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Federalism and the Challenge of Applying International Human Rights Law Against Child Marriage in Africa

Solomon Ebobrah*
Niger Delta University
sebobrah@yahoo.co.uk

Felix Eboibi**
Niger Delta University
lixboibi@yahoo.com

Abstract

Federalism presents a dilemma for the implementation of international human rights law in those African states that operate federal constitutions. Central governments in these states enjoy international legal personality, make treaties and represent their states as parties to those treaties, yet internal legislative competence over some issues regulated by treaty is commonly shared between central and regional governments. Consequently, while central governments bear responsibility for transforming international standards into national law, challenges arise in areas such as the protection of children from child marriage, where they lack exclusive national legislative competence. How have these states managed to implement international law without violating their own constitutions? Applying a comparative approach, this article argues that African federal states have employed two main models to overcome the dilemma, neither of which has been totally effective. Drawing lessons from federal states outside Africa, the article suggests other mechanisms to perfect Africa's two main models.

Keywords

Child marriage, constitutions, federalism, human rights, treaty implementation

INTRODUCTION

The prohibition against child marriage under international human rights law does not mean much for the threatened girl child unless that prohibition is translated into national law and enforced by national courts. Despite the value added by international mechanisms, the national legal system, with

* Professor of international human rights law, Niger Delta University, Wilberforce Island, Bayelsa State, Nigeria.
** Lecturer, Faculty of Law, Niger Delta University, Wilberforce Island, Bayelsa State, Nigeria.

its reach, accessibility and more familiar enforcement apparatus, arguably remains the best arena for the most effective protection of human rights. Perhaps this partly accounts for the practice, in drafting human rights treaties, of obligating states to take measures to make rights applicable at the domestic level. Once governments are convinced into accepting human rights standards collectively endorsed by the comity of nations, those standards ought easily to be replicated in national legal systems, where they can be invoked and used by or for the benefit of those most in need of protection. As representatives of their peoples, national parliaments would be expected to be eager to facilitate this transformation. Paradoxically, in some states, the transformation of human rights standards into domestic law appears to have become even more difficult than the adoption of new international treaties. Although the difficulty applies to states with all kinds of internal governance arrangements, federal states arguably experience an additional layer of difficulty arising from the constitutional distribution of legislative competence between central and regional governments.[1] As one scholar concludes in relation to the United States of America, "federalism and the human rights implementation do not share a common ground".[2]

Federalism's additional layer of challenge for the transformation of international human rights standards poses a real danger regarding the elimination of child marriage in Africa's federal states. How does the challenge play out? In the distribution of legislative powers, most federal constitutions do not neatly or sufficiently assign competence for treaty implementation, even though treaty making powers are explicitly assigned to central authorities.[3] Thus, while the central government is constitutionally empowered to enter into treaties and the central legislature is empowered to ratify the government's treaty-making action, the power to implement treaties is generally not expressly conferred on central authorities. In other words, while the central government can commit the state to a treaty, it cannot always guarantee compliance, especially if treaty matters fall outside exclusive central legislative

1 See for instance TH Strom and P Finkle "Treaty implementation: The Canadian game needs Australian rules" (1993) 25 *Ottawa Law Review* 39 at 44. Also see BR Opeskin and DR Rothwell "The impact of treaties on Australian federalism" (1995) 25 *Case Western Reserve Journal of International Law* 1 for the argument that federalism creates difficulties for the conduct of external affairs.

2 AM Merico-Stephens "Of federalism, human rights and the Holland Caveat: Congressional power to implement treaties" (2003–04) 25 *Michigan Journal of International Law* 265 at 266.

3 This is not peculiar to African federal constitutions. For instance, Opeskin and Rothwell "The impact of treaties", above at note 1 at 2, point out that the Australian (federal) Constitution does not state if "the federal executive power extends to the making of treaties nor whether that power is exclusive of the states". In relation to Canada, L Barnett "Canada's approach to the treaty-making process" (November 2008, publication no 2008-45-E, Library of Parliament background paper) also makes the point (at 1) that Canada's Constitution does not "explicitly delineate federal or provincial authority with respect to the conduct of international affairs".

competence and spill into the legislative competence of regional authorities.[4] This creates a dilemma regarding rights implementation.

As Tushnet points out, there are two main dimensions to the dilemma that federalism poses regarding compliance with a state's international obligations. On the one hand is the "restriction on the subject-matter scope" of central legislative powers, and on the other is the "restriction on the methods" that central authorities may employ in enforcing translated human rights standards across a federation.[5] In relation to the prohibition against child marriage, the question becomes whether issues concerning child marriage fall within the central legislative competence in Africa's federal states. If not, how have those states generally managed their obligation to prohibit child marriage? Even in cases where central authorities have developed mechanisms to prohibit child marriage, how do they deal with the question of actual enforcement across the federation? Furthermore, in those states with pluralist legal systems, how do central authorities mediate the enforcement of secular statutory laws over the religious and customary systems of laws that citizens may choose to invoke as personal laws? These are some of the questions that this article engages. The legislative practices of five self-proclaimed federal states in Africa form the basis for the analysis.[6]

On the question of the restriction of subject-matter scope, this article shows that two main approaches have been adopted by African states to navigate the dilemma of federalism. It argues that, whereas the more popular approach of incorporating the prohibition against child marriage into constitutional bills of rights appears preferable for tackling the challenge of competing (regional) legislative competence, the challenge of enforcement remains and invites creative solutions.

Following this introduction is an outline of the international legislative framework requiring the prohibition against child marriage. The article then explains how constitutional principles such as federalism and legal pluralism complicate the translation of international human rights obligations to provide domestic protection. Drawing lessons from comparative analyses, the next section explores strategies for engaging the constitutional obstacles. The conclusion summarizes the main points.

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4 See also Barnett, id at 6; Strom and Finkle "Treaty implementation", above at note 1 at 45.

5 MV Tushnet "Federalism and international human rights in the new constitutional order" (2001) *The Wayne Law Review* 841 at 850. Analysing US Supreme Court decisions, Tushnet presents the court's position as regards the first dimension that US Congress can only act if it can invoke constitutionally enumerated powers. In relation to the second dimension, Congress cannot "commandeer" state officials to implement treaty obligations. As this article shows, although the first dimension is most prominent in the context of African federations, the second dimension often arises.

6 The questions raised in this article regarding the tension between the constitutional distribution of powers and international treaty obligations do not appear to have received judicial attention in the states considered.

