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The Right to Cultural Freedom and Forced Marriages in South Africa – What the Constitution Giveth, the Constitution Taketh Away

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Recently the media was flooded with reports of a 13-year-old girl who was married off to a sangoma (57) in an attempt to alleviate her apparent struggle with the ancestral spirits and cure her of epilepsy. Although the sangoma was arrested and charged with statutory rape, the charges were later dropped due to the fact that the girl's parents had consented to the marriage. Moreover, the sangoma paid R5000 *lobolo* to the girl's parents as part of the negotiations that precede the conclusion of a customary marriage. Shocked and outraged, the public criticised prosecutors as being ignorant to the law as section 3(1)(a) of the *Recognition of Customary Marriages Act* 120 of 1998 (the *RCMA*) prohibits a person from entering into a customary marriage if he or she is below the age of 18. The *RCMA*, however, allows for a minor to enter into a customary marriage with the permission of his or her parent or guardian. Although last-mentioned provision seems to afford validity to the marriage between the sangoma and the girl in terms of the *RCMA*, there is, however, still one important (legal) aspect which is lacking: the consent of the young girl to be married to the sangoma. This is, therefore, nothing more than a forced marriage; a practice which has become quite common among the African communities in South Africa.

Although the notion of forced marriages is not new to African communities, the harm caused to the women (and often children) in such marriages poses a new challenge to the South African legal system, particularly within the area of criminal law. This situation is further exacerbated by the fact that the *Constitution of the Republic of South Africa, 1996* (the Constitution) elevated the status of African customary law to that equal to the Western common law, which was the only recognised legal system in the pre-constitutional dispensation. The South African legal system therefore comprises two distinct legal systems which have to function in parallel. However, the problem with this dual legal system of ours is that certain customs and practices of the African communities are considered to be crimes in terms of the common law, but merely part of one's culture in terms of African customary law. What's more, certain cultural practices also result in the infringement of various human rights entrenched in the Constitution. To illustrate, in the case of a forced marriage such as the sangoma/teenager case, the girl will be deprived of her right to freedom and security of the person simply because she did not consent to the marriage. As part of the right to freedom and security of the person one has the right to make a decision regarding procreation. It goes without saying that having children is considered to be a natural consequence of a marriage. In African customary law, however, it is considered to be part of a wife's duty to bear children. As a result, women trapped in a forced marriage are almost always subjected to non-consensual sexual intercourse by their supposed husbands. Apart from the fact that the man's conduct in such

instances then clearly constitutes the statutory crime of rape, it also deprives the woman of her constitutional right to bodily integrity as she is not given any choice in the matter of procreation. What's more, during rape the woman is usually subjected to some form of violence at the hands of the man. In such instances not only can the man can be charged with the common law crime of assault, but his conduct will also infringe the woman's fundamental right to be free from all forms of violence; another right which forms part of her constitutional right to freedom and security of the person.

The South African courts have yet to effectively deal with the issue of forced marriages within South Africa's traditional communities. While the courts seem eager to emphasise the constitutional right to practice one's culture freely, they also seem hesitant to condone any and all types of conduct in the name of culture. At the same time the courts want to see to it that justice is served and that the perpetrators of crime, whether they adhere to African customary law or the common law, are punished for their wrongdoing. Therefore, when it comes to issues of conflict between African customary law and the common law in South Africa there is a delicate balance that should be maintained and the question arises as to how such balance can be maintained. The answer to this question can be found in the Constitution. Any kind of conflict between African customary law and the common law should be resolved in by looking towards the Constitution as the highest authority in South Africa. While the Constitution affords these two distinct legal systems the same status it can also be used to limit the exercise of these systems and in so doing ameliorate any harmful effects resulting from their exercise. In fact, section 36 of the Constitution provides for the limitation of any rights in the Constitution, irrespective of whether they fall within the scope of African customary law or the common law, if such limitation is reasonable and justifiable. It goes without saying that the right to marry in accordance with one's particular cultural can never outweigh the right to freedom and security of the person. Similarly, the right to be free from all forms of violence can never be sacrificed in the name of a cultural practice - which in the case of a forced marriage, a person did not agree to be part of.

The solution to the problem of forced marriages, in particular, and any other conflict between African customary law and the common law, in general, is therefore simple: one has the constitutional right to cultural freedom, but the moment the exercise of that right infringes another individual's human rights, one forfeits the right to practice your culture freely. Of course, this does not mean that African customary law should now again take the back seat to the common law, but merely that any kind of cultural practice should be brought in line with the Constitution and the principles that underlie it. Unfortunately this is not a process which will happen overnight as the South African Constitution is still relatively young. The Constitution is, however, considered to be a transformative document intended to not only transform the legal system into one which puts democracy and respect for human rights above all else, but also to transform society in South Africa and establish a culture of respect for human rights among all citizens. It is therefore essential that society adapts with the Constitution, otherwise it will just be another piece of legislation without any real effect. As this process of transformation is a slow one, the courts in the meantime have to do their best to ensure that the conflict between African customary law and the common law is ameliorated as best they can. This, however, does not mean that the courts should condone a marriage between a non-consenting teenager and an elder man and it certainly does not mean that the courts should condone the rape of a child.

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[Published: 2013-02-08]