

Stop Forced Child Marriage: A Comparative Global Law Analysis

Michelle J. Miller

Abstract—Millions of girls are forcibly married during the transitional period between puberty and adulthood. At a stage of vulnerability cultural practices, religious rights and social standards place her in a position where she is catapult into womanhood. An advocate against forced child marriage could argue that child rights, cultural rights, religious rights, right to marry, right to life, right to health, right to education, right to be free from slavery, right to be free from torture, right to consent to marriage are all violated by the practice of child marriage. The author is this advocate and this paper will present how some of these rights are violated and establish the need for change.

Keywords—Child marriage, forced child marriage, child rights, protection, religious rights, cultural rights, right to life, human rights.

I. INTRODUCTION

THE forced marriage of young girls and the act of marrying a girl child to a boy a few years older or to an adult male decades older than her (hereinafter referred to as “forced child marriage”) is not an ancient practice, it is happening right now!. As Dr. Babatunde Osotimehin notes in *Marrying to Young: End Child Marriage*, “No society can afford the lost opportunity, waste of talent, or personal exploitation that child marriage causes [1].” Child marriage is a forced marriage because minors are deemed incapable of giving informed consent [1, p.11]. In fact, extreme forms of force marriage may involve threats, abduction, imprisonment, rape and even death [2]. The following quote provides the current and potential future prevalence of child marriage:

“One out of nine girls will be married before their 15th birthday. Most of these girls are poor, less-educated, and living in rural areas. Over 67 million women 20-24 year old in 2010 had been married as girls. Half were in Asia, one-fifth in Africa. In the next decade 14.2 million girls under 18 will be married every year; this translates into 39,000 girls married each day. This will rise to an average of 15.1 million girls a year, starting in 2021 until 2030, if present trends continue. While child marriages are declining among girls under age 15, 50 million girls could still be at risk of being married before their 15th birthday in this decade” [3].

Forced marriage is one where one or both, of the parties entered into it under duress. The force used may be either emotional or physical or both [4]. Forced marriages take myriad forms including;

“Early marriage of girls younger than the edge of

consent; temporary marriage by which a man can pay to marry a woman for a few hours or a few months (*mut’a siqueh*); wife inheritance, by which a woman can be forced to marry her brother-in-law once her husband has passed away; and debt-rape or compensation marriage, through which families settle tribal or inter-family disputes by giving a girl child in marriage. Even where these unions may not be civilly registered, they are binding according to religious, traditional, or other prevailing social customs [2, p. 59].”

To bring about change in child marriage we must complete a thorough review of legal issues presented on a global scale, identify ways to increase enforcement and educate communities. This writing will present some of aforementioned rights and supports the position that international and national protections of certain group rights must cease in order to protect the basic human rights of the child. However, the focus of this writing is to identify international law mandates, legal loopholes, lack of enforcement, and the overall ineffective application of these mandates in various countries (Hereinafter referred to as “States”). Social standards, religious practices, and cultural traditions may conflict with the fundamental rights of girls. In some areas of Africa young girls must endure female genital cutting to establish their cleanliness before marriage, in some parts of Asia acid is thrown on females that reject marriage proposals, and in the Middle East a women might be beaten or killed if she fails a virginity test the day of marriage [2, p.64]. National legal systems around the world that fail to protect individuals despite societal norms, ancient religious mindsets and brutal cultural practices act as an impediment to the right to life and indirectly perpetuates the acceptance of the same inhumane practices it allegedly intends to stop.

Part one of this paper provides an overview of forced child marriage practices. Part two examines international law framework that address force child marriages and identifies some of the shortcomings of this framework. Part three addresses national responsibility and utilizes country legal examples to demonstrate the need to enforce laws that prohibit child marriage. Part four explains how cultural rights and/or religious rights (also referenced as “group rights”) are protected to the detriment of children. Part five summarizes how the current international and national legal framework fail to protect victims of forced child marriage. Part six gives recommendations for international and national law that would protect the victims of force child marriage.

Michelle J. Miller is with the John Marshall Law School, United States (e-mail: michelle.millersq@gmail.com).

II. OVERVIEW OF CHILD MARRIAGE PRACTICES

A. Child Marriage Practices

In developing countries, one in nine girls (between the ages of 10 and 14) or 15 million have been forced into marriage [3, p.1]. The author's position is that any form of child marriage is forced marriage because a child does not have the capacity to consent to the marriage contract. "A forced marriage is one where one or both, of the parties entered into it under duress. The force used may be either emotional or physical or both [5]." Forced child marriage is likely one of the severest forms of child abuse and it is one of the most disturbing violations of human rights and child rights. The practice of forced child marriage constitutes sexual servitude, abuse, gender inequality, threat to livelihood, all sorts of mental anguish and emotional distress. The continuous cultural and/or religious practices is an inadequate justification of forced child marriage continues to perpetuate a profound double standard that devalue females, degrades them to the status of an animal or an inanimate object sold at the will of men. In patriarchal societies, which still exists in many parts of the world today, male leaders and men of wealth use money and powerful positions as a means to fulfill their animalistic lust and inordinate sexual gratification at the expense of innocent children and women. In fact, this pedophilic practice can involve extreme forms of threatening behavior, abuse, abduction, imprisonment, physical violence, rape and in some cases, murder [2, p.60]. The author's research on this topic began several years ago during a law student trip to South Africa this paper starts with a marriage practice in South Africa.

1. An Overview of Ukuthwala in South Africa

The forced marriage practice sometime referred to as "bride abduction" and "bride kidnapping" has a historical basis where a young couple that desired to be married to one another and the abduction was fake because both parties agreed to it. Learning about this practice, and the evolved changes, prompted me to research this topic. This historical practice has evolved into a non-consensual means of forcing girl into marriage. In South Africa, a custom known as "Ukuthwala" has changed from its customary roots. This practice entailed a girl being kidnapped, sometimes unaware and sometimes with knowledge, by the intended groom and his friends [6]. Originally, the practice of Ukuthwala had the following purposes:

"(1) to force the father of the girl to give consent; (2) to avoid the expenses of a wedding; (3) to hasten matters if the woman was pregnant; (4) to persuade the woman of the seriousness of the intent to marry her; and (4) to avoid payment of lobola" [6, p.4].

