



Forced child marriages as a form of child trafficking in the South African context

NS Mnisi

 **Orcid.org/0000-0002-3172-9799**

Mini-dissertation submitted in partial fulfilment of the requirements for the degree *Masters of Laws* in *Comparative Child Law* at the North-West University

Supervisor: Ms Chantelle Feldhaus

Graduation ceremony: July 2020

Student number: 24327530

DECLARATION

I, Nomfundo Sharon Mnisi, Identity number 9406260233085 and student number 24327530, hereby declare that the mini-dissertation titled "**Forced child marriages as a form of child trafficking in the South African context**", is my original work in design and execution. I further declare that the study has not previously been submitted by me at this or any other institution for a degree. It is submitted to the North-West University (Potchefstroom Campus) in partial fulfilment of requirements for the degree *Master of Laws* (LLM) in Comparative Child Law.

NOMFUNDO SHARON MNISI

Date: 25 November 2019

ACKNOWLEDGEMENTS

Firstly, I wish to thank God, for without His sufficient grace and strength, I would not have been able to complete this study.

I wish to express my appreciation to my supervisor, Ms Chantelle Feldhaus, for her patience, guidance and support. Without your assistance and support, it would not have been possible to achieve this milestone. I am grateful for all you have done for me, especially the opportunity to work with you and all that you have taught me during this journey.

I am sincerely grateful to my parents and members of my family, for their support and for being there for me during the toughest moments. I am grateful for the encouragement, unconditional love and support during my studies. May God bless you all.

ABSTRACT

Child marriage is a clear violation of human rights. It is still practised around the world and affects the lives of young girls in particular. Such marriage takes place between two persons, where one of the spouses is under the age of eighteen and free and full consent has not been given, especially in situations associated with child trafficking. Child marriages have similar defining elements as child trafficking. For instance, the coercive element is found in both and forced marriage can consist of sexual or economic exploitation, which is often the purpose of trafficking. Therefore, if child marriage consists of the three core elements, it can be a form of child trafficking. Child marriage violates the rights of several children, for example, the right to education, dignity, health and equality. This practice disrupts the development of children, as it deprives them from fully enjoying their childhood and has negative impacts on their health, as it puts them at risk of being vulnerable to domestic violence.

The parents or guardians of young girls marry off their daughters at an early age because of poverty, consider them as poor investment and value them less compared to boys. There are a few international and regional legal instruments that address the issue of child marriage by protecting and promoting the rights of children such as the *United Nations Convention on the Rights of the Child* (1989), the *African Charter on the Rights and Welfare of the Child* (1990) and the *Convention on the Elimination of All Forms of Discrimination Against Women* (1980). Although these legal instruments prohibit child marriage and serve as guiding principles for States Parties, children's rights are still violated by members of their families, as young girls are constantly forced to get married by their parents and families through the excuse of culture and economic status.

Keywords

Child marriage, child trafficking, best interest, child brides, enforcement, root causes, exploitation

LIST OF ABBREVIATIONS AND ACRONYMS

ACRWC	African Charter on the Rights and Welfare of the Child
AHR	Advocates for Human Rights
AHRLJ	African Human Rights Law Journal
AIDS	Acquired Immune Deficiency Syndrome
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CFHR	Centre for Human Rights
Constitution	Constitution of the Republic of South Africa, 1996
CRC	United Nations Convention on the Rights of the Child
ECOWAS	Economic Community of West African States
	Girls Not Brides
HIV	Human Immunodeficiency Virus
JFLP	Journal of Family Law and Practice
JIWS	Journal of International Women's Studies
J Comp L Afr	Journal of Comparative Law in Africa
J Int'l Afr Ins	Journal of the International African Institute
PER	Potchefstroom Electronic Review
SADC	Southern African Development Communities
SAJ	South African Journal
SALJ	South African Law Journal
SALRC	South African Law Reform Commission

STI	Sexually Transmitted Infections
RCMA	Recognition of Customary Marriages Act
UNICEF	United Nations Children's Fund

TABLE OF CONTENTS

DECLARATION.....i

ACKNOWLEDGEMENTS.....ii

ABSTRACT.....iii

LIST OF ABBREVIATIONS AND ACRONYMS.....iv

CHAPTER 1: INTRODUCTION.....1

1.1 Introduction and problem statement.....1

1.2 Causes and negative consequences.....1

1.3 Legal framework.....3

1.4 Outline of the study.....8

CHAPTER 2: INTERNATIONAL AND REGIONAL PROTECTION OF CHILDREN.....8

2.1 Introduction.....8

2.2 International and regional instruments.....10

2.2.1 Convention on the Rights of the Child, 1989.....10

2.2.1.1 General.....10

2.2.1.2 The best interest principle.....12

2.2.2 Universal Declaration of Human Rights, 1948.....16

2.2.3 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 196417

2.2.4	<i>Convention on the Elimination of All Forms of Discrimination against Women, 1979</i>	17
2.2.5	<i>Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000</i>	18
2.2.6	<i>African Charter on the Rights and Welfare of the Child, 1990</i>	21
2.2.6.1	General.....	21
2.2.6.2	The best interest principle.....	22
2.2.7	<i>Protocol on the Rights of Women in Africa, 2005</i>	23
2.2.8	<i>The African Youth Charter, 2006</i>	24
2.2.9	<i>The Charter on Human and People's Rights (Banjul Charter), 1981</i>	25
2.2.10	<i>AU: Solemn Declaration on Gender Equality in Africa, 2004</i>	26
2.3	<i>Conclusion</i>	28
3	CHAPTER 3: LEGAL FRAMEWORKS ON THE PROTECTION OF CHILDREN IN SOUTH AFRICA	29
3.1	<i>Introduction</i>	29
3.2	<i>South African context</i>	29
3.3	<i>Relevant legislation for the protection of children's rights</i>	32
3.3.1	<i>Constitution of the Republic of South Africa, 1996</i>	32
3.3.2	<i>Children's Act 38 of 2005</i>	34
3.3.3	<i>Sexual Offences and Related Amendment Act 32 of 2007</i>	35
3.3.4	<i>Recognition of Customary Marriages Act 120 of 1998</i>	36

3.3.5	<i>Prevention and Combating of Trafficking in Persons Act, 2013.....</i>	<i>37</i>
3.3.6	<i>Initiatives to combat human trafficking.....</i>	<i>38</i>
3.6	Conclusion.....	39
4	CHAPTER 4: ANALYSIS OF SOUTH AFRICA'S CURRENT LEGAL POSITION.....	40
4.1	<i>Introduction</i>	<i>40</i>
4.2	<i>Implementation and enforcement of the law.....</i>	<i>40</i>
4.3.	<i>Conclusion.....</i>	<i>43</i>
5	CHAPTER 5: CONCLUSION AND RECOMMENDATIONS.....	44
5.1	Introduction.....	44
5.2	Recommendations.....	47
	BIBLIOGRAPHY.....	50
	<i>Literature.....</i>	<i>50</i>
	<i>Case law.....</i>	<i>65</i>
	<i>Legislation.....</i>	<i>65</i>
	<i>International instruments.....</i>	<i>65</i>
	<i>Regional instruments.....</i>	<i>66</i>
	<i>Internet sources.....</i>	<i>66</i>

CHAPTER 1: INTRODUCTION

1.1 Introduction and problem statement

Child marriages have been condemned globally as a harmful practice that violates children's rights.¹ In South Africa, 6% of girls are married before the age of eighteen.² In spite of international law, national legislation and the efforts of various non-governmental organisations, many girls are still subjected to forced marriages in South Africa.³ The *South African Law Reform Commission* found in 2004 that the problem of forced child marriages is aggravated by the lack of a dedicated or single piece of legislation which comprehensively addresses the problem.⁴ South Africa made progress in 2010 with the coming into force of the *Children's Act* 38 of 2005, which addresses the problem of child marriages.⁵

1.2 Causes and negative consequences

Factors such as economic gain, cultural and control over sexuality are the major contributing factors to child marriage; and such marriages have detrimental effects on the mental, social and physical health of the girl child.⁶ There are clear overlaps between child marriage and child trafficking; and there are factors that are common to both practices such as poverty, as it increases the risk for child marriages, thus leading to a high incidence of child marriages since poor families feel they do not have sufficient "resources and incentives to invest in alternative options for girls."⁷ Poverty, together with high unemployment rates, is the main factor underlying children's vulnerability to being trafficked.⁸ The inability to provide basic needs, such as food and

¹ Warria 2017 79 *CYSR* 274.

² UNICEF South Africa: Child marriage rates 2017 1.

³ Warria 2017 79 *CYSR* 274.

⁴ The South African Law Reform Commission. This is "an independent advisory statutory body established by the South African Commission Act of 1973. The objects of the South African Law Reform Commission are to conduct research on all branches of the law in order to make recommendations to Government for the development, improvement, or reform of the law." "The Commission investigates matters appearing on a programme approved by the Minister of Justice and Constitutional Development."

⁵ The commencement date on page one of the *Children's Act* 38 of 2005.

⁶ Burris 2014 *TJICL* 152.

⁷ Kurtz and Jain 2007 *ICRW* 9.

⁸ South African Law Reform Commission Discussion Paper 111 Project 131 Trafficking in Persons 51. See also Braimah 2014 *AHRLJ* 483. Otoo-Oyortey and Pobi's assert that "globally, poverty is a major

clothing in most families, is one of the main reason why most families seek marriage for their daughters so they can have a better life.⁹

With regard to control over sexuality, especially in societies that practise child marriages, there is a cultural understanding that a girl's virginity is important for the family's honour and prestige.¹⁰ Furthermore, gender discrimination, such as "social or cultural practices", also contribute to child trafficking, young girls in particular. For instance, since girls are devalued in most societies, it makes them excessively vulnerable to trafficking.¹¹ The practice of child marriage is predominantly rooted in cultural and traditional values, and most families feel they are compelled to conform to certain cultural requirements as failure to do so could lead to family shame and ridicule.¹²

Child marriage has negative consequences for girls, such as health-related concerns, "little or no access to education and freedom of will."¹³ These are some of the reasons why there are international standards on child marriage and child trafficking due to the extremely damaging consequences of both. These negative consequences include lack of participation and decision-making and, given the intimate nature of marriage and the kind of impact it can have on individuals, the decision to marry should primarily be made by parties themselves with no or little family interference.¹⁴ Child brides are faced with difficulties of developing self-identity and lack the confidence to voice their opinions and have no agency.¹⁵ The alienation from participation and decision-making about problems in one's own life, and those faced by a household, family, or community, is rooted in gender inequality.¹⁶

cause, as well as a consequence of early marriage for many young girls under the age of eighteen." "In many traditional settings, poor families use the early marriage of daughters as a strategy for reducing their own economic vulnerability, shifting the economic burden related to a daughter's care to the husband's family."

⁹ Aronowitz *Human trafficking: A reference Handbook* 3026.

¹⁰ Jones, Tefera, Stephens and Gupta 2014 *ODI* 17.

¹¹ United Nations Office on Drugs and Crime *Toolkit to Combat Trafficking in Persons* 423.

¹² Diala 2019 *PV* 58.

¹³ Egwu and Nwimo 2015 *JLPG* 141.

¹⁴ Baxter 2018 *NLJ* 69.

¹⁵ Nwimo and Egwu 2015 *JLPG* 142.

¹⁶ Edmeades, Kes and Parsons 2015 13 *RFIA* 13.

The negative consequences on the health of young girls is concerning as they experience complications such as high rate of maternal mortality and pregnancy-induced hypertension due to lack of maturity of their bodies to give birth.¹⁷ Child brides are more vulnerable to sexually transmitted infections because they are regularly unable to negotiate safe sex with their husband, putting them at higher risk of early pregnancy.¹⁸ Furthermore, the health consequences associated with child trafficking include "traumatic injury from sexual and physical assault or work-related injury, sexually transmitted infections, chronic untreated medical conditions, pregnancy and related complications."¹⁹

A girl's opportunity to have access to education, whether formal or non-formal education, is severely limited upon getting married thus, preventing the girl child from obtaining knowledge and skills that will assist in life.²⁰ Child marriage, itself, can be considered a form of violence against girls and gender norms that devalue girls, and is often a precursor for further acts of violence because when a girl's consent is superseded in the first instance, it is likely to happen again in future.²¹ Violence can be "physical, emotional, or sexual", and affects the physical and mental health of girls.²² Girls, who are married young are often at high risk of domestic violence, sexual abuse, and isolation from their loved ones since they lack equal status in their marriages.²³

1.3 Legal framework

There are, however, several legal instruments currently used to prosecute people responsible for distorting child marriages. These instruments include *inter alia*, section 28 of *the Constitution of the Republic of South Africa*, 1996, which protects the rights of children.²⁴ Section 28(1)(d) of the *Constitution* states that children must be

¹⁷ Schuman 2019 *WMLR* 2353.

¹⁸ Edmeades, Kes and Parsons 2015 13 *RFIA* 17.

¹⁹ Greenbaum and Bodrick 2017 *AAP* 3.

²⁰ <https://www.icrw.org>

²¹ Humphreys and Stanley *Domestic violence and child protection: Directions for good practice* 23.

²² Carlsson, Machel and Pires 2013 *WHO* 1005.

²³ Carlsson, Machel and Pires 2013 *WHO* 1005.

²⁴ Section 28 of the *Constitution of the Republic of South Africa*, 1996. (Hereafter, referred to as the "*Constitution*")

protected from abuse, maltreatment, degradation or neglect.²⁵ Secondly, section 17 of the *Sexual Offences Amendment Act 32 of 2007*²⁶ states that, any person who unlawfully and intentionally involves the services of a child, with or without the consent of the child, for any financial benefit for the intention of engaging in a sexual act or committing sexual act with the child, is guilty of the offence of sexual exploitation of a child.²⁷ Lastly, section 12(2)(a) of the *Children's Act 38 of 2005* prohibits a child below the age of eighteen to be given out in marriage or engagement.²⁸

In South Africa, a child is defined as a person who is below the age of eighteen in terms of section 28(3) of the *Constitution*.²⁹ Therefore, a child marriage is one concluded between two persons, where "one or both parties to a marriage are under the age of eighteen."³⁰ Thus, a child marriage, by definition, is a forced marriage. A forced marriage can be defined as the union of two persons where one of the persons has not given her full and free consent to the marriage.³¹ Where one of the parties is a minor, the consent of a parent or guardian is an additional requirement for the customary marriage to be valid and the marriage will not be considered as a forced marriage.³² Hence, a marriage where the parents or guardians give their consent on behalf of a child without the child's full and free consent, is a forced marriage.³³

Arguably, if the minimum age of marriage is eighteen in terms of international law, this simply means all marriages involving persons under the age of eighteen are child marriages. Thus, child marriages are forced child marriages, an indication that in terms of the understanding of international law, child marriages are, therefore, by

²⁵ Section 28(1)(d) of the *Constitution of the Republic of South Africa, 1996*.

²⁶ Sections 15 and 17 of the *Sexual Offences Amendment Act 32 of 2007*. Section 15 of the *Sexual Offences Amendment Act* makes provision for statutory rape. The section states that, "a person who commits an act of sexual penetration with a child is, despite the consent of the child to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child."

²⁷ Section 17 of the *Sexual Offences Amendment Act 32 of 2007*.

²⁸ Section 12(2)(a) of the *Children's Act 38 of 2005*.

²⁹ Section 28(3) of the *Constitution of the Republic of South Africa, 1996*.

³⁰ UNICEF Ending Child Marriage: Progress and Process 2014 2.

³¹ European Parliamentary Assembly Resolution 1468 "Forced Marriages and Child Marriages" 2005. See also UNICEF Ending Child Marriage: Progress and Process 2014 2.

³² Section 3(a) of the *Recognition of Customary Marriages Act 120 of 1998*. "This is an indication of non-compliance to the international law minimum age standard."

