 Algeria, Lesotho, Libya, and Rwanda. See also Burundi and Congo (Brazzaville) boys twenty-one years and girls eighteen years, Côte d'Ivoire boys twenty years and girls eighteen years. See also Girls Not Bride "Minimum Age of Marriage in Africa" 1.

41 Burkina Faso, Chad, Senegal, DRC, Gabon, Seychelles, Cameroon, Niger, Swaziland, United Republic of Tanzania, Guinea-Bissau, Zambia, Malawi, Sudan. It is important to point out that Malawi officially banned child marriage in February 2015 by raising the minimum age of marriage to eighteen years. News24 "Malawi Officially Bans Child Marriages" <http://www.news24.com/Africa/News/Malawi-officially-bans-child-marriages-20150415> (accessed 15-09-2017).

Secondly, the right to full and free consent of both parties to marriage is another area of contradiction between the practical application of the rights of the girl-child and the promotion of culture. This right is recognised in different human rights instruments, such as Article 1 of the Convention on Consent to Marriage and Article 16(1) of the CEDAW. However, in many child marriage cases parental consent plays a more significant role than the consent of the girl intending to be married and different reports show that some countries provide for under-age marriages with parental consent.⁴² For example, in Angola, the minimum age for marriage is set at eighteen years, but with parental consent a girl can get married at the age of fifteen years and a boy at the age of sixteen years.⁴³ This no doubt is problematic because it is contrary to the provisions of the ACRWC, which sets the age of marriage at eighteen years.

It is worth noting that the minimum age of sexual consent in some African states is also a concern. In Sudan, for example, the minimum age of sexual consent for girls is eighteen years, while girls are given out in marriage at puberty for Muslim marriages and at thirteen years for other marriages.⁴⁴ Odala rightly points out that it is important for the minimum legal age of marriage not to be lower than the minimum age of sexual consent in order to avoid the sexual exploitation of girls.⁴⁵

Thirdly, the legal tradition of most African states is pluralistic in nature, comprising customary law, religious law, common law and legislation.⁴⁶ The role of each component of the legal system at a national level is distinct from the other.⁴⁷ Most often customary or religious laws are not in line with national and international standards,⁴⁸ partly due to attempts to opt for traditional norms that suit the lives of the citizens.⁴⁹ In addition, constitutional recognition of customary marriages exists within some countries.⁵⁰ This results in contradictions between the legal systems, regarding child marriage,⁵¹ as what is prohibited under national legislation(s) and international human rights standards is on the other hand widely accepted and established in customary and religious laws and practices.⁵² For example, Article 45(4) of the Constitution of Kenya provides for the enactment of legislations that recognises marriages concluded under any tradition, custom or religion.⁵³

3.2 The Relevance of Universality of Human Rights to Children's Rights

The concept of human rights is derived from the UN Charter, 1945.⁵⁴ The Charter "reaffirms faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women [boys and girls] and of nations large and small."⁵⁵

The principle of universality of human rights is the foundation of international human rights law⁵⁶ and this is emphasised in the UDHR and in various other international human rights conventions, declarations and resolutions.⁵⁷ An example is the Vienna Declaration which

42 Odala "Why is it Important for Countries to Have Minimum Legal Age of Marriage?" 3 <http://www.girlsnotbrides.org/wp-content/uploads/2013/06/ACPF-Importance-of-min-age-of-marriage-legislation-May-2013.pdf> (accessed 19-09-2017).

43 *Ibid.*

44 *Ibid.*

45 *Ibid.*

46 Ndulo "African Customary Law, Customs, and Women's Rights" 2011 *Cornell Law Faculty Publications* 87–90.

47 *Ibid.*; while customary law governs matters that deal with personal law such as marriage, inheritance and traditional authority, religious law governs most especially Islamic beliefs and practices.

48 Odala "Why is it Important" 7.

49 *Ibid.* 4.