The traditional practice was between a male and female within the same age group. However, today the traditional custom has become the justification for the forced marriage of girls as young as 12 years old to men old enough to be their father. In some cases, part of an abduction process includes the girl's parents if the parents receive money from the

intended groom [6, p.5]. This customary practice was been reviewing during the author's trip to South Africa in 2011 because it was not prohibited due to customary law rights within the South Africa Constitution. Today, in fact, marriage laws in almost all Sub-Saharan African have provisions that allow children to marry under customary law without specifying a minimum age [2, p.60]. Learning about Ukuthwala ignited this in-depth legal research on this topic.

B. Bride Abduction and Bride Kidnapping Worldwide

A similar change in the historical custom of consensual abduction for marriage purposes has also transformed into a forced marriage practice in Kyrgyzstan [7]. A Human Rights Watch Report provided the following description of forced marriages in Kyrgyzstan: The practice of "kidnapping of women and girls – some as young as 12 years old – for forced marriage carried out by groups of men who capture a woman through physical force or deception and take her to the home of the intended groom. The abductor's family then exerts psychological, and sometimes physical, pressure to coerce the young women to consent to marry. In some cases the young woman is raped soon after being taken to the abductor's house, so that she will feel shame and feel unable to return to her parents' home; other times the kidnapped woman is coerced to have sex or in some cases is raped on her wedding night [8]." Bride kidnapping has also been documented in Armenia and Georgia. In addition, bride kidnapping has been documented in Albania, Turkmenistan, Azerbaijan, Uzbekistan [6, p. 4] and many other countries as will be noted in this writing. Children are betrayed by their families, neighbors, community leaders and government officials because they are left voiceless, helpless and in some cases breathless because their lives are cut short and there's nothing that they can do. This paper will demonstrate how the difficulty of balancing international mandates, constitutional rights and societal practices in countries across the globe impacts the ability to protect girls and stop child marriage.

III. INTERNATIONAL LEGAL INSTRUMENTS AND NATIONAL LAWS THAT IMPACT CHILD FORCED CHILD MARRIAGE

According to Restatement of the Law 3d: Foreign Relations Law of the United States ("FLR"), Article 102 provides that a rule of international law is one that has been accepted as such by the international community of States: (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world. International law, in the context of FLR Article 103, is evidenced by:

"a) judgments and opinions of international judicial and arbitral tribunals; (b) judgments and opinions of national judicial tribunals; (c) the writings of scholars; (d) pronouncements by States that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other States [9]."

Many international treaties and instruments proclaim that forced child marriage is a harmful practice that must be stopped. Many States, including many of the ones discussed in

this writing, are signatories to these international instruments and have ratified them (meaning that their national laws should reflect the mandates within these international instruments). However, few States have laws that align with these international treaties or enforce laws that address this issue [10]. The practice of force marriage continues, at alarming rates in fact, in some countries even when there are laws that prohibit the practice [6, p.6]. One of the simplest requirements is to implement the recommendation to set the minimum age of marriage to 18. Interestingly, many countries have set the minimum age of marriage as 18 and yet still have loop holes in the law that permits the marriage of a little girl for several reasons [8, p.5]. In other countries, like the United States for instance, the minimum age of marriage is generally 18 but parents and guardians can consent to marriage below 18 [11]. Laws like the ones in the United States thus inadvertently provides a means for a parent to legitimately consent to the marriage of a young girl and potentially provides a loophole for legalized force child marriage in America. We will look at this issue on the Section III of the paper; now we will focus on certain international instruments.

The Convention to Marriage, Minimum Age for Marriage, and Registration of Marriages (“CCM”) and the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”) both contain principles that establish that consent is a pertinent marriage factor. CCM was entered into force on December 9, 1964 and as of October 2015 there are only 55 parties and 16 signatories. Greece, Israel, Italy and the United States are not listed for ratification, acceptance, ascension or acceptance. [11, p.13] Of all of the States of focus in this paper, only the U.S. is a signatory.

CEDAW went into force on September 3, 1981 and as of October 2015 there are 189 parties, but only 99 signatories. The United States is the only country that does not show ratification, acceptance, ascension, or acceptance. [11, p.3] Of all of the States of focus in this paper, only South Africa, the U.S., and India are signatories. However, while both international instruments recommend that States set a minimum marriage age, neither CEDAW nor the CCM sets a minimum age for marriage and the CCM actually permits exceptions to the minimum age requirement [6, p.5]. Again, a loophole in an international instrument for States to use to justify reducing the age of marriage even if State law recognizes 18 as the minimum age of marriage consent. Worldwide, more than 700 million women alive today were married and approximately 250 million were married before 15. [6, p.3]

There are several international instruments that speak to human rights that are violated in a forced child marriage context. Yet again, language loopholes provide an avenue to justify behavior that is detrimental to the girl child. For instance, Article 7 of the Universal Declaration of Human Rights (UDHR) provides that

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement

to such discrimination [12].”

Article 7 of the UDHR obviously includes children, but in many cases the rights of the child are not considered within the context of certain cultural and religious practices that a child are forced to engage in. In addition, Article 24 of the UDHR provides that

“(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses.” [6, p.4]

Furthermore, Article 1 and 3 of CRC provide that individuals under the age of 18 are considered children and the “best interest of the child” should be of primary consideration to various spheres of society. Furthermore, Article 19 (1) of the CRC provides that State must take appropriate steps to protect the child from

“All forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.” [6, p.7]

The CRC was entered into force on September 2, 1990 and as of October 2015, 196 parties, but only 140 signatories. Several countries made declarations and reservations and I’d like to note that the United States again is the only country that does not show ratification, acceptance, accession or acceptance [13]. Of all of the States of focus in this paper, only South Africa, the U.S., Chad, Bangladesh, and Pakistan are signatories. On their face, the UDHR and the CRC appear to provide undeniable rights to children. However, in the forced child marriage situation, the phrases “full age”, “equal rights” and “free and full consent” are virtually ignored as if the text were nonexistent. - States ignore these issues as if forced child marriage does not constitute an Article 7 UDHR violation and as if Article 1, Article 3 and Article 19 of the CRC do not provide a “best interest of the child” standard.