³³ Mathibela, Mudarikwa and Roos 2016 *LRC* 5.

implication, forced marriages. Forced marriage is entered into as a result of physical or psychological pressure, or coercion, the latter being more subtle.³⁴ Consent is required when it comes to marriage. For example, forced marriage may occur in situations involving human trafficking.³⁵ Forced marriages and human trafficking have common defining elements and both contain a coercive element.³⁶ Forced marriage can include actual exploitation, such as sexual exploitation or economic exploitation.³⁷

South Africa has ratified the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, 2000* into its domestic legislation in order to combat child trafficking and has the obligation to take the necessary steps to prevent child trafficking for the purpose of exploitation, such as trafficking for the purpose of marriage.³⁸ The protection of children from all forms of exploitation is emphasised in articles 32, 34 and 36 of the *United Nations Convention on the Rights of the Child, 1989*, which places an obligation on States Parties to protect children from exploitations such as sexual abuse and exploitation that occur in child marriages.³⁹ These articles are discussed in Chapter Two.

According to the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 2000*, trafficking consists of three core elements as follows:⁴⁰ Firstly, a material act being the recruitment, transportation, transfer, harbouring of a person; secondly, exploitation which can either be sexual or economic; and lastly, the use of certain means such as force, deception or threats.⁴¹ Child marriage can be seen as a form of human trafficking if it consists of the three core elements and child marriage can be a way of recruiting girls for sexual exploitation or

³⁴ An-Na'im 2000 *ILEU* 3.

³⁵ Thomas and Park 2011 *AFHR* 359.

³⁶ Myria 2015 *FMC* 13.

³⁷ Mikhail 2002 *GD* 44.

³⁸ Kruger 2012 2 *PHR* 1. See also Article 3(c) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 2000*.

³⁹ Warria 2017 79 *CYSR* 277.

⁴⁰ Article 3(c) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, 2000*. Hereafter, referred to as the Palermo Protocol. For the purposes of this Protocol, (c)- "The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered trafficking in persons even if this does not involve any of the means set forth in subparagraph (a) of this article."

⁴¹ Stoyanova 2013 *ALR* 66.

labour exploitation in particular.⁴² Child marriage is a means of trafficking since the marriage is concluded "with the goal of acquiring, buying, offering, selling or exchanging a person for the purpose of exploitation."⁴³ Children who are trafficked for sex may also be sold into forced marriages, as there are situations where children are trafficked for purposes of marriage and not only for sex or labour.⁴⁴

With child marriages, childhood is lost and children are denied freedom, personal and academic development, all which has unfavourable psychosocial and socio-economic consequences.⁴⁵ The practice of child marriage violates the girl child's right to dignity, as girls are controlled through violence, threats and isolation.⁴⁶ Child marriage is characterised by lack of consent and a form of violence, and the violence can vary, including manipulation, deception and coercive means.⁴⁷ Child marriage is a very specific sub-form of child trafficking and, therefore, the same international legal standards that are applied to child trafficking, which are extensive, should also be applied to child marriage.

Child marriage violates several human rights such as the right to equality, the right to give free and full consent in marriage, the right to education and the right to be free from slavery as contained in international conventions.⁴⁸ Article 4 of the *Universal Declaration of Human Rights*, 1948 and article 1 of the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, 1956 obliges states members to prohibit slave-like practices that encourage exploitation.⁴⁹ Denying children the right to consent to getting married is a clear violation of their rights as outlined by numerous international conventions.⁵⁰ For

⁴² Myria 2015 *FMC* 13.

⁴³ www.endslaverynow.org

⁴⁴ www.endslaverynow.org

⁴⁵ Warria 2017 79 *CYSR* 277.

⁴⁶ Ezer; Kerr and Major 2006 *GJGL* 369.

⁴⁷ Myria 2015 *FMC* 6.

⁴⁸ Warria 2017 79 *CYSR* 277.

⁴⁹ Article 4 of the *Universal Declaration of Human Rights*, 1948. (Hereafter, referred to as the "UDHR"). See also article 1 of the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery* 1956. This legal instrument is discussed in full in Chapter 2.

⁵⁰ See article 16 of the *Universal Declaration of Human Rights*, 1948.

example, article 16 of the *UDHR* states that "marriage shall be entered into only with free and full consent of the intending parties."⁵¹

Article 16(1) of the *Convention on the Elimination of All Forms of Discrimination Against Women*, 1979 makes provision for equality between men and women on the right to enter into marriage, the right to freely choose a spouse and the right to get married only with free and full consent.⁵² Article 9(1) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* places an obligation on States Parties to institute comprehensive policies, programmes and other measures to prevent and combat trafficking in persons, and to provide protection to victims of trafficking from revictimisation.⁵³ Article 21(2) of the *African Charter on the Rights and Welfare of the Child*, 1990 states that child marriages shall be prohibited, and legislation shall specify the minimum age of 18 for marriage.⁵⁴

Against this background, the question that arises is as follows: Is South Africa enforcing the international legal obligations adequately? International law standards cover this overlap of child trafficking for the purpose of marriage, but the problem is lack of adequate enforcement, as the legislation is not properly enforced. To answer the research question indicated above, domestic laws are examined against international treaties that purport to regulate or prohibit the practice of child marriage, with particular emphasis on laws relating to the trafficking of young girls for the purposes of marriage.

1.4 Outline of the study

This study is divided into five chapters. Chapter one focuses on the introduction, the problem statement and provides an overview of the study. Chapter Two focuses on

⁵¹ Article 16 of the *Universal Declaration of Human Rights*, 1948.

⁵² Article 16(1) of the *Convention on the Elimination of All Forms of Discrimination Against Women*, 1979. "The Convention was enforced on 3 September 1981 and South Africa ratified the Convention on 15 December 1995." (Hereafter, referred to as the CEDAW). This legal instrument is discussed in full in Chapter 2.

⁵³ Article 9(1) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*, 2000.

⁵⁴ Article 21(2) of the *African Charter on the Rights and Welfare of the Child*, 1990. This legal instrument is discussed in full in Chapter 3.

international and regional law, provides an overview of several international and regional legal instruments that protect children's rights and address the issue of child marriage. These international and regional legal standards include the following: the *Convention on the Rights of the Child*; the *Convention on the Elimination of All Forms of Discrimination against Women*; and the *African Charter on the Rights and Welfare of the Child*.

Chapter Three focuses on South Africa's legal framework on the protection of the rights of children. It also provides an overview of the South African context with regard to child marriages, the rights of children violated through child marriage, and reference to relevant legislative frameworks that prohibit child marriage. Chapter Four provides an analysis of the legal position of South Africa against international and regional instruments. The Chapter also provides a general discussion on the compliance and implementation of international and regional legal standards by South Africa. Chapter Five is the conclusion and recommendations.

CHAPTER 2: INTERNATIONAL AND REGIONAL PROTECTION OF CHILDREN

2.1 Introduction

Section 39(2) of the *Constitution* provides that, "when interpreting any legislation, when developing common or customary law, every court, tribunal or forum, must consider international law."⁵⁵ This section makes provision for the consideration of international law by South African courts when children are forced into marriages, through child trafficking by exposing them to abuse, rape and assault. International human rights and regional instruments that have an impact on trafficking for the purpose of child marriage, are discussed, with particular emphasis on the contradiction of the practice of child marriage against international and regional obligations.

Child marriages are an increasingly common form of exploitation of human trafficking victims.⁵⁶ Child marriage is specifically recognised as an abuse of human rights under a number of international and regional human rights instruments.⁵⁷ Trafficked children are treated as a commodity, sold to interested parties for the establishment of a family, while children, who are victims of trafficking, are completely deprived of their human rights, their health impaired and are deprived of the right to education.⁵⁸ The trafficking of children, for the purpose of marriage, is prohibited by numerous international and regional instruments, for example, *the Convention on the Rights of the Child*, 1989, *the African Charter on the Rights and Welfare of the Child*, 1990 and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*, 2000. Lutya argues that there is a link between child marriages and trafficking and states as follows:

Some entrenched cultural norms and values that could be detrimental to the psychological and personal development of young women and girls survive in South Africa. Notably, child marriages due to HIV/AIDS, child placement, as well as

⁵⁵ Section 39(2) of the *Constitution of the Republic of South Africa*, 1996.

⁵⁶ Bozic *ECLIC* 2018 48.

⁵⁷ Gill and Anitha Forced marriage: introducing a social justice and human rights perspective 5.

⁵⁸ Bozic 2018 *ECLIC* 48.

materialism and immediate gratifications, are some of the cultural practices drawing young women and girls to human traffickers in this country.⁵⁹

A child is defined by international legal instruments as any person below the age of eighteen years.⁶⁰ According to Chaudhuri, international law recognises that a child may be considered as a victim of child trafficking even when she is exploited within her own marriage, and "from such an emerging perspective, child trafficking also has direct relevance within the context of child marriage itself."⁶¹ According to Kofi Annan, the former Secretary General of the United Nations,

There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they can grow up in peace.⁶²

The above quote clearly reflects on the importance of a government's obligation to protect and promote the rights of children. The quote further reflects on the norms and principles that States Parties should adhere to resonate strongly with international and regional instruments.⁶³ Therefore, South Africa, as a member state of several international and regional legal instruments, has an obligation to implement these legal instruments in its municipal law.⁶⁴ In order to implement international standards into municipal law, a government is required to guarantee that the current legal framework prohibits and criminalises child marriages, as it is in the best interest of children to prohibit and prevent this slave-like practice.

2.2 International and regional instruments

2.2.1 Convention on the Rights of the Child, 1989

2.2.1.1 General

⁵⁹ Luya 2012 *INTECH* 16.

⁶⁰ Article 1 of the *Convention on the Rights of the Child*, 1989.

⁶¹ Chaudhuri 2015 *ECPAT* 60.

⁶² <https://www.unicef.org>

⁶³ Abrahams and Matthews *UNICEF* 2011 5.

⁶⁴ Mudarikwa, Roos and Mathibela 2016 *LRC* 4.

Before the adoption and ratification of the *Convention on the Rights of the Child*, 1989, children's rights were not explicitly recognised by any treaty, nor was there any legally binding international authority.⁶⁵ Article 32 of the *CRC* provides as follows:

A child should be protected from economic exploitation and from performing any work that may interfere with the child's education or cause harm to the child's health or physical, mental, spiritual, moral or social development, and this right shall be recognised by State Parties.⁶⁶

Article 34 of the *CRC* provides as follows:

States parties shall undertake to protect the child from all forms of sexual exploitation and sexual abuse, by taking all appropriate national, bilateral and multilateral measures to prevent sexual exploitation of children.⁶⁷

Furthermore, article 36 of *CRC* states that children shall be protected by State Parties from all other forms of exploitation prejudicial to any aspects of the child's welfare.⁶⁸ Each State Party must submit a follow-up report every five years to address their progress to the committee, and any problem each State Party is addressing to meet compliance.⁶⁹ The Committee on the Rights of the Child acknowledged the effort of South Africa in its report under article 44 of *CRC* to address the situation of the sale, trafficking and abduction of children, together with the adoption of the *Hague Convention on Civil Aspects of International Child Abduction*, into domestic legislation.⁷⁰

The Committee, however, expressed its concern regarding the increasing incidence of sale and trafficking of children, particularly girls, and lack of adequate measures to

⁶⁵ Boumans *SJILC* 191 2015 195.

⁶⁶ Article 32 of the *United Nations Convention on the Rights of the Child*, 1989.

⁶⁷ Article 34 of the *United Nations Convention on the Rights of the Child*, 1989. "For these purposes, States Parties shall, in particular, take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; and (c) The exploitative use of children in pornographic performances and materials."

⁶⁸ Article 36 of the *United Nations Convention on the Rights of the Child*, 1989.

⁶⁹ Article 44(1)(b) of the *United Nations Convention on the Rights of the Child*, 1989. "The Committee on the Rights of the Child is made up of eighteen experts who are responsible for monitoring implementation of the *CRC* by its State parties."

⁷⁰ Report of the *Committee on the Rights of the Child*, 2000 293.

enforce legislative guarantees to prevent and combat this problem.⁷¹ The Committee recommended that, South Africa, in terms of article 35 of *CRC*, to strengthen law and enforce such law by ensuring that its domestic legislation adopts the principles and provisions of *CRC*, and also increase efforts to raise awareness in communities with regard to the sale, trafficking and abduction of children.⁷²

Furthermore, the Committee recommended that the South Africa seek to institute bilateral agreements with neighbouring countries to prevent the sale, trafficking and abduction of children and to ensure the safe return of children to their families.⁷³ The recommendations made by the Committee could serve as appropriate measures and guidelines for the implementation of programmes or campaigns to assist in preventing or combating the sexual exploitation of children, young girls, in particular, in child marriages, who are exposed to such exploitations in the hands of their husbands.

2.2.1.2 The best interest principle

CRC recognises the best interest principle as follows: In every decision involving a child, such decision must be in the best interest of the child.⁷⁴ The nature of child marriages violates international human rights and, South Africa, as a member state, has an international obligation in terms of the *CRC*, to protect and prevent the kinds of harm against children that are inflicted through child marriages.⁷⁵ According to Boumans, although *CRC* addresses many of the issues related to child marriages, however, *CRC* seems to be more successful in shedding some light to the issue by merely mentioning the prohibition of harmful traditional practices, rather than providing solutions, and ambiguities in interpretation of its text constitute another problem that undermines the spirit of the *CRC*.⁷⁶ *CRC*, which is dedicated specifically

⁷¹ Report of the *Committee on the Rights of the Child*, 2000 294.

⁷² Report of the *Committee on the Rights of the Child*, 2000 294.

⁷³ Report of the *Committee on the Rights of the Child*, 2000 294.

⁷⁴ Article 3 of the *United Nations Convention on the Rights of the Child*, 1989.

⁷⁵ Maluleke *DJCD* 5 2009 47.

⁷⁶ Boumans *SJILC* 191 2015 199. See also article 24 of the *United Nations Convention on the Rights of the Child* 1989. According to Boumans, "in 2015, children were trafficked and forced to marry at young ages, and as a result, these continued violations have negative impacts on children's lives and it cannot be said that they are being protected to the fullest extent while such activities still continue." "The practice of child marriage is, therefore, not in the best interest of a child."

to children's rights, does not made provisions that expressly prohibit child marriage and, although child marriage is not directly referred to in *CRC*, other rights linked to child marriage are addressed in *CRC*.⁷⁷

The absence of a provision that explicitly prohibits child marriage is used as the basis for the conclusion that *CRC* does not apply to boys and girls equally.⁷⁸ While *CRC* was designed to be "gender blind," an indication that the provisions of *CRC* are against gender discrimination and afford the same protection for boys and girls,⁷⁹ however, violations that primarily affect boys, such as child soldiers, are covered under in the *CRC* article, while the same consideration is not provided for violations affecting girls, especially with regard to child marriage.⁸⁰ In other words, *CRC* is more detailed with regard to the prohibition of harmful practices that affect boys, through express provisions that prohibit such practices more than harmful practices that affect girls such as child marriages.

Notwithstanding the gap, there are certain rights in *CRC* that indirectly place an obligation on States Parties to protect girls from becoming victims of child marriage.⁸¹ These guaranteed rights include, article 2 of *CRC*, which requires states to ensure and respect the rights set forth in *CRC*, and guaranteed to all children without discrimination, for example, the sex of a child.⁸² Article 3 of *CRC* places obligation on institutions such as courts, administrative authorities and legislative bodies to take into account the best interest of the child.⁸³ Furthermore, article 6 of *CRC* requires states to guarantee that a child's right to life is protected and that the child is assured of

⁷⁷ Addaney and Azubike *ALF* 2017 115. "Firstly, the right to protection from all forms of abuse, girls get abused by their husbands or their in-laws whether it be emotional or physical abuse, and secondly, the right to be protected from harmful traditional practices, forced child marriage is still practised by some communities and it is prejudicial to the health of the girl child." "Thirdly, the child's right to express his or her views freely are enshrined in the *CRC* guarantees; the right of children to express their views freely in matters that affect their lives, hence they are entitled to refuse consent to marriage."

⁷⁸ Askari *JICL* 5:123 1998 124.

⁷⁹ Askari *JICL* 5:123 1998 124.

⁸⁰ Askari *JICL* 5:123 1998 124.

⁸¹ Ebobrah and Eboibi *JAL* 61 2017 337.

⁸² Article 2 of the of the *United Nations Convention on the Rights of the Child*, 1989.

⁸³ Article 3 of the of the *United Nations Convention on the Rights of the Child*, 1989.

survival and development.⁸⁴ The practice of child marriage threatens the life of girls and puts their future at risk.

