

# **An analysis of child marriage as a constitutional violation against the right of the child**

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## **SOLEMN DECLARATION**

I hereby declare that the assignment entitled

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that I herewith submit in the module **LLMC 874** in partial fulfilment of the requirements for the **LLM** degree is my own original work, that no plagiarism has been committed in it, and that it has not already been submitted to any other university or by any other person.

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Signed at **Potchefstroom** on this 23rd day July of **2020**.

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**CHIPEGO MITI LONGWE**

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## **ABSTRACT**

Child marriage is a global problem that has received much attention over the past years, subsequent to the increased recognition of children's human rights. Many people across the world, who are alive today, were forced into marriage from a young age. In addition, many children, irrespective of their gender, still continue to be subjected to marriage.

This practice is harmful as it robs many children of their childhood, and it is unfortunate that these children have little or no say in when and whom they get to marry. In Africa, child marriages have been associated with cultural and/or religious practices. With particular reference to South Africa, the most common form of customary practice is *ukuthwala*, which is often carried out in rural areas and involves the practice of a man abducting a young girl with the intention of forcing the girl's family into negotiations for marriage. Child marriage is often defended by justifying it as a practice linked to culture and religion; both of which are rights protected under the South African *Constitution*. This raises a significant conflict between cultural rights and children's rights.

This study focuses on child marriage and interrogates how it ultimately violates the constitutional rights of the children who are forced into this harmful practice. It emphasises that the South African Constitutional legal framework is insufficient in protecting children from child marriage as children's rights are ultimately superceded by cultural rights where cultural practices, such as child marriage, are carried out.

**Key words:** Child marriage, forced marriage, human rights, *ukuthwala*, cultural rights.

## LIST OF CONTENTS

SOLEMN DECLARATION .....	i
ACKNOWLEDGMENTS.....	ii
ABSTRACT .....	iii
LIST OF ABBREVIATIONS.....	vii
CHAPTER 1 INTRODUCTION .....	1
CHAPTER 2 CHILD MARRIAGE AS A HARMFUL CULTURAL AND RELIGIOUS PRACTICE.....	5
<b>2.1</b> <i>Introduction</i> .....	5
<b>2.2</b> <i>An introduction to "child marriage" in its general context</i> .....	7
<b>2.3</b> <i>Factors contributing to child marriage in Africa</i> .....	10
2.3.1 <i>Gender inequality</i> .....	10
2.3.2 <i>Poverty</i> .....	12
2.3.3 <i>Lack of educational opportunities</i> .....	13
2.3.4 <i>Culture, religion and tradition</i> .....	14
2.3.4.1 <i>Ukuthwala as a primary example of child marriage</i> .....	14
2.3.4.2 <i>Cultural practices and the spirit of ubuntu</i> .....	15
<b>2.4</b> <i>Child marriage: A violation of human rights</i> .....	17
<b>2.5</b> <i>Steps toward combating child marriage</i> .....	19
<b>2.6</b> <i>Conclusion</i> .....	21
CHAPTER 3 THE INTERNATIONAL LEGAL FRAMEWORK ON COMBATING CHILD MARRIAGE .....	23
<b>3.1</b> <i>Introduction</i> .....	23
<b>3.2</b> <i>The development of international children's rights</i> .....	24

<b>3.3</b>	<b><i>The protection of children's rights under the CRC .....</i></b>	<b>33</b>
3.3.1	<i>The underlying principles of the CRC.....</i>	34
3.3.2	<i>The prohibition of child marriage illuminated under the provisions of the CRC.....</i>	37
3.3.3	<i>Implementation of the CRC .....</i>	39
3.3.4	<i>The Committee on the Rights of the Child .....</i>	40
3.3.5	<i>The Optional Protocol to CRC on the Sale of Children.....</i>	43
<b>3.4</b>	<b><i>Conclusion .....</i></b>	<b>43</b>
<b>CHAPTER 4</b>	<b>THE REGIONAL LEGAL FRAMEWORK ON COMBATING CHILD MARRIAGE .....</b>	<b>46</b>
<b>4.1</b>	<b><i>Introduction .....</i></b>	<b>46</b>
<b>4.2</b>	<b><i>The regional development of children's rights .....</i></b>	<b>47</b>
4.2.1	<i>The Banjul Charter.....</i>	47
4.2.2	<i>The African Charter on the Rights and Welfare of the Child.....</i>	50
4.2.3	<i>Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).....</i>	54
<b>4.3</b>	<b><i>Enforcement mechanisms and contributions to the fight against child marriage .....</i></b>	<b>55</b>
<b>4.4</b>	<b><i>Conclusion .....</i></b>	<b>59</b>
<b>CHAPTER 5</b>	<b>THE SOUTH AFRICAN DOMESTIC LEGAL FRAMEWORK ON COMBATING CHILD MARRIAGE .....</b>	<b>61</b>
<b>5.1</b>	<b><i>Introduction .....</i></b>	<b>61</b>
<b>5.2</b>	<b><i>The relationship between South African municipal law and international law .....</i></b>	<b>62</b>
<b>5.3</b>	<b><i>The South African legal framework on child marriage .....</i></b>	<b>65</b>
5.3.1	<i>The Constitution of the Republic of South Africa .....</i>	65

5.3.2	<i>The Children's Act</i> .....	69
5.3.3	<i>The Recognition of Customary Marriages Act</i> .....	71
5.3.4	<i>Jezile v S</i> .....	74
<b>5.4</b>	<b><i>The criminalisation of ukuthwala in South Africa</i></b> .....	<b>75</b>
<b>5.5</b>	<b><i>Conclusion</i></b> .....	<b>77</b>
<b>CHAPTER 6 CONCLUSION AND RECOMMENDATIONS</b> .....		<b>79</b>
<b>BIBLIOGRAPHY</b> .....		<b>84</b>

## **LIST OF ABBREVIATIONS**

AHRLJ	African Human Rights Law Journal
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Social, Economic and Cultural Rights
ICRW	International Center for Research on Women
ILO	International Labour Organisation
OHCHR	Office of the High Commissioner for Human Rights
OPAC	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict
OPIC	Optional Protocol to the Convention on the Rights of the Child on a communications procedure
OPSC	Optional Protocol the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
PELJ	Potchefstroom Electronic Law Journal
SACJ	South African Journal of Criminal Justice
SALRC	South African Law Reform Commission