50 *Ibid.* 5–7. This report states that customary marriages are constitutionally recognised in ten African countries namely Kenya, Liberia, Malawi, Mozambique, Namibia, Uganda, Sudan, Sierra Leone, Eritrea and Ethiopia.

51 *Ibid.*

52 *Ibid.*

53 However, Article 2 of the Constitution of Kenya emphasises constitutional supremacy and that any law inconsistent with the constitution is void. Therefore, the practice of child marriage is not legal as the minimum age of marriage in Kenya is eighteen years. However, monitoring and implementation are slow as there are still underage marriages; See Odala "Why is it Important" 6; Equality Now "UN CEDAW and CRC Recommendations on Minimum Age of Marriage Laws around the World as of November 2013" 42.

54 Human rights are "rights that one has simply because one is human." See also Donnelly "The Relative Universality of Human Rights" 2007 *Human Rights Quarterly (HRQ)* 281–306.

55 Preamble to the UN Charter.

56 United Nations Human Rights Office of the High Commissioner "What are Human Rights?" 1 <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (accessed 05-03-2018)

57 It is worth noting that the UDHR has provided inspiration and a common standard setting for other international, regional and national human rights instruments and frameworks to build on and establish standards based

provides that

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat 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 and fundamental freedoms.⁵⁸

This implies that the global application of human rights is recognised as a standard with inherent flexibility among various historical, cultural and religious backgrounds.⁵⁹ As such, Viljoen argues that

The principle of the universality of human rights does not therefore mean uniformity in application of this principle across the globe. Human rights have no fixed and pre-determined meaning; they are constantly made visible and are given concrete meaning in very different contexts.⁶⁰

As such human rights are a yardstick against which to assess the nature and extent of implementation of rights and obligations in any society.⁶¹ This is also confirmed by Ayton-Shenker who argues that the fundamental nature of human rights offers one legal standard of minimum protection necessary for human dignity.⁶²

It is important to note that the birth and development of children's rights stem from the need to protect the child and to ensure "that mankind gave [all] children the best it had got to give."⁶³ In this regard and in line with other international human rights instruments, a girl-child is entitled by virtue of her common humanity to "a basic modicum of human dignity."⁶⁴ Hence, universality applies to all rights of a girl-child. In the context of child marriage, such rights include, among others, minimum age of marriage,⁶⁵ consent to marriage,⁶⁶ protection from harmful cultural practices,⁶⁷ right to non-discrimination,⁶⁸ right to health,⁶⁹ right to education,⁷⁰ and freedom from degrading inhuman and cruel treatment.⁷¹ However, as Freeman argues the implementation of human rights is weak and fraught,⁷² as seen in the contradictions discussed in the previous section.

Within the discourse of universality of human rights, scholars like Cobbah have questioned the validity and viability of the universality of human rights.⁷³ The criticisms relate to the debate surrounding human rights as a historically Western concept and the fact that African

on the principles of universality. See the preamble to the UDHR and para 8 of the preamble to the Vienna Declaration.

58 Paragraph 5 of the Vienna Declaration.

59 Ayton-Shenker "The Challenge of Human Rights and Cultural Diversity" 4 United Nations Background Notes.

60 Viljoen *International Human Rights Law in Africa* 2 ed (2012) 8.

61 *Ibid.* 4.

62 Ayton-Shenker "The Challenge of Human Rights and Cultural Diversity" 4.

63 This is proclaimed in the Geneva Declaration of the Rights of the Child of 1924, adopted 26 September 1924, League of O.J. Spec. Supp. 21, 43 (also known as Geneva Declaration). See also Kaime *The African Charter on the Rights and Welfare of the Child* (2009) 11–12.

64 Zechenter "In the Name of Culture: Cultural Relativism and the Abuse of the Individual" 1997 *Journal of Anthropological Research* 319–347.