Article 35 of *CRC* serves as a safety net to guarantee that children are safe from being abducted, or other forms of exploitation or any other purpose.⁸⁵ Thus, article 35 of *CRC* provides double protection for children, in that, while the main forms of trafficking are dealt with in articles 34 and 36 of *CRC*, article 35 requires "blanket action" on abduction, sale or the traffic of children for any purpose or in any form.⁸⁶ This simply means that article 35 of *CRC* requires effective action from States Parties to prevent and end trafficking of children, resulting in all forms of exploitation as mentioned in articles 34 and 36 of *CRC*. Government must fulfil its legal obligations to all children and by effective action, a government needs to implement policies, programmes and create awareness to assist in curbing the problem of child marriage through child trafficking.⁸⁷

However, while *CRC* protects children against trafficking, it should be noted that it fails to stipulate what constitutes the offence of trafficking in children.⁸⁸ *CRC* does not mention the means that constitute the offence of child trafficking, such as coercion, force, abduction and fraud as mentioned under the definition of trafficking in article 3 of the *Protocol to prevent, suppress and punish trafficking in persons, especially women and children, 2000*.

⁸⁴ Article 6 of the of the *United Nations Convention on the Rights of the Child, 1989*.

⁸⁵ Tsireledzani: *Understanding the Dimensions of Human Trafficking in Southern Africa, 2010* 28. See also articles 32 and 36 of the *United Nations Convention on the Rights of the Child, 1989*.

⁸⁶ Tsireledzani: *Understanding the Dimensions of Human Trafficking in Southern Africa, 2010* 29.

⁸⁷ Frederick, Kabir and Kamath, 2009 *IRC* 12.

⁸⁸ Tsireledzani: *Understanding the Dimensions of Human Trafficking in Southern Africa, 2010* 29. Article 3 of the *Protocol to prevent, suppress and punish trafficking in persons, especially women and children, 2000* defines trafficking as: (a) "Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation." "Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

According to Davidson, *CRC* is ineffective because it has no "enforcement teeth".⁸⁹ *CRC* is merely ineffective to stop the most alarming abuses of children, for instance, child marriage since it has no enforcement mechanisms adequate to end such abuses.⁹⁰ This means that that *CRC* makes provisions and principles that protect children from harmful practices, but practices such as child marriage exist, although most countries have ratified *CRC*. For example, South Africa is one of the countries that has ratified *CRC* and, in some parts of the country, the practice is prevalent.⁹¹ This clearly serves as an example of how *CRC* lacks enforcement mechanisms, because once a States Party does not meet its obligations, it can only merely provide recommendations but, cannot force the country to enforce its provisions.⁹² Subsequently, when States Parties fail to enforce the ban on child marriages, they perpetuate the type of discrimination listed in article 2(2) of *CRC*.⁹³

Askari contends that the practice of child marriage violates article 24(3) of *CRC* whereby, States Parties are required to "abolish traditional practices prejudicial to the health of children." One common outcome of child marriage is the health risks associated with early pregnancy and, regrettably, article 24(3) of *CRC* fails to expressly mention child marriage as one of the traditional practices.⁹⁴ This gives a leeway to States Parties to choose to deny that the practice of child marriage falls under the provisions of article 24(3) of *CRC*.⁹⁵

As the most comprehensive legal instrument on children's rights, *CRC* fails to directly protect children, girls in particular, from child marriage, as it does not explicitly list "child marriages" under the provision that deals with harmful traditional practices. This

⁸⁹ Davidson *MSILR* 22 2014 522.

⁹⁰ Davidson *MSILR* 22 2014 522.

⁹¹ Maluleke *PER* 2012 1.

⁹² Askari *JICL* 1998 128.

⁹³ Article 2 of the *United Nations Convention on the Rights of the Child*, 1989 states that, "the *CRC* applies to all children, whatever their race, religion or abilities; whatever they think or say, whatever type of family they come from." "It does not matter where children live, what language they speak, what their parents do, whether they are boys or girls, what their culture is, whether they have a disability or whether they are rich or poor. No child should be treated unfairly on any basis." See also Askari *JICL* 1998 128.

⁹⁴ Askari *JICL* 1998 130. See also article 24(3) of the *United Nations Convention on the Rights of the Child*, 1989.

⁹⁵ Askari *JICL* 1998 130.

is problematic in a sense that States Parties have a gateway in interpreting what forms of traditional practices qualify to fall under harmful traditional practices, making it difficult to end the practice of child marriages. Thus, countries could argue that child marriages do not have a negative effect on young girls and do not infringe their rights or cause any prejudicial harm.

2.2.2 *Universal Declaration of Human Rights, 1948*

Article 4 of the *Universal Declaration of Human Rights, 1948*, places an obligation on state members, such as South Africa, to prohibit slave-like practices that encourage exploitation.⁹⁶ According to article 16(1) of *UDHR*, both men and women have the right to marry with the guarantee of equal rights to and during a marriage.⁹⁷ Subsection (2) further states that the marriage shall be entered into with the free and full consent of both parties entering into the marriage, this is contrary to the harmful practice of child marriage.⁹⁸

Both *UDHR* and the *International Covenant on Civil Political Rights, 1966* provide that no marriage shall be entered into without the free and full consent of the intending spouses; these provisions leave no room for any exceptions as it is clear that consent has to be given by both parties.⁹⁹

Robles states that *UDHR* emphasises that intending spouses of "full age" have a right to get married and have equal rights, thus, when young girls marry an older spouse, the age difference makes it difficult to have equal status in the marriage.¹⁰⁰ "Free and full consent" infers that young girls should not be getting married because they do not acquire the capacity to freely and fully consent to the marriage, and the consent of children is overlooked by parents, which underlines their vulnerability.¹⁰¹

⁹⁶ Article 4 of the *Universal Declaration of Human Rights, 1948*. (Hereafter, referred to as "*UDHR*").

⁹⁷ Article 16(1) of the *Universal Declaration of Human Rights, 1948*.

⁹⁸ Article 16(2) of the *Universal Declaration of Human Rights, 1948*.

⁹⁹ Article 16(2) of the *Universal Declaration of Human Rights, 1948* and article 23(3) of the *International Covenant on Civil Political Rights, 1966*.

¹⁰⁰ Robles *ICLR* 2018 111.

¹⁰¹ Robles *ICLR* 2018 111.

The United Nations Human Rights Office of the High Commissioner, stated in a series of articles published to mark the 70th anniversary of the adoption of *UDHR* that, the phrases "full and free consent" and "full age" amount to the prohibition of child marriages because of lack of capacity to consent.¹⁰²

2.2.3 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1964

Article 1 of the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1964* states that, no marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person as prescribed by law.¹⁰³ State Parties must specify a minimum age for marriage that is not less than eighteen years in terms of this convention, no marriage shall be legally entered into by any person under this age as per article 2 of the Convention.¹⁰⁴

2.2.4 Convention on the Elimination of All Forms of Discrimination against Women, 1979

Article 16(2) of the *Convention on the Elimination of All Forms of Discrimination against Women, 1979* provides only that a minimum age for marriage must be specified, and this will assist in preventing marriages of children below the age of eighteen, with the assumption that children from eighteen years are more mature to marry.¹⁰⁵ In 1994, the *CEDAW* Committee on a General Recommendation on Equality and Family Relations recommended that the minimum age for marriage for both boys and girls be eighteen.¹⁰⁶ With regard to the minimum age, article 16(2) of *CEDAW* was interpreted to require that the minimum age of marriage be eighteen for both men and women

¹⁰² United Nations Human Rights Office of the High Commissioner the *Universal Declaration of Human Rights at 70: still working to ensure freedom, equality and dignity for all* 2018 2.

¹⁰³ Article 1 of the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1964*.

¹⁰⁴ Article 2 of *the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1964*.

¹⁰⁵ Article 16(2) of *Convention on the Elimination of All Forms of Discrimination against Women, 1979*.

¹⁰⁶ General Recommendation 21 1994 para 36. See also Mwambene and Sloth-Nielsen 2011 11 *AHRLJ* 9.

and that marriage should not be legal unless both parties have attained the "full maturity and capacity to act."¹⁰⁷

Whereas, child marriage affects young boys as well, the number of girls affected is much higher and due to its impact on girls, it could be concluded that child marriage is a manifestation of discrimination against girls, which goes against the provisions of *CEDAW* and is clearly outlawed.¹⁰⁸ *CEDAW* has been criticised as "one of the weakest links in the chain of international human rights law", due to its weak implementation mechanisms and is encumbered with reservations.¹⁰⁹ The Convention has effectively failed to ensure women's equality under the nationality laws of some States Parties.¹¹⁰

2.2.5 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, 2000

The purpose of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, 2000* is firstly, to prevent and combat human trafficking with the focus of protecting women and children since they are regarded to be the most vulnerable to human trafficking.¹¹¹ Secondly, to promote and facilitate co-operation between states, to combat and eradicate human trafficking.¹¹² The *Palermo Protocol* has been described as "comprising a strong law enforcement tool", along with comprehensively weak language on human rights protection and victim assistance.¹¹³ In the case of child marriage being a form of child trafficking, the act of "transfer" in the definition of trafficking, in terms of the *Palermo Protocol*, is satisfied because the girl is transferred from her family to her husband's family by means of force.¹¹⁴

¹⁰⁷ Bozic *ECLIC* 2018 53.

¹⁰⁸ Swart and Hassen *AHRLJ* 16 2016 463.

¹⁰⁹ Menz *CLR* 104 2016 522.

¹¹⁰ Menz *CLR* 104 2016 522.

¹¹¹ Article 2(a) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, 2000*. "South Africa has signed and ratified the *United Nations Convention against Transnational Organised Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* (henceforth referred to as the Palermo Protocol), which came into force on 29 September 2003 and 25 December 2003 respectively."

¹¹² Article 2(b) and (c) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, 2000*.

¹¹³ Human Science Research Council 21.

¹¹⁴ Warner 2004 12 *JGSPL* 261.

Article 9(1) of the *Palermo Protocol* requires States Parties to implement comprehensive policies, programmes and other measures to prevent and combat trafficking in persons, and to provide protection to victims of trafficking from revictimisation.¹¹⁵ Article 9(5) of the *Palermo Protocol* further states that member states must adopt or strengthen legislative or other measures, through bilateral and multilateral cooperation to prevent the demand that advances all forms of exploitation of persons, especially women and children, leading to trafficking.¹¹⁶

The *Palermo Protocol* comprises mandatory language, for instance, "States Parties shall" while the protections and assistance provisions contain weaker terms, for example, "in appropriate cases" and "to the extent possible."¹¹⁷ Given the patterns of trafficking, which lead to child marriage, the question of why the *Palermo Protocol* did not include a specific reference to child marriage may well be raised.¹¹⁸ In fact, efforts to include some form of child marriage actually existed during initial negotiations, according to the *Travaux Préparatoires of the Palermo Protocol*, where a number of states had recommended that the term "forced marriage" be included, as a separate item under the definition of exploitation.¹¹⁹

The Special Rapporteur on Violence against Women suggested adding the term "slave-like" in order to capture practices such as forced marriages.¹²⁰ Instead, the phrase

¹¹⁵ Article 9(1) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*, 2000.

¹¹⁶ Article 9(1) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*, 2000.

¹¹⁷ Tsireledzani: *Understanding the Dimensions of Human Trafficking in Southern Africa*, 2010 21.

¹¹⁸ MacLean *DJILP* 67 2012 79.

¹¹⁹ *Travaux Préparatoires* 344. The *Travaux Préparatoires*, "like a legislative history, is a document that details negotiations, proposed text development, and input from a variety of interested parties. It provides context and illuminates the drafters' and initial state parties' intended meanings of the provisions of the Protocol."

¹²⁰ *Travaux Préparatoires* 334. Ms. Dubravka Šimonovic was appointed as United Nations Special Rapporteur on violence against women, in June 2015 by the UN Human Rights Council. "According to her mandate, the Special Rapporteur is requested to: (a) Seek and receive information on violence against women, its causes and consequences from Governments, treaty bodies and specialised agencies;" (b) "Recommend measures, ways and means at the local, national, regional and international levels to eliminate all forms of violence against women and its causes, and to remedy its consequences; (c) "Work closely with all special procedures and other human rights mechanisms of the Human Rights Council and with the treaty bodies, taking into account the request of the Council that they regularly and systematically integrate the human rights of women and a gender perspective into their work;" and (d) "Continue to adopt a comprehensive and universal approach to the elimination of violence against women, its causes and consequences,

"practices similar to slavery" was adopted as a catch-all, with "at a minimum" inserted to both allow States Parties to go beyond the offences list and to also guarantee that exploitation was flexible enough to include other acts that might occur in the future.¹²¹ Whereas, neither slavery nor practices similar to slavery are defined in the *Palermo Protocol*, the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, 1956 include possibly, the broadest definition of child marriage as a slave-like practice as follows:

A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group.¹²²

The definition is convenient for capturing various forms of coercive marriage, including acts involving individuals and organisations outside of the family.¹²³ According to article 1(c)(i) of the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, States Parties are obligated to take steps to end practices in which women who have no right to refuse, are promised or given into marriage.¹²⁴

According to Maclean, the reflection of what drives all forms of trafficking in persons is the inclusion of an exchange of money or other valuable consideration, and the definition of trafficking of persons brings up an unavoidable and difficult debate over where to draw the line between "marriage trafficking" and "cultural practices of child

including causes of violence against women relating to the civil, cultural, economic, political and social spheres."

¹²¹ *Travaux Préparatoires* 343.

¹²² Article 1(c)(i) of the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 1956.

¹²³ MacLean *DJILP* 67 2012 80.

¹²⁴ Article 1(c)(i) of the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 1956. "Each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and, as soon as possible, the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention signed at Geneva on 25 September 1926." (c) "Any institution or practice whereby: (i) A woman, without the right to refuse, is promised or given into marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group."

marriage" condemned by instruments of international law.¹²⁵ The author further states that, although the exact reasons for failure of negotiating parties to include marriage as a form of exploitation is unclear, it is likely that disagreement over what forms of child marriages would qualify as human trafficking was, at least, one issue.¹²⁶ Thus, it is vital to begin with practices that closely resemble other forms of trafficking of persons, for instance, commercial marriages performed solely to deliver an individual into forced labour, whether sexual or otherwise.¹²⁷

2.2.6 African Charter on the Rights and Welfare of the Child, 1990

2.2.6.1 General

Article 16 of the *African Charter on the Rights and Welfare of the Child*, 1990 provides that States Parties must take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and, particularly, physical or emotional abuse, neglect, maltreatment such as sexual abuse while in the care of the child.¹²⁸ Furthermore, article 21(1) of *ACRWC* states that appropriate measures have to be taken by member states to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child.¹²⁹

Article 21(2) of *ACRWC* states that child marriage and the betrothal of boys and girls shall be prohibited and effective action, like legislation shall specify the minimum age of marriage to be eighteen years.¹³⁰ *ACRWC* has relevant provisions that address the issue of human trafficking, child trafficking, in particular. For example, article 29(1)(a) of *ACRWC*, provides that member states must take appropriate measures to prevent the abduction, sale of, or trafficking in children for any purpose or in any form, by any person, including parents or legal guardians of the child.¹³¹ In other words, it can be

¹²⁵ MacLean 2012 *DJILP* 67 80. "This condemnation is in the form of any infringement of the right of individuals to freely choose whom to marry, a tenant of many international treaties."

¹²⁶ MacLean 2012 *DJILP* 67 80.

¹²⁷ MacLean 2012 67 *DJILP* 81.

¹²⁸ Article 16 of the *African Charter on the Rights and Welfare of the Child*, 1990.

¹²⁹ Article 21(1) of the *African Charter on the Rights and Welfare of the Child*, 1990.

¹³⁰ Article 21(2) of the *African Charter on the Rights and Welfare of the Child*, 1990.

¹³¹ Article 29(1)(a) of the *African Charter on Rights and Welfare of the Child*, 1990.

argued that article 29(1)(a) of *ACRWC* protects children from child marriage, as it can be one of the purposes of children being trafficked, sold or abducted.