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PRESERVING GIRLHOOD: THE INTERNATIONAL OBLIGATION TO PREVENT CHILD MARRIAGE

Notwithstanding persisting pockets of resistance from some quarters, the international human rights movement has succeeded in raising popular consciousness on the undesirability of child or early marriage.[7] Apparently convinced that child marriage (which has been shown to affect the girl child disproportionately) is a violation of several human rights, states have addressed the issue in human rights instruments adopted at regional and global levels. As this section shows, a state's obligation to preserve girlhood through the prevention of child marriage can be either direct or indirect. The obligation is indirect when it arises as part of the state's duty to prevent other violations connected to the practice of child marriage.

From a global perspective, the Universal Declaration on Human Rights (UDHR) sets the tone in its article 16, which affirms the equal right of men and women to marry and found a family. Article 16 further requires that prospective couples should be of full age and enter into the marriage with free and full consent. As will become clear, this formulation in the arguably non-binding UDHR has inspired similar provisions in other global and regional instruments just as it has influenced the drafting of national laws. Apart from the express requirement that marriage must take place between persons of full age, the requirement in article 16(2) that the consent to marry should be free and full precludes child marriage, since uninformed consent and coerced consent cannot qualify as free or full consent.

Building on article 16 of the UDHR, article 23 of the International Covenant on Civil and Political Rights (ICCPR) also guarantees the right of men and women of "marriageable age" to marry and found a family, emphasizing that "no marriage shall be entered into without the free and full consent of the intending spouses". International law's prohibition against child marriage is further reinforced in article 10 of the International Covenant on Economic, Social and Cultural Rights, in which states recognize that "marriage must be entered into with the free consent of the intending spouses". While some would argue that nothing in these provisions precludes consent given by a person below the legal age of maturity, the municipal criminal law practice of invalidating consent allegedly given by minors in cases of alleged rape serves as a compelling basis for the argument that a child's consent does not actually constitute consent.

Equally important for understanding a state's obligation to tackle child marriage is the UN Convention on the Elimination of all forms of Discrimination

7 It is not uncommon to find interchanging usage of child marriage, early marriage or forced marriage as representing the phenomenon of marriage in which one or both parties fall(s) below the legal age of majority. See for instance, advocacy material from Equality Now "Protecting the girl child" (2004). This article will mostly use the term "child marriage" to capture this phenomenon.

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Against Women (CEDAW), which contains provisions that directly and indirectly obligate states to prohibit child marriage. In terms of indirect but applicable provisions, article 2 of CEDAW requires state parties to adopt relevant measures to prohibit all forms of sex or gender based discrimination, and specifically obligates states to abolish customs and practices that discriminate against women.[8] However, article 16 represents CEDAW's most direct provisions on child marriage. Whereas in article 16(1)(a) state parties recognize the right of both males and females to enter into marriage, article 16(1)(b) recognizes the right of people freely to choose a spouse and only to enter into marriage with their full and free consent. Article 16(1)(e) further requires states to protect women's right to decide (on equal terms with men) on the number and spacing of children. This is arguably impossible where, instead of a woman, it is a girl child who has to compete with a mature man in decision making. Even more importantly, in very specific terms, article 16(2) obligates states to invalidate the betrothal and marriage of a child and to enact legislation setting out a national minimum age for marriage.

In stark contrast to the instruments highlighted above, the Convention on the Rights of the Child (CRC), which is dedicated specifically to the rights of children, does not contain provisions that expressly prohibit child marriage. Notwithstanding this lacuna, certain rights guaranteed in the CRC indirectly require states to take positive steps to protect the girl child from becoming a victim of child marriage. These include: article 2, which requires states to ensure that the rights in the CRC are respected and guaranteed to all children without discrimination, inter alia, on grounds of the child's gender; article 3, which requires state institutions such as courts, administrative authorities and legislative bodies only to take action that is in the best interest of the child; and article 4, which obligates states to take all appropriate action to protect and implement the rights guaranteed in the CRC. Further, article 6 requires states to ensure that children's right to life is protected and that every child is assured of survival and development. Article 19 requires states to take appropriate measures to protect children from physical and mental violence and abuse, specifically including sexual abuse. Article 24(2)(a) of the CRC further obligates states to take measures to diminish infant and child mortality, while sub-article (3) requires states to take measures to abolish traditional practices that are prejudicial to the health of children. Other relevant provisions in the CRC include: article 34, requiring states to protect children from all forms of sexual exploitation and sexual abuse; article 35, calling for the protection of children from abduction and sale; and article 36, obligating states to protect children from all forms of exploitation prejudicial to any aspect of a child's welfare.

8 See CEDAW, art 2(f). As human rights advocates have consistently argued, religious and customary laws that promote child marriage are discriminatory and harmful against girls and women who are predominantly at the receiving end since they are affected more than their male counterparts.

Two other relevant global instruments are the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices (Supplementary Slavery Convention)[9] and the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (Consent to Marriage Convention).[10] Adopted in 1956, the Supplementary Slavery Convention creates a framework that links child marriage and slavery-like practices. According to its article 1(c)(i), states are required to take steps to end practices in which a woman, who has no right to refuse, is promised or given in marriage on the payment of any form of consideration to some other person(s) or group. Read together with article 35 of the CRC, which requires states to protect children from abduction and sale, article 1(c)(i) of the Supplementary Slavery Convention applies to situations such as those in *Koroua v Niger*[11] (before the Community Court of Justice of the Economic Community of West African States), in which voiceless under-age girls were exchanged for payment in transactions branded as marriage. For its part, article 1 of the Consent to Marriage Convention provides that "no marriage shall be legally entered into without the full and free consent of both parties" and "such consent shall be express by them in person". The convention further obligates states to specify a minimum age for marriage, which shall not be less than 15 years.[12] Overall, these global instruments to which African states are party impose a minimum obligation on those states to protect children, especially the girl child, from the menace of child marriage.

Within Africa itself, under the framework of the African Union,[13] the African Charter on the Rights and Welfare of the Child (African Children's Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) contain provisions that specifically or generally speak to the issue of child marriage. In general terms, in its articles 3 (non-discrimination), 4 (best interest of the child), 5 (survival and development of the child) and 11 (child's right to education), the African Children's Charter requires state parties to protect children from some of the consequences of child marriage. Such consequences include discrimination against girls, threat to life especially resulting from under-age

9 Either by succession or through accession to the treaty, no fewer than 29 African states are currently party to this supplementary convention: Algeria, Cameroon, Central African Republic, Congo, Côte d'Ivoire, Djibouti, Egypt, Ethiopia, Ghana, Guinea, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia and Zimbabwe.

10 The Consent to Marriage Convention has at least 12 African state parties: Benin, Burkina Faso, Côte d'Ivoire, Guinea, Liberia, Libya, Mali, Niger, Rwanda, South Africa, Tunisia and Zimbabwe.

11 (2004–09) CCJELR 217.