65 Article 21(1) of ACRWC.

66 Article 16 of CEDAW.

67 Article 21(1) of ACRWC and Article 5 of the African Women's Protocol.

68 Article 3 of the CRC and Article 18(3) of the ACRWC.

69 Article 14 of the CRC and Article 15 of the ACRWC.

70 Article 11 of ACRWC and Article 12 of the African Women's Protocol.

71 Article 16(1) of ACRWC and Arts 3 and 4 of the African Women's Protocol.

72 Freeman "Human Rights" in Burnell and Randall (eds) *Politics in the Developing World* (2005) 250.

73 Cobbah "African Values and the Human Rights Debate: An African Perspective" 1989 *Human Rights Quarterly* (HRQ) 309–331.

traditional societies promote communalism which contrasts with Western societies that promote individualism.⁷⁴ However, numerous scholars have provided credible arguments, especially in the context of harmful cultural practices, to justify the validity and viability of the universality of human rights to everyone irrespective of cultural differences. For instance, Langlois notes that the values and principles of human rights have become more recognised as an effective response to injustice.⁷⁵ Donnelly equally argues that: “The functional universality of human rights depends on human rights providing attractive remedies for some of the most pressing systemic threats to human dignity.”⁷⁶ Hence the need to comply with human rights standards such as Article 21(2) of ACRWC that prohibits child marriage. The extent and nature of the impact of harmful cultural practices especially in child marriage cases have been well documented in several reports and publications.⁷⁷ For example, Equality Now states in its report entitled “Protecting the Girl Child: Using the Law to End Child, Early and Forced Marriage and Related Human Rights Violations” that

when a young girl is married and gives birth, the vicious cycle of poverty, poor health, curtailed education, violence, instability, disregard for rule of law and legal and other discrimination often continues into the next generation, especially for any daughters she may have.⁷⁸

Against this background, emphasis is placed on the need to effectively implement and enforce human rights standards as an “empowering framework for protecting vulnerable and at-risk girls” from harmful cultural practices.⁷⁹ On the strength of this defence, the concept of cultural relativism is considered problematic as it condones harmful practices,⁸⁰ such as child marriage, female genital mutilation, gender inequality, arbitrary killings and torture.⁸¹ It also weakens the validity and universal application of the human rights of the girl-child.⁸²

However, the question then is: why is the defence of relativism seen to be relevant to issues of harmful cultural practices, even when countries are legally bound to human rights standards? In the case of African societies, it seems one can conclude the following:

- Such rights that address harmful traditional practices and promote the equality of women or feminism in a highly patriarchal society are still very contentious.⁸³ This is especially the case in societies where some people believe that promoting the rights of women and girls is an attempt to disempower men and remove their perceived authority over women.⁸⁴
- Traditional cultural practices or religious beliefs have been passed on from one generation to the next. As such, some people who are deeply influenced by culture view harmful practices as the norm and not as a violation.⁸⁵

However, these conclusions should not be used to justify harmful practices. Rather, practical measures or strategies should be put in place to properly deal with harmful cultural practices and violations of human rights in Africa.⁸⁶ This argument is supported by the words of Hafner-

⁷⁴ *Ibid.*

⁷⁵ Langlois “Normative and Theoretical Foundations of Human Rights” in Goodhart (ed) *Human Rights Politics and Practice* (2013) 12.

⁷⁶ Donnelly 2007 HRQ 287.

⁷⁷ See, for example, UNICEF Early Marriage 2–17; Equality Now “Protecting the Girl-Child” 9–10 and UNICEF *Early Marriage a Harmful Traditional Practice, A Statistical Exploration* (2005) 1–40.

⁷⁸ Equality Now “Protecting the Girl-Child” 15.

⁷⁹ UN Population Fund (UNFPA), “Ending Child Marriage: A Guide for Global Policy Action” (2006) 21 <http://www.unfpa.org/sites/default/files/pub-pdf/endchildmarriage.pdf> (accessed 20-09-2017).