SARS	South African Review of Sociology
SDG	Sustainable Development Goals
STATS SA	Statistics South Africa
UNICEF	United Nations International Children's Emergency Fund
UDHR	United Nations Universal Declaration of Human Rights

## CHAPTER 1 INTRODUCTION

We must do away with child marriage. Girls who end up as brides at a tender age are coerced into having children while they are children themselves.<sup>1</sup>

Child marriage is a global practice that affects millions of children on a daily basis and cuts across countries, cultures, religions and ethnicities.<sup>2</sup> The statistics provided in chapter two will illustrate that there are millions of young people across the world who are being forced to marry at a young age and consequently suffer the harmful effects of child marriage.<sup>3</sup>

Child marriage is driven by various factors such as poverty, lack of access to education, and the marginalisation of girls linked to inequality between male and female children. The most common factor in many African countries is the practice of culture and/or religion. Globally, every social group has certain cultural and/or religious practices to which they conform, and these practices are either viewed as beneficial to all the members of the society or as harmful to a specific group.<sup>4</sup> In South Africa, *ukuthwala* is the most common form of child marriage practiced and involves the process of abducting a girl for purposes of marrying her,<sup>5</sup> and is therefore harmful to children. Despite its harmful nature and the fact that it violates the rights of children, it is often justified by society in terms of the right to practice one's culture; a right that has been protected by the *Constitution of the Republic of South Africa, 1996 (the Constitution)*.<sup>6</sup>

According to South African common law, a child belongs to society, and an obligation is placed on society to contribute to the teaching, disciplining and moral upbringing of a child.<sup>7</sup> It is argued that society must protect the child from all

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<sup>1</sup> Dr Nkosazana Dlamini-Zuma, current South African Minister of Cooperative Governance and Traditional Affairs and former Chairperson of the African Union, in her speech at the International Conference on Family Planning during November 2013; held just before the launch of the African Union Campaign to End Child Marriage in Africa.

<sup>2</sup> Girls Not Brides date unknown <https://www.girlsnotbrides.org/where-does-it-happen/>.

<sup>3</sup> Mathur, Greene and Malhotra 2003 *ICRW* 1.

<sup>4</sup> Maluleke 2012 *PELJ* 2.

<sup>5</sup> Curran and Bonthuys 2005 *SAJHR* 615.

<sup>6</sup> *Constitution of the Republic of South Africa, 1996*.

<sup>7</sup> Rugwiji *Child Abuse Research in South Africa* 55.

forms of activities that may lead to violence towards a child or impact the child's mental or physical growth. The conclusion of child marriages should therefore not be condoned in any societal group due to the negative impact that it has on the life of the child as they are denied the ordinary experiences which they should be exposed to, such as education, friendships with peers, and good healthy living.<sup>8</sup> Child marriage further suggests a violation of children's rights as it has an adverse effect on the wellbeing of the child due to the fact that it involves economic transactions, lack of freedom, and a violation of the right to consent.<sup>9</sup>

Children's human rights have not always been legally recognised. The practice of realising children's needs and the importance of providing them with complete care fall among the major ethical principles known as human rights.<sup>10</sup> The need to protect children only became apparent in the early 1900s.<sup>11</sup> This led to the adoption of various international and regional law instruments centred at the need to protect the rights of children.

Child marriage violates international human rights in terms of, amongst others, the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 1964 (the *Marriage Convention*);<sup>12</sup> the *Convention on the Elimination of All forms of Discrimination Against Women* (CEDAW), 1981;<sup>13</sup> and the *Convention on the Rights of the Child*, 1990 (CRC).<sup>14</sup> It further violates regional human rights in terms of, amongst others, the *African Charter on the Rights and Welfare of the Child*, 1999,<sup>15</sup> as well as domestic human rights in terms

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<sup>8</sup> Mathur, Greene and Malhotra 2003 *ICRW* 1.

<sup>9</sup> Mikhail 2002 *Gender & Development* 43.

<sup>10</sup> Van Bueren *The international law on the rights of the child* xv.

<sup>11</sup> The need to develop children's rights was recognised with the creation of the International Labour Organisation (ILO) in the early 1900s. The ILO Constitution was adopted in 1919 with the goal of combating child labour.

<sup>12</sup> *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* (1964).

<sup>13</sup> *Convention on the Elimination of All forms of Discrimination Against Women* (1981).

<sup>14</sup> *Convention on the Rights of the Child* (1990).

<sup>15</sup> *African Charter on the Rights and Welfare of the Child* (1999).

of, amongst others, the *Constitution* and the *Recognition of Customary Marriage Act*, 1998 (RCMA).<sup>16</sup>

In light of the increasing plight of child marriages, the eradication thereof has been listed as one of the Sustainable Development Goals (SDGs).<sup>17</sup> It is significant that there are currently 193 countries that have agreed to the goal of ending child marriage by the year 2030.<sup>18</sup> South Africa, as one of these countries, and in compliance with international and regional standards, has accordingly enacted a range of laws to protect children from practices that violate their basic human rights. However, despite the enactment of these laws to protect children's rights, these rights are continuously violated through the conclusion of child marriages. This study therefore aims to provide an in-depth analysis of child marriage, with specific reference to *ukuthwala* as an example of child marriage practiced in South Africa, in order to answer the main research question of this study: is the current constitutional legal framework sufficient to protect children from child marriage?

In order to achieve this aim, this study will comprise a literature-based review evaluating both primary and secondary sources, including an analysis of various books, journal articles, legislation, case law, and internet sources in order to establish the nature of child marriage and further to examine how children have been protected against child marriage. This study will analyse and discuss the development and legal frameworks on children's human rights from an international, regional and South African perspective. It will evaluate the harmful effects that child marriage has on children, together with the violation of children's constitutional rights in South Africa, and establish why child marriage continues to be practiced despite its constitutional violation of the rights of children.

This study consists of six chapters, each analysing the practice of child marriage in order to demonstrate how child marriage is harmful and constitutes a violation of

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<sup>16</sup> *Recognition of Customary Marriage Act* 120 of 1998.

<sup>17</sup> Girls Not Brides <https://www.girlsnotbrides.org/themes/sustainable-development-goals-sdgs/>.