12 Consent to Marriage Convention, art 2. However, the second sentence of art 2 (which permits authorities to grant a dispensation) somewhat dilutes the standard set out in this instrument.

13 The African Union replaced the Organisation of African Unity in 2000.

pregnancy and the denial of access to education occasioned by early marriage. Other generally applicable provisions include articles 14 (child's right to health), 16 (protection against child abuse and torture), 27 (child's protection from sexual exploitation) and 29 (child's protection from sale, trafficking and abduction).[14] In very direct and specific terms, article 21 of the African Children's Charter requires states to take measures to protect children from harmful social and cultural practices, expressly demanding that states prohibit child marriage and the betrothal of girls and boys. Article 21 further requires states to assert 18 years as the minimum age for marriage.

In very similar terms to the African Children's Charter, the African Women's Protocol also directly and indirectly obligates African states to protect the girl child from early marriage. Hence, in its articles 2 (non-discrimination), 3 (women's right to dignity), 4 (women's right to life, integrity and security of the person), 5 (elimination of harmful practices) and 14 (right to reproductive health), the African Women's Protocol contains general provisions that give rise to the state's obligation to prohibit child marriage. Significantly, article 6 of the African Women's Protocol (dealing with marriage) specifically requires states to guarantee that marriages only take place with the free and full consent of both parties and that the minimum age of marriage for women is 18 years. Clearly, states are under both continental and global obligations to prohibit child marriage and protect the girl child from early marriage and its attendant consequences. The question is: how have African states fared in this regard?

TRANSLATING INTERNATIONAL OBLIGATIONS INTO EFFECTIVE DOMESTIC PROTECTION: ARE CONSTITUTIONAL PRINCIPLES A NUISANCE?

Viewed against Henry Shue's tripartite typology of human rights obligations,[15] treaty provisions requiring domestic action by state parties give rise to three layers of duty: to respect, protect and fulfil the rights of the girl child. Whereas the duty to respect requires state parties to refrain from interfering with the rights of the girl child, the duty to fulfil invites governments' positive action in aid of child victims. Both these layers of state duty generally affect matters within the immediate control of the state party: decisions and conduct of its officials. By contrast, the duty to protect obligates state parties to prevent third parties (other tiers of government and / or non-state actors) from infringing the protected rights of the girl child. It is in relation to this duty to protect that federalism complicates compliance.

14 In many ways, these provisions mirror the generally applicable provisions in the CRC. Insofar as states are under an obligation to ensure that children enjoy the rights guaranteed in those provisions, a duty to protect children from child marriage is incumbent on states since these rights are violated when a child is compelled to marry before maturity.

15 H Shue *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1980, Princeton University Press).

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Although it takes on different meanings, at a very basic level of understanding, federalism is a political arrangement under which governance and governmental powers are constitutionally divided between tiers of government, commonly between a central government and regional governments. Generally employed as a constitutional mechanism for integrating distinct and autonomous groups into a modern state,[16] federalism creates a composite external political structure but does not destroy the pre-existing multiple political units, allowing them to continue to exist internally while retaining some or much of their autonomous identity.[17] Notwithstanding scholarly differences regarding the core principles of federalism, two main characteristics of federalism are relevant to the present discourse. These are the idea of respect for the constitutional division of governmental powers and the right of federating units to retain aspects of their identity, including customary and religious norms that have survived over time. Safeguarded by constitutional entrenchment, neither the division of governmental powers nor pluralism (social and legal) can arbitrarily be changed by any tier of government in these states. Thus, the federating units can (and do) stake their claim to limited internal independence that translates not only to the exercise of legislative competence over predetermined or residual matters but also to allowing the application of particular systems of law associated with given communities. An overview of some federal constitutions in Africa serves to establish this point.

In addition to claiming a federal character in its nomenclature (article 1), the 1995 Constitution of Ethiopia establishes Ethiopia's federalism in its articles 46, 50, 51 and 52. Significantly, article 50(8) of the Ethiopian Constitution, which affirms that central (federal) and regional (state) powers are as defined in the constitution, also commits each tier of government to respect the powers of the other tier(s).[18] Thus, each tier of the Ethiopian federation can only validly exercise competence over the issues assigned to it in the constitution. Further, although the Ethiopian Constitution does not appear to state expressly the recognized sources of law in that legal system, article 34(5) read together with article 78(5) affirms the current efficacy of religious and customary laws of the peoples, as originally developed in the federating

16 See M Burgess "Federalism" in A Wiener and T Diez (eds) *European Integration Theory* (2009, Oxford University Press) 25 at 27. In the case of Africa, apart from Ethiopia, which was not created as a federal state by colonial forces, integration into federations was not voluntary, as federating groups were forced into a state structure created by colonizing powers with the result that devolution of powers was top-down.

17 Also see generally S Dosenrode "Federalism" in S Dosenrode (ed) *Approaching the European Federation?* (2007, Ashgate Publishing Ltd) 17.

18 Art 55 of the Ethiopian Constitution enumerates the matters over which the central (federal) legislative authorities can exercise competence, while art 52 gives regional (state) authorities residual authority, and thus more powers numerically.

units.[19] These provisions can only be amended in accordance with the constitutional amendment procedure set out in article 104.

Albeit not in exactly the same formulation, shared governmental competence and legal pluralism equally feature in the federal constitutions of Nigeria (1999), Somalia (Provisional Constitution of 2012), South Sudan (Transitional Constitution of 2011) and Sudan (2005). While section 2 of the Nigerian Constitution proclaims Nigeria's status as a federation, section 4(1), (3), (6) and (7) divides legislative (and therefore governance) competence between the centre and the sub-national states on the basis of the exclusive and concurrent lists contained in the constitution.[20] For Somalia, article 48 of its constitution sets out the federal status while article 51(2) insists that "every government shall respect and protect the limits of its powers and the powers of other governments".[21] Articles 2 and 3 of the Somali Constitution leave no doubt that Somalia is an Islamic state and Shari'ah law takes precedence over secular law, since "no law can be enacted that is not compliant with the general principles and objectives of Shari'ah".[22] The Transitional Constitution of South Sudan (arguably modelled on the Constitution of Sudan) declares the federal status of South Sudan in its article 47. However, it is article 48(2)(b) that obligates the national government to "respect the powers devolved to the states and local governments", while article 49(1) enjoins all levels of government to "respect each other's powers and competences" and "exercise their powers so as: not to encroach on or assume powers or functions conferred upon any other level except as provided for in this Constitution".[23]

In effect, all these federal constitutions affirm the inviolability of the principle of the constitutional division of governmental competence.[24] In each

19 Id, art 34(5) states: "This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute." As is argued later in this article, this provision empowers the states to apply religious and customary laws in family law matters and therefore creates tension vis-à-vis the central authority's competence to enforce international human rights standards.