⁸⁰ Ibhawon “Cultural Relativism and Human Rights: Reconsidering the Africanist Discourse” 2001 *Netherlands Quarterly of Human Rights* (NQHR) 43–62 47.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Tharoor “Are Human Rights Universal?” 1999/2000 *World Policy Journal* 2–3 <http://tembusu.nus.edu.sg/docs/Shashi%20Tharoor.pdf> (accessed 20-09-2017).

⁸⁴ Cole “Violence against Women” 2003 *Human Rights Dialogue* 9.

⁸⁵ Bennet “The Cultural Defence and the Custom of Thwala in South African Law” 2010 *University of Botswana Law Journal* 3–26 12.

⁸⁶ Strategies to reduce child marriage and promote respect for human rights will be discussed in the latter part of this article.

Burton:

Ever since the adoption of the UDHR more than six decades ago, it has been clear that the world needs to do more to respect the human rights that are integral to life with dignity. That's not the issue. Instead, today the questions concern strategy. What's the best strategy for promoting respect for human rights [fundamental rights of the girl-child]?⁸⁷

Equally important to note in the defence of universality of human rights is that the ratification of international human rights instruments as binding treaties by many states implies universal validity or endorsement of the universality of human rights.⁸⁸ For instance, the near universal ratification of the CRC by 194 countries confirms the recognition of the universality of children's rights.⁸⁹ UNICEF also states that the CRC "constitutes a common reference against which progress in meeting human rights standards for children can be assessed and results compared."⁹⁰ However, despite this defence of universality, there is a wide difference in the ideals of human rights and the reality of the practice of human rights, as seen in the contradictions discussed above.⁹¹

3.3 Understanding the Cultural Relativism Debate

Generally, cultural relativism is understood as the "idea that all values and principles are culture-bound and that there are no universal standards that apply across cultural divides."⁹² Over the years some cultural relativists have critically questioned the legitimacy in the universal application of western-based human rights standards.⁹³ They argue that a fundamental link exists between the origin of a cultural practice or principle and the validity of such a practice to its culture.⁹⁴ Therefore, ideas about which practice is right and appropriate in one culture may be wrong and unlawful in another culture.⁹⁵ An example is Viljoen's analysis of the payment of a bride price: some cultures see this practice as appropriate while other cultures strongly object and regard it as violating the dignity of women.⁹⁶ According to Viljoen, it becomes problematic when a cultural practice becomes harmful and affects the dignity of a person.⁹⁷

The principles of universality and its global application are criticised by some relativists as promoting cultural imperialism of the West.⁹⁸ Panniker points out that many relativists and non-westerners argue in defence of relativism due to fear over the survival of their culture,⁹⁹ especially because of the oppression experienced under colonisation and Western cultural domination.¹⁰⁰ They strongly believe and argue that the application of universality is promoted because of hidden agendas¹⁰¹ or an attempt at global political and economic domination of non-westerners.¹⁰² In as much as non-westerners need to generally express their concerns about the global application of human rights, human rights represent an effective response to eliminating harmful practices and promoting respect for the fundamental rights of all,

87 Hafner-Burton *Making Human Rights a Reality* (2013) 2.

88 Zechenter 1997 *Journal of Anthropological Research* 321.

89 Kaime "The Convention on the Rights of the Child and the Cultural Legitimacy of Children's Rights in Africa: Some Reflections" 2005 *African Human Rights Law Journal (AHLJ)* 221–238 222.

90 UNICEF "Convention on the Rights of the Child: Frequently Asked Questions" https://www.unicef.org/crc/index_30229.html (accessed 20/09/2017).

91 An-Na'im "Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights" in An-Na'im *Human Rights and Justice* 74 <http://nw18.american.edu/~dfagel/islam&universalrights.pdf> (accessed 07-03-2018).

92 Mayer *Islam and Human: Tradition and Politics* 4 ed (2007) 9.

93 Pollis and Schwab "Human Rights: A Western Construct with Limited Applicability" in Pollis and Schwab (eds) *Human Rights: Cultural and Ideological Perspectives* (1979) 1.