<sup>18</sup> Girls Not Brides <https://www.girlsnotbrides.org/themes/sustainable-development-goals-sdgs/>.

children's constitutional rights. Chapter one introduces the study by providing a background to child marriage and the motivation behind this research.

Chapter two proceeds to establish child marriage as a harmful cultural practice by discussing child marriage in its general context and the factors that contribute to the conclusion of child marriage. *Ukuthwala*, as the most common form of child marriage in South Africa, will be introduced in this chapter and referred to as an example of child marriage throughout this study. The chapter will then proceed to outline the children's rights that are violated through child marriage and then evaluate what steps can be taken to eradicate child marriage in the promotion of the 2030 SDGs.

Chapters three and four will examine the international and regional legal frameworks put in place to recognise, protect and promote children's human rights. Various international and regional laws will be examined with the aim of determining what protection is offered in the international and regional contexts to prohibit child marriages.

Chapter five will scrutinise the South African legal framework regarding child marriage with the aim of determining whether the current legislation and constitutional framework are sufficient in protecting children from being forced to enter into child marriage.

Chapter six will reflect on the content of the study and summarise the main findings. It will examine the relationship between human rights and child marriages, and based on the reflections made, provide possible solutions to secure a future free of child marriages. A personal opinion and recommendations on the matter will then be formulated.

## CHAPTER 2 CHILD MARRIAGE AS A HARMFUL CULTURAL AND RELIGIOUS PRACTICE

### 2.1 Introduction

One in every five girls in the world marry before the age of 18.<sup>19</sup> Statistics show that there are now over 65 million women who were married as children.<sup>20</sup> That is five percent of women who were married by the age of 15, and a further 21 percent who were married before reaching the age of 18.<sup>21</sup>

In Africa, 9.5 percent of women were married by the age of 15 and 33 percent by the age of 18.<sup>22</sup> Accordingly, the most recent data available based on community survey results released by Statistics South Africa during 2017 show that there were a total of 72 child marriages registered during that year alone, with 62 of those marriages being girls marrying for the first time.<sup>23</sup> In previous years, figures have shown that there has been little reduction in child marriage since the 1950s.<sup>24</sup> Figures today reflect 25 million fewer child marriages being concluded.<sup>25</sup> However, despite the significant reduction, the fact still remains that this harmful practice is an ongoing issue, and if efforts to eliminate child marriage, in compliance with the SDGs are not accelerated, then there will be more than 150 million young girls by 2030 who will have married before reaching the age of 18 years.<sup>26</sup>

Before the establishment of the SDGs, the United Nations established the Millennium Development Goals (MDGs) which were a compilation of eight goals<sup>27</sup>

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<sup>19</sup> Girls Not Brides date unknown <https://www.girlsnotbrides.org/where-does-it-happen/>.

<sup>20</sup> UNICEF 2018 <https://www.unicef.org/press-releases/25-million-child-marriages-prevented-last-decade-due-accelerated-progress-according>.

<sup>21</sup> UNICEF data 2018 <https://data.unicef.org/topic/child-protection/child-marriage/>.

<sup>22</sup> UNICEF data 2018 <https://data.unicef.org/topic/child-protection/child-marriage/>.

<sup>23</sup> Stats SA 2017 *Marriages and Divorces* 3.

<sup>24</sup> Jensen and Thornton 2003 *Gender & Development* 12.

<sup>25</sup> UNICEF 2018 <https://www.unicef.org/press-releases/25-million-child-marriages-prevented-last-decade-due-accelerated-progress-according>.

<sup>26</sup> UNICEF date unknown <https://www.unicef.org/protection/child-marriage>.

<sup>27</sup> 1. Eradicate extreme hunger and poverty; 2. Achieve universal primary education; 3. Promote gender equality and empower women; 4. Reduce child mortality; 5. Improve maternal health;

put in place in an effort to meet the needs of the poor by the target date of 2015. With a new target date of 2030, there are now a collection of 17 global goals<sup>28</sup> which have been set by the United Nations General Assembly and form part of an agenda adopted by all the United Nations Member States to achieve the MDGs.<sup>29</sup> The SDGs are classified as non-binding soft law; however, there are legal frameworks in place which are binding and could contribute to the achievement of these goals.

The United Nations International Children's Emergency Fund (UNICEF) is an organisation responsible for seven of the global SDG goals.<sup>30</sup> One of these goals is the fight against child marriage. Child marriage has been proven to hinder the achievement of at least eight SDGs.<sup>31</sup> These include the achievement of gender equality, a healthy lifestyle, ending poverty, ending hunger, and being able to live a life free from violence and exploitation. It also hinders the achievement of quality education and economic growth, and the recognition of human rights and justice. When a child is not subjected to child marriage, their health and education improve, their economic opportunities widen, and they are furthermore less likely to be exposed to poverty, hunger, violence and discrimination.<sup>32</sup> Therefore, to achieve the SDG goals, it is essential that children are placed at the forefront of the agenda.<sup>33</sup>

This chapter will serve as a background to this study by proceeding with a discussion on what is meant by the term "child marriage". The factors leading to child marriage will be examined with the aim of highlighting why this practice

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6. Combat HIV/AIDS, malaria and other diseases; 7. Ensure environmental sustainability; 8. Develop a global partnership for development.

<sup>28</sup> 1. No poverty; 2. Zero hunger; 3. Good health and wellbeing; 4. Quality Education; 5. Gender Equality; 6. Clean water and Sanitation; 7. Affordable and Clean Energy; 8. Decent Work and Economic Growth; 9. Industry, Innovation and Infrastructure; 10. Reduced Inequalities; 11. Sustainable Cities and Communities; 12. Responsible Consumption and Production; 13. Climate Action; 14. Life Below Water; 15. Life on Land; 16. Peace, Justice and Strong Institutions; 17. Partnerships for the Goals.

<sup>29</sup> Le Blanc 2015 *Sustainable Development* 176.

<sup>30</sup> UNICEF date unknown <https://data.unicef.org/children-sustainable-development-goals/>.

<sup>31</sup> Girls Not Brides 2019 <https://www.girlsnotbrides.org/about-child-marriage/>.

<sup>32</sup> Girls Not Brides 2019 <https://www.girlsnotbrides.org/themes/sustainable-development-goals-sdgs/>.

