

Analysis of the Best Interest of the Child Principle within a Marriage Law Framework: A Study of South Africa

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Abstract : Article 3 of the United Nations Convention on the Rights of Child states that 'The best interests of the child must be a top priority in all decisions and actions that affect children.' This stance is also echoed in terms of article 20 of the African Charter on the Rights and Welfare of the Child. South Africa, as a signatory of the aforesaid international and national conventions, constitutionalised the best interest of the child in terms of section 28(2) of the Republic of South Africa, 1996. Section 28(2) provides that '[A] child's best interests are of paramount importance in every matter concerning the child.' The application of 'the best interests of the child' principle is consequently applicable in all fields of South African law, including matrimonial law. Two separate but equal Acts regulate civil marriages in South Africa, namely the Marriage Act 25 of 1961 and the Civil Union Act 17 of 2006. Customary marriages are regulated by the Recognition of Customary Marriages Act 120 of 1998. In terms of the Marriage Act and the Recognition of Customary Marriages Act, a minor may (provided he/she obtains the required consent) enter into a marriage. Despite the aforesaid, section 1 of the Civil Union Act categorically prohibits a minor from entering into a civil union. The article will first determine whether the ban of minors from entering into a civil union undermines the 'the best interests of the child' principle, and if so, whether it is in violation of the Constitution as well as international and national conventions. In addition, the article will critically analyse whether the application of the Marriage Act and the Civil Union Act (dual Acts) result in disparity within the South African marriage law framework, and if so, whether such discrepancy violates same-sex couples' right (in particular a same-sex minor) to equality before the law and to have their dignity protected. The article intends, through the application of a qualitative research methodology and by way of a comparative analyses of international and domestic laws, consider whether a single well-defined structure such as the Dutch marriage law system would not be an improved alternative to address the existing paradox resulting from the application of an Act that undermines 'the best interest of the child' principle. Ultimately the article proposes recommendations for matrimonial law reform.

Keywords : best interests of the child, civil marriage, civil union, minor

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