94 Goodhart "Origins and Universality in Human Rights Debates: Cultural Essentialism and the Challenge of Globalisation" 2003 *HRQ* 935–964 939.

95 Viljoen *International Human Rights Law* 8.

96 *Ibid.*

97 *Ibid.*

98 Steiner and Alston *International Human Rights in Context: Law Politics Morals* 2 ed (2000) 367.

99 Pannikar "Is the Notion of Human Rights a Western Concept?" in Steiner and Alston (eds) *International Human Rights in Context: Law Politics Morals* (2000) 386.

100 Kaime *The African Charter on the Rights and Welfare of the Child* 43.

101 Tharoor 1999/2000 *World Policy Journal* 3.

102 Freeman *Politics in the Developing World* 246.

especially the girl-child.

In addition, some relativists have argued that human rights emphasises individual autonomy in contrast to non-western cultures that emphasise communal autonomy.¹⁰³ Brems points out that non-western cultures

do not define themselves in the first place as autonomous individuals, but instead experience themselves as having an "ascribed status" as members of a larger group or community, such as family, tribe class, nation, or other group.¹⁰⁴

Within African traditional societies the community is seen as more important than the individual.¹⁰⁵ Individual autonomy in Western cultures contrasts with communal autonomy in African cultures.¹⁰⁶ African traditional societies are recognised as communitarian in nature,¹⁰⁷ based on the social organisation and relations within a community.¹⁰⁸ In other words, the community is the primary focus and interest and not the individual emphasised in Western societies.¹⁰⁹ Against this background, African scholars such as Cobbah argue that the African philosophy of existence can be summed up as "I am because we are, and because we are, therefore I am."¹¹⁰

However, Gyekye¹¹¹ argues that although the community is recognised as the dominant entity of African social organisation,¹¹² the place of the individual within the African community is often misunderstood.¹¹³ According to Gyekye, African social order is both communal and individualistic in nature, and not purely communalistic as many believe it to be.¹¹⁴ Therefore, when an individual identifies with the community he/she belongs to, a reciprocal relationship exists between the individual and the community.¹¹⁵ It is within this relationship that the limited character of the possibilities of the individual is identified: this limitation shows the value of African communalism.¹¹⁶

However, despite this argument, Freeman rightly points out that there is a need to take human rights seriously in order to protect the oppressed.¹¹⁷ He argues that the reasons advanced in defence of relativism that focus on human rights expressing a Western concept are not convincing in this regard.¹¹⁸ This is because this defence is often used as "a mere cloak for self-interest and arbitrary rule."¹¹⁹ Similarly, Tharoor states that "the traditional culture that is sometimes advanced to justify the non-observance of human rights, including in Africa, in practice no longer exists in a pure form at the national level anywhere."¹²⁰ This is because culture constantly evolves and societies change due to internal and external forces to become more modern societies.¹²¹

103 Ibhawon 2001 NQHR 46.

104 Brems "Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse" 1997 HRQ 136–164 145.

105 Tharoor 1999/2000 *World Policy Journal* 1.

106 Cobbah 1987 HRQ 320.

107 *Ibid*; Gyekye *An Essay on African Philosophical Thought: The Akan Conceptual Scheme* (1987) 154. The terms "communitarian", "communitarianism" and "communalism" are often used interchangeably. This is to emphasise the communal basis and the social order of African traditional societies.

108 Gyekye *An Essay on African Philosophical Thought* 154–155.

109 Himonga *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* (1998) 115.

110 Cobbah 1987 HRQ 320.

111 Gyekye *An Essay on African Philosophical Thought* 154–156.

112 *Ibid*.

113 *Ibid*.

114 *Ibid*.

115 *Ibid*.

116 *Ibid*. 156.

117 Freeman *Politics in the Developing World* 250.

118 *Ibid*.