<sup>33</sup> UNICEF 2016 <https://www.unicef.org/agenda2030/69525.html>.

continues despite its harmful effects. It will then proceed to scrutinise child marriage as a violation of many of the children's rights which are protected by international law conventions, as well as regional law, and South African domestic legislation. The chapter will then conclude with a discussion on solutions and measures which have been put in place with the aim of ending this global problem.

## **2.2 An introduction to "child marriage" in its general context**

The term "child" has been defined in various legal instruments. The most important legal international instrument is the CRC which defines a child as "every human being who is below the age of 18 years old."<sup>34</sup> The CRC, however, places a limitation on this definition by stating that the above-mentioned age will only be applicable unless majority is attained earlier by any law which is applicable to the child.<sup>35</sup> Accordingly, the *African Charter*,<sup>36</sup> as well as the South African *Constitution*, mirrors this definition by stating that a child refers to anyone who is below the age of 18 years.<sup>37</sup> However, there is other South African legislation that adds to this definition. For example, the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act)*<sup>38</sup> defines a child as a person who is under the age of 18 years but makes special provision for sections 15 and 16 of the same Act by stating that when it comes to matters dealing with statutory rape and statutory sexual assault, reference made to a child will mean a person who is 12 years old and older but below 16 years old.<sup>39</sup>

Taking into account the fact that this study addresses the issues pertaining to child marriage, a child for the purposes of this study will mean a person who is below the age of 18 years, and therefore accordingly unable of expressing or giving his or her consent. It is argued here that consent is an essential aspect when it comes to marriage. Such consent to marry can be derived from the

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<sup>34</sup> A 1 of the CRC (1990).

<sup>35</sup> A 1 of the CRC (1990).

<sup>36</sup> A 2 of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>37</sup> Section 28 (3) of the *Constitution*, 1996.

<sup>38</sup> *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*.

<sup>39</sup> Section 1 (1) (a) and (b) of the *Sexual Offences Act 32 of 2007*.



*Universal Declaration of Human Rights* (UDHR)<sup>40</sup> which stipulates that marriage is only to be entered into when there is free and full consent of both the parties who are intending to marry.<sup>41</sup> This means that there must be a non-coercive agreement where the parties have a full understanding of the consequences of giving consent.<sup>42</sup> If either one of the parties does not give their full and free consent to the marriage, then such a marriage is recognised as a forced marriage.<sup>43</sup>

It is therefore important to note that consent is not considered full and free if either one of the parties at the time of giving consent is not of the age to make an informed decision about a life partner.<sup>44</sup> Accordingly, where a child has the inability to give their free and full consent, it cannot be supplemented by that of a parent by virtue of the fact that the term "full consent" requires that consent be given by the actual person consenting.<sup>45</sup>

One of the requirements of consent is that it must be done in the presence of witnesses as well as an authority who is competent to solemnise the marriage.<sup>46</sup> It is for this reason that CEDAW places emphasis on the betrothal and marriages of children as having no legal effect.<sup>47</sup> In light of this, all child marriages are forced marriages because a child generally does not have the legal ability to give their free and full consent.<sup>48</sup> Child marriage is, therefore, an epidemic legal problem viewed as both the cause and the consequence of numerous social issues.<sup>49</sup>

Against this background, child marriage can therefore be defined as:

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<sup>40</sup> *Universal Declaration of Human Rights*, General Assembly Resolution 217 A (III) (1948).

<sup>41</sup> Article 16(2) *Universal Declaration of Human Rights*.

<sup>42</sup> Centre for Human Rights 2018 *A Report on Child Marriage in Africa* 16.

<sup>43</sup> Centre for Human Rights 2018 *A Report on Child Marriage in Africa* 16.

<sup>44</sup> Centre for Human Rights 2018 *A Report on Child Marriage in Africa* 16.

<sup>45</sup> Article 1 of the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* (1964).

<sup>46</sup> Article 1 of the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* (1964).

<sup>47</sup> Article 16(2) of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979).

<sup>48</sup> Centre for Human Rights 2018 *A Report on Child Marriage in Africa* 16.

<sup>49</sup> Centre for Human Rights 2018 *A Report on Child Marriage in Africa* 16.

Any marriage which is carried out below the age of 18 (eighteen) years and before the child, usually the girl, is physically, physiologically, and physiologically ready to shoulder the responsibilities of marriage and childbearing.<sup>50</sup>

This means the type of marriages entered into by the child, whereby the family decides on a spouse for the child without giving any consideration to the child's views.<sup>51</sup> Child marriage can also be considered as the sale of the child, especially in terms of cultural and religious practices, which is expressly prohibited by law. The *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Optional Protocol to CRC on the sale of children)*<sup>52</sup> defines the sale of children as an act or transaction where the child is transferred from a person or group of persons to another for some form of remuneration or consideration.<sup>53</sup>

The payment of *lobolo*, which is a payment made by the family of the bride to the family of the groom, usually in the form of cattle or other livestock,<sup>54</sup> is a requirement that forms part of the cultural and religious practice of child marriage.<sup>55</sup> It is argued here that this requirement is a direct interpretation of a sale of a child in that a form of payment is made in exchange for the child to form part of the groom's family.

Child marriages are more common amongst minor girls than amongst minor boys. However, similar to child brides, child grooms are also forced to take on the responsibilities of an adult, for which they may not be prepared.<sup>56</sup> Therefore, it is important to note that while the practice of child marriage is more common

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<sup>50</sup> Section (I) (D) of the UN Office of the High Commissioner for Human Rights (OHCHR) *Fact Sheet No. 23*.

<sup>51</sup> Mtshali 2014 *Child Abuse Research in South Africa* 53.

<sup>52</sup> The *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (2002).

<sup>53</sup> Article 2 of the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (2002).

<sup>54</sup> Curran & Bonthuys 2005 *SAJHR* 616.

<sup>55</sup> Kalamar, Lee-Rife and Hindin 2016 *Journal of Adolescent Health* S20.