A closer look at CEDAW reveals that. Article 16, subsection 2 of CEDAW provides that States should enact laws that specify a minimum age of marriage. Article 16 of CEDAW also provide that the “The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory. [14].” Let’s look at the COC again, it provides that “free and full consent” is required to enter into a marriage and Article 2 provides that State parties to the convention must enact legislation to specify the minimum age of marriage [15]. Unfortunately, neither Article 16 of CEDAW nor Article 2 of the COC set a minimum age and while it is a significant gesture to exclaim that marriage to a child should have no legal effect but the practical results of this mandate is lacking. However, despite these international conventions, customary marriages may be instituted without legal affect and where the marriage is not legally effective the

person who suffers is the girl child who ultimately has no legal rights. Thus, State parties must review failures to implement these rules and truly considers the “best interest of the child” in the force child marriage context. In 2013, a UN resolution was presented to end child marriage [16].

IV.STATE RESPONSIBILITY TO PREVENT CHILD MARRIAGE

Many States have signed and ratified International Instruments that address issues pertinent to forced child marriages. Despite this, many countries still allow child marriages below the age of fifteen. These countries include African countries such as Ethiopia, Kenya, and Nigeria, Latin American countries including Peru and Argentina, Middle Eastern countries such as Lebanon and Iran, Asian countries such as Sri Lanka and Malaysia and North American ones like the United States [17]. In some of these cases, the marriage could be a forced marriage situation and such situations include instances when a parent or guardian provides “legally” required authorization for a child to marry under the statutory marriage age. The fact remains that many girls marry before the age of 18 in States worldwide, such as Mali, Bangladesh, Uganda, and Nicaragua, which have established 18 as the legal minimum age at marriage [18]. In other instances, since may State parties to international conventions also have laws that give indigenous people rights to practice ritual customs and religious traditions this may “legally” include the marriage of a girl child to an adult male. Rengita de Silva de Alwis takes a position aligned with this paper when she concluded the following:

“States parties should ensure that traditional, historical, religious and cultural attitudes are not used to justify violations of women’s rights to equality before the law and to equal enjoyment of all Covenant rights [18, p. 13].”

The author’s take this position further by proclaiming legal prohibition of such violations. International promulgations like Article 28 of the UDHR states that State parties are bound to respect the obligations set forth in the declaration must be given priority under State law. In addition, Article 2, Article 4 and Article 34 of the CDC place obligations on State parties to ensure that the rights of children, as outlined in the CDC, are upheld. In fact, Article 2 of the CDC gives the following direction to States:

“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members [18, p.14].”

Child marriage is a violation of human rights yet many States must work diligently to implement laws that protect the

rights of females or ensure laws that provide such protection are enforced. Let’s review the rules in United States, Chad, and Bangladesh for consideration.

Chad ranks in the top five countries where girls are married before the age of 18. Chad is a country with high poverty levels and payment of a bride-price is mandatory in Chad. As a result, parents are willing to marry their young daughters for financial benefit [18, p.16]. In Chad, the median age gap between spouses is 9 years with the highest gap found was 75 years [19]. Due to this large age gap, the position of the girl-wife is subservient in the family and she is considered a possession instead of a partner in the marriage. According to the ICRW, the subordination of the child-wife diminishes her position and severely limits the wife’s ability to ensure the enjoyment of her civil and political rights [19, p. 7]. It is importance to note that Chad is part of the International Convention on Civil and Political Rights (ICCPR) yet the practices within the State does not align with ICCPR [20].

According to the ICCPR and its Constitution, Chad government and legal officials are charged with the responsibility of ensuring the women and girls within the State are protected. Article 6(1) of the Chad Constitution gives all people the “inherent right to life” [20, p. 7]. The Civil Code of Chad sets the minimum age of marriage at 15 for girls and 18 for boys [21]. However, there is a conflict between the Civil Code, the Penal Code and customary laws on the minimum age of marriage. Article 277 of the Penal Code stipulates that:

“The consummation of a customary marriage before a girl has reached the age of 13 is similar to rape and shall be punished as such” [21, p.7].

Thus, the Penal Code permits customary marriages at earlier ages, even when girls have not reached the age of 13, under the condition that it is not consummated [21, at p.7]. The fact that a State law prohibits marriage under 18 and has signed on to an international legal convention that prohibits early child marriage doesn’t negate the reality that these international and national rules are violated daily in practice and ignored by legal authorities. There is little incentive for families to protect the girl child in poor countries like this due to financial need.

“Driven by poverty and the incentive to claim a dowry for their daughters, many families are complicit in forcing young girls to wed. With so many young girls forced into early marriage and bearing children before they are physically mature, the corresponding rates of maternal and neonatal death in Mali are dangerously high. A Malian woman’s chances of dying due to pregnancy or childbirth related complications are 1 in 15. As for neonatal mortality rates, Mali ranks number seven in the world, with 54 deaths per 1,000 live births [22].”

Thus, we must realize that due to socio-economic concern, dire need and societal practices State and international rules prohibiting child marriage are simply ignored words on a piece of paper [22, p. 8]. Chad is not the only State where the letter of the law provides for rights and protections that are not realized by individuals with the State. In Bangladesh, paying a marriage price is punishable by law yet girls are married daily.