119 Ibhawoh 2001 NQHR 55.

120 Tharoor 1999/2000 *World Policy Journal* 3.

121 *Ibid*.

3.4 Striking a Balance Between Human Rights and Cultural Practices

There is growing consensus that a balance needs to be found to reconcile the contradictions between the theory and practice of human rights and the promotion of culture.¹²² This is especially true with regard to individual human rights standards guaranteed at international and national level which conflict with collective cultural rights, religious beliefs and the perceptions/orientations of people within a culture.¹²³ According to An-Na'im, there is a need to develop cultural legitimacy of human rights standards in order to address this conflict and promote greater respect for the various human rights standards.¹²⁴

An-Na'im has written extensively on the nature, role and importance of cultural legitimacy.¹²⁵ He defines cultural legitimacy as "the quality or state of being in conformity with recognised principles or accepted rules and standards of a given culture."¹²⁶ The "authority and reverence derived from internal validity" of people within a culture is identified as the defining characteristic of cultural legitimacy.¹²⁷ This is explained further that

Given the organic relationship between culture and human behaviour, any system of human rights standards is more likely to be observed in practice if its norms are perceived by the people concerned as valid and legitimate in terms of their own culture. That is to say, the more human rights norms are accepted and internalised by a particular population as an integral part of their local culture, the more that population will articulate and implement those norms in daily practice, action to ensure enforcement in case of violation of those norms.¹²⁸

This argument shows that the practical application of human rights alone cannot resolve the conflict between human rights and culture, especially within African societies. Therefore, human rights accepted and internalised as part of a culture will provide a better chance for the realisation of children's rights,¹²⁹ as well as reduce any criticism of Western values having dominance over African values.¹³⁰ Although traditional African culture is often conveyed as monolithic and static, this is not the case as culture is subject to change depending on internal or external circumstances.¹³¹

Therefore An-Na'im suggests "internal cultural discourse" and "cross-cultural dialogue" as strategies to "establish enlightened perceptions and interpretations of cultural values and norms" and "aimed at broadening and deepening international (or rather intercultural) consensus."¹³² It is worth noting that within each culture issues to be resolved and processes taken with regard to these strategies may vary.¹³³ For example, in the context of child marriage, internal cultural discourse could involve the participation of key government officials, human rights or children's rights institutions, relevant non-governmental organisations (NGOs), family heads, and religious or traditional leaders. Women and girls should also be involved in the process to challenge existing harmful cultural practice or the interpretation of the practice.¹³⁴ This process will involve constructive dialogue, negotiations, persuasion¹³⁵ and adjustments based on the flexibility permitted within the culture to present alternative views of such a harmful practice.¹³⁶

As a contribution to this discourse on cultural legitimacy of human rights, the possibility

122 An-Na'im "Problems of Universal Cultural Legitimacy for Human Rights" in An-Na'im and Deng (eds) *Human Rights in Africa: Cross-Cultural Perspectives* (1990) 331.

123 *Ibid.*

124 *Ibid.*

125 *Ibid.*

126 *Ibid.* 336.

127 *Ibid.*; Kaime *The African Charter on the Rights and Welfare of the Child* 36–37.

128 An-Na'im "Islam and Human Rights in Sahelian Africa" in Westerlund and Evers (eds) *African Islam and Islam in Africa: Encounters Between Sufis and Islamists* (1997) 79–94 86.

129 Ibhawon 2000 HRQ 843.

130 Kaime 2005 AHR LJ 223.

131 Ibhawon 2000 HRQ 841.

132 An-Na'im "Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment" in An-Na'im (ed) *Human Rights in Cross Cultural Perspectives: A Quest for Consensus* (1991) 19–43 21 and 27.