<sup>56</sup> UNICEF date unknown <https://data.unicef.org/topic/child-protection/child-marriage/>.

amongst girls than boys, it remains a violation against the right of the child regardless of gender.<sup>57</sup>

### **2.3 Factors contributing to child marriage in Africa**

Of the 41 countries worldwide with a child marriage prevalence rate of 30 percent or more, 30 of these countries are in Africa.<sup>58</sup> There are several reasons why this prevalence continues to rise in Africa.<sup>59</sup> Most African countries with high rates of child marriage have civil laws that prohibit child marriage and set minimum marriage ages. However, the situation persists in part because strong cultural and religious practices make it difficult to enforce these laws. In fact, research shows that culture and religion are some of the major causes of child marriage, including poverty, gender inequality, limited education and economic options, and insecurity in the face of conflict.<sup>60</sup>

For the purposes of this study, the focus will be placed on the dominant factors. However, it is important to note that all factors leading to child marriage should not be viewed in compartments but rather as interlinked, because the presence of one factor ultimately leads to the presence of another.

#### **2.3.1 Gender inequality**

The factors leading to child marriage can be summarised and classified in terms of social, cultural and economic factors.<sup>61</sup> However, none of these factors can be understood without making reference to, and taking into consideration, the inferior status which is automatically associated with girls.<sup>62</sup> As noted above, the

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<sup>57</sup> UNICEF 2019 <https://data.unicef.org/topic/child-protection/child-marriage/>.

<sup>58</sup> Other countries affected by child marriage include Southern Asia, Latin America as well as the Caribbean region.

<sup>59</sup> Gaffney-Rhys 2011 *The International Journal of Human Rights* 360.

<sup>60</sup> More examples of factors contributing to child marriage include a woman's high fertility rate, a woman's inferior status, the status of unemployment (Maswikwa *et al* 2015 *International perspectives on sexual and reproductive health* 59); and the lack of protection within the legal system, armed conflict and sexual violence as well as the lack of adequate registration procedures for birth and marriage in African countries, particularly in rural areas (Centre for Human Rights 2018 *Child Marriage Report* 34-38).

<sup>61</sup> Centre for Human Rights 2018 *Child Marriage Report* 25.

<sup>62</sup> Centre for Human Rights 2018 *Child Marriage Report* 25.

conclusion of child marriage is more common amongst girls than than boys.<sup>63</sup> Gender inequality, therefore, plays a significant role in the reasons why child marriages are concluded.

Besides the social pressures within the community, some cultures have a belief that sending off a girl to marry before she reaches puberty will result in an overflow of blessings to that child's family.<sup>64</sup> Furthermore, whilst some communities believe that the practice is not harmful because it actually protects the girl from any attacks or violence, others enforce the practice to avoid the shame associated with their children falling pregnant out of wedlock.<sup>65</sup> Parents therefore promote this practice in the belief that it places a value on a girl's virginity.<sup>66</sup> Not only is it believed that it protects a girl from sexual exposure and rape, but also from unintended pregnancies, Sexually Transmitted Infections (STIs) and the Human Immunodeficiency Virus (HIV) as a Sexually Transmitted Disease (STD).<sup>67</sup>

Some cultures in South Africa believe in specified roles for the genders, ultimately giving rise to a higher prevalence in child marriage.<sup>68</sup> For example, the practice of child marriage is predominantly entertained as *ukuthwala* by the Xhosa speaking culture,<sup>69</sup> *ukuganisela* by the Zulus who form part of the Nguni speaking culture, and *go thiba difate* by the Sepedis who form part of the Sotho speaking culture.<sup>70</sup> More often, the implementation of these roles in the different cultures tends to disadvantage the female gender in that boys are generally associated with a higher social value.<sup>71</sup> Therefore, it is argued here that boys are praised more and less pressure is placed on them with fewer expectations relating to how they are to behave themselves generally. Girls are more often left out of any decisions

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<sup>63</sup> See para 2.2 above.

<sup>64</sup> Mtshali 2014 *Child Abuse Research in South Africa* 57.

<sup>65</sup> Mtshali 2014 *Child Abuse Research in South Africa* 57.

<sup>66</sup> Gaffney-Rhys 2011 *The International Journal of Human Rights* 360.

<sup>67</sup> Nour 2009 *Women's Health in the Developing World* 53.

<sup>68</sup> Centre for Human Rights 2018 *Child Marriage Report* 26.

<sup>69</sup> Choma 2011 *US-China Law Review* 875.

<sup>70</sup> Mtshali 2014 *Child Abuse Research in South Africa* 51.

<sup>71</sup> Centre for Human Rights 2018 *Child Marriage Report* 26.

which need to be made about families, the community or even themselves.<sup>72</sup> It is for this reason that this discrimination has a major influence on the social value of the girl, making them more susceptible to child marriage and other social harm than boys.<sup>73</sup>

### 2.3.2 Poverty

There is a substantial gap between the prevalence of child marriages amongst the poor and the rich.<sup>74</sup> Poverty is one of the most common factors that leads to the conclusion of child marriages.<sup>75</sup> Like with gender inequality, there are a number of other factors leading to child marriage which arise as a result of poverty, such as the lack of educational opportunities, as will be discussed below.<sup>76</sup>

Disadvantaged or poor families often view the young child in their family as an economic burden.<sup>77</sup> In addition to this, families are faced with the pressure of having to ensure their daughter's financial security.<sup>78</sup> Therefore, either allowing or forcing the child to get married means a decrease in the financial burden for the family for two reasons. Firstly, in many parts of Africa, the family of the bride receives some sort of payment for marrying off the bride.<sup>79</sup> This payment of the bride price – referred to as *lobolo* – is paid to the girl's family and therefore results in a decrease of the financial burden.<sup>80</sup> Secondly, the family is no longer pressurised to educate the child who, in the eyes of the family, is not perceived as a source of future wealth to that family.<sup>81</sup> Therefore, the responsibilities which the family may have for the child are shifted onto the next family; that is, the family of the groom.<sup>82</sup>

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<sup>72</sup> Centre for Human Rights 2018 *Child Marriage Report* 26.

<sup>73</sup> Centre for Human Rights 2018 *Child Marriage Report* 26.

<sup>74</sup> UNICEF 2014 [https://www.unicef.org/media/files/Child\\_Marriage\\_Report\\_7\\_17\\_LR..pdf](https://www.unicef.org/media/files/Child_Marriage_Report_7_17_LR..pdf).

<sup>75</sup> Gaffney-Rhys 2011 *The International Journal of Human Rights* 360.

<sup>76</sup> See para 3.2.2 below.

<sup>77</sup> Gaffney-Rhys 2011 *The International Journal of Human Rights* 360.

<sup>78</sup> Nour 2009 *Women's Health in the Developing World* 53.