20 Although there is no provision spelling out the duty of each tier of government to respect the constitutional division of competence, all actors recognize that duty, and sec 9 of the Nigerian Constitution requires the involvement of state assemblies (legislatures) before any alteration of the constitution can be validly made.

21 Being a transitional constitution, this Somali Constitution does not conclusively enumerate the areas of competence of each government. However, art 54 reserves four issues for the central government.

22 See Provisional Constitution of Somalia 2012, art 2(3).

23 See South Sudanese Constitution, art 49(1)(b) and (c).

24 Although their respective constitutions have no provisions proclaiming a federal status, Kenya and South Africa are two other African states with constitutional devolution of powers in a federal or quasi-federal format. However, Kenya is not considered in this article because art 192 of the Kenyan Constitution empowers the national government to suspend a county government unilaterally. By its design, the South African Constitution does not have this kind of tension between principles of federalism and

federal state, notwithstanding the international treaty obligations assumed by central authorities, so far as translation into the national legal system is concerned, central action would ordinarily be possible only if the constitution allocates the issues involved to the centre, similar to Tushnet's "restriction on subject-matter scope of congressional power".[25] To complicate matters further, even in the face of actual constitutional competence in favour of central authorities, insofar as the constitution supports plural systems of law, it remains unclear whether centrally enacted secular laws trump religious and / or customary laws. Further, though to a lesser degree, Tushnet's second dimension of the dilemma arises to the extent that these constitutions generally do not empower central authorities to employ or "commandeer" the services of sub-national officials for the purpose of implementing international obligations. The Vienna Convention on the Law of Treaties (VCLT) no doubt applies, because states cannot rely on national constitutional or other legal difficulties as an excuse to avoid or escape international obligations.[26] However, this only means that the state will continually be held accountable before international mechanisms and be made to pay compensation without necessarily advancing the protection of rights, in this case the rights of the girl child. In other words, effective protection of international human rights within these states depends on how much room central authorities have to navigate successfully those obstacles thrown up by federalism. Hence, it needs to be considered whether the regulation of child marriage is a matter within the competence of central governments in Africa's federal states.

Article 51(8) of the Ethiopian Constitution gives the central (federal) government exclusive power to "formulate and implement foreign policy" and to "negotiate and ratify international agreements". The other 20 or so powers or functions that the constitution allocates to Ethiopia's central government speak neither to treaty implementation nor responsibility for the protection of human rights, even though article 55(12) grants the central legislature power to "ratify international agreements concluded by the Executive".[27] However, article 51(1) of the Ethiopian Constitution confers on the central government power to "protect and defend the Constitution", which contains a bill of rights.[28] In the Nigerian context, the second schedule to the Nigerian

contd
the state's international obligation. For instance, the limited powers of the provinces are further limited by fundamental rights.

25 Tushnet "Federalism and international human rights", above at note 5 at 850.

26 See VCLT, art 27.

27 Art 73(3) and (6) authorize the Ethiopian prime minister to implement laws and policies of the central legislature and "exercise overall supervision over the implementation of the country's foreign policy" but this is arguably less than absolute authority to implement treaty obligations in spite of the constitutional distribution of powers.

28 As will become evident, this power might be both a form of empowerment and a limitation in relation to the struggle between constitutional protection of the girl child and respect for a constitutional guarantee of legal pluralism.

Constitution distributes legislative powers, so that 66 items are left exclusively to the central (federal government), 11 items fall within the concurrent jurisdiction of both tiers while all other matters not listed are reserved to the sub-national states. Matters in the exclusive list that are relevant for the present discourse include "diplomatic, consular and trade representation",[29] "external affairs"[30] and the "implementation of treaties relating to matters on this list".[31] Also included is "the formation, annulment and dissolution of marriages other than marriages under Islamic law and Customary law including matrimonial causes relating thereto".[32] It is also significant to note section 12 of the Nigerian Constitution titled "implementation of treaties", which requires treaties to be enacted into national law in order to have the force of law within the Nigerian legal system. Significantly, section 12(2) empowers the National Assembly (central legislature) to make laws "for the Federation or any part thereof with respect to matters not included in the Exclusive List for the purpose of implementing a treaty". Thus, whereas the Nigerian Constitution does not give legislative competence over human rights (some of which are contained in the bill of rights) to the central authority, section 12(2) arguably grants special legislative competence to the central (federal) government insofar as treaty implementation is concerned.

Although the constitutional process in Somalia is still on-going and legislative powers are yet to be conclusively divided among the tiers of government, article 54 of the Provisional Constitution of Somalia assigns power over "foreign affairs" exclusively to the central government. Similarly, schedule A of the Transitional Constitution of South Sudan reserves power over "foreign affairs and international representation" as well as "international, regional and bilateral treaties and conventions" to the national government. The other 55 items listed do not touch on human rights or the implementation of treaties. Significantly, schedule B gives South Sudan's sub-national states power over matters such as "regulation of religious matters", "registration of marriage, divorce, inheritance, birth, death, adoption and affiliations", "enforcement of national and state laws", "traditional authority and customary law" and "customary law courts".[33]

In other words, treaty negotiation and ratification are matters constitutionally within the mandate of central authorities, yet the constitutions are silent on the implementation of treaties.[34] Further, human rights generally do not

29 Nigerian Constitution, 2nd sched (Exclusive List), item 20.
30 Id, item 26.
31 Id, item 31.
32 Id, item 61.
33 Generally see South Sudanese Constitution, scheds A and B. It is noteworthy that sched D stipulates that residual powers shall be exercised according to their nature, with matters that cannot be regulated by a single state falling to the national government.
34 In view of the Nigerian Constitution, sec 12(2), Nigeria would prima facie qualify as an exception. However, while this provision avoids the dilemma of the constitutional division of powers, it does not overcome the challenge of legal pluralism.

fall within the exclusive competence of any central government, but each of the constitutions examined contains a bill of rights that protects listed rights. In the context of respect for the principle of the constitutional division of powers, this implies that central authorities that sign up to human rights treaties are not always empowered to implement those standards within entire national legal systems. Thus, federalism triggers tension between respect for international obligations and fidelity to the national constitution. The inclusion of bills of rights in the constitutions may be a significant tempering mechanism, to the extent that central governments generally have the mandate to protect and implement the constitutions. However, so far as child marriage is concerned, sub-national competence over marriage as a subject-matter, especially in relation to marriages concluded under religious or customary laws, throws open the question whether central (federal) competence to protect the constitution and the bill of rights trumps the constitutional recognition of religious and customary law systems or sub-national competence to regulate marriages. Thus, in the federal states considered in this article, federalism and its core principles complicate state compliance with obligations under international law. However, this is not peculiar to African states, but is a universal challenge for federal states as experience in Australia, Canada and the United States shows.