133 An-Na'im *African Islam and Islam in Africa: Encounters between Sufis and Islamists* 87.

134 UNFPA "Ending Child Marriage: A Guide for Global Policy Action" 28.

135 An-Na'im *African Islam and Islam in Africa: Encounters between Sufis and Islamists* 86.

136 An-Na'im *Human Rights in Cross-Cultural Perspectives* 27.

of codifying the outcomes of internal cultural discourse and cross-cultural dialogue as written laws is considered. Codification, according to Meyer, is “the formulation and reduction to a written instrument of rules of law that elaborate established doctrines and precedents, which, even if non-binding, have legal consequences.”¹³⁷

Generally, African customary laws are unwritten, however, written customary laws are often criticised as excluding some of the principles and values of unwritten customary law and are seen as preventing a unified understanding of customary law.¹³⁸ An example of a written customary law is the KwaZulu Act on the Code of Zulu Law (KwaZulu Act)¹³⁹ and Natal Code of Zulu Law (Natal Code).¹⁴⁰ It is important to note that both Codes have been in place for more than 130 years.¹⁴¹ Contentious issues on gender inequality in the Codes, which conflicts with the provisions of the Constitution, were addressed in the cases such as *Gumede v President of the Republic of South Africa*.¹⁴² This Constitutional Court declared the discriminatory legislative provisions relating to proprietary consequence of customary marriage in section 7 of the Recognition of Customary Marriage Act, section 20 of the KwaZulu Act and section 20 of the Natal Code as unconstitutional.¹⁴³

As Herskovitz states “culture is flexible and holds many possibilities of choice within its framework.”¹⁴⁴ As such, the term ‘codification’ should be considered in relation to those parts of custom and tradition that have been sufficiently clarified.¹⁴⁵ This is with regard to people within a culture who initiate a process of change of a cultural tradition through internal cultural discourse and cross-cultural dialogue in a highly patriarchal African society and arrive at an alternative view or goals and an outcome that is culturally legitimate.¹⁴⁶

We argue that these outcomes should be codified. Codification will further deepen consensus for culturally legitimate international human rights standards,¹⁴⁷ promote compliance due to fear of sanction for violating the law,¹⁴⁸ prevent any attempt aimed at monopolising and manipulating the outcomes of dialogue,¹⁴⁹ as well as further strengthen disadvantaged individuals and groups, especially women and girls to challenge any attempt at any harmful practice or manipulations thereof.¹⁵⁰ In addition, it is evident that efforts to resolve conflicting issues between human rights and culture, especially problems of harmful cultural practices like child marriage, require different practical and sustainable strategies.

4 ALTERNATIVE STRATEGIES TO REGULATORY FRAMEWORKS FOR PROTECTING THE HUMAN RIGHTS OF THE GIRL-CHILD

A human rights framework is an imperative for the protection of the girl-child in Africa. However, alternative strategies to further strengthen protection are essential due to the complexities of culture and the interconnecting factors that reinforce harmful cultural practices such as child marriage. Practical strategies, especially those that deal with change in cultural perceptions and attitudes have been identified to produce positive results.¹⁵¹ As stated above, internal cultural discourse and cross-cultural dialogue will play an important role in promoting respect for all the rights relating to the prohibition of child marriage. In addition, education, awareness-raising and media campaigns at national and local levels will strengthen the protection of the

137 Meyer “Codifying Custom” 2012 *University of Pennsylvania LR* 1003.

138 *Ibid.* 998.

139 The KwaZulu Act on the Code of Zulu Law, 16 of 1985.

140 Proclamation R151 of 1987.

141 Bekker and Van Niekerk “Gumede v President of the Republic of South Africa: Harmonisation, or the Creation of New Marriage Laws in South Africa?” 2009 *SAPL* 206–222 210.

142 (CCT 50/08) [2008] ZACC cited in Bekker and Van Niekerk *SAPL* 2009 206–222; Bennet and Pillay “The Natal and Kwazulu Codes: The Case for Repeal” 2003 *South African Journal on Human Rights (SAJHR)* 217–238.