<sup>79</sup> Centre for Human Rights 2018 *Child Marriage Report* 31.

<sup>80</sup> Kalamar, Lee-Rife and Hindin 2016 *Journal of Adolescent Health* S20.

<sup>81</sup> Kalamar, Lee-Rife and Hindin 2016 *Journal of Adolescent Health* S16.

<sup>82</sup> UNICEF 2001 <https://www.unicef-irc.org/publications/291-early-marriage-child-spouses.html>.

One of the recent trends in South Africa is the phenomenon of having a "sugar daddy". This usually involves younger girls engaging in sexual activities with older men in exchange for money or other goods.<sup>83</sup> Arguably, the amount of young girls and/or women who are entertaining this phenomenon is increasing because they see it as an easier way of living the "nice life" and ensuring that their standards remain high to keep up with the pressures of society. Accordingly, this emphasises poverty in that some parents encourage this form of transactional relationships as a means of securing resources for the family in that it puts the food on the table.<sup>84</sup> So in essence, for most families, forcing a child to marry young is merely because the family or parents believe that it is the only option, regardless of the negative effects it may have on the child.<sup>85</sup>

### *2.3.3 Lack of educational opportunities*

There is a direct correlation between a girl's age at marriage and the level of education that she has received.<sup>86</sup> The right to education has been enshrined in a number of legal instruments at an international,<sup>87</sup> regional<sup>88</sup> and domestic level.<sup>89</sup> But the lack of access thereto has been identified as a cause, a consequence, and an aggravating factor of child marriage.<sup>90</sup> It is a cause in that, as previously mentioned, there are no financial resources to place a child in school, and a consequence in that it deprives a child of the effective development of the child's personality, talents, and mental and physical abilities to achieve their fullest potential.<sup>91</sup>

This "lack of educational opportunities" relates to the fact that child marriage is generally associated with children who have received a lower level of education or

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<sup>83</sup> Centre for Human Rights 2018 *Child Marriage Report* 32.

<sup>84</sup> Centre for Human Rights 2018 *Child Marriage Report* 32.

<sup>85</sup> Mtshali 2014 *Child Abuse Research in South Africa* 57.

<sup>86</sup> Jensen and Thornton 2003 *Gender & Development* 13.

<sup>87</sup> A 28 of the CRC (1990); A 26 of the *Universal Declaration of Human Rights* (1948); A13 and 14 of the *International Covenant on Economic, Social and Cultural Rights* (1966).

<sup>88</sup> A 17 of the *African Charter on Human and People's Rights* (1981); A 11 on the *African Charter on the Rights and Welfare of the Child* (1999).

<sup>89</sup> Section 29 of the *Constitution*.

<sup>90</sup> Centre for Human Rights 2018 *Child Marriage Report* 25.

<sup>91</sup> A 29 of the CRC (1990).

otherwise have no access to educational facilities at all.<sup>92</sup> It is evident that children who do not attend primary school are more likely to marry at a young age than those who have access to a primary education.<sup>93</sup> It is for this reason that there is importance placed on keeping children in school by increasing educational opportunities and implementing better methods that will impact school enrolment. This will generally have a positive effect on the child.<sup>94</sup>

#### 2.3.4 *Culture, religion and tradition*

Africa is a diverse continent with a vast practice of cultural beliefs, often within the smaller countries of Africa, which not only render children more vulnerable to child marriage but also enthusiastically promote it.<sup>95</sup> Community members within these smaller countries justify their practices, and believe that child marriage is a positive practice for the child because it prepares that child for life.<sup>96</sup>

##### 2.3.4.1 *Ukuthwala* as a primary example of child marriage

In South Africa, child marriage is practiced in different forms but mainly manifests in the cultural practice of *ukuthwala*.<sup>97</sup> Originally, the recognition of customary marriages was denied by the government of the Union of South Africa<sup>98</sup> for various reasons. A few of these reasons include the fact that firstly, the conclusion of customary marriages involves a compulsory payment of *lobolo*. Accordingly, the government of the Union of South Africa believed that this payment could be misconceived as the sale of a woman.<sup>99</sup>

Secondly, customary marriages have an element of polygamy tied to them which in turn defeats the understanding of marriage commonly understood to involve

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<sup>92</sup> Jensen and Thornton 2003 *Gender & Development* 13.

<sup>93</sup> Gaffney-Rhys 2011 *The International Journal of Human Rights* 360.

<sup>94</sup> Svanemyr *et al* 2012 *Reproductive Health* 2.

<sup>95</sup> Centre for Human Rights 2018 *Child Marriage Report* 25.

<sup>96</sup> Centre for Human Rights 2018 *Child Marriage Report* 27.

<sup>97</sup> Centre for Human Rights 2018 *Child Marriage Report* 24.

<sup>98</sup> The government of the Union of South Africa was formerly known as the Cape Colonial Government.

<sup>99</sup> Konyana and Bekker 2007 *De Jure* 139.

one man and one woman.<sup>100</sup> Lastly, customary marriage has an element of *ukuthwala* which involves the crime of abduction.<sup>101</sup> However, despite its consideration as a crime, the practice of *ukuthwala* is a cultural practice which has continued to grow over the years.<sup>102</sup> It originated in the Xhosa culture and was predominantly practiced in the Eastern Cape.<sup>103</sup> Today, the practice of *ukuthwala* has gradually spread amongst the different ethnic groups in South Africa.<sup>104</sup> The word *ukuthwala* can be directly translated as "to carry" and involves the act of a man abducting a girl child and forcibly taking her to his home as a means of forcing the girl's family to engage in customary marriage negotiations.<sup>105</sup> Curran and Bonthuys describe the practice as "stealing the bride" and further describe the process as follows:

The groom and his friends would carry the bride off to his family home. The negotiations for *lobolo* between the families of the bride and groom would then follow the abduction, rather than preceding the wedding. If the families cannot come to an agreement, the girl will return to her home, while the man's family will be liable for the damages.<sup>106</sup>

This practice has been culturally legitimised.<sup>107</sup> Usually it is carried out with the consent of the girl because it is considered beneficial to the family in that it saves the family the effort of organising and paying for a large traditional wedding.<sup>108</sup> However, it should be emphasised that such consent bears no weight as a child is unable to express his or her consent.<sup>109</sup>

#### 2.3.4.2 Cultural practices and the spirit of *ubuntu*

All customary practices, including those which involve women and children, are based on the spirit of *ubuntu*.<sup>110</sup> The term *ubuntu* is one that has received much

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<sup>100</sup> Konyana and Bekker 2007 *De Jure* 139.