Just like *CRC*, *ACRWC* fails to state what constitutes trafficking in children.¹³² However, in contrast to other international law instruments, such as *CRC*, for example, *ACRWC* prohibits the marriage of persons under the age of eighteen.¹³³ It explicitly sets the minimum age of marriage at eighteen and allows no exceptions for local religious or other cultural practices; it also does not allow for exceptions based upon the consent of a local authority or the parents or guardians of the children concerned.¹³⁴ *ACRWC* provides greater protection to the rights of the child, since it specifically establishes eighteen years as the minimum age for marriage, thus this approach helps to avoid situations where there is a discrepancy between the minimum age of marriage for boys and girls, which is consistently lower for girls.¹³⁵

2.2.6.2 The best interest principle

The most significant element of children's human rights law is that children's best interests are given paramount consideration.¹³⁶ Article 4(1) of *ACRWC* states that the best interest of the child shall be the primary consideration, child marriages contradict the best interest principle since children are not mature enough physically and emotionally to get married.¹³⁷ Article 4(1) of *ACRWC* is broad and applies to all actions by States Parties concerning the child as well as all actions by other stakeholders, such as parents, traditional leaders and community representatives who, in the best interests of the child, must not "perpetrate, perpetuate or support child marriage."¹³⁸

Article 4(1) of *ACRWC* states that the best interests of the child must be "the primary consideration" in all actions concerning children, thus an indication that it is a principle

¹³² Tsireledzani: *Understanding the Dimensions of Human Trafficking in Southern Africa*, 2010 38.

¹³³ Warner *JGSPL* 12 2004 257. See also Article 21(2) of the *African Charter on the Rights and Welfare of the Child*, 1990.

¹³⁴ Warner *JGSPL* 12 2004 257. See also Article 21(2) of the *African Charter on the Rights and Welfare of the Child*, 1990.

¹³⁵ Memzur *SAPR/PL* 23 2008 20.

¹³⁶ Ekundayo *IJHSS* 5 2015 149.

¹³⁷ Article 4(1) of the *African Charter on the Rights and Welfare of the Child*, 1990.

¹³⁸ Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on ending child marriage, 2017.

that will usually take priority over others.¹³⁹ According to Chirwa, *ACRWC* provides better protection for children in Africa as the best interests principle under *ACRWC* is the overriding consideration.¹⁴⁰ The author further states that, unlike *CRC*, *ACRWC* goes a step further by mentioning that the best interests of the child must be "the primary consideration" in all matters relating to the child.¹⁴¹ In contrast, *CRC* considers the best interest principle as "a primary consideration", implying that other considerations are equally determinant.¹⁴²

2.2.7 *Protocol on the Rights of Women in Africa, 2005*

Harmful practices are defined in article 1(g) of the *Protocol on the Rights of Women in Africa, 2005* as follows:

All behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.¹⁴³

Karugonjo-Segawa states that the *Maputo Protocol* not only defines harmful practices as acts that affect the fundamental rights of women and girls negatively, but also attitudes, which could include mind-sets and ways of thinking of others, which are not only ambitious but, also bring up the question of how much can actually be affected by law and legal mechanisms.¹⁴⁴ Furthermore, Karugonjo-Segawa argues that this definition is rather unique and is not provided for in *CEDAW*, most likely because harmful practices such as child marriages are commonly practised in Africa and, as such, their definition is not very pertinent in *CEDAW*.¹⁴⁵

The basis for the prohibition against child marriage is found in the provisions that prohibit discrimination and harmful practices.¹⁴⁶ In terms of article 4(1)(g) of the

¹³⁹ Article 4(1) of the *African Charter on the Rights and Welfare of the Child, 1990*.

¹⁴⁰ Chirwa *IJCR* 2002 160. See also article 4(1) of the *African Charter on the Rights and Welfare of the Child, 1990*.

¹⁴¹ Chirwa *IJCR* 2002 160.

¹⁴² Chirwa *IJCR* 2002 160.

¹⁴³ Article 1(g) of the *Protocol on the Rights of Women in Africa, 2005*.

¹⁴⁴ Karugonjo-Segawa *DIHR* 2005 15.

¹⁴⁵ Karugonjo-Segawa *DIHR* 2005 15.

¹⁴⁶ Budoo and Ramnauth *CHR* 2018 48.

Maputo Protocol, States Parties have an obligation to ensure that traffickers are prosecuted, and women and children, who are at risk of being trafficked, are protected.¹⁴⁷ Article 5 of the *Maputo Protocol* obliges States Parties to take measures that aim to eradicate all practices that affect the rights of women.¹⁴⁸

Furthermore, article 6(1)(a) and (b) of the *Maputo Protocol* places an obligation on member states to enact appropriate national legislative measures to ensure that no marriage shall take place without the free and full consent of both parties and that the minimum age of marriage for women shall be eighteen.¹⁴⁹ The minimum age is clearly specified as eighteen by the protocol, which affirms children's rights, particularly girls to be protected from child marriage. It also provides for freedom from child marriage as the protocol exceeds current global human rights protections by prohibiting child marriage practices and promoting the rights of girls to decide themselves on matters of marriage and family.¹⁵⁰

2.2.8 *The African Youth Charter, 2006*

Even though the *African Youth Charter, 2006* is a human rights instrument with main aim of empowering the African youth, it is also relevant to the problem of trafficking of persons. Article 23(1) of the *African Youth Charter* states that member states must acknowledge the need to eliminate discrimination against girls and young women in accordance with international, regional and national human rights conventions and obligations. In this regard, they shall:

- a. Introduce legislative measures that eliminate all forms of discrimination against girls and young women and ensure their human rights and fundamental freedoms;
- b. Protect girls and young women from economic exploitation and from performing work that is hazardous, takes them away from education or that is harmful to their mental or physical health;

¹⁴⁷ Article 4(1)(g) of the *Protocol on the Rights of Women in Africa, 2005*.

¹⁴⁸ Article 5 of the *Protocol on the Rights of Women in Africa, 2005*.

¹⁴⁹ Article 6(1)(a) and (b) of the *Protocol on the Rights of Women in Africa, 2005*.

¹⁵⁰ The *Protocol on the Rights of Women in Africa, 2005*.

- c. Enact and enforce legislation that protects girls and young women from all forms of violence, genital mutilation, incest, rape, sexual abuse, sexual exploitation and trafficking.¹⁵¹

South Africa should take into account the provisions of article 23 of the *African Youth Charter* in order to prevent further discrimination of girls and eliminate gender discrimination relating to child marriages as child marriages seemingly affect girls only. By taking measures to prevent discriminations against girls and young women, such as creating awareness programmes, and teaching members of the community, especially boys and men, about equality and discrimination against girls and young women. Such measures will also add and assist in combating trafficking of children, particularly trafficking of young girls for the purpose of marriage.

2.2.9 The Charter on Human and People's Rights (Banjul Charter), 1981

Article 5 of the *Charter on Human and People's Rights*, 1981 provides that every person has the right to have their dignity inherent in a human being respected and to the recognition of his or her legal status, and all forms of exploitation and degradation of man such as slavery, torture, cruelty, inhuman or degrading punishment and treatment shall be prohibited.¹⁵² In terms of article 18(3) of the *Banjul Charter*, a country must make sure that every discrimination against women and children are eliminated as required by international declarations and conventions and also ensure the protection of the rights of the woman and the child is upheld.¹⁵³

According to Musiwa, although the *Banjul Charter* does not use the term "child marriage" verbatim, article 18 of the *Banjul Charter* infers that 'to protect children's rights' is equivalent to the obligation of the government to uphold the protection of children's rights from all harmful practices, including child marriage.¹⁵⁴ According to Ssenyonjo, article 18 of the *Banjul Charter* prohibits discrimination against women only in the context of the family and clear provisions to guarantee the right of consent to

¹⁵¹ Article 23(1)(a), (i) and (l) of the *African Youth Charter*, 2006.

¹⁵² Article 5 of the *Charter on Human and People's Rights* 1981. Hereafter referred to as the *Banjul Charter*.

¹⁵³ Article 18(3) of the *Charter on Human and People's Rights*, 1981.

¹⁵⁴ Musiwa 2018 *LJ* 99. See also the article on *the Charter on Human and People's Rights, 1981*.

marriage are absent.¹⁵⁵ In addition, such an omission is influenced by the *Banjul Charter's* emphasis on traditional African values and traditions with the lack of addressing concerns that customary practices, such as child marriage can be harmful to children.¹⁵⁶

2.2.10 AU: Solemn Declaration on Gender Equality in Africa, 2004

The African Union (AU), in its *Solemn Declaration on Gender Equality in Africa, 2004*, encouraged states to establish campaigns for systematic prohibition of the abuse of girl children as wives and sex slaves in violation of their rights as enshrined in *ACRWC*.¹⁵⁷ Furthermore, states were invited to initiate public campaigns against gender-based violence as well as trafficking of women and girls, and importantly, to reinforce legal mechanisms for the protection of women and girls at national level.¹⁵⁸

The judgment in *Hadijatou Mani Koraou v. Republic of Niger* ECW/CCJ/JUD/06/08 of 27 October 2008 is important because it speaks to what the state should do to prevent and protect children from child marriage.¹⁵⁹ The facts of the case are as follows: In 1996, the applicant, Mrs Hadijatou Mani Koraou was 12 years when she was sold to the 46 year old tribal chief, Mr El Hadj Souleymane Naroua, for the amount of 240.000 CFA francs. The transaction between the applicant's family and Mr El Hadj Souleymane Naroua transpired in the name of the "*Wahiya*", a practice of child marriage, currently practised in Niger, which entails acquiring a young girl, commonly a slave, to be a servant of the household, but under the condition of being a fifth wife, known as "*Sadaka*."

On 18 August 2005, El Hadj Souleymane Naroua gave the applicant a liberation certificate from slavery. After receiving the liberation certificate, the applicant left the household of her husband and former master. He did not allow her to leave, because she was and remained his wife. The civil and customary tribunal of Konni, in judgment on 20 March 2006, found that "the applicant and El Hadj Souleymane Naroua were

¹⁵⁵ Ssenyonjo 2007 51 *JAL* 44. See also the article on *the Charter on Human and People's Rights, 1981*.

¹⁵⁶ Ssenyonjo 2007 51 *JAL* 44.

¹⁵⁷ AU: *Solemn Declaration on Gender Equality in Africa* 2004 para 3.

¹⁵⁸ AU: *Solemn Declaration on Gender Equality in Africa* 2004 para 4.

¹⁵⁹ *Hadijatou Mani Koraou v. Republic of Niger* ECW/CCJ/JUD/06/08 of 27 October 2008.

never properly married, that there was no religious ceremony and Hadijatou Mani Koraou could continue living her own life with the person of her choice."

In October 2008, the Republic of Niger was found to be in violation of the prohibition of slavery as stated in the *African Charter on Human and Peoples' Rights* by the Economic Community of West African States Community Court of Justice.¹⁶⁰ The applicant, Mrs Hadijatou Mani Koraou, claimed her fundamental human rights were violated by the defendant, and she was discriminated against on the grounds of sex and social origins in violation of articles 2 and 18(3) of the *African Charter of Human and Peoples' Rights*.¹⁶¹ The applicant further argued that her rights to "equal protection of the law and equality before the law", as guaranteed in article 3 of the *Banjul Charter*, were infringed upon, because the *Sadaka* or the sale of girls, and not to freely consent to marriage, constituted gender discrimination.¹⁶²

The court held that violation based on discrimination is not attributable to the State but, rather, due to El Hadj Souleymane Naroua and, therefore, making the ground of discrimination ineffective.¹⁶³ The court stated as follows:

When failing to deal with a prohibited offence of its own volition and failing to take adequate measures to ensure punishment, the national judge did not assume its duty of protecting Hadijatou Mani Koraou's human rights and, therefore, engaged the defendant's responsibility as the administrative authority's one when it declared, listen, "I cannot do anything, you must leave."¹⁶⁴

The court held that the State did not adequately protect the applicant's rights against slavery, as the practice of *sadaka*, rooted on social origin considerations, placed the applicant in a disadvantageous situation and infringed upon her right to equal dignity afforded to everyone.¹⁶⁵ The court further held that, the situation of slavery that the

¹⁶⁰ *Hadijatou Mani Koraou v. Republic of Niger* ECW/CCJ/JUD/06/08 of 27 October 2008 para 62. See also Allain 2009 *AJIL* 311.

¹⁶¹ *Hadijatou Mani Koraou v. Republic of Niger* ECW/CCJ/JUD/06/08 of 27 October 2008 para 62. See also articles 2 and 18(3) of the *African Charter of Human and Peoples' Rights*, 1981.

¹⁶² *Hadijatou Mani Koraou v. Republic of Niger* ECW/CCJ/JUD/06/08 of 27 October 2008 para 62.

¹⁶³ *Hadijatou Mani Koraou v. Republic of Niger* ECW/CCJ/JUD/06/08 of 27 October 2008 para 71.

¹⁶⁴ *Hadijatou Mani Koraou v. Republic of Niger* ECW/CCJ/JUD/06/08 of 27 October 2008 para 84.

¹⁶⁵ *Hadijatou Mani Koraou v. Republic of Niger* ECW/CCJ/JUD/06/08 of 27 October 2008 para 3 15.

applicant was exposed to, caused her physical, psychological and moral harm, and the State was responsible due to the inaction of its administrative and judicial authorities.¹⁶⁶

2.3 Conclusion

International and regional legal instruments have a strong position against forced child marriages.¹⁶⁷ Child marriage is both a manifestation of gender inequality and a reflection of the social norms that contribute to the discrimination against girls and women and, is incompatible with the objects of equality.¹⁶⁸ Strong advocacy has to be raised against practices of child marriage that are discriminatory to the child on grounds of sex or other status.¹⁶⁹

Young girls are vulnerable to child marriages and their parents or guardians overlook their rights to consent to the marriage as guaranteed in international and regional law. This is not in line with the standard of legal instruments with regard to the "best interest principle", which is afforded to every child, as the parents or guardians decide to marry off their daughters to older men, for different reasons such as "bride price."

Marriage between two parties, where one of the spouses is under the age of eighteen, a young girl, in particular, has not given her consent, should not be legal as this acknowledges that children below that age are not fully mature and do not have the capacity to act.¹⁷⁰ Marrying off a child before she reaches the age of eighteen, as stipulated by international and regional legal instruments, deprives the girl child of her childhood and her right to access education, which could improve her life and the lives of members of her family.

¹⁶⁶ *Hadijatou Mani Koraou v. Republic of Niger* ECW/CCJ/JUD/06/08 of 27 October 2008 para 4 15. "For this reason, the applicant is entitled to an all-inclusive compensation for the harm caused by slavery. Says that Mrs Hadijatou Mani Koraou was victim of slavery and that the Republic of Niger was responsible because of the inaction of its administrative and judicial authorities."

¹⁶⁷ Robles *JCLR* 2018 110.

¹⁶⁸ Budoo and Ramnauth *CHR* 2018 48.

¹⁶⁹ Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on ending child marriage, 2017.

¹⁷⁰ IPPF *Ending child marriage: A guide for global policy action*, 2006 8.

CHAPTER 3: LEGAL FRAMEWORKS ON THE PROTECTION OF CHILDREN IN SOUTH AFRICA

3.1 Introduction

In South Africa, girls are not only trafficked for sexual or labour purposes, but the trafficking of young girls for the purpose of marriage is prevalent in the country as well.¹⁷¹ It is important to understand that child marriage is viewed as a form of human trafficking as, it involves the forced removal of one being from one point to another without their consent. This chapter focuses on the different pieces of legislation and laws that deal with human rights, especially child marriage.

3.2 The South African context

The South African version of forced marriage is generally known as "*ukuthwala*." *Ukuthwala* is a custom that originated from the *Xhosas*, and although the custom is mainly practised among Xhosa-speaking tribes, the practice has expanded to different ethnic groups, such as the Mpondo and the Mfengu clans.¹⁷² It is vital to address issues confronted by marginalised girls, child brides in this case, in order to redress imbalances between men and women in South Africa.¹⁷³

There are three different forms of *ukuthwala* as follows: firstly, where the young girl is well aware of the intended abduction from her suitor. In other words, the parties plan her abduction together and the force used merely serves as a performance only;¹⁷⁴ secondly, the girl is not made aware of the agreement made by her family in secret, on her behalf, and the parents support the man's plan to abduct the girl, this usually happens in cases where the girl will not agree with her parent's choice;¹⁷⁵ and lastly, where the practice of *ukuthwala* takes place against the will of the girl, whereby,

¹⁷¹ Monyane 2013 *SARS* 64.