Confronted with constitutions that entrench federalism and allocate treaty-making powers to central authorities without addressing treaty-implementing powers, older and more established federal states have also faced the dilemma that federal states in Africa currently face. As the evidence from these countries shows, even with the benefit of judicial intervention, the dilemma introduced by federalism does not easily disappear. In the 1920s, the dilemma played out in the United States, providing both judicial and scholarly evidence of the existing tension. In the case of *Missouri v Holland*,[35] the US Supreme Court was confronted with this dilemma in relation to the US Migratory Bird Treaty Act 1918, enacted by US Congress to implement a treaty between the United States and Great Britain for the protection of species of migratory birds. Following the decision of a state Attorney General to test the act's validity by violating it and his subsequent arrest and prosecution, the state of Missouri brought a challenge to ask whether Congress has the power to enact a statute to give effect to a treaty entered into under the Executive's treaty power, if that statute standing alone would be an unconstitutional interference with states' rights under the Tenth Amendment.[36] Notwithstanding the decisions of US courts, it is significant to note that the limit of federal legislative powers vis-à-vis the legislative competence of states has remained a sticking point. This is further buttressed by the assertion that some statutes (or parts of statutes), such as the Gun-Free School Zones Act 1994, the civil liabilities aspects of the Violence Against Women Act 1994

35 252 US 416, 40 S Ct 382 64 L Ed 641 (1920).
36 Ibid.

and the Religious Freedom Restoration Act 1993 (all national laws enacted to implement US treaty obligations), have been invalidated to uphold state legislative competence.[37]

Arguably, the invalidation of national statutes by US courts is an indication of the judicial angle to the existing tension between fidelity to federalism and respect for treaty-imposed international state obligations. Scholars have also contributed to the debate on this subject. For instance, in analysing US Congress's enactment of an act that makes female genital mutilation (FGM) a federal crime, White points out that "no one has been charged under the statute, but if and when someone is convicted of FGM, he or she will undoubtedly challenge the constitutionality of the federal statute".[38] Further showing the divisiveness and complications of the debate, White goes on to analyse whether the private nature of FGM is the reason why the federal statute prohibiting FGM is lame, since the regulation of private conduct falls within the regulatory competence of states.[39] In White's opinion, "because FGM occurs in the context of the home and family, it generally should be considered within the states' province along with most domestic relations and child abuse laws".[40] Similarly, Paust shows how the US Supreme Court had to decide whether Congress was constitutionally competent to enact the Violence Against Women Act to implement CEDAW. In his analysis, Paust also describes concerns of the US Senate Foreign Relations Committee that CEDAW "requires broad regulation of private conduct", stating that the United States will not "take action with respect to private conduct except as mandated by the Constitution".[41] While Tushnet and Paust see reasons why US Congress should be considered to have treaty implementing powers, scholars like White and Bradley[42] do not. In the United States, federalism obviously interferes with the commitment to international human rights treaty obligations.

The conflict between fidelity to a federal constitution and respect for international law became a full blown controversy in the Canadian constitutional field as far back as 1937 when the Canadian case of *Attorney General for Canada v Attorney General for Ontario and Others* (*Labour Conventions* case)[43] was heard by the United Kingdom's Judicial Committee of the Privy Council. As commentators point out, Canada's Constitution Act of 1867 fails to assign power to conduct international affairs expressly to any tier of government. Hence, while Canada's federal government enjoys "sole authority to negotiate, sign and

37 See Tushnet "Federalism and international human rights", above at note 5 at 850.

38 See AE White "Female genital mutilation in America: The federal dilemma" (2001) 10 *Texas Journal of Women and the Law* 129 at 144–45.

39 Id at 146–47. White makes the point (id at 166) that "the Supreme Court in other contexts has emphasized the traditionally exclusive state dominion over local crimes".

40 Id at 192.

41 JJ Paust "Human rights purposes of the Violence Against Women Act" (2000) 22/2 *Houston Journal of International Law* 209 at 213–14.

42 Cited by Tushnet "Federalism and international human rights", above at note 5 at 861.

43 Partly reproduced in (1937) 31/2 *American Journal of International Law* 348.

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ratify international treaties", it cannot claim comparable authority to implement treaty obligations, since "many treaties … deal with matters that fall under provincial jurisdiction".[44] This set the stage for the *Labour Convention* cases when in 1935 Canada ratified three International Labour Organization conventions. Following ratification, the Canadian federal Parliament enacted three national implementing laws to give domestic effect to the conventions. Led by Ontario, Canada's provinces challenged the constitutionality of the implementing laws on the grounds that labour issues that formed the subject matter of both the conventions and the implementing laws were matters that were constitutionally within the legislative jurisdiction of the provinces and therefore outside the competence of the federal authorities.

At the Supreme Court of Canada, the judges were divided as to whether the implementing laws were ultra vires or intra vires the Parliament of Canada.[45] Sitting on appeal over the decision of the Supreme Court of Canada, the Judicial Committee of the Privy Council[46] unanimously took the view that the implementing laws were unconstitutional because they were outside the legislative jurisdiction of the Canadian Federal Parliament. Rejecting arguments that constitutional provisions (section 132) that authorized legislation necessary for "performing the obligations of Canada or any of the Province [sic] thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries" could sustain encompassing legislative action by the Canadian Parliament, the Law Lords ruled that there was no constitutional ground for stretching the competence of the federal Parliament.[47] The Privy Council rather took the view that:

> "[I]t could be remarkable that while the Dominion could not initiate legislation, however desirable, which affected civil rights in the Provinces, yet its government [sic] not responsible to the Provinces nor controlled by Provincial Parliaments, need only agree with a foreign country to enact such legislation and its Parliament would be clothed with authority to affect Provincial rights to the full extent of that agreement."[48]

Strom and Finkle claim that the *Labour Conventions* case defines Canadian law on treaty implementation.[49] Thus, Canada's federalism ensures that federal

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44 See Barnett "Canada's approach", above at note 3 at 1 and 6.

45 *Labour Conventions* case, above at note 43 at 348.

46 The bench comprised Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright and Sir Sidney Rowlatt.

47 *Labour Conventions* case, above at note 43 at 349 and 356. The Privy Council also rejected the argument that sec 91, which gives Parliament power to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces ("residual power"), could sustain Parliament's action.

48 Id at 352.

49 Strom and Finkle "Treaty implementation", above at note 1 at 42.

authorities can enter into treaties and may incur international responsibility for non-compliance, but respect for provincial legislative authority cannot be tampered with.