<sup>101</sup> Konyana and Bekker 2007 *De Jure* 139.

<sup>102</sup> Monyane 2013 *SARS* 65.

<sup>103</sup> Choma 2011 *US-China Law Review* 875.

<sup>104</sup> Mwambene and Sloth-Nielson 2011 *AHRLJ* 3.

<sup>105</sup> Mwambene and Sloth-Nielson 2011 *AHRLJ* 3.

<sup>106</sup> Curran & Bonthuys 2005 *SAJHR* 615.

<sup>107</sup> Mwambene and Sloth-Nielson 2011 *AHRLJ* 3.

<sup>108</sup> Curran & Bonthuys 2005 *SAJHR* 616.

<sup>109</sup> See para 2.2 above.

<sup>110</sup> Maluleke 2012 *PELJ* 5.



recognition from various legal circles, including the *Constitution of the Republic of South Africa* Act 200 of 1993 (Interim Constitution),<sup>111</sup> the Constitutional Court and several legal academics.<sup>112</sup> *uBuntu* is an African saying which forms part of the deep cultural heritage of African people and inspires a concept of humanity directly translating to "I am because we are and therefore we are because I am".<sup>113</sup>

In the case of *Dikoko v Mokhatla* 2006 (6) SA 235 (CC),<sup>114</sup> Judge Mokgoro explained the importance of the role which the concept of *ubuntu* plays in South Africa by stating that the basic constitutional value of human dignity is one which closely relates to *ubuntu* in our constitutional democracy and formalises an idea which is based on the deep respect for the humanity of others.<sup>115</sup> Section 10 of the *Constitution*, being the section that protects a person's right to dignity, is therefore one such example that has been seen to embrace the spirit of *ubuntu*.

However, despite its promotion of humanity, *ubuntu* has been noted to underscore the importance of consensus in that the overall concept tends to favour the community as opposed to the individual.<sup>116</sup> Accordingly, it is argued that child marriage tends to favour the community as opposed to the child, as children are being forced into this harmful practice by the child's family and/or guardians and they neglect to consider the effects that child marriage have on the child. Therefore, in the moment of forcing the child to engage in child marriage, the child's human dignity is being stripped, as the family only considers the benefits that the practice has on them.

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<sup>111</sup> The *Constitution of the Republic of South Africa* 200 of 1993.

<sup>112</sup> Johnson Pete and du Plessis *Jurisprudence: A South African Perspective* 206.

<sup>113</sup> Gobodo-Madikizela "Working through the Past: Some thoughts on Forgiveness in Cultural Context" 163.

<sup>114</sup> *Dikoko v Mokhatla* 2006 (6) SA 235 (CC).

<sup>115</sup> *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 68.

<sup>116</sup> Maluleke 2012 *PELJ* 4.

## **2.4 Child marriage: A violation of human rights**

Once a girl is married, she takes up the role of a wife, domestic worker, and then in due time, a mother.<sup>117</sup> A number of rights that have been protected by international, regional and domestic law are violated just by assuming these roles as a child. These legal frameworks will be discussed in greater detail in the following chapters. However, for now, one can note that internationally CEDAW has made child marriage illegal by expressly stipulating that all child marriages shall have no legal effect.<sup>118</sup> Furthermore, the CRC does not directly make mention of marriage, but child marriage is linked to other rights addressed in the CRC, including the right to protection from all forms of abuse and violence, as well as the right to have the best interests of the child considered.<sup>119</sup>

Regionally, the *African Charter*<sup>120</sup> has obligated State Parties to take appropriate measures to eliminate all harmful social and cultural practices which could affect the child.<sup>121</sup> Therefore, justifying the practice of child marriage as a cultural or religious practice results in a clear violation of law in terms of this instrument.

Domestically, section 7(1) and (2) of the Bill of Rights forms the cornerstone of democracy in South Africa and reads as follows:

1. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
2. The state must respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>122</sup>

The State has therefore been placed under the obligation to ensure that relevant steps are taken to implement international, regional and domestic laws with the aim of protecting children. The *Constitution* makes provision for a child to have

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<sup>117</sup> Nour 2009 *Women's Health in the Developing World* 53.

<sup>118</sup> Article 16(2) of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979).

<sup>119</sup> Articles 19 and 3 of the CRC (1990) respectively.

<sup>120</sup> *African Charter on the Rights and Welfare of the Child* (1990).

<sup>121</sup> Article 21(1) of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>122</sup> Section 7 (1) and (2) of the *Constitution*.

the right to be protected from maltreatment, neglect, abuse or degradation.<sup>123</sup> All of these rights are violated through child marriage.

It is common knowledge that with a wife, the husband usually has certain sexual expectations. This often leads to a child being forced to engage in sexual activities with her husband; thus the sudden violent intrusion of sexual relations.<sup>124</sup> The use of the word "forced" describes a child's resistance to engage in these activities and in turn results in the child becoming a victim of domestic violence.<sup>125</sup>

It is furthermore common knowledge that the conclusion of a marriage involves habitation with the spouse. Once a marriage has been concluded, the child will be forced to move in with her husband, sometimes in a village or town far away from the child's ordinary place of residence or parental home.<sup>126</sup> In most African cultures, polygamy is seen as an acceptable practice where men engage in marriage with more than one woman.<sup>127</sup> This can take a huge toll on the child, often leading to the child feeling neglected, rejected and isolated.<sup>128</sup> As a result of the assumed roles, children lose their childhood and miss the opportunity to develop friendships, ultimately leading to depression, and this is an infringement on the child's right to be excluded from an environment which hinders the child's wellbeing, physical and mental health, and social development.<sup>129</sup>

Young girls who are wedded early are often also placed at the risk of bearing children early.<sup>130</sup> In an attempt to prove a girl's fertility, the level of unprotected sexual intercourse with her husband is increased.<sup>131</sup> This not only leads to a higher chance of falling pregnant but an increased risk to the child's health by making her more vulnerable to sexually transmitted infections or other illness.<sup>132</sup> Although parents believe that a child's engagement in marriage protects the child from

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<sup>123</sup> Section 28 (d) of the *Constitution*.