Bangladesh also ranks in the top 5 countries where child marriage takes place. Unlike Chad, Bangladesh had several rules that address child marriage [23]. The Child Marriage Restraint Act of 1929 states:

“6.(1) Where a minor contracts or directs any child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized, shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand Taka, or with both: provided that no woman shall be punishable with imprisonment [23, p.1].”

It is important to identify that The Child Marriage Restraint Act of 1929 does not specifically prohibit child marriage. To the contrary, it simply punishes the solemnization of the child. In other words, the same family members (and man that marries that child) has the responsibility of ensuring that the marriage there is no sexual activity. Not only is this law unrealistic, but it is also virtually impossible to monitor and enforce. [24] Several decades later, the Child Marriage Restraint Act of The Dowry Prohibition Act, 1980, provides for punishment for giving, taking or abetting the giving or taking of dowry [25]. Three years later, in 1983, the Cruelty to Women (Deterrent Punishment) Ordinance, 1983, provides for the abduction of women for unlawful purposes, trafficking in women, or causing or attempting to cause death or grievous harm to a wife for dowry. Then a year later, the Child Marriage Restraint Act Amendment Ordinance, 1984, which increases the marriageable age for women from 16 to 18 years, and for men from 18 to 21 years. It also provides for punishment for marrying or giving in marriage of a child. “While it is commendable that the minimum age for marriage has been raised, the fact that it was 18 for girls and 21 for boys could be regarded as discriminatory. The government had pronounced a prohibition on child marriage, yet alternative sources of information asserted that it was not enforced at all, and that 68 per cent of girls were married below the age of 16 [24].” Although there have been laws in Bangladesh for over 30 years that were intended to eliminate child marriage, currently over fifty percent of the girls in Bangladesh are married below the age mandated by law.

In Bangladesh, parents marry off underage daughters despite national rules and other initiatives. According to State of the World’s Children report released by UNICEF in 2011, approximately 66 percent of girls in Bangladesh will be married before their 18th birthday [23, p. 2]. The continual practice of child marriage in Bangladesh demonstrates another instance where laws the prohibit child marriage have been passed but they are not enforced.

Our brief review of Chad and Bangladesh are mere examples of what happens in States around the world. States sign on to international conventions that prohibit marriage before the age of 18 and implement national rules that do the same, but the numbers of girls that are married in violation of the laws are still high. States must be held accountable to the

children within their country. Girls need someone to be their voice in a legal system where they are voiceless and helpless victims. To truly understand the global scale of this issue and the challenge faced by States, it’s important to review the various rights that must be balanced by States and the failure to properly balance these rights negatively impact the victim – the child wife.

In the United States (USA), almost every state sets the legal minimum age of consent for marriage at 18 years old. However, almost all of these states were permit marriage under 18 with parental consent and other reasons. In states of California, Delaware and Mississippi the judge has discretion and no age limits for the legal age for marriage (with parental consent) is identified in the statute [26]. In New Hampshire, at one time, the legal age for marriage with parental consent is 14 for males and 13 for females [26, p.2]. In all other states within In the USA, the marriage age is 15 – the statutory age of 18 with parental consent. The rule provides as follows: 22 U.S.C.A. § 7104 – Prevention of Trafficking, Subsection (j) has a prevention of child trafficking through child marriage section. This section of the U.S. Code became effective on March 7, 2013 and it provides that;

“Secretary of State shall establish and implement a multi-year, multi-sectoral strategy: (1) to prevent child marriage; (2) to promote the empowerment of girls at risk of child marriage in developing countries; (3) that should address the unique needs, vulnerabilities, and potential of girls younger than 18 years of age in developing countries;(4) that targets areas in developing countries with high prevalence of child marriage; and (5) that includes diplomatic and programmatic initiatives [27].”

This rule is a step in the positive direction as girls in the U.S. and around the world as it identifies the vulnerability of girls and their need for help.

V. OVERVIEW OF GROUP RIGHTS THAT IMPACT FORCED CHILD MARRIAGE

A. Cultural Rights and Child Marriage

The unequal and harsh treatment of women and children throughout the world are in many cases deeply embedded in culture, religion and tradition. These practices include “virginity testing, early marriage, female genital mutilation and other harmful practices [28].” To further consider the need of a new legal regime that address child marriage we must look into the laws and practices of other States. Let’s look at Bangladesh again and South Africa.

Because the girl child is a source of income for a family careful consideration must be given to factors that would reduce the resources received by the family for the child.

“... In some parts of Africa, for example, women are subjected to female genital cutting in order to ensure a woman’s cleanliness and sexual restraint. In parts of South Asia, family members of spurned suitors throw scarring acid on women who reject marriage proposals. In areas of the Middle East, women are forced to undergo virginity tests on their marriage night – failure of which

can result in beatings or even death. Women in many areas of the works are also the victims of honor killings by their own fathers and brothers, because they are perceived to have brought shame upon their families – for discovery of non-virgin, resistance to a forced marriage, or relate trespasses [2, p.64].”

These practices, while considered part of societal norms, have detrimental effects on the girl child.

As noted in Section III, several States have promulgated laws intended to prohibit the practice of child marriage yet religious and cultural laws are still given more weight. For example, in Bangladesh the legal marriageable age of consent is 18, but child marriage is not banned [29].

“In Bangladesh, marriage laws are based on a combination of religious and civil law. Civil laws dictate that the legal age of consent and minimum age for marriage is 18 for women and 21 for men. Bangladesh does not have a specific law banning forced marriage. However, legally, the consent of both parties to a marriage is required. Where parties to a marriage are above the legal age of consent, consent to marry becomes one of the primary factors in determining the validity of a marriage. A forced marriage may therefore be challenged and declared invalid if there is evidence to indicate that either party did not consent to the union. Where the parties are minors, consent to the marriage may be given by their legal guardians. However, marrying off minors is a criminal offence, and persons who marry off minors may be prosecuted under the Child Marriage Restraint Act. However, the marriage itself would not be invalidated by this process [30].”

In other words, the law allegedly provides protection against child marriage while at the same time provide a loophole to permit child marriage under certain circumstances.