Similar to the position in Canada, the Constitution of Australia has no provision allocating treaty implementing powers to any tier of government and actually does little more than grant competence to the federal government over external affairs.[50] As a consequence, disputes regarding federal competence to enact treaty implementing laws even in areas within the legislative competence of the sub-national states have also come before the Australian courts.[51] For instance, in the Australian case of *R v Burgess: Ex parte Henry*,[52] the question was whether the central Parliament was constitutionally competent to enact legislation to implement the Air Navigation Convention ratified by Australia. In their analysis of that decision, Strom and Finkle concluded that "the Australian Supreme Court … was reluctant to permit the Commonwealth government to assume unlimited powers over implementation legislation merely because it had entered into an international agreement".[53] Opeskin and Rothwell give a slightly different analysis of that case, stating that "the Court was unanimous in upholding the Commonwealth's power to implement the Convention by appropriate legislation", even though it struck down the regulations on other grounds.[54] However, Opeskin and Rothwell drew attention to the position adopted by some of the judges to the effect that the federal Parliament can only exercise legislative competence when the subject matter is of international concern. This is considered necessary "in order to prevent a gradual accretion of power by [sic] federal Parliament, which might in time destroy the traditional division of powers between the states and the centre".[55] Thus, even in Australia, federalism interferes with the state's implementation of international obligations.

Judicial concern with the need to protect the federal principle in Australia is further demonstrated by dicta in other cases in which the federal Parliament sought to make federal law to implement treaty obligations. For instance in the 1982 case of *Koowarta v Bjelke-Petersen*,[56] which deals squarely with human rights, the Australian State of Queensland challenged the

50 See Opeskin and Rothwell "The impact of treaties", above at note 1 at 2.

51 See Strom and Finkle "Treaty implementation", above at note 1 at 48; Opeskin and Rothwell, ibid.

52 [1936] ALR 482; 55 CLR 608.

53 Strom and Finkle "Treaty implementation", above at note 1 at 49.

54 Opeskin and Rothwell "The impact of treaties", above at note 1 at 10.

55 Id at 11.

56 (1982) 153 CLR 16. In the related case of *Queensland v Commonwealth of Australia* (1982) 39 ALR 417 at 420, Queensland sought a declaration that the Racial Discrimination Act exceeded the Commonwealth's legislative power even though it did not claim a conflict between the act and any Queensland law; see C Howard "*Koowarta v Bjelke Petersen and Others*; *Queensland v Commonwealth of Australia*: External affairs powers" (1982) 13 *Melbourne University Law Review* 635.

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constitutionality of Australia's Racial Discrimination Act 1975, which the Commonwealth (federal) government had enacted to implement the International Covenant on the Elimination of Racial Discrimination. Significantly, the High Court of Australia was split on the question of the consequence of federalism vis-à-vis the federal legislative power under section 51 of the covenant, dealing with external affairs. Although three of the judges upheld the legislation on the grounds that the Commonwealth Parliament can give legislative effect to any international agreement entered into bona fide by the Commonwealth, whatever its content, and in doing so may override state law,[57] Howard's analysis is that "these three judges were particularly concerned to set a rational limit to Commonwealth legislative power under section 51(29) having regard to the federal nature of the Constitution".[58] Whatever the decision of the court, the important point for our present discourse is that, here again, in relation to the domestic implementation of the federal state's international human rights obligations, federalism emerges as a point of controversy.

A third Australian example, relevant not just as evidence of the nuisance tendency of federalism but also of the possible tension that may result in human rights matters, is the fallout from the Human Rights Committee (HRC) decision in *Toonen v Australia*.[59] Following the HRC's decision that the State of Tasmania's law criminalizing homosexuality violated Australia's obligations under the ICCPR, a dispute arose between the Commonwealth of Australia and the State of Tasmania over the issue of compliance. Apparently, the Attorney General of Tasmania took the view that "the relevant Tasmanian legislation 'will be retained and the UN decision ignored' and that, if the Commonwealth attempted to override the Tasmanian legislation by relying on the external affairs power, Tasmania would consider a High Court challenge".[60] It is reported that the Attorney General of the Commonwealth (of Australia) responded that "states were expected to conform with international standards" and "if they failed to cooperate, the Commonwealth would be forced to intervene".[61] In other words, even if the federal authorities wanted to implement international human rights obligations, federalism would stand in the way. Thus, Africa's federal states are not alone in the dilemma that federalism brings for the implementation of international human rights in national legal systems. However, it has to be possible simultaneously to respect the allocation of governmental powers under a federal constitution and states' obligations under international human rights law. The next section examines how states have done or tried to do this and how it can or should be done better.

57 Strom and Finkle "Treaty implementation", above at note 1 at 50.
58 See C Howard's case note on the two cases: Howard *"Koowarta"*, above at note 56 at 636.
59 UN HRC comm 488/1992, CCPR/C/50/488/1992 decision of 4 April 1994.
60 As quoted by Opeskin and Rothwell "The impact of treaties", above at note 1 at 52.
61 Ibid.

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TACKLING THE DILEMMA OF FEDERALISM: STRATEGIES FOR EFFECTIVE DOMESTIC PROTECTION OF THE GIRL CHILD

Since federalism complicates domestic compliance with international human rights obligations to protect children from early marriage, what strategies have been employed to meet this challenge? Two main approaches are identifiable in the states considered.[62] This article examines these two approaches in the light of more general comparative experiences. The first approach is that employed in the Nigerian legal system, while the second finds expression especially in the constitutional framing practices of Ethiopia.[63]

In the classical dualist manner, treaties neither form part of Nigerian law nor are directly applicable in the Nigerian legal system. Further, although the Nigerian Constitution contains a bill of rights,[64] it does not necessarily capture the range of rights guaranteed in the human rights treaties ratified by the country. Rather, as a consequence of section 12 of the constitution, which requires implementing national legislation for treaties to have direct force of law in Nigeria, human rights treaties have to be enacted as national law to have direct domestic legal effect.[65] Accordingly, in 2003 the Nigerian government promulgated the Child Rights Act of Nigeria (CRAN) to give municipal force of law to treaties that the state has ratified for the protection of children's rights.[66] Enacted as a federal law by the Nigerian National Assembly and signed into law by the president, CRAN brings to life section 12(2) of the Nigerian Constitution, which empowers the National Assembly to enact treaty-implementing legislation, even over matters not included in the Exclusive Legislative List. Thus, in an apparent exception to the federalist principles of the Nigerian Constitution, the central government can regulate matters outside its normal legislative competence, thereby constitutionally borrowing sub-national-state legislative power for the sake of treaty implementation. Sections 21, 22 and 23 of CRAN address the subject of child betrothal and child marriage, prohibiting these practices and voiding marriages contracted by persons under 18 years.[67] Section 23 goes further to criminalize these practices, attaching either a fine or a term of imprisonment for the violation of these provisions. Federal legislation is, therefore, the vehicle for treaty implementation within the national legal system.