143 Bekker and Van Niekerk 2009 *SAPL* 206–222.

144 Herskovitz *Cultural Dynamics* (1964) 6 cited in Kaime 2005 *AHRLJ* 233.

145 Meyer 2012 *University of Pennsylvania LR* 1010–1011.

146 An-Na’im *Human Rights in Cross-Cultural Perspectives* 21, 27

147 *Ibid.*

148 Meyer 2012 *University of Pennsylvania LR* 1000.

149 An-Na’im *Human Rights in Cross-Cultural Perspectives* 28.

150 *Ibid.*

151 Malhotra, Warner, McGonagle et al. “Solutions to End Child Marriage: What the Evidence Shows” 2011 International Centre for Research of Women (ICRW) 6 <https://www.icrw.org/wp-content/uploads/2016/10/Solutions-to-End-Child-Marriage.pdf> (accessed 20-09-2017).

rights of girls and eliminate the practice of child marriage.¹⁵² According to Rembe,

education contributes to knowledge and understanding of the wider context under which conflicts arise. It fosters inter-group dialogue, sustains confidence-building measures and strengthens respect for diversity. It helps the vulnerable to overcome fear.¹⁵³

Education has the capacity to transform the life of a girl-child, as she acquires knowledge on rights and skills which will empower her to have a better chance at life.¹⁵⁴ In addition, teaching parents, family members and other beneficiaries of child marriage, who are mainly responsible for when and to whom a girl gets married, about the important role of education, the benefits of delayed marriage, and the impact of child marriage can also help address and eliminate the practice of child marriage.¹⁵⁵

It is worth noting that the positive impact of education as “a human rights in itself and a means of realising and promoting other human rights”¹⁵⁶ is why it is one of the key goals of the Sustainable Development Goals (SDGs).¹⁵⁷ Goal Four of the SDGs seeks to ensure inclusive and quality education for all boys and girls and to promote lifelong learning.¹⁵⁸ Therefore an effort needs to be made to ensure access to education at an appropriate age and at all levels for the girl-child.

5 CONCLUSION

The complexities surrounding the practice of child marriage are challenging. This article considers this challenge, taking into consideration the need to strike a balance between rights and culture, especially with regard to the issue of child marriage. The debate between the universality of human rights and cultural relativism provides a solid foundation for clarity and understanding, although efforts to resolve the conflicts between the fundamental rights of a girl-child, and the promotion of cultural practices go beyond this debate. The process to ensure the cultural legitimacy of human rights is very important for the success of the practical implementation and enforcement of children’s rights in Africa. The possibility of codification of culturally legitimate human rights standards seems viable as an additional strategy to strengthen the legitimacy of human rights. Sustainable strategies linked to education, dialogue and awareness also play an important part in ending child marriage in Africa.

152 Lane “Stealing Innocence: Child Marriage and Gender Inequality in Pakistan” 2011 *Institute for Human Rights Abo Akademi University* 32–34.

153 Rembe “To Reaffirm Faith in Fundamental Human Rights: The Challenge of Managing Diversity in Africa” 2002 *Connecticut Journal of Int Law* 307–308.

154 Lane “Stealing Innocence: Child Marriage and Gender Inequality in Pakistan” 2011 34.

155 Malhotra et al “Solutions to End Child Marriage” 13.

156 Lane “Stealing Innocence: Child Marriage and Gender Inequality in Pakistan” 2011 34. See also UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment NO. 13: The Right to Education (Art.13), adopted at the Twenty-First Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1999, E/C.12/1999/10 <http://www.refworld.org/docid/4538838c22.html> (accessed 08-03-2018).

157 It was one of the eight goals of the Millennium Development Goals (MDGs) that 191 UN Member States signed in 2000 and agreed to achieve by 2015. See Millennium Development Goals (MDGs) http://www.who.int/topics/millennium_development_goals/about/en/ (accessed 20-09-2017). Sustainable Development Goals: 17 Goals to Transform Our World <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> (accessed 20-09-2017).

158 *Ibid.*