Bangladesh has signed some international conventions and implementing national laws that prohibit child marriage for decades yet it still ranks as a top country for child marriage. For instance, Bangladesh acceded to the CCM on 5 October 1998 [31]. According to the Convention, contracting states agree to require consent from both parties entering into marriage and to establish a legal minimum age for marriage [31, p.1]. Bangladesh, however, reserved the right to apply these provisions in accordance with "personal laws of different religious communities of the country" [31, p.2]. In the absence of a uniform family code in civil law, personal laws of religious communities govern many family matters in Bangladesh, such as marriage, divorce, custody, and inheritance. South Africa, unlike Bangladesh, specifically recognizes customary law (or the law of certain cultures within a State) as an integral part of the legal system. Because the Constitution in South Africa recognizes customary law, and thus traditional practices, this part of the paper will review the South Africa's legal system to demonstrate the legal conflict between individual rights and group rights that occur in many States. Sections 30 and 31 of the South Africa Constitution provide the following:

“Everyone had the right to use the language and to

participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights [32].”

In addition, the Bill of Rights states the following:

“1. Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community (a.) to enjoy their cultural, practice their religion and (b.) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. 2. The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”

As you see, the South African Constitution does provide for the legal practice of cultural rights as long as those practices do not violate sections of the Bill of Rights. The issue of consideration is how do you balance those rights and when does some rights have greater importance than others? If so, which ones? The position presented in this paper is that the rights of the individual must trump cultural rights, religious rights and any other group right that inherently diminish the rights of an individual. In addition, Section 39(3) of the South Africa Constitution states, in part, that:

“The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill [33].”

The aforementioned constitutional provisions are admirable in that they demonstrate a State's sensitivity to the rights of its citizens and establish a sense of equality unprecedented in many States today. However, this constitutional approach has some setbacks like South Africa. When looking at South Africa,

“One of the challenges of the South African Constitution lies in the contradictions that it raises between universal individual rights guaranteed in the Bill of Rights, on the one hand and long cherished traditional practices on the other, which often violate the rights contained in the Bill of Rights. Ukuthwala custom is one of the examples of such a tension [6, p.12].”

Ukuthwala, as mentioned in the introduction of this writing, is a cultural practice gone wrong. The practice of Ukuthwala has been protected as a cultural right. However, the practice of obtaining a bride price for a girl that may become a slave or trafficked in sex trafficking arena defies the girl's right to human dignity. These issues are challenging to address due to cultural rights. The challenge is also further complicated by religious rights.

B. Religious Rights and Forced Child Marriage

Child marriage is tied to the religious practices within a country. In this part, we will look into the practices of child marriage practices in India, Uzbekistan, Tajikistan, and Pakistan. Child marriage is not a new phenomenon as it has been a practice for centuries. Freedom of religion is mandated by the Constitution of many States or at least the freedom to practice ones religious belief within certain parameters. The

religious practice of child marriage may be an integral part of societal norms and is considered an untouchable area of legal change in some locations. This is further complicated by self-proclaimed religious practices that simply condone child marriage. "The religious and cultural norms of child marriage are often ignored to the demise of the efforts intended to eliminate child marriage. Religious belief are often time the core of family thought patterns and societal standards. Thus, when a religious practice appears to condone certain conduct, even to the detriment of innocent children, people tend to align themselves with spiritual leaders. The strong bond created among people groups based on religion are in some cases honored so highly that violation of basic human rights are ignored or virtually eliminated in the process.

Due to population, India has one of the highest numbers of child marriages of all States across worldwide. As of 2007

"Five states in India have the highest prevalence of child marriage: Madyha Pradesh at 73 percent, Andhra Pradesh at 71 percent, Rajasthan at 69 percent, Bihar at 67 percent and Uttar at 64 percent [34]."

As of 2013, the 10 countries with the highest rates of child marriage were: Niger, 75%; Chad and Central African Republic, 68%; Bangladesh, 66%; Guinea, 63%; Mozambique, 56%; Mali, 55%; Burkina Faso and South Sudan, 52%; and Malawi, 0%. In terms of absolute numbers though, because of the size of its population, India has the most child marriages and 47% of all marriages in India the bride is a child [18, p.24]. Muslim and Hindu beliefs, in some readings, view child marriage as an acceptable practice according to religious text. This belief differs by people group and provides a critical issue of consideration when addressing the practice of child marriage. There isn't an overriding total religious belief that child marriage is acceptable in any State, but it is an issue of consideration among religious sects. For example,

"Although some Indian advocates question the existence of child marriage in traditional Hindu texts, Nepalese advocates argue that the Hindu scriptures in 400 to 100 BC urged the father to marry off his daughter at a very young age. Those religious texts recommended ages eight to ten as the ideal age of marriage [6, p.24]."

A group that follow the tenants of this religious belief may find it within their rights to practice their religious beliefs to marry off a child between the ages of eight to ten as noted in this text. The issue is whether the right to practice this religious belief should be given more credence over the rights of a child to have a healthy and happy life. The Child Marriage Restraint Act, 1929, enacted in pre-partition India, a child was defined as a woman under 18 years of age or a man under 21 years of age. The Act punished men who marry children, those who solemnize child marriage, and parents or guardians who permit child marriage. Underage marriages were, however, still considered legally valid and were permitted under religious personal laws of the country. This Act, however, was repealed by the Prohibition of Child Marriage Act of 2006 [35].

The Prohibition of Child Marriage Act of 2006 makes a

marriage contract with a female under the age of 18 and with a male under the age of 21 to be voidable. The Act perpetuates gender based discrimination because a female is legally considered an adult at age 18 while a man isn't legally considered an adult until the age of 21. This paper will not address details pertaining to gender based discrimination perpetuated in rules such as this, but it is an issue that's noteworthy. The Act further provides as follows:

Section 3(1) Every child marriage, whether solemnized before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage: provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage. (2) If at the time of the petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend along with the Child Marriage Prohibition Officer. (3) The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority [35, p. 1].