62 As will be shown, some states combine both approaches in their practices.

63 As will become evident, South Sudan and Sudan arguably adopt a blend of both models.

64 See Nigerian Constitution, chap IV.

65 Hence, see the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act of Nigeria LFN, 2010, which is one of the few international human rights treaties that have been domesticated into national law.

66 The two main treaties in this regard are the CRC (ratified in 1991) and the African Children's Charter (ratified in 2000). The act is a comprehensive piece of legislation that covers a wide range of issues relating to the rights of children.

67 CRAN, sec 277 sets 18 years as the marriageable age in Nigeria.

Enjoying constitutional foundation and legitimacy, CRAN arguably escapes challenge to its constitutionality. However, it still provokes what Tushnet identified as the second dimension to the federalism challenge: overcoming the restriction on federal methods of implementation.[68] Since central and sub-national states share authority over the same body of citizens and those citizens reside within the territories of the sub-national states, CRAN takes the very practical step of sharing implementation responsibilities among all three tiers of government in Nigeria. For instance, CRAN provides for (sub-national) state governments to have the duty to investigate violations of the act,[69] provide for the welfare of certain children[70] and provide accommodation for a certain class of children.[71] In addition to establishing state child rights implementation committees,[72] CRAN also empowers the relevant minister, in appropriate cases, to declare a state government to be in default of certain obligations.[73] In other words, the effectiveness of the prohibition of child marriage in CRAN depends largely on enforcement by sub-national states and their officials. This raises the question whether section 12(2) of the Nigerian Constitution also gives the federal authorities competence to assign responsibilities to sub-national states and to "commandeer" sub-national officials for the enforcement of federal laws.[74] Perhaps these questions inform the common but contestable perception that sub-national states need to enact their own similar legislation (or "domesticate" [sic] CRAN) before it can become applicable within the territories of the sub-national states.[75] Such arguments apparently challenge the competence of the central legislature on the basis of federalism: the first dimension, which should have been partly settled by section 12(2) instead of questioning the method of enforcement that does not appear to be addressed in section 12(2). The Nigerian approach thus successfully empowers central authorities to work around the federal principle by authorizing implementing federal legislation, yet leaves open the challenge of methods to ensure federation-wide implementation of the centrally enacted legislation.

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68 See Tushnet "Federalism and international human rights", above at note 5 at 850.

69 See CRAN, sec 45.

70 Id, sec 177.

71 Id, sec 188.

72 Id, sec 264.

73 Id, sec 203.

74 Although, there is a single (federal) police force in Nigeria responsible for investigating and prosecuting offences under the Federal Criminal Code Act and the state criminal code laws, most everyday offences are prosecuted in the state courts. Very few (mostly technical) criminal prosecutions take place in the federal courts of original jurisdiction.

75 See for instance, OS Akinwumi "Legal impediments on the practical implementation of the Child Right Act 2003" (2009) 37/3 *International Journal Legal Information* 385, who argues (at 391) that "until the Child Right Act is enacted into law in each of these legislative systems, it is not binding on the states". See also TS Braimah "Child marriage in northern Nigeria: Section 61 of part 1 of the 1999 Constitution and the protection of children against child marriage" (2014) 14 *African Human Rights Law Journal* 474 at 481.

In contrast to the Nigerian approach, Ethiopia applies constitutional framing to deal with the dilemma of federalism. According to article 9(4) of the Ethiopian Constitution, international treaties ratified by the state are an integral part of the law of the land. Read together with articles 3(1) and 6(1)(a) of Ethiopia's Federal Courts Proclamation,[76] treaties such as the African Children's Charter[77] and CEDAW[78] are directly applicable before federal courts in Ethiopia. As such, provisions in these treaties that protect children from child marriage are enforceable before the federal courts.[79] Further, article 34 of the Ethiopian Constitution (dealing with marital, personal and family rights) also speaks to the issue of child marriage. Whereas article 34(1) insists that the right to marry and found a family is available to men and women "who have attained marriageable age as defined by law", sub-article (2) provides that "marriage shall be entered into only with the free and full consent of the intending spouses".[80] With these constitutional provisions in place, even though Ethiopia does not have a separate child rights law, it still meets its obligation to protect children from child marriage within the national legal system. Formulated as constitutional provisions, these treaty obligations bind all tiers and officials of government without any need for legislative action, which, in any case, could be challenged for violating the principles of federalism.

A number of practical questions can be raised in relation to this regime, but those questions can also be answered by reading the constitution together with other general laws. First, article 34(4) and (5) of the Ethiopian Constitution appears to remove the protection in the preceding provisions, since these latter provisions recognize marriages "concluded under systems of religious or customary laws". Article 34(5) further provides that the "Constitution shall not preclude … adjudication of disputes … in accordance with religious and customary laws". Secondly, the term "marriageable age" is not defined in the constitution. In relation to the apparent contradictions in article 34(4) and (5) of the Ethiopian Constitution, federalism complicates the situation further, to the extent that residual powers over religious and customary matters remain with the sub-national states, even though power to establish or give recognition to religious and customary courts is shared by federal and state legislative organs.[81] However, this complication is resolved by articles 26(2) and 27(2) of the revised Family Code of Ethiopia (a federal law), which requires marriages concluded under religious or customary laws to meet "essential conditions of marriage" set out in the code.[82] With regards

76 Federal Courts Proc no 25/1996.
77 Ratified by Ethiopia on 27 December 2002.
78 Ratified by Ethiopia on 10 September 1981.
79 Although the authors found no evidence that this has ever happened, they are conscious of the limitations of their own research as external researchers.
80 This is arguably inspired by an equivalent formulation in the UDHR.
81 See Ethiopian Constitution, art 78.
82 Essential Conditions of Marriage Code, sec 2 includes requirements of consent and age.

to the "marriage age", a combined reading of the revised Family Code of Ethiopia and the Ethiopian Criminal Code pegs the age at 18 years.[83] Thus, while the actual prohibition of child marriage enjoys constitutional flavour by inclusion in the constitution, Ethiopia turns to federal legislation to deal with some identifiable gaps. This not only insulates the prohibition of child marriage (and other human rights guarantees) from a challenge of constitutionality on the basis of the violation of the principles of federalism, but also imposes an implementation obligation on all governmental actors, even if primary responsibility for protecting and defending the constitution rests on the federal government.[84] However, considering that the revised Family Code and the Criminal Code are both federal laws, it remains debatable whether the "essential conditions of marriage" and the definition of the "marriageable age" are binding on the sub-national states. Nevertheless, reports of the practice of child marriage in rural Ethiopia have remained as troubling as reports of the continuing practice in parts of northern Nigeria. In other words, despite the differing modes employed by these two states, the scourge of child marriage continues to defy central control in both states.

