

Harmonization of Age of Sexual Consent and Marriage

Regional Conference on Harmonization of Laws by Africa
Child Policy Forum

9th to 10th May 2007,

Safari Park Hotel, Nairobi.

Presenter: Millie Odhiambo-Mabona

Director, The CRADLE-The Children Foundation

International Framework

- The world is becoming a global village governed by global standards.
- At an international level, the standards that have guided issues relating to the age of marriage or consent to sex is contained in various international treaties and the more instructive ones being the Convention on the Age of Marriage, the CRC, the African Charter on the Rights and Welfare of the Child and CEDAW.

International Framework Cont..

- The CRC and the African Charter defines a child as a person below the age of 18.
- Articles 34 of the CRC and Article 27 of the African Charter protects the child against sexual abuse and exploitation.
- Children are also protected from harmful cultural practices under article 21 of the Charter that explicitly provides that States

International Framework Cont...

- parties shall take measures to eliminate harmful social and cultural practices affecting the welfare of the child and in particular..." child marriage and betrothal of girls and boys shall be prohibited and effective action including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory."

Practice in States

- In most African Countries, there has been a challenge in ensuring these standard are adhered to especially due to cultural norms and values and diversity in marriage systems that are also pegged to these cultural norms and values;

Practice in States Cont..

- The marriage systems that subsists in most African countries may be broadly divided into 3:
- Religious based: (Hindu/Muslim)
- Civil marriages
- African Customary marriages

Practice in States

- The religious and African customary marriages have one thing in common: that the age of marriage is not clearly defined and varies from community to community.
- In most cases, early marriages is practiced and in some instances betrothal of girls at birth is common.

Practice in States

- For instance in Ghana, girls were and in some instance still are betrothed to Trokosi priests from early age.
- In Swaziland, the King gets to select a virgin (often below the age of 18 years) at the annual reed dance.
- In Kenya, Tanzania and other African countries, girls are still married early with prevalence varying in different communities.

Practice in States

- Abduction of girls is still an issue of concern in Ethiopia.
- In the recent past, there has been a growing move towards standardization of laws related to marriage and age of sexual consent in most African countries to conform to internationally agreed standards.
- This has seen most countries enacting progressive laws prohibiting sexual violence such as in Tanzania and Kenya and providing higher ages for sexual consent. South Africa has a bill pending on Sexual Offences as well that also has 18 years as the age of sexual consent.

Practice in States

- In most countries, the age of sexual consent has been rising. For instance in Kenya it started with the Children Act that moved the age of sexual consent (though not explicitly to 18 years), the Criminal Law Amendment Act that moved the age of sexual consent to 16 years and more recently the Sexual Offences Act that moved it to 18 years.

Practice in States

- In some instances, this move has been challenged and opposed. For instance in Uganda, there was opposition to the age of sexual consent at 18 years.

Practice in States cont...

- However, this change has not been reflected in the marriage laws in most countries that still allows for diverse systems of law to apply and which provide different standards.
- For instance in Kenya, even though the age of sexual consent has moved to 18 years, we still have a diverse system of laws on marriage.

Practice in States cont...

- The Marriage Act provides for 21 years and if one wants to marry at a younger age, there is need for consent from the guardians.
- The Hindu Act provides for 18 years for boys and 16 for girls. If the girl is below 18 then the consent of the guardian is needed.
- The African Christian Marriage and Divorce Act has similar provisions as the Marriage Act.
- The Matrimonial Causes Act defines children as " in the case of African (including Somalis, Abyssinians (Ahmara, Tigre and Shoa), Malagasies and Comoros Islanders), Arabs or

Practice in States Cont...

- Baluchis born in Africa, males who have not attained the age of 16 years and females who have not attained the age of 13 years, and in the case of all other persons, unmarried children who have not attained the age of Majority.”
- African customary and Muslim marriages allow for child marriages.

Practice in States cont...

- In Madagascar the minimum age for sexual consent is very high at 21 yet the age for marriage is 14-17 years;
- In Tanzania, the minimum age for sexual consent is 18 yet the age for marriage is 15-18;
- In both countries though, there are also gender disparities. Boys are expected to get married at 17 to 18 years.

Practice in States cont...

- In SA girls can get married at 16 and boys at 18.
- In Eritrea the marriage age for both boys and girls is 15 and in Namibia it is 16.
- In Comoros the court may allow a person below 18 years to marry where both parties have consented to the marriage.

Practice Cont...

- Malawi discourages marriages below 18 but the courts can allow marriage of a person from 15 years but with parental consent. At the same time the age of sexual consent is lower at 13 for girls and boys under 12 are presumed incapable of sexual activity;

Practice Cont..

- If one looks at reservations made in the past to treaties, the section on marriage has been a common culprit.
- This has shown the inability of states to harmonize their laws to provide progressive standards protecting children while at the same time preserving cultural and religious values or norms.

Issues of concern

- There is clearly gender disparities in the application of laws;
- There is also a discrepancy and disparity between age of consent for sexual activity and age of marriage. It is assumed that marriage implies ability to consent to sex and hence this creates conflicts in laws.
- Most countries also still have other laws that seem to give different definitions for a child.

Recommendations

- It is positive that CRC is almost completely ratified internationally save for the US and Somalia. (As at 2007?)
- However we need to advocate for popularization of the Regional Instruments and much more without reservations.
- Legal reforms need to be wholistic and capture all laws relating to the child including the constitution.

- Thank you
- Muchas Gracias
- Asante Sana