¹⁷² Mwambene and Sloth-Nielsen *AHRLJ* 2011 11 3. "Similar to the Indian tradition of arranged marriages, several girls in South Africa have been victims to such a similar system of arranged marriages, however, such arranged marriages take a different form better known as forced marriages as the marriage involves the abduction of young girls."

¹⁷³ Delport 2007 *UNESCO* 37.

¹⁷⁴ Erasmus, Jokani and Knoetze 2018 *OBITER* 749.

¹⁷⁵ Rice 2014 *JSAS* 388.

she is taken by force to the man's family home and because of the girl's unwillingness, the marriage "would arguably be a forced one."¹⁷⁶

This section focuses on the third form of *Ukuthwala*, better known as forced marriage, with reference to the case of *Jezile v S and Others*,¹⁷⁷ which is an example of how child marriages can be viewed as a form of child trafficking.¹⁷⁸ In this case, the complainant was 14 years old and the appellant 28 years old; the appellant decided that she would make a suitable wife.¹⁷⁹ On the same day, after seeing the complainant for the first time, he requested that the two families start *lobola* negotiations, which were concluded on the same day; and this was done without the mother's knowledge.¹⁸⁰ On 7 November 2013, the appellant was convicted in the Wynberg Regional Court on one count of human trafficking and three counts of rape. He was sentenced to 22 years direct imprisonment.¹⁸¹

These incidents with regard to the current practice of *ukuthwala*, clearly shows that the practice has taken the form of forced marriage and can no longer merely be viewed as a preliminary process undertaken in the lead-up to a customary marriage.¹⁸² According to Mwambene and Sloth-Nielsen, the current trend related to *ukuthwala*

¹⁷⁶ Mwambene and Sloth-Nielsen 2011 *JFLP* 7.

¹⁷⁷ *Jezile v S and Others* (A 127/2014) [2015] ZAWCHC 31; 2015 (2) SACR 452 (WCC); 2016 (2) SA 62 (WCC); [2015] 3 All SA 201 (WCC) (23 March 2015).

¹⁷⁸ Songololo Human Trafficking Week 2-9 October 2015: Stop Child Trafficking 2015 174. Available at <http://www.molosongololo.com>. Songolo "has observed that most South African cases involving trafficking include that of children being forced into marriage."

¹⁷⁹ *Jezile v S and Others* (A 127/2014) [2015] ZAWCHC 31; 2015 (2) SACR 452 (WCC); 2016 (2) SA 62 (WCC); [2015] 3 All SA 201 (WCC) (23 March 2015) para 6.

¹⁸⁰ *Jezile v S and Others* (A 127/2014) [2015] ZAWCHC 31; 2015 (2) SACR 452 (WCC); 2016 (2) SA 62 (WCC); [2015] 3 All SA 201 (WCC) (23 March 2015) para 7. "Having arrived at the appellant's house in his home village, the complainant was immediately dressed in *amadaki* (specially designed attire for the new bride, or *makoti*, which was referred to in the trial as "the makoti attire or clothing". "The complainant was unhappy and ill at ease (the reasons and extent of this were an issue during the trial) and left her new marital home a few days into the marriage, hiding first in a nearby forest and then, on her mother's instruction, at another house." "She was found and promptly returned to the appellant by her own male family members, two to three days later." "Shortly thereafter, the appellant informed the complainant that he would be returning to Cape Town with her." "This trip was by her male family members. Issues raised during the trial were the following: Whether the complainant travelled willingly with the appellant from the Eastern Cape to Cape Town; and remained in Cape Town willingly with him until she fled; or whether she was trafficked to Cape Town by the appellant for purposes of exploitation or abuse of a sexual nature."

¹⁸¹ *Jezile v S and Others* (A 127/2014) [2015] ZAWCHC 31; 2015 (2) SACR 452 (WCC); 2016 (2) SA 62 (WCC); [2015] 3 All SA 201 (WCC) (23 March 2015) para 1 and 2.

¹⁸² Mwambene and Sloth-Nielsen *AHRLJ* 2011 11 8.

may lead to child marriages. This is a serious matter that could lead to violence against women and children.¹⁸³ Section 9 of the *Constitution*, as well as international human rights standards, prohibit discrimination based on sex and recognise the equality of both sexes.¹⁸⁴ The practice of *ukuthwala* violates international human rights standards, particularly where a forced marriage is the result of such practice and equality norms make it clear that men and women are to have equal rights at the point of entry into marriage.¹⁸⁵ Musiwa argues that while preserving cultural practices, as they play a major role in the essence of humanity, such practices are outweighed by the recognition that child marriage, is a harmful practice to the "survival, growth and development of that same culture."¹⁸⁶

Furthermore, where consent is obtained through force, this is also a clear violation of international standards which require that there should be free and full consent from both parties.¹⁸⁷ Most forced marriages have slave-like characteristics, which are similar to child trafficking, thus it can be said to be a form of child trafficking.¹⁸⁸ This is because children in forced marriages are coerced into these unions and are compelled to engage in acts alike to victims of sex and labour trafficking.¹⁸⁹

3.3 Relevant legislation for the protection of children's rights

3.3.1 Constitution of the Republic of South Africa, 1996

The rights of children are protected in terms of section 28 of the *Constitution of the Republic of South Africa, 1996*.¹⁹⁰ Section 28(1)(d) of the *Constitution* states that children must be protected from abuse, maltreatment, degradation or neglect.¹⁹¹ According to section 28(2) of the *Constitution*, the best interest of the child is of

¹⁸³ Mwambene and Sloth-Nielsen *AHRLJ* 2011 11 8.

¹⁸⁴ Section 9 of the *Constitution of the Republic of South Africa, 1996*.

¹⁸⁵ Mwambene and Sloth-Nielsen *AHRLJ* 2011 11 10.

¹⁸⁶ Musiwa 2018 *LJ* 99.

¹⁸⁷ Article 1 of the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1964*. See also Mwambene and Sloth-Nielsen *AHRLJ* 2011 11 11.

¹⁸⁸ Warria 2017 79 *CYSR* 274.

¹⁸⁹ Warria 2017 79 *CYSR* 274.

¹⁹⁰ Section 28 of the *Constitution of the Republic of South Africa, 1996*. (Hereafter referred to as the "Constitution").

¹⁹¹ Section 28(1)(d) of the *Constitution of the Republic of South Africa, 1996*.

paramount importance in every matter concerning the child, and in terms of this provision, forced child marriage is clearly not in the best interest of the child as it violates the right of the child who needs to be cared for, including the right to be protected from abuse or degradation.¹⁹²

Section 9 of the *Constitution* prohibits discrimination on the basis of sex and recognises equality of sexes.¹⁹³ This section of the *Constitution* is important when it comes to forced child marriage since girls are the ones who are mostly forced to marry and are discriminated against, and there is no equality, as boys are valued more in most communities. According to section 10 of the *Constitution*, every person has inherent dignity and the right to have his or her dignity respected and protected; this provision applies to children, particularly those forced into marriage, which contradicts the rights to have their dignity respected.¹⁹⁴

Arguably, forced child marriages violates the rights of the young to have their human dignity respected and protected because of the abusive nature of the practice. Steinmann defines human dignity as follows:

The ontological element which entails that human beings have equal inherent human dignity that cannot be waived or diminished; the second element being the claim that inherent human dignity has to be recognised and respected; and the limited-state claim as the third element, which entails that states have a positive obligation to progressively realise human dignity through the mechanism of socio-economic rights.¹⁹⁵

According to Currie and de Waal, human dignity is a "central value of the objective and normative value system" assured by the *Constitution*.¹⁹⁶ The authors further argue that the right to dignity is a value that interprets all the other fundamental human

¹⁹² Section 28(2) of the *Constitution of the Republic of South Africa*, 1996.

¹⁹³ Section 9 of the *Constitution of the Republic of South Africa*, 1996. See also article 2 of the *United Nations Convention on the Rights of the Child*, 1989 and article 3 of the *African Charter on the Rights and Welfare of the Child*, 1990.

¹⁹⁴ Section 10 of the *Constitution of the Republic of South Africa*, 1996.

¹⁹⁵ Steinmann *PER* 2016 1.

¹⁹⁶ Currie and de Waal *The Bill of Rights Handbook* 250.

rights, such as the right to bodily integrity and not merely a justiciable and enforceable human right.¹⁹⁷

Through forced marriage, the rights to health of children, as guaranteed by the *Constitution* in section 27, is violated, as they are more vulnerable to getting infectious diseases, such STIs and HIV/AIDS.¹⁹⁸ In terms of section 29 of the Constitution, all children have the right to education and the state has an obligation to fulfil this right. Every child has a right to education, and through forced child marriage, the fundamental right to education of the girl child is infringed as she is forced to discontinue studies.¹⁹⁹

Mtshali argues that even though the *Constitution* guarantees equality for women and children, and prohibits the exploitation and abuse of children and women, there are, however, inadequate measures put in place to enforce the provisions of the *Constitution*, on protecting girls from forced marriages.²⁰⁰ Forced child marriage and the prejudicial harm it imposes on young girls, by depriving them of their childhood, among other, rights is inconsistent with *Ubuntu*.²⁰¹

3.3.2 Children's Act 38 of 2005

The *Children's Act* 38 of 2005 came into effect on 1 April 2010.²⁰² Section 12(1) of the *Children's Act* states that every child has the right not to be subjected to social, cultural

¹⁹⁷ Currie and de Waal *The Bill of Rights Handbook* 251. See also *S v Makwanyane* 1995 (3) SA 391 CC par 144 "where the Constitutional Court discussed the importance of the right to dignity." The Court stated that, "recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern." "This right, therefore, is the foundation of many of the other rights that are entrenched in the Bill of Rights."

¹⁹⁸ Section 27 of the *Constitution of the Republic of South Africa*, 1996.

¹⁹⁹ Section 29 of the *Constitution of the Republic of South Africa*, 1996.

²⁰⁰ Mtshali *SAJ* 2014 59.

²⁰¹ <http://www.justice.gov.za>. *Ubuntu* means "I am, because you are". "In fact, the word *ubuntu* is just part of the Zulu phrase "Umuntu ngumuntu ngabantu", which literally means that a person is a person through other people. *Ubuntu* has its roots in humanist African philosophy, where the idea of community is one of the building blocks of society." "*Ubuntu* refers to the nebulous concept of common humanity, oneness: humanity, you and me both. "*Ubuntu* is correct behaviour, but correct in this sense is defined by a person's relations with other people. *Ubuntu* refers to behaving well towards others or acting in ways that benefit the community."

²⁰² The *Children's Act* 38 of 2005.

and religious practices, which are detrimental to his or her well-being.²⁰³ A child below the minimum age may not be given out in marriage or engagement in terms of section 12(2)(a) of the *Children's Act*.²⁰⁴ Furthermore, if children are above that minimum age, they may not be given out in marriage or engagement without their consent.²⁰⁵ The provisions in this Act give a clear indication that forced child marriage infringes the protection of their well-being.

The *Children's Act* similarly defines "a child", in accordance with international and regional legislation as well as the *Constitution*, as a person under the age of 18.²⁰⁶ Trafficking is defined in the *Children's Act* along the provisions of article 3 of the *Trafficking in Persons Protocol*. The *Children's Act* makes provision for acts of "sale" and "supply."²⁰⁷ Article 3(c) of the *Trafficking in Persons Protocol* provides as follows:

Where a child is recruited, transported, transferred, harboured or received for purposes of exploitation, this, in itself, will be considered as trafficking in children even if the means such as threat, force, abduction, deception and fraud are not involved.²⁰⁸

It, therefore, simply means that trafficking in children can transpire merely when children are "recruited, transported, transferred, harboured or received for the purpose of exploitation."²⁰⁹ The definition of trafficking in children found in section 1 of the *Children's Act* has been criticised for causing a greater evidentiary burden than necessarily required by the *Trafficking in Persons Protocol* since it requires the acts of force, threat and coercion to be involved.²¹⁰

Section (12)(2)(a) of the *Children's Act* states that a child under the "minimum age set by law, for a valid marriage may not be given out in marriage or engagement."²¹¹ Mwambene and Sloth-Nielsen raise the question of whether the *Children's Act*

²⁰³ Section 12(1) of the *Children's Act* 38 of 2005.

²⁰⁴ Section 12(2)(a) of the *Children's Act* 38 of 2005.

²⁰⁵ Section 12(2)(a) of the *Children's Act* 38 of 2005.

²⁰⁶ *Children's Act* 38 of 2005 Interpretation Clause.

²⁰⁷ Tsireledzani: *Understanding the Dimensions of Human Trafficking in Southern Africa*, 2010 44.

²⁰⁸ Article 3(c) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* 2000. See also Kassan *Trafficking in Children* in Davel and Skelton Commentary on the *Children's Act* 2007 38.

²⁰⁹ Tsireledzani: *Understanding the Dimensions of Human Trafficking in Southern Africa* 2010 44.

²¹⁰ Tsireledzani: *Understanding the Dimensions of Human Trafficking in Southern Africa*, 2010 44.

²¹¹ Article (12)(2)(a) of the *Children's Act* of 2005.

adequately protects children, particularly girls, and whether the *Children's Act* gives legal practitioners sufficient power to protect girls against the abuse of forced marriage such as *ukuthwala*.²¹² The authors criticise the language of the *Children's Act* in section 12(2)(a) and (b), which mentions the "giving out" of a child to marriage without the consent of the child as follows: it is contrary to the *Constitution*; and it violates the right to freedom of choice and the right to education.²¹³

3.3.3 *Sexual Offences and Related Amendment Act 32 of 2007*

Having sexual intercourse with a child without her consent, following her abduction, constitutes rape, which, in essence, violates section 15 of the *Sexual Offences and Related Amendment Act 32 of 2007*. Section 15 of the *Sexual Offences Amendment Act* provides that a person who commits an act of sexual penetration with a child is, despite the consent of the child to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child.²¹⁴

The age of consent of a child is sixteen, which means that sexual intercourse with a child under the age of sixteen constitutes a sexual offence. Children as young as 12 are forced into marriage and, having sexual intercourse with a child that is 12 or below, is rape, as a child below that age is legally incapable of consent.²¹⁵ The definition of human trafficking, as provided for in section 70(2)(b) of the *Sexual Offences Amendment Act*, is in line with the definition in the *Palermo Protocol*. However, the definition is broader as it mentions terms such as "supply", "sale", "disposal" and "receiving" of a person and threat of harm.²¹⁶ According to section 71 of the *Sexual Offences Amendment Act*, a person found guilty of trafficking in persons may be convicted to life imprisonment.²¹⁷

²¹² South African Law Reform Commission Project 138 "The practice of ukuthwala" Discussion paper 132 2014 16. See also <http://www.justice.gov.za/salrc/dpapers/dp132-Ukutwala.pdf>

²¹³ South African Law Reform Commission Project 138 "The practice of ukuthwala" Discussion paper 132 2014 16. See also <http://www.justice.gov.za/salrc/dpapers/dp132-Ukutwala.pdf>

²¹⁴ Section 15 of the *Sexual Offences and Related Amendment Act 32 of 2007*.

²¹⁵ Section 17 of the *Sexual Offences Amendment Act 32 of 2007*.

²¹⁶ Section 70(2)(b) of the *Sexual Offences and Related Amendment Act 32 of 2007*.

²¹⁷ Section 17 of the *Sexual Offences Amendment Act 32 of 2007*.