The Delhi High Court, unlike the courts in some other countries plagued by this issue, has taken a step in the direction that aligns with the position of this paper. The Delhi High Court held that Prohibition of Child Marriage Act, 2006 overrides all personal laws and governs each and every citizen of India The girl has the right to approach the Court under Section III of the Prohibition of Child Marriage Act, 2006 to get the marriage declared void [35, p.5]. This is a step in the right direction. However, the opinion of the court fails to recognize the subservient and vulnerable state of the child-wife.

The Delhi Court's conclusion that a distressed, immature and likely uninformed child an opportunity to approach the Court to get a marriage declared void is an unrealistic tactic. In other words, having a right and being in the position to realize that right are not synonymous. The approach in the best interest of the child would be to declare a marriage contracted with a female under the age of 18 to be void [36]. The author's Delhi Court should have concluded that the Prohibition of Child Marriage Act of 2006 should override any religious rights that permit child marriage. In so doing, a perpetuator or the family of the girl-wife cannot argue that they had a right to marry off the adolescent girl based on religious beliefs. A court taking this position is of great importance in places like Uzbekistan where some researchers have noted that marriage is based primarily on religion in some regions of the country.

In Uzbekistan, like many other countries, the legal contracting age for marriage is 18. A law that provides for a marriage age of 18; however, has failed to eliminate the practice of child marriage. According to the United Nations Population Fund Administration, child marriage accounted for approximately 14% of the marriages in Uzbekistan [6, p.13]. Steps have been made to strengthen the laws that prohibit child marriage and penalize perpetrators of this act. However, the issue of marriage at an early age is a social norm. As a result, some people believe laws that prohibit a young girl

from marrying a man violates their religious rights and circumvents their cultural tradition.

Many marriages in Uzbekistan are purely religious and not legally registered. This is, in part, because religious ceremonies allow for girls to be married as well as polygamy [6, p.14]. Thus, in Uzbekistan, in practice, local tradition supersedes the law and most people do not even realize that forced marriage is a crime [6, p.12]. The Uzbekistan example is another demonstration of the disconnection between the law and the actual practices within a State. In 2009 the Spiritual Administration of Muslims of Uzbekistan adopted an internal regulation 35 that stated that nikah could only be carried out by an official imam, and only after official state registration of the marriage. This regulation was intended to protect the rights of women and should have decreased the number of child marriages. However, in practice, a madrassa student interviewed for this research noted, couples getting married have begun to ask religious figures from their areas to perform nikah, rather than an official mosque imam. In their opinion, nikah can be performed by any faithful Muslim. All the child spouses interviewed here reported that during their nikah ceremonies the religious leader did not ask them for their ages, or whether they had completed their state registration [37]. Current legislation has been proposed to address this issue, but developing stricter laws wouldn't be productive unless steps were taken to ensure that the laws were enforced. Engaging in the practice of child marriage, though prohibited by law, is also a known practice in Tajikistan.

In Tajikistan, like in India and Uzbekistan, child marriage is sometimes based on religious beliefs and practices. In Tajikistan, even though the minimum age to marry is seventeen, many parents circumvent the law and arrange traditional Muslim marriages [38]. In 1993, Tajikistan ratified both the CRC and CEDAW. However, child marriage is still prevalent in Tajikistan. The Tajikistan Family Code provides that a child is a person under the age of 18, in accordance with the CRC. The Family Code is the main instrument regulating relationships between parents and defining parents' obligations to their children, and the responsibility of the State when parents fail to carry out their obligations [39]. In 2005, the Advocates of Human Rights recounted the following comment of a woman interviewed in Tajikistan:

“These young girls are desperate not to get married...they are 14, maybe 15, and they are in school, or maybe they just finished school and their parents won't send them back to school or let them keep studying and instead force them to marry. This is when many girls commit suicide or burn themselves or jump into a river [40].”

President Emomali Rahmon could not ignore the plight of the young girls according to some researchers and journalist and signed a law amending the country's Family Code to raise the legal age for women to marry from 17 to 18 years on July 23, 2010. The amendments took effect on January 1, 2011 and parents who attempt to have their daughters married before the age of 18 will be prosecuted. Now let's look at another example: Pakistan.

Pakistan is another place where child marriage is prohibited by law, but is a daily practice due to cultural and religious rights. Section 4 of the Pakistani Child Marriage Restraint Law of 1929 provides the following, “whoever being male above eighteen years of age, contracts child marriage shall be punishable with simple punishment which may extend one month, or with fine which may extend to one thousand rupees, or with both.” And Section 2 (a) defines a child as follows: “child” means a person who, if a male, is under eighteen years of age, and if a female, is under sixteen years of age [41].” Pertinent sections address the child marriage and provide for a punishment of those who engage in or assist with this practice as done by the Sierra Leone case example noted in Section 4 of this document. This approach would strengthen Section 4 (1 and 2) Pakistani Child Marriage Restraint Law of 1929 which provides for the following: (1) Where a minor contracts a child marriage any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized, shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both: Provided that no woman shall be punishable with imprisonment. (2) For the purpose of this section, it shall be presumed, unless and until the contrary is proved, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnized.

Under Muslim Personal Law, a girl under the age of sixteen years, is incompetent to contract a marriage. The marriage itself does not become invalid on that score, although the adult husband contracting the marriage or the persons who have solemnized the marriage may be held criminally liable...thus this capacity to bypass the law and bolster the practice of selling girls into marriage in exchange for money, settling disputes with the exchange of girls known as vani or swara and the use of a girl as compensation for crimes [42].” The situation in Pakistan demonstrates just how egregious the child marriage is. For this reason it is important to recognize that cultural rights, societal norms and religious traditions cannot trump the law or the basic human rights of the girls that are impacted in a way that is detrimental to her livelihood. It is thus integral to recognize on an international scale that certain rights cannot trump the right a child has to human dignity and life in general.