The other three states considered in this article generally adopt either one or a mixture of these two approaches to protect children from child marriage: inclusion of the prohibition of child marriage in the constitutional bill of rights and / or the enactment of a federal law to prohibit the practice. South Sudan is representative of this category. Article 15 of the South Sudanese Constitution (the right to found a family) provides that "every person of marriageable age" has a right to marry and "no marriage shall be entered into without the free and full consent of the man and woman". Similar to the position in Ethiopia, South Sudan's constitutional guarantee arguably imports the formulation in the UDHR. In addition to this constitutional protection, South Sudan also has federal legislation, the Child Act of 2008, guaranteeing protection from early marriage and other harmful customs or traditional practices.[85] Section 36 of the act obligates all levels of South Sudanese government to "recognize, respect and ensure" the rights protected in it.

Despite the different approaches identified in this article, child marriage remains a troubling violation in the countries considered. While it is possible to explain this as a challenge common to all states, federal and non-federal alike, inadequate regulation and prosecution in non-federal states can be attributed more to a lack of will than to the complications of the political system. Thus, it remains desirable to explore means by which the challenges of

83 Art 7(1) of the revised Family Code provides that a person who has not attained the age of 18 cannot marry, while art 626 of the Ethiopian Criminal Code prohibits sexual intercourse with a child between 13 and 18 years. Art 627 prohibits sexual intercourse with persons under 13 years as "sexual outrages committed on infants".

84 See Ethiopian Constitution, art 51.

85 See Child Act of South Sudan 2008, secs 2, 24 and 26.

federalism can be better met. In that regard, experiences and suggestions from outside Africa, even in the general field of international law, might be useful considerations for enhancing the strategies already developed in Africa. One strategy employed by Canada is to engage in prior sensitization and consultation before ratification of an international treaty. By engaging in nation-wide consultation and procuring the agreement of sub-national governments before ratification, the state ensures cooperative implementing action post-ratification.[86] Although in the African context it cannot be discountenanced that this could delay ratification or even result in non-ratification, it need not be the case insofar as such consultation is not stipulated as a constitutional or statutory requirement for ratification.

In relation to the dilemma of methods of implementation, the idea of direct implementation by federal authorities has been mooted in the United States. For instance, Doherty shows that, reacting to inadequate sub-national prosecution resulting in the US violation of treaty obligations, President Harrison invited US Congress to pass a law permitting federal prosecution in similar situations.[87] In both approaches identified in this article, the legislative framework prohibiting and criminalizing child marriage already exists. Thus, in order to tackle non-enforcement by sub-national states, enforcement by federal officials in federal courts can be a viable option, not only for ensuring immediate implementation but also for nudging sub-national states towards assuming enforcement roles in the long run. Faced with the prospect of federal prosecution of their citizens, sub-national states may be forced to act similarly to the manner in which complementarity in international criminal law, particularly in the Statute of the International Criminal Court, can force states to take prosecutorial action. Such direct federal enforcement could, however, be carried out on the basis of the principle of subsidiarity. As Taylor explains in relation to German constitutional practice, in matters not falling within its exclusive competence, the German federal government operates on the principle of subsidiarity, only taking action if federal action can be more effective than action taken at the regional or local level.[88] In the context of enforcing the prohibition of child marriage, action at the federal level would then only be taken when states fail to implement and enforce applicable laws. With regard to the conflict between secular law and religious and / or customary law, a leaf could be borrowed from Indian practice that, through judicial pronouncement, subjects all forms of personal law to the operation of

86 See for instance, SA McDonald "The problem of treaty-making and treaty implementation in Canada" (1981) 19 *Alberta Law Review* 301. Also see Opeskin and Rothwell "The impact of treaties", above at note 1 at 2, who see this as a practice of cooperative federalism.

87 R Doherty "Foreign affairs v federalism: How state control of criminal law implicates federal responsibility under international law" (1996) 82/7 *Virginia Law Review* 1261 at 1336.

88 G Taylor "Germany: The subsidiarity principle" (2006) 4/1 *International Journal of Constitutional Law* 115.

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statutory law prohibiting child marriage.[89] Applied together with existing approaches, these strategies have the strong potential to strengthen children's protection from child marriage.

CONCLUSION

If inclusion in international human rights instruments were all that is required to ensure that children, especially the girl child, are protected from the dangers of child marriage, then there would be fewer children facing that threat or danger. As this article has shown by outlining relevant instruments, international human rights law deals with the subject of child marriage globally and regionally. Continuing reports of the incidence of child marriage and forced marriage around parts of Africa highlight the need for these international guarantees to be translated into tangible legal effect at the national level. This article has shown that, in the search for better and more effective national implementation of the prohibition of child marriage, federalism constitutes a clear and present danger in Africa's federal states, which include two of the continent's most populated countries. As argued in this article, the dilemma that federalism presents calls for answers to certain questions in order to explore the best ways to ensure domestic protection for children in danger.

Adopting a comparative constitutional approach, this article has demonstrated that several of Africa's federal states, much like older federal states elsewhere, face different forms of a two-pronged challenge: finding constitutionally allowable means to legislate international obligations into national effect in the absence of exclusive legislative competence; and ensuring federation-wide enforcement of such central legislation. Arguably, this brief study has shown that two main models have been developed in the African context to meet the challenge. On the one hand is the incorporation of the prohibition of child marriage in the constitutional bill of rights, as evident in the Ethiopian practice. On the other is the enactment of federal legislation that binds sub-national authorities. In both cases, the authors argue, the challenge of enforcement remains to be addressed. Applying lessons from older federal states, the authors have suggested that African states borrow and adapt practices from those states in order to strengthen children's protection from child marriage. Overall, this article has demonstrated that federalism presents challenges for the national implementation of international human rights obligations. Thus, the lessons learnt may be useful in advancing the general cause of human rights.

89 See "Prohibition of Child Marriage Act to prevail over personal laws: HC" (25 September 2015) *The Indian Express*, available at: <indianexpress.com/article/ cities/ahmedabad/prohibition-of-child-marriage-act-to-prevail-over-personal-laws-hc> (last accessed 18 May 2017), reporting that the Gujarat High Court in India ruled that the Prohibition of Child Marriage Act, 2006 prevails over Muslim personal law.