3.3.4 *Recognition of Customary Marriages Act 120 of 1998*

Section 3(1) of the *Recognition of Customary Marriages Act 120 of 1998* requires that both parties consent to their marriage and to be above the age of eighteen, forced child marriage, therefore, could be used to overcome the bride's consent.²¹⁸ The age of consent is eighteen, if one of the parties is under that age, parental consent is an additional requirement for a valid marriage.²¹⁹ South Africa has no direct legal sanctions for child marriage, however, the *Prevention and Combating of Trafficking in Persons Act, 2013* is clear on the legal consequences that are applicable if a person concludes a forced marriage with another person, and this is applicable even in circumstances where parental consent is obtained.²²⁰

In the fight against child marriages, section 3(3)(a) of the *Recognition of Customary Marriages Act 120 of 1998* provides that the consent of a parent or parents, or legal guardian to the marriage is required if either of the prospective spouses is a minor.²²¹ Generally, this type of marriage, under this provision, can be justified under the basis of culture and tradition, which often leads to forced child marriage.²²²

According to Morake, the *Recognition of Customary Marriage Act* is not in accord with article 6 of the *Protocol on the Rights of Women in Africa*, since *Recognition of Customary Marriage Act* affords parents, legal guardians and the Minister the power to consent on behalf of minor children to enter into marriage.²²³ While the *Protocol on the Rights of Women in Africa* sets the minimum age for marriage at 18 and requires the consent of both prospective spouses, the *Recognition of Customary Marriage Act* "perpetuates social and cultural drivers of child marriages."²²⁴

3.3.5 *Prevention and Combating of Trafficking in Persons Act, 2013*

²¹⁸ Section 3(1)(a) of the *Recognition of Customary Marriages Act 120 of 1998*.

²¹⁹ Section 3(3)(a) of the *Recognition of Customary Marriages Act 120 of 1998*.

²²⁰ Kreston *SACJ* 2014 1 25.

²²¹ Section 3(3)(a) of the *Recognition of Customary Marriages Act 120 of 1998*.

²²² Morake 2018 *PSAF* 1.

²²³ Morake 2018 *PSAF* 18.

²²⁴ Morake 2018 *PSAF* 18.

The *Prevention and Combating of Trafficking in Persons Act* was passed in 2013 with the aim of making it easy to prosecute traffickers associated with child marriage. Section 4(2)(b) of the Act provides that any person who concludes a forced marriage with another person, for the purposes of exploitation of that person, is guilty of an offence.²²⁵ Parents and members of the family, who force a child into marriage for financial or other gain, can potentially be prosecuted under provisions which criminalise the transfer, harbouring or receipt of persons by means of force, intimidation or other forms of coercion or by abusing vulnerability, for the purpose of exploitation.

The *Prevention and Combating of Trafficking in Persons Act* defines trafficking in section 4(1) as any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic, by means of a threat of harm, the threat or use of force or other forms of coercion, the abuse of vulnerability.²²⁶ As such, child trafficking can be defined as occurring where the act of trafficking such as the delivery, recruitment, transportation, and the purpose of trafficking, which is exploitation, are present, and showing the victim was subjected to trafficking by means of abuse of vulnerability, due to the victim being a child.²²⁷

The definition provided in the Act is in compliance with the *Palermo Protocol*, however, there is no distinction at this point in time between trafficking in adults and trafficking in children, as is called for under *Palermo Protocol*.²²⁸ The Act defines abuse of vulnerability as "any abuse that leads a person to believe that he or she has no reasonable alternative but to submit to exploitation, and includes but is not limited to, taking advantage of the vulnerabilities of that person resulting from being a child."²²⁹ Children are targeted by traffickers because of their vulnerable status and this also plays a major role in their being forced into marriage. It should be noted that the *Trafficking in Persons Act* makes no direct reference to cultural practices, nonetheless,

²²⁵ Section 2(b) of the *Prevention and Combating of Trafficking in Persons Act* 2013.

²²⁶ Section 4(1) of the *Prevention and Combating of Trafficking in Persons Act* 2013.

²²⁷ Kreston *SACJ* 2014 1 26.

²²⁸ Kreston *SACJ* 2014 1 25.

²²⁹ Section 1 of the *Prevention and Combating of Trafficking in Persons Act* 2013.

it does define forced marriage, which is often due to trafficking or for the purpose of trafficking.²³⁰

3.3.6 Initiatives to combat human trafficking

South Africa launched an anti-trafficking programme in 2009 referred to as *Tsireledzani*, meaning to protect.²³¹ The National Prosecuting Authority, headed the *Tsireledzani* programme and involved different government, international, and national organisations.²³² The aims of the programme include guaranteeing South Africa's compliance with the 2000 *Palermo Protocol* through research, training and raising awareness.²³³ According to the National Prosecuting Authority:

This component will build the capacity of government officials, NGOs and the media to prevent trafficking from South Africa, identify trafficked persons, improve the standard of physical protection and direct assistance offered to victims of trafficking in the country, and increase the number of trafficking cases investigated and prosecuted by law enforcement and justice officials.²³⁴

3.4 Conclusion

It is important to note that although laws that prohibit child marriage and child trafficking are necessary, however, they are not sufficient to eliminate the practice in reality.²³⁵ South Africa has made a lot of effort in preventing and combating child marriage and child trafficking by designing and establishing campaigns to create awareness. For instance, the Department of Social Development, which is the leading department for the national multi-sectoral Child Protection Week campaign, where awareness is raised through educational talks, radio talks and promotional materials, specifically focuses its campaigns on marginalised communities.²³⁶

²³⁰ The *Prevention and Combating of Trafficking in Persons Act* 2013. "Forced marriage, for this purpose, means a marriage concluded without the consent of each party to the marriage."

²³¹ <https://www.loc.gov/law/help/human-trafficking/southafrica.php> para B.

²³² <https://www.loc.gov/law/help/human-trafficking/southafrica.php> para B.

²³³ <https://www.loc.gov/law/help/human-trafficking/southafrica.php> para B.

²³⁴ <https://www.loc.gov/law/help/human-trafficking/southafrica.php> para B.

²³⁵ Budoo and Ramnauth *CHR* 2018 56.

²³⁶ Budoo and Ramnauth *CHR* 2018 70.

Furthermore, in 2102, the South African Commission for Gender Equality investigated child marriage, in the form of *ukuwthala*, by assessing gaps found in government's response and prevention efforts and made a few recommendations, such as providing "training on how to report and respond to cases of *ukuthwala* and the need for improved monitoring, oversight and accountability."²³⁷

Even though there are appropriate national laws, they are, nonetheless, inconsistent and ineffective, or do not adequately protect children from forced marriage through child trafficking. Till to date, child marriages in South Africa are still practised and girls, as young as the age of 14, are abducted and forced into marriages in the name of tradition.²³⁸

²³⁷ Budoo and Ramnauth *CHR* 2018 63. "The South African Commission for Gender Equality is an independent statutory body created by the Constitution of the Republic of South Africa, 1996."

²³⁸ Nkosi and Wassermann 2014 *NC* 134. See also Prince *Sunday Times* 1.

CHAPTER 4: ANALYSIS OF SOUTH AFRICA'S CURRENT LEGAL POSITION

4.1 Introduction

Chapter Two focused on international and regional legal instruments to protect children against child marriage. South Africa has complied with international legal standards by implementing legislative framework that addresses child marriage. Although, legally speaking, it might appear that in terms of the law, child marriages are prohibited in South Africa, customary law is still taken into consideration in some instances. Even though South Africa has legislation to protect and promote children's rights, however, such legislation provides insufficient protection against child marriage.

South Africa prohibits child marriage through several legislation *inter alia*, the *Children's Act* and the *Recognition of Customary Marriages Act* as discussed in Chapter Three. However, with all these legal instruments, the government has difficulties enforcing the law against child marriage, due to silence motivated and promoted by culture in societies where cases of child marriages are not reported to police officials.²³⁹ This chapter focuses on the analysis of South Africa's legal position against international and regional law as well as an evaluation of the different legal instruments with regard to South Africa's compliance with international and regional standards.

4.2 Implementation and enforcement of the law

The inadequate enforcement of legislation is due to lack of effective monitoring and enforcement mechanisms to assist in preventing or sanctioning child marriages, "poor understanding of the laws, few adequate training of public officials such as police officers, lack of resources to enforce legislation and lack of guidelines on how to handle cases of child marriage."²⁴⁰

The *United Nations Committee on the Rights of the Child* made a few recommendations on South Africa's second periodic report, 2016 with regard to the high prevalence of

²³⁹ Human Rights Watch Organisation 2014 3 available at <https://www.hrw.org/report/2014/03/06/ive-never-experiencedhappiness/child-marriage-malawi>

²⁴⁰ Blondeel, Chandra-Mouli, Scolaro, Svanemyr and Temmerman, 2013 *IPU* 19.

harmful practices in the country, including child marriage.²⁴¹ The Committee found that South Africa's legislation prohibits all forms of harmful practices through criminalising child marriage.²⁴² The Committee recommended that a national plan of action be developed and adopted in order to oversee the effective and complete elimination of child marriage.²⁴³ Furthermore, South Africa should ensure that all stakeholders, such as children affected or those at risk of child marriage and the community, participate in developing, adopting, implementing and monitoring relevant laws and policies.²⁴⁴

Child marriage violates the provisions of the *Constitution*. Firstly, the preamble of the *Constitutions* provides for the elimination of injustices and recognises that everyone must be respected and live in unity, regardless of diversity.²⁴⁵ The definition of a child in section 28(3) of the *Constitution* is similar to the definition of a child as provided for in article 1 of *CRC* and article 2 of *ACRWC*.²⁴⁶ Consequently, child marriage violates section 28(3) as the practice involves the conclusion of a marriage where one of the

²⁴¹ South Africa's second periodic report to the *Committee on the Rights of the Child*, 2016 10.

²⁴² South Africa's second periodic report to the *Committee on the Rights of the Child*, 2016 10.

"In the light of its general comment No. 18 on harmful practices (2014), adopted jointly with the Committee on the Elimination of Discrimination against Women, the Committee urges the States Parties to: (a)- Guarantee bodily integrity, autonomy and self-determination of all children, including intersex children, by avoiding unnecessary medical or surgical treatment during infancy or childhood; (b)- Build capacity of all professional groups working for and with children to prevent, identify and respond to incidents of harmful practices and to eliminate customary practices and rituals that are harmful to children; and (c)- Ensure sanctions on perpetrators of harmful practices, including perpetrators of the abuse of *ukuthwala*, and provide effective remedies to victims of harmful practices."

²⁴³ South Africa's second periodic report to the *Committee on the Rights of the Child*, 2016 10.

²⁴⁴ South Africa's second periodic report to the *Committee on the Rights of the Child*, 2016 10.

²⁴⁵ *Constitution of the Republic of South Africa*, 1996. The preamble provides as follows: "We, the people of South Africa, recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; respect those who have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity." "We, therefore, through our freely elected representatives, adopt this *Constitution* as the supreme law of the Republic so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which every citizen is equally protected by law; and improve the quality of life of all citizens and free the potential of each person; and build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations."

²⁴⁶ Section 28(3) of the *Constitution of the Republic of South Africa*, 1996. See also article 1 of the *United Nations Convention on the Rights and Welfare of the Child*, 1989 and article 2 of the *African Charter on the Rights and Welfare of the Child*, 1990.

parties is a minor, thus, the marriage is not valid as previously noted in terms of article 16(2) of *CEDWA*.²⁴⁷

According to Mathibela, Mudarikwa and Roos, the results of a weak enforcement of the law in South Africa on the protection of children against child marriage is because the country "failed to protect the best interest of the child", and this is supported by the reasoning that consent from parents or guardians on behalf of children is not absolute.²⁴⁸ The importance of consent in child marriage is in line with section 3(1)(a)(ii) of *RCMA*, which recognises that for a valid customary marriage, the consent of both parties is required.²⁴⁹ Section 4(2)(b) of *RCMA* affords children the protection against trafficking for purposes of exploitation, which, in actual fact, emerges in child marriages.²⁵⁰ According to Gazidis, May, McConnachie and Mudarikwa, this undermines the precepts of the *Constitution*, that children must be protected because of their vulnerability, and exposing children to marriage without their consent infringes their right to equality, dignity, freedom and security of the person.²⁵¹

The right to equality is guaranteed to everyone by the *Constitution*, which is aligned with international and regional legal standards. Nevertheless, gender inequality is still one of the major factors that contributes to child marriage. This is a clear indication of South Africa's weak enforcement of the law pertaining to child marriages since there are still challenges of gender inequality with regard to child marriages, which predominantly affects girls in particular. Although the *Constitution* guarantees equality for all, young girls, who are forced to get married, are not afforded equal opportunities to freely choose their spouses as everyone. In order to adequately address the issue of child marriage in the country, focus should be on the promotion of equality rights of children rather than simply focusing on gender-based responses on how roles, social

²⁴⁷ Article 16(2) of the *Convention on the Elimination of All Forms of Discrimination against Women*, 1980. "The article stipulates that 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."

²⁴⁸ Mathibela, Mudarikwa and Roos *LRC* 2016 32.

²⁴⁹ Section 3(1)(a)(ii) of the *Recognition of Customary Marriages Act* 120 of 1998.

²⁵⁰ Section 4(2)(b) of the *Recognition of Customary Marriages Act* 120 of 1998.

²⁵¹ Gazidis, May, McConnachie and Mudarikwa, 2015 *LRC* 9. See also sections 9, 10 and 12 of the *Constitution of the Republic of South Africa*, 1996.

expectations and status power of men affect women and children,²⁵² and how these responses could assist in reducing inequalities between men and women, which, will in turn, prevent the occurrence of child marriages, considering the fact that it is one of the contributing factors to this social ill.²⁵³

4.3. Conclusion

This Chapter focused on South Africa's legislative framework and compliance with international and regional legal standards. The prevalence of child marriage in South Africa, even after the adoption and implementation of legislation that prohibits the practice of child marriage, is an indication of gender inequality and lack of respect and promotion of the rights of children, girls, in particular.

The prevalence of child marriage in South Africa is a clear indication that there are still challenges with regard to the implementation and enforcement of laws, policies and programmes designed to prevent such practice.²⁵⁴ Due to the continuance of child marriage in South Africa, there is need to implement measures, such as awareness programmes, to strengthen legal frameworks that protect girls from child marriage and strengthen the commitment to international and regional principles. Girls are entitled to the same protection provided to everyone in South Africa, and for their rights to be respected as provided for in the *Constitution*.

²⁵² Mfono 2000 *AFM* 79.

²⁵³ Mfono 2000 *AFM* 79.

²⁵⁴ Todres 2012 *JLP* 112.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

Regardless of the prohibition of marriage of children under the age of eighteen as indicated in the *Children's Act* and *RCMA*, child marriage is still prevalent in South Africa, although it is prohibited by law. Government has a legal obligation in terms of international and domestic law to protect children from child marriage. So far, government has failed in effectively enforcing laws to prevent and end this harmful practice. The existence of appropriate current legislation that addresses child marriage is ineffective in that it does not sufficiently protect girls from child marriage, even though there is legislation to implement all international and regional principles prohibiting such practice.

There is no current legal provision in South Africa that outlaws child marriage, even in the case where parental consent was given. The minister of home affairs, Mr Motsoaledi, stated that, in 2017, there were 103 incidents of underage marriage, and widows and divorcées under the age of eighteen faced with many problems.²⁵⁵ Mr Motsoaledi held that "this should be definitely stopped."²⁵⁶ Since there is no legal provision in South Africa's existing legislation, the Government is in the process of developing a new marriage policy, which will "allow South Africans to conclude legal marriages that will be in line with the constitutional principle of equality, and based on human dignity and non-discrimination."²⁵⁷

The prohibition of under-age marriage, particularly young girls, would be codified in legislation in terms of the Protocol on Gender and Development of SADC, ratified by South Africa.²⁵⁸ The development of a new marriage policy in the country indicates progress from the side of Government to prevent and end child marriage, and the

²⁵⁵ Ensor *Business Day*, 2019 1. Also available at <https://www.businesslive.co.za/bd/national/2019-08-30-new-single-marriage-law-proposed-based-on-principle-of-equality/>

²⁵⁶ Ensor *Business Day*, 2019 1.

²⁵⁷ Ensor *Business Day*, 2019 1.

²⁵⁸ Ensor *Business Day*, 2019 1.

policy will afford young girls protection from child marriage, under the law, in accordance with the constitutional principle of equality.

Young girls are forced into marriage because of this deep-rooted practice, which has significant impediments on a girl's fundamental human rights, and child marriage ends a girl's childhood and jeopardises her future. Child marriage forces children into adulthood before they attain emotional and physical maturity, affects their health, education, economic and social development. There are several awareness programmes on how to deal with children who survived abuse than knowing about the needs of child survivors of child marriage. The goal is prevention, when it comes to child exploitation and abuse, thus the need to learn and prevent the harm from taking place in the first instance.