VI. BALANCING RIGHTS THAT IMPACT FORCED CHILD MARRIAGE

Child marriage is a prevalent societal problem that is gaining more international attention as global and business travel increases. Every day, girls are robbed of the opportunity to live their lives in a manner that ensures that they will one day have a healthy and happy adulthood. Over 150 countries have laws that require a girl to be 18 years old or older to enter into a marriage contract in agreement with several international conventions. Despite these laws, many States

have a challenging time balancing the various rights given to groups must be reviewed in conjunction with the rights of the child. Cultural rights and religious rights are rights that are not discussed in detail when reviewing laws pertaining to child marriage on an international scale. In most instances, a law addresses gender inequality and child rights. However, the legal topics must be reviewed in a manner going forward so that new legislation truly protects girls. Although many countries have raised the legal age for marriage, this has had little impact in locations where child marriage is a normal practice.

It has been recognized in South Africa that rights given to groups must be balanced against their impact on vulnerable people. The overriding consideration must be to do that which is fair, just and equitable. In addition, more importantly, the interests of the minor children and other dependents of the deceased should be paramount [44]. It has been recognized that some rights that give credence to indigenous, cultural and religious practices can negatively impact those family members that are vulnerable and lack adequate protection in the home and in the community. This dynamic must be recognized on an international scale as well. As we look at law loopholes in the South Africa, the United States, India, Chad, Bangladesh, Tajikistan, Uzbekistan, Pakistan and other States around the world we must conclude that laws must be changed. Most of all, the laws must be enforced and communities educated about why these laws are important.

VII. CONCLUSION

Girls forced into marriages are denied protection from their families, community leaders and governments. Resolving child marriage issues goes beyond the recognition that a “child” doesn’t have the capacity to consent to a life-long agreement of marriage. In the case of marriage under the age of 10, consent is not a consideration because the capacity does not exist. From roughly 10 to 14 years of age, consent cannot be said to have been given since at such an early age the child cannot be expected to understand the implications of accepting a lifetime partner. It can also be argued that an older child/late adolescent cannot be said to give informed consent to such a potentially damaging practice as early marriage [43].

Several layers of collaboration are needed to end child marriage. States cannot blindly permit inhuman activities to occur within its borders. Government leaders cannot implicitly support cultural practices and religious customs that support marriage of young girls in violation of laws that prohibit children from entering into a marriage contract.

On an international level, conventions that address child marriage must develop a system that identifies States that do not enforce rules that prohibit child marriage and establish repercussions for a State’s failure to do so. State officials that join international conventions must not only ensure that the international objectives are implemented on the national level, but that they are enforced to the fullest extent. In many countries where child marriage is an accepted practice, governments fail to criminalize egregious acts of domestic violence, abuse and rape experienced by girls and women on a

daily basis so all issues must be changed. This is the position that Sierra Leone took in a world changing legal decision in 2009. On February 25, 2009, the Sierra Leone Court convicted three former Revolutionary United Front leaders of forced marriage as a crime against humanity for the first time in the history of international law [44]. This Court recognized the issue of forced child marriage to be exactly what it is – a crime against humanity and so shall it be the case all over the world. Girls forced into marriages are denied protection from their families, community leaders and governments. Resolving early child marriage issues goes beyond the recognition that a “child” does not have the capacity to consent to the potentially life long agreement of marriage. In the case of marriage under the age of 10, consent is not a consideration. From roughly 10 to 14 years of age, consent cannot be said to have been given since at such an early age the child cannot be expected to understand the implications of accepting a lifetime partner. It can also be argued that an older child/late adolescent cannot be said to give informed consent to such a potentially damaging practice as early marriage [45].

ACKNOWLEDGMENT

Firstly, the author would like to express her sincere gratitude to Professor Steven D. Schwinn for a life changing student trip to South Africa that spearheaded this research. The author also sincerely thanks the Girls Not Brides organization, a global partnership of over 70 countries and hundreds of organizations committed to ending child marriage, for the plethora of information and encouragement.

REFERENCES

- [1] United Nations Population Fund, *Marrying to Young: End Child Marriage*, 2012 <http://www.unfpa.org/sites/default/files/pub-pdf/MarryingTooYoung.pdf>.
- [2] Seelinger, Kim Thuy, “Forced Marriage and Asylum: Perceiving the Invisible Harm.” 42 *Columbia Human Rights Law Rev.* 55, 60 (2010).
- [3] Alexandra Hervish and Charlotte Feldman-Jacobs. “Who Speaks for Me? Ending Child Marriage” Population Reference Bureau Policy Brief (April 2011) <http://www.prb.org/pdf/1/ending-child-marriage.pdf>
- [4] Welstead, Mary, “Forced Marriage: Bifurcated Values in the UK” 21 *Denning Law Journal* 49, 51 (2009).
- [5] Child marriages are considered force marriage arrangements from an international law perspective because a child under 18 is considered incapable of giving the informed consent necessary to validate marriage. See the Convention to Marriage, Minimum Age for Marriage, and Registration of Marriages, 32 U.N.T.S. 231, (November 7, 1972), <http://www.unhcr.ch/html/menu3/b/63.htm>.
- [6] Ntlokwana, N., Center for Constitutional Rights, *Submissions to the South Africa Law Commission on Ukuthwala Customs*, p.2.
- [7] Thomas, Cheryl, “Forced and Early Child Marriage: A Focus on Central and Eastern Europe and Former Soviet Union Countries with Selected Laws From Other Countries, United Nations Division for the Advancement of Women & United Nations Economic Commission for Africa, Expert Group Meeting on Good Practices in Legislation to Address Harmful Practices Against Women (May 25-29, 2009), EGM/GPLHP/2009/EP.08, p.3 (June 19, 2009).
- [8] Human Rights Watch Report, p. 2 “Reconciled to Violence” (September 2006), <http://hrw.org/reports/2006/kygyzstan0906/>.
- [9] Restatement of the Law 3d: Foreign Relations Law of the United States.
- [10] United Nations, Treaty Series, vol. 521, p. 231.
- [11] Human Rights Council adopts resolution to end child, early and forced marriage, *Child Not Brides*, July 2, 2015. <http://www.girlsnotbrides.org/human-rights-council-adopts-resolution-to-end-child-early-and-forced-marriage/>