In essence, purpose of international and regional legal systems is to provide States Parties with fundamental guiding frameworks to assist in combating child marriages. To combat child marriage, the national legal system in South Africa should prohibit all forms of child exploitation, including trafficking and such laws must be effectively and consistently enforced. When girls are denied their inherent right to freely choose and consent to whom they want to marry, their international right, as provided for in *UDHR* is violated. It is important for South Africa to provide sufficient resources to combat child marriage.

In order to eradicate child marriage, it is paramount to empower women and girls, through national policies, hence, a gender perspective ought to be applied when initiatives to prevent and end child marriages are adopted and implemented. A girl's denial of expressive consent causes them to be delivered into a form of slavery through marriage. In such marriage that lacks consent, the girl child suffers from similar challenges as marriages solemnised by rape and abduction and, it is dehumanising, and violates her right to human dignity.

Poverty and gender inequality are both causes and consequences of child marriage, which, in essence, reflects lack of education and economic empowerment opportunities. Child marriage is also used to construct family alliances, create economic

partnerships or strengthen political ties. The need to survive and get out of poverty leads to most poor families giving the girl child out in marriage. This practice reduces the responsibility of feeding and educating a lot of people in the family, and this is a well-known economic approach. By giving out the young girl in marriage at a young age, the family benefits, as the bride price paid over to the family is used to support the family and pay off debts in some instances.

The *Sexual Offences Act* and the *Children's Act* only address fragments of the human trafficking problem, the *Sexual Offences Act* addresses only trafficking for purposes of sexual exploitation, while the *Children's Act* addresses only issues of trafficked children. Whereas, both do not provide any prevention initiatives, specialised training and personnel, which contribute to lack of enforcement of the legislation. The wording "giving out" of a child to marriage without the consent of the child stipulated in the *Children's Act* contradicts the *Constitution* as it infringes the right to freedom of choice and the right to education of children. Decisions made by parents or guardians on behalf of their children should be consistent with the best interest of a child and not detrimental to the child.

The aim of this study was to establish whether or not South Africa is adhering to its international obligations, and if the current national legal instruments adequately curb the problem of child marriage and, if so, to what extent. The current legal instruments implemented in South Africa in accordance with international and regional standards and guidelines do not effectively protect children, especially girls from child marriage since the practice is ongoing in the country.

The problem is not lack of laws that prohibit child marriages in the country; it is simply lack of efficient enforcement of the laws since South Africa has ratified all international instruments prohibiting child marriage and incorporated them into municipal law. Thus, there is need for Government to assist in creating awareness to end child marriages, for example, assist NGOs in raising awareness in order to achieve the goal to end the practice. There is very little commitment dedication with regard to enforcing laws that protect young girls from child marriages by public officials, including police officials, community leaders, traditional leaders, social workers and the courts.

5.2 Recommendations

Even though South Africa has adhered to the standards of international law by implementing the international standards into national law and recognising children's rights in the *Constitution*, there are a few recommendations that need to be made in order to assist in the effectiveness of the law. South Africa has an obligation in terms of the standards set by international and regional laws, to eradicate child marriage. Therefore, the recommendations provided below will assist in curbing child marriage.

It is commonly known that poverty is the key factor that contributes to forced child marriage, improving the financial status of families could reduce or end child marriages. Education and training awareness programmes to prevent and end child marriage could assist in better responses to combat child trafficking for the purpose of marriage. For this initiative to be effective, there has to be an immediate reduction of poverty for long-term purposes by making available economic prospects for unmarried girls who have completed school. The Government should put in place intervention programmes to address issues of child trafficking, such as poverty, inequality and gender discrimination. Programmes and policies should be implemented to make it possible for families to afford education for girls, and assist in addressing norms attached to the bride price, which pushes parents to force their children to get married.

Parents or guardians choose the spouses for their daughters without giving them the opportunity to choose freely who they want to marry or when, thus, it is crucial to educate parents and the community about the effects of child marriage. There is a great need for public awareness by educating the public on human rights, specifically children's rights and mechanisms to enforce such rights, this will ensure progress. Young married girls often experience harmful effects with regard to their well-being, such as increased domestic abuse, rape and lack of nutrition, thus, it is paramount to inform parents and the society about the dangers and harmful effects of child marriage.

It is important to prevent child marriages, however, Government and programme planners should also focus on young girls, who are already married, in order to provide

guidance on health implications such as HIV/AIDS, maternal mortality and promote the regular use of family planning. For programmes to be more effective, they should be extended to men or their involvement in the prevention of child marriage, by teaching them approaches to negotiate their way out of parental pressures to marry young girls.

The departments of Education and Health should work towards incorporating the outcomes of child marriage when they evaluate interventions to address child protection problems in the local context to comprehend the role of other departments in addressing child marriage. Furthermore, assessments and formative research should be conducted to identify and understand the causes of child marriage, for example, cultural norms and practices, and risk factors such as social expectations, knowledge, attitudes, and perceptions related to gender roles and practices of child marriage.

The aim of advocacy should be to place child marriages as number one on the agenda and ensuring that advocacy messages reach all actors of Government, by focusing on closing the gap between speaking about the problems and to address the practical situation for children, by implementing the commitment of national campaigns into big-scale programmes that help in preventing the effects of child marriage. Training programmes on how to better enforce child laws for public officials must be implemented. There is also a need to introduce several national campaigns to raise awareness in communities where child marriage is still prevalent, especially about the law and sanctions. There is need for Government to institute programmes that will help better the lives of young girls, by providing skills development and literacy training, particularly for traditionally disadvantaged groups, and ensuring that the age of the girl is established before issuing a marriage certificate.

The training of the South African Police Services is essential, and such officers need to be empowered to handle and deal with reported cases of child marriages under the pretext of customary practices. It is also important that Police Officials develop standing operating procedures on how to effectively handle cases of child marriages. It has been said that the Police Officials usually refuse to handle similar cases such as

the matter in *S v Jezile* since they claim it is a customary issue and outside their jurisdiction.

Bibliography

Literature

Abrahams and Matthews 2011 *United Nations Children's Fund*

Abrahams K and Matthews T "Promoting Children's Rights in South Africa: A Handbook for Members of Parliament" 2011 *United Nations Children's Fund* 1-102

Addaney and Azubike 2017 *Amsterdam Law Forum*

Addaney M and Azubike O "Education as a Contrivance to Ending Child Marriage in Africa: Perspective from Nigeria and Uganda" 2017 *Amsterdam Law Forum* 9:2 110-130

An-Na'im 2000 *International Law at Emory University*

An-Na'im A "Forced Marriage" 2000 *International Law at Emory University* 1-14

Anitha S and Gill AK *Forced marriage: introducing a social justice and human rights perspective* (Zed Books 2011)

Aptel 2016 *Journal of International Criminal Justice*

Aptel C "Child Slaves and Child Brides" 2016 *Journal of International Criminal Justice* 14 305-325

Aronowitz AA *Human trafficking: A reference Handbook* (ABC-CLIO Santa Barbra California 2017)

Aryama 2018 *Women's Rights Law Reporter*

Aryama VG "Don't: The Need for a Solution to the Child Marriage Problem in the United States" 2018 *Women's Rights Law Reporter* 39 386-427

Askari 1998 *Journal of International and Comparative Law*

Askari L "The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriages" 1998 *Journal of International and Comparative Law* 5 123-138

Bachaka 2017 *Journal of Law, Policy and Globalization*

Bachaka AM "The International Legal Framework to Combat Human Trafficking"
2017 *Journal of Law, Policy and Globalization* 68 41-48

Baxter 2018 *Nevada Law Journal*

Baxter TD "Child Marriage as Constitutional Violation" 2018 *Nevada Law Journal*
19:1 39-84

Behravesch 2017 *Fordham international Law Journal*

Behravesch JA "Guatemala's Ban on Child Marriage: A Step toward Compliance with
CEDAW" 2017 *Fordham International Law Journal* 41 53-78

Birech 2013 *International Journal of Humanities and Social Science*

Birech J "Child Marriage: A Cultural Health Phenomenon" 2013 *International
Journal of Humanities and Social Science* 3:17 97-103

Blondeel, Chandra-Mouli, Svanemyr, Scolaro and Temmerman 2013 *Inter -
Parliamentarian Union*

Blondeel K, Chandra-Mouli V, Svanemyr J, Scolaro E and Temmerman M "The
Contribution of Laws to Change the Practice of Child Marriage in Africa" 2013 *Inter-
Parliamentarian Union* 1-41

Boumans 2015 *Syracuse Journal of International Law and Commerce*

Boumans K "Filling the Gaps: New Proposals for the Convention on the Rights of a
Child" 2015 *Syracuse Journal of International Law and Commerce* 43:1 191-221

Bozic 2017 *EU and Comparative Law Issues and Challenges*

Bozic V "Forced Marriages of Children as a Form of Exploitation of Human
Trafficking Victims" 2017 *EU and Comparative Law Issues and Challenges* 4 8-66

Braimah 2014 *African Human Rights Law Journal*

Braimah TS "Child marriage in Northern Nigeria: Section 61 of Part I of the 1999 Constitution and the protection of children against child marriage" 2014 *African Human Rights Law Journal* 14 474-488

Bricknell and Lyneham 2018 *Australian Institute of Criminology*

Bricknell S and Lyneham S "When saying no is not an option: Forced marriage in Australia and New Zealand" 2018 *Australian Institute of Criminology* 1-99

Britton and Dean 2014 *Human Rights Review*

Britton HE and Dean LA "Policy Responses to Human Trafficking in Southern Africa: Domesticating International Norms" 2014 *Human Rights Review* 15 305-328

Budoo and Ramnauth 2018 *Centre for Human Rights*

A Budoo and D Ramnauth "Report on Child Marriage in Africa" 2018 *Centre for Human Rights* 1-80

Burris 2014 *Tulane Journal of International and Comparative Law*

Burris C "Why Domestic Institutions Are Failing Child Brides: A Comparative Analysis of India's and the United States' Legal Approaches to the Institution of Child Marriage" 2014 *Tulane Journal of International and Comparative Law* 23 151-176

Carlsson, Machel and Pires 2013 *World Health Organisation*

Carlsson G, Machel C and Pires E "The world we want: an end to child marriage" 2013 *World Health Organisation* 328 1005-1006

Convention on the Elimination of All Forms of Discrimination against Women "General Recommendation 21 13th session" 1994 1-10

Chaudhuri 2015 *ECPAT International*

Chaudhuri ER "Thematic Report: Unrecognised Sexual Abuse and Exploitation of Children in Child, Early and Forced Marriage" 2015 *ECPAT International* 1-98

Chirwa 2002 *International Journal of Children's Rights*

Chirwa DM "The Merits and Demerits of the African Charter on the Rights and Welfare of the Child" 2002 *International Journal of Children's Rights* 10 157-177

Clark, Dixon and Dottridge 2008 *United Nations Office on Drugs and Crime*

Clark M, Dixon J and Dottridge M "An Introduction to Human Trafficking: Vulnerability, Impact and Action" 2008 *United Nations Office on Drugs and Crime* 1-128

Currie I and de Waal J *The Bill of Rights Handbook* (Juta Cape Town 2013)

Davidson 2014 *Michigan State International Law Review*

Davidson H "Does the U.N. Convention on the Rights of the Child Make a Difference" 2014 *Michigan State International Law Review* 22:2 497-530

Davis, Postles and Rosa 2013 *PLAN International*

Davis A, Postles C and Rosa G "A girl's right to say no to marriage: working to end child marriage and keep girls in school" 2013 *PLAN International* 3-59

Degu, Kibret and Mengestie 2014 *International Journal of Biomedical and Advance Research*

Degu G, Kibret GD and Mengestie SW " Perceptions and Practices of Early marriage of female child from 2009 to 2013 in Sinane district Northwest Ethiopia" 2014 *International Journal of Biomedical and Advance Research* 543-547

Delpont 2007 *United Nations Educational, Scientific and Cultural Organization* "Human

Delpont E "Trafficking in South Africa: Root Causes and Recommendations" 2007 *United Nations Educational, Scientific and Cultural Organization* 7-72

Diala 2019 *Pravni Vjesnik*

Diala J "The Child in a Child; Child Marriage and Lost Identity in Southern Africa"
2019 *Pravni Vjesnik* 35 53-73

Ebobrah and Eboibi 2017 *Journal of African Law*

Ebobrah S and Eboibi F "Federalism and the Challenge of Applying International Human Rights Law against Child Marriage in Africa" 2017 *Journal of African Law* 61:3 333–354

Edmeades, Kes and Parsons 2015 *Review of Faith and International Affairs*

Edmeades J, Kes A and Parsons J "Economic Impacts of Child Marriage: A review of the literature" 2015 *Review of Faith and International Affairs* 13:3 12-22

Egwu and Nwimo 2015 *Journal of Law, Policy and Globalization*

Egwu IO and Nwimo SO "Girl Child Marriage: Implications for Community Intervention Programmes" 2015 *Journal of Law, Policy and Globalization* 37 141-149

Ekundayo 2015 *International Journal of Humanities and Social Science*

Ekundayo O "Does the African Charter on the Rights and Welfare of the Child (ACRWC) only Underlines and Repeats the Convention on the Rights of the Child (CRC)'s Provisions?: Examining the Similarities and the Differences between the ACRWC and the CRC" 2015 *International Journal of Humanities and Social Science* 5:7(1) 143-158

Ensor L "New, single marriage law proposed based on principle of equality" *Business Day* 30 August 2019

Erasmus, Jokani and Knoetze 2018 *OBITER*

Erasmus D, Jokani M and Knoetze E "A Criminal Law Response to the Harmful practices of *Ukuthwala*" 2018 *OBITER* 747-767

Ezer T, Kerr K and Major K 2006 *Georgetown Journal of Gender and the Law*

Ezer, Kerr and Major "Child Marriage and Guardianship in Tanzania: Robbing Girls of Their Childhood and Infantilizing Women" 2006 *Georgetown Journal of Gender and the Law* 357-450

Fayokun 2015 *US China Law Review*

Fayokun KO "Legality of Child Marriage in Nigeria and Inhibitions against Realisation of Education Rights" 2015 *US China Law Review* 12 812- 826

Freccero and Whiting *Human Rights Centre* 2018

Freccero J and Whiting A "Toward an End to Child Marriage Lessons from Research and Practice in Development and Humanitarian Sectors" 2018 *Human Rights Centre* 1-84

Frederick, Kabir and Kamath 2009 *Innocenti Research Centre*

Frederick J, Kabir R and Kamath R "South Asia in Action: Preventing and Responding to Child Trafficking Analysis of Anti-Trafficking Initiatives in the Region" 2009 *Innocenti Research Centre* 1-70

Gazidis, May, McConnachie and Mudarikwa 2015 *Legal Resource Centre*

Gazidis S, May C, McConnachie C and Mudarikwa M "Realising the rights of all children in South Africa: An Alternative Report to the United Nations Committee on the Convention on the Rights of the Child" 2015 *Legal Resource Centre* 4-26

Glinski, Thompson and Warner 2013 *Girls Not Brides*

Glinski AM, Thompson L and Warner A "Ending Child Marriage: What Will It Take?" 2013 *Girls Not Brides* 1-13

Greenbaum and Bodrick 2017 *American Academy of Pediatrics*

Greenbaum J and Bodrick N "Global Human Trafficking and Child Victimization"
2017 *American Academy of Pediatrics* 140:6 1-12

Greene, Hart, Mullinax and Perlson 2018 *American Jewish World Service*

Greene MC, Hart J, Mullinax M and Perlson S "The Centrality of Sexuality for
Understanding Child, Early and Forced Marriage" 2018 *American Jewish World
Service* 4-39

Hanmer and Elefante 2016 *World Bank Group*

Hanmer L and Elefante M "The Role of Identification in Ending Child Marriage:
Identification for Development (ID4D)" 2016 *World Bank Group* 1-30

Hassen and Swart 2016 *African Human Rights Law Journal*

Hassen S and Swart M "A comparison between the position of child marriage
"victims" and child soldiers: Towards a nuanced approach" 2016 *African Human
Rights Law Journal* 458-475

Hickling 2017 *United Nations Population Fund*

Hickling C "Child Marriage A Mapping of Programmes and Partners in Twelve
Countries in East and Southern Africa" 2017 *United Nations Population Fund* 1-82

Howard N *Child Trafficking Youth Labour Mobility and the Politics of Protection*
(Springer Nature 2017)

Human Science Research Council "Tsireledzani: Understanding the Dimensions of
Human Trafficking in Southern Africa" 2010 1-204

Humphreys C and Stanley N *Domestic violence and child protection: Directions for
good practice* (Jessica Kingsley Publishers 2006)

International Planned Parenthood Federation "Ending Child Marriage: A Guide for Global Policy Action" 2006 1-32

Jones, Tefera, Stephens and Gupta 2014 *Overseas Development Institute*

Jones N, Tefera B, Stephens J and Gupta T "Early marriage and education: the complex role of social norms on shaping Ethiopian adolescent girls' lives" 2014 *Overseas Development Institute* 1-92

Karugonjo-Segawa 2005 *Danish Institute for Human Rights*

Karugonjo-Segawa R "The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women" 2005 *Danish Institute for Human Rights* 1-73

Kassan D "Trafficking in Children" in Davel CJ and Skelton AM (eds) *Commentary on the Children's Act* (Juta Cape Town 2007)

Kreston 2014 *South African Journal of Criminal Justice*

Kreston SS " Human trafficking legislation in South Africa: Consent, coercion and consequences " 2014 *South African Journal of Criminal Justice* 20-36

Kreston 2014 *South African Journal of Criminal Justice*

Kreston SS "Trafficking in children in South Africa: An analysis of pending legislation" 2014 *South African Journal of Criminal Justice* 8:1 32-50

Kruger 2012 *Program on Human Rights*

Kruger B "Combating Human Trafficking: The South African Legal Context" 2012 *Program on Human Rights* 2 1-13

Kurtz and Jain 2007 *International Center for Research on Women*

Kurtz k and Jain S "New Insights on Preventing Child Marriage: A Global Analysis of Factors and Programs" 2007 *International Center for Research on Women* 1-53

Linongoe-fontebo HN "Socio-cultural, economical and organizational determinants of child marriage in Cameroon" in Green MC, Gunn TJ and Hill M (eds) *Religion, Law and Security in Africa* (African Sun Media 2007)

MacLean 2012 *Davis Journal of International Law and Policy*

MacLean D "Commercial Marriage Trafficking: Uncovering a Growing New Form of Transnational Human Trafficking, and Shaping International Law to Respond" 2012 *Davis Journal of International Law and Policy* 19 67-109

Mahato 2016 *International Journal of Scientific and Engineering Research*

Mahato SK "Causes and Consequences of Child Marriage: A Perspective" 2016 *International Journal of Scientific and Engineering Research* 7:7 698-702

Malhotra 2010 *International Centre for Research on Women*

Malhotra A "The Causes, Consequences and Solutions to Forced Child Marriage in the Developing World" 2010 *International Centre for Research on Women* 1-12

Maluleke 2009 *Department of Justice and Constitutional Development*

Maluleke J "Ukuthwala: Let's Protect Our Children. Justice Today" 2009 *Department of Justice and Constitutional Development* 5

Maluleke 2012 *PER*

Maluleke M "Culture, tradition, custom, law and gender equality" 2012 *Potchefstroom Electronic Review* 1-22

Memzur *South African Public Law* 23 2008

Memzur BD "The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?" 2008 *South African Public Law* 1-29

Menz 2016 *California Law Review*

Menz S "Statelessness and Child Marriage as Intersectional Phenomena: Instability, Inequality, and the Role of the International Community" 2016 *California Law Review* 497-544

Mfono 2000 *Agenda Feminist Media*

Mfono Z "The Custom of Bride Abduction Holds its Own Against Time" 2000 *Agenda Feminist Media* 45 76-80

Mikhail 2002 *Gender and Development*

Mikhail SLB "Child Marriage and Child Prostitution: Two Forms of Sexual Exploitation" 2002 *Gender and Development* 10 43-49

Morake 2018 *Panos Institute Southern Africa*

Morake WML "Let Me be a Child, Child Marriage is Child Abuse Addressing Child Marriage using Anti-Sexual Violence Policies in Kwazulu Natal, South Africa" 2018 *Panos Institute Southern Africa* 1-28

Monyane 2013 *South African Review of Sociology*

Monyane C "Is Ukuthwala Another Form of 'Forced Marriage'?" 2013 *South African Review of Sociology* 64-82

Mtshali 2014 *South African Journal*

Mtshali V "Forced child marriage practiced under the pretext of customary marriage in South Africa" 2014 *South African Journal* 15(2) 51-61

Mubangizi 2012 *Journal of International Women's Studies*

Mubangizi JC "A South African Perspective on the Clash between Culture and Human Rights, with Particular Reference to Gender-Related Cultural Practices and Traditions" 2012 *Journal of International Women's Studies* 13(3) 33-48

Mudarikwa, Roos and Mathibela 2016 *Legal Resource Centre*

Mudarikwa M, Roos E and Mathibela N "Girls Must Not Be Brides: An Evaluation of South Africa's Compliance with International, Regional and National Obligations towards Protecting Children from Child and Forced Marriages, in its Current Legal Framework of Civil and Customary Marriages" 2016 *Legal Resource Centre* 1-44

Musiwa 2018 *Legal Issues Journal*

Musiwa A "A Critical Analysis of Section 26 of the Constitution of Zimbabwe in Relation to Child Marriage: Key Insights for Zimbabwe's Child Protection Practitioners " 2018 *Legal Issues Journal* 6:1 89-109

Msuya 2017 *Dignity a Journal on Sexual Exploitation and Violence*

Msuya NH "Tradition and Culture in Africa: Practices that Facilitate Trafficking of Women and Children" 2017 *Dignity a Journal on Sexual Exploitation and Violence* 2:1 1-36

Myria 2015 *Federal Migration Centre*

Myria "Victims of early and forced marriages" 2015 *Federal Migration Centre* 1-162

Mwambene and Sloth-Nielsen 2011 *African Human Rights Law Journal*

Mwambene L and Sloth-Nielsen J "Benign accommodation? *Ukuthwala*, 'forced marriage' and the South African Children's Act" 2011 *African Human Rights Law Journal* 11 1-22

Mwambene 2018 *African Human Rights Law Journal*

Mwambene L "Recent legal responses to child marriage in Southern Africa: The case of Zimbabwe, South Africa and Malawi" 2018 *African Human Rights Law Journal* 18 527-550

National Prosecuting Authority "Tsireledzani: Understanding the Dimensions of Human Trafficking in Southern Africa" 2010 1-204

Lutya 2012 *INTECH*

Lutya TM "Human Trafficking of young women and girls for sexual exploitation in South Africa" 2012 *INTECH* 1-32

Nkosi and Wassermann 2014 *New Contree*

Nkosi M and Wassermann J "A history of the practice of *ukuthwala* in the Natal/KwaZulu-Natal region up to 1994" 2014 *New Contree* 131-146

Oosterveld 2007 *Canadian Yearbook of International Law*

Oosterveld V "The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments" 2007 *Canadian Yearbook of International Law* 45 131-172

Osezua 2016 *African Sociological Review*

Osezua CO "Gender Issues in human trafficking in Edo State, Nigeria" 2016 *African Sociological Review* 20:1 36-66

Parrot A "Human Rights and Health Status of Girls and Young Women in Afghanistan under the New Democracy: Forced and Child Marriages" in Wejnert B (eds) *Democracies: Challenges to Societal Health* (Emerald Group Publishing Limited 2011)

Prince C "Parents sell girls as child brides" *Sunday Times* 31 May 2009

Rafferty 2008 *Child Development Perspectives*

Rafferty Y "The Impact of Trafficking on Children: Psychological and Social Policy Perspectives" 2008 *Child Development Perspectives* 2:1 13-18

Rice 2014 *Journal of Southern African Studies*

Rice K "Ukuthwala in Rural South Africa: Abduction Marriage as a Site of Negotiation about Gender, Rights and Generational Authority among the Xhosa" 2014 *Journal of Southern African Studies* 40:2 381-399

Robinson 2002 *Office of the High Commissioner for Human Rights*

Robinson M "Recommended Principles and Guidelines on Human Rights and Human Trafficking" 2002 *Office of the High Commissioner for Human Rights* 1-15

Robles 2018 *International and Comparative Law Review*

Robles MJ "Child Marriage and the Failure of International Law: a Comparison of American, Indian, and Canadian Domestic Policies" 2018 *International and Comparative Law Review* 18:1 105-125

Southern African Development Community parliamentary forum "Model-Law-on-Eradicating-Child-Marriage-and-Protecting-Children-Already-in-Marriage" 2016 2-78

South African Law Reform Commission "Discussion Paper 111 Project 131 Trafficking in Persons" 2008 1-167

South African Law Reform Commission "Project 138: The practice of *ukuthwala* Discussion paper" 2014 1-64

South Africa's second periodic report to the Committee on the Rights of the Child "Concluding observations on the second periodic report of South Africa" 2016 1-23

Sambo and Spies 2012 *Social Work*

Sambo JP and Spies G "The Role of the Social Worker in the Prevention of Child Trafficking In South Africa" 2012 *Social Work* 48:2 190-208

Schuman 2019 *William and Mary Law Review*

Schuman RL "State Regulations are Failing Our Children: An Analysis of Child Marriage Laws in the United States" 2019 *William and Mary Law Review* 60 2337-2374

Sloth-Nielsen and Mwambene 2011 *Journal of Family Law and Practice*

Sloth-Nielsen J and Mwambene L "Benign accommodation? Ukuthwala, 'forced marriage' and the South African Children's Act" 2011 *Journal of Family Law and Practice* 5- 16

Ssenyonjo 2007 *Journal of African Law*

Ssenyonjo M "Culture and the Human Rights of Women in Africa: Between Light and Shadow" 2007 *Journal of African Law* 51 39-67

Steinmann 2016 *Potchefstroom Electronic Law Journal*

Steinmann R "The Core Meaning of Human Dignity" 2016 *Potchefstroom Electronic Law Journal* 19 1-32

Stoyanova 2013 *Amsterdam Law Forum*

Stoyanova V "The Crisis of a Definition: Human Trafficking in Bulgarian Law" 2013 *Amsterdam Law Forum* 5:1 64-79

Terman 2013 *United Nations Office of the High Commissioner on Human Rights*

Terman R "Child, Early and Forced Marriage: A Multi-Country Study" 2013 *United Nations Office of the High Commissioner on Human Rights* 1-52

Thomas and Park 2011 *Advocates for Human Rights*

Thomas C and Park R "Developing Legislation on Violence against Women and Girls" 2011 *Advocates for Human Rights* 1-1034

Todres 2012 *Journal of Law and Policy*

Todres J "Assessing Public Health Strategies for Advancing Child Protection: Human Trafficking as a Case Study" 2012 *Journal of Law and Policy* 21 93-112

Trafficking in person's directives issued in terms of section 44(8) of the Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013) 2016 1-10

United Nations Children's Fund "Ending child marriage: Progress and prospects" *UNICEF New York* 2014 1-8

United Nations Committee on the Rights of the Child "European Parliamentary Assembly Resolution 1468 Forced Marriages and Child Marriages" 2005

United Nations General Assembly "Report of the Special Rapporteur on Contemporary Forms of Slavery, including its Causes and Consequences' Gulnara Shahinian. Thematic report on servile marriage" 2012 1-18

United Nations Human Rights Office of the High Commissioner "The universal declaration of human rights at 70: still working to ensure freedom, equality and dignity for all" 2018 1-3

United Nations Office on Drugs and Crime "Toolkit to Combat Trafficking in Persons" 2008 1-546

United Nations Office on Drugs and Crime "Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto" 2016 3-755

Vijayasree and Radhika 2016 *International Journal of Science and Research*

Vijayasree B and Radhika S "Child Trafficking: Psychological Effect and the Need for Counselling" 2016 *International Journal of Science and Research* 5:3 756-757

Walker 2013 *Development research and Projects Centre*

Walker J "Why Ending Child Marriage Needs to Be an Education Goal" 2013 *Development research and Projects Centre* 6-40

Warner 2004 *Journal of Gender, Social Policy and the Law*

Warner E "Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls" 2004 *Journal of Gender, Social Policy and the Law* 12 1-39

Warria 2017 *Children and Youth Services Review*

Warria A "Forced child marriages as a form of child trafficking" 2017 *Children and Youth Services Review* 79 274–279

Case law

Jezile v S and Others (A 127/2014) [2015] ZAWCHC 31; 2015 (2) SACR 452 (WCC); 2016 (2) SA 62 (WCC); [2015] 3 All SA 201 (WCC) (23 March 2015)

Hadijatou Mani Koraou v. Republic of Niger ECW/CCJ/JUD/06/08 of 27 October 2008

S v Makwanyane 1995 (3) SA 391 CC

Legislation

Children's Act 35 of 2008

Constitution of the Republic of South Africa 1996

Prevention and Combating of Trafficking in Persons Act 2013

Recognition of Customary Marriages Act 120 of 1998

Sexual Offences Amendment Act 32 of 2007

South African Commission Act of 1973

International instruments

Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1964)

Convention on the Elimination of All Forms of Discrimination against Women (1980)

International Covenant on Civil Political Rights (1966)

United Nations Convention on the Rights of the Child (1989)

Universal Declaration of Human Rights (1948)

Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (2000)

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956)

Regional Instruments

African Charter on the Rights and Welfare of the Child (1990)

African Youth Charter (2006)

AU: Solemn Declaration on Gender Equality in Africa (2004)

Charter on Human and People's Rights (1981)

Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on ending child marriage (2017)

Protocol on the Rights of Women in Africa (2005)

Internet sources

Annan 2000 <https://www.unicef.org>

Annan K "State of the World's Children" 2000 <https://www.unicef.org> date accessed 30 July 2019

Department of Justice and Constitutional Development of the Republic of South Africa 2015 <http://www.justice.gov.za>

Department of Justice and Constitutional Development of the Republic of South Africa "Ukuthwala" 2015 <http://www.justice.gov.za> date accessed 2 September 2019

End Slavery Now Organisation 2019 www.endslaverynow.org

End Slavery Now Organisation "Forced Marriage" 2019 www.endslaverynow.org date accessed 4 April 2019

Goitom 2016 <https://www.loc.gov/law/help/human-trafficking/southafrica.php>

Goitom H "Training Related to Combating Human Trafficking: South Africa" 2016
<https://www.loc.gov/law/help/human-trafficking/southafrica.php> date accessed
18 October 2018

Human Rights Watch Organisation 2014

<https://www.hrw.org/report/2014/03/06/ive-never-experienced-happiness/child-marriage-malawi>

Human Rights Watch Organisation 2014 "I've never experienced happiness: child marriage in Malawi" 2014 <https://www.hrw.org/report/2014/03/06/ive-never-experienced-happiness/child-marriage-malawi> date accessed 18 September 2019

International Centre for research on Women 2006 <https://www.icrw.org>

International Centre for research on Women "Child Marriage and Education" 2006
<https://www.icrw.org> date accessed 16 August 2019

International Center for Research on Women 2007 <https://www.k4health.org>

International Center for Research on Women "How to end Child Marriage: Action Strategies for Prevention and Protection" 2007 <https://www.k4health.org> date accessed 28 August 2019

Mudarikwa date unknown <http://resources.lrc.org.za>

Mudarikwa M "The Practice of Ukuthwala in Jezile v The State" date unknown <http://resources.lrc.org.za> date accessed 4 September 2019

Office of the High Commissioner date unknown <https://www.ohchr.org>

Office of the High Commissioner "Solutions to end Child Marriage: Summary of the evidence" Date Unknown <https://www.ohchr.org> date accessed 3 September 2019

United Nations Children's Fund 2017 <https://www.girlsnotbrides.org>

United Nations Children's Fund "South Africa: Child Marriage Rates" 2017
<https://www.girlsnotbrides.org> date accessed 3 July 2018

Songolo 2015 www.molosongololo.com

Songololo M "Human Trafficking Week 2-9 October 2015: Stop Child Trafficking"
2015 <http://www.molosongololo.com> date accessed 1 April 2019