- [12] United Nations General Assembly in Paris on 10 December 1948, <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement>.
- [13] United Nations Development Fund for Women UNIFEM - CEDAW and Security Council Resolution 1325: A Quick Guide, P. 49 http://www.unrol.org/files/CEDAWandUNSCR1325_eng.pdf
- [14] Reservations to CEDAW, UN Women. <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>.
- [15] Sahl, Silke, "Researching Customary International Law, State Practice and the Pronouncements of States regarding International Law", Hauser Global Law School Program, New York University School of Law (June/July 2007).
- [16] GNB Team, Press Release: Human Rights Council Adopts Resolution to End Child, Early and Forced Marriage, Child Not Brides (02 July 2015) <http://www.girlsnotbrides.org/press-release-human-rights-council-adopts-resolution-to-end-child-early-and-forced-marriage/>.
- [17] Rengita de Silva de Alwis, Child Marriage and the Law: Legislative Reform Initiative – Paper Series, Wesley Centers for Women, United Nations Children's fund (UNICEF), Gender, Rights and Civil Engagement Section, Division of Policy and Practice, 17 (April 2007).
- [18] Sanyutka Mathur, Margaret Greene, Anju Malhotra, "Too Young to Wed: The Lives, Rights and Health of Young Married Girls" International Center for Research of Women, p.1 (2003).
- [19] IHRLS, http://www2.ohchr.org/english/bodies/hrc/docs/ngos/IHRLS_Chad_95.pdf.
- [20] International Convention on Civil and Political Rights, Entry into force March 23, 1976. <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.
- [21] OECD Development Centre Chad: Consolidated Humanitarian Appeals Process 2010, <http://genderindex.org/sites/default/files/datasheets/TD.pdf>
- [22] "In Mali, Child Marriage is a Death Sentence for Many Young Girls" http://www.unicef.org/wcaro/english/4501_5120.html.
- [23] UN CEDAW – Bangladesh, 48th Session, 97th Meeting, CEDAW/C/SR.970, p. 9 (February 15, 2011) http://www.unicef.org/sowc2011/pdfs/SOWC-2011-Main-Report_EN_02092011.pdf.
- [24] The Child Marriage Restraint Act, http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=149.
- [25] UNICEF Report, http://www.unicef.org/sowc2011/pdfs/SOWC-2011-Main-Report_EN_02092011.pdf.
- [26] Hannah Cartwright "Legal Age of Consent for Marriage and Sex for the 50 United States", Global Justice Initiatives (August 21, 2011) <https://globaljusticeinitiative.files.wordpress.com/2011/12/united-states-age-of-consent-table11.pdf>.
- [27] U.S.C.A. § 7104: Prevention on Trafficking, [http://uscode.house.gov/view.xhtml?req=\(title:22%20section:7104%20edition:prelim\)](http://uscode.house.gov/view.xhtml?req=(title:22%20section:7104%20edition:prelim)).
- [28] Office of the High Commissioner for Human Rights, "Harmful Traditional Practices Affecting the Health of Women and Children" Fact Sheet No. 23, www.unhcr.org/html/menu6/2/fs23.htm.
- [29] United Nations Population Fund, Virtual Slavery: The Practice of Compensation Marriages (July 16, 2008).
- [30] Embassy of the United States, Dhaka Bangladesh, "Forced Marriage in Bangladesh" http://dhaka.usembassy.gov/forced_marriage_definitions.html.
- [31] UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages on 5 October 1998 (CCM), UN 5 Feb. 20022002 <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVI/XVI-3.en.pdf>.
- [32] South Africa Constitution, Chapter 2 Bill of Rights, Section 30 and 31.
- [33] South Africa Constitution, Chapter 2 Bill of Rights, Section 39.
- [34] International Center for Research of Women, New Insights on Preventing Child Marriage: A Global Analysis of Factors and Programs, pg. 30 (2007).
- [35] The Child Marriage Restraint Act, 2006 <http://www.hsph.harvard.edu/population/trafficking/india.childmar.07.pdf>.
- [36] The Prohibition of Child Marriage Act of 2006, The Gazette of India Extraordinary, Ministry of Law and Justice (Child Marriage Act), 11 January 2007.
- [37] Child Marriage Act, 11 January 2007.
- [38] UNICEF, Child Marriage Handbook – India, http://www.unicef.org/india/Child_Marriage_handbook.pdf
- [39] Family Code of the Republic of Uzbekistan (Last edition from 30-04-2013). <http://unfpa.org/webdav/site/eeca/shared/documents/publications/Uzbekistan%20English.pdf>.
- [40] UNFPA – Tajikistan, <http://unfpa.org/webdav/site/eeca/shared/documents/publications/Tajikistan%20English.pdf>.
- [41] The Advocates of Human Rights, "Domestic Violence in Tajikistan", p. 23 (October 2008).
- [42] Pakistan Child Marriage Restraint Act of 1929, <http://www.vakilno1.com/saarclaw/pakistan/child-marriage-restraint-act-1929.html>.
- [43] International Center for Research of Women, New Insights on Preventing Child Marriage: A Global Analysis of Factors and Programs, pg. 28 (2007).
- [44] Bhe and Others v Khayelitsha Magistrate and Others (CCT 49/03) (2004) ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004), <http://www.saflii.org/za/cases/ZACC/2004/17.html>
- [45] Innocent Digest (No 7, 2001) in case UNFPA and UNIFEM Joint Proposal for a Planning Grant "Improving Social and Economic Opportunities for Adolescent Girls in Ethiopia and Bangladesh".