<sup>124</sup> Mtshali 2014 *Child Abuse Research in South Africa* 57.

<sup>125</sup> Mtshali 2014 *Child Abuse Research in South Africa* 57.

<sup>126</sup> Nour 2009 *Women's Health in the Developing World* 53.

<sup>127</sup> Nour 2009 *Women's Health in the Developing World* 54.

<sup>128</sup> Nour 2009 *Women's Health in the Developing World* 54.

<sup>129</sup> Section 28(1)(f)(ii) of the *Constitution*.

<sup>130</sup> Kalamar, Lee-Rife and Hindin 2016 *Journal of Adolescent Health* S17.

<sup>131</sup> Nour 2009 *Women's Health in the Developing World* 54.

<sup>132</sup> Nour 2009 *Women's Health in the Developing World* 53.

infectious sicknesses, the contrary has been proven in that the husbands, who are usually much older than the girl, are either in a polygamous relationship or have otherwise had many sexual partners prior to, or while still with the child; hence increasing the risk of transferring HIV and other sexually transmitted infections to her.<sup>133</sup>

## **2.5 Steps toward combating child marriage**

Child marriage has increasingly received recognition on international, regional and national levels in that the drive towards ending marriage requires co-operation at both international and local government level in high prevalence countries.<sup>134</sup>

The first significant step in combating child marriage is the establishment of children's rights at both of these levels. Where children's rights were not always recognised, they were first recognised at an international level and then slowly developed regionally and domestically. Having first been highlighted in the MDGs and now forming part of the SDGs, it is clear that the prevention of child marriage has been established as a priority on the global agenda for several decades.<sup>135</sup>

In order to ensure that the SDGs are effectively achieved, there must be compliance with, and proper implementation of, the current legal frameworks in South Africa. This can be done with the assistance of various monitoring bodies that have been established to oversee such compliance and implementation. For example, the CRC and the *African Charter* have a Committee consisting of various experts who monitor the implementation of these legislative instruments. These Committees function in such a way that all allegations of violations against any right in the respective instruments are reported to the relevant Committee. They

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<sup>133</sup> Nour 2009 *Women's Health in the Developing World* 54.

<sup>134</sup> Girls Not Brides date unknown <https://www.girlsnotbrides.org/how-can-we-end-child-marriage/>.

<sup>135</sup> Kalamar, Lee-Rife and Hindin 2016 *Journal of Adolescent Health* S16.

therefore have powers to deal with both individual complaints as well as inter-State disputes and are tasked to investigate the reported allegations.<sup>136</sup>

Once investigated, these Committees produce reports for the State involved, and the reports are made available to the public. These Committees also publish their interpretation of human rights provisions, known as general comments. General Comment 5, for example, is one that could be useful to States as it provides a clear guideline on how, and to what extent, they are to implement the CRC.<sup>137</sup>

One of the goals aimed at the eradication of child marriage is goal number five. This goal establishes the concept of equality with its key focus on the empowerment of women and girls.<sup>138</sup> Therefore, one can derive that these two goals are linked by virtue of the fact that delivering on the promise to eradicate child marriage is not only essential to protecting children, but also ensures that gender equality is advanced.<sup>139</sup>

In light of the fact that child marriages are supported as a cultural practice, cultural norms need to be influenced by working with relevant stakeholders in order to challenge and ultimately change the norms surrounding child marriage.<sup>140</sup> The African Union launched a campaign during 2014 to end child marriage in Africa. This African Union Campaign to End Marriage in Africa (AU Campaign) has been effective in bringing the issue of child marriage as a main focus in Africa.

This AU Campaign placed its focus on improving the conceptual framework, targeting the countries which engage in this practice, and ensuring that proper monitoring and evaluation were provided. However, in addition to efforts from legal bodies, parents and caregivers also play essential roles in guiding and providing the first line of support to their children.<sup>141</sup> One of the most effective methods of ensuring that child marriage and its consequences are reduced lies in

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<sup>136</sup> ACERWC date unknown <https://www.acerwc.africa/mandate/>; UNHR Office of the Commissioner date unknown <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx>.

<sup>137</sup> UN Committee on the Rights of the Child 2003 *General Comment 5*.

<sup>138</sup> Kalamar, Lee-Rife and Hindin 2016 *Journal of Adolescent Health* S16.

<sup>139</sup> UNICEF 2018 *Progress for Every Child in the SDG era* 65.

<sup>140</sup> Svanemyr *et al* 2012 *Reproductive Health* 2.

<sup>141</sup> Boezaart *Child Law in South Africa* 275.

mandating a child's school attendance.<sup>142</sup> Governmental and non-governmental policies aimed at raising awareness and educating communities that empower girls through education can, therefore, help end child marriage.<sup>143</sup>

Setting a minimum age for marriage is a helpful mechanism in combating child marriage. As a significant step towards protecting children against child marriage, CEDAW has placed an obligation on State Parties to take all necessary action to ensure that a minimum age is set for the conclusion of marriages.<sup>144</sup> The *Protocol to the African Charter on Human and Peoples' Rights of Women in Africa* (Protocol to the Banjul Charter) complies with this international law instrument by setting the required minimum age for marriage at 18 years.<sup>145</sup> As a result of this mechanism, the prevalence of child marriage and teenage childbearing has been proven to be lower in countries that are consistent with laws against child marriage as opposed to countries without such consistency.<sup>146</sup>

## **2.6 Conclusion**

Child marriages are forced marriages that are concluded by children before reaching the age of 18 years old, with these children having no say in the process because it is based on cultural and/or religious practices that are carried out by the child's family.

There are many factors that contribute to placing a child at the risk of engaging in child marriage. Essentially, these can be summarised as religious and/or cultural practices, poverty, social norms, the misconception that marriage provides protection to the child, family honour, and customary laws.<sup>147</sup> Despite its violation of the rights of the child, *ukuthwala*, as a common form of child marriage, is a

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<sup>142</sup> Nour 2009 *Women's Health in the Developing World* 51.

<sup>143</sup> Nour 2009 *Women's Health in the Developing World* 55.

<sup>144</sup> Article 16 of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979).

<sup>145</sup> Article 21(2) of the *African Charter on the Rights and Welfare of the Child* (1990); Article 6 of the *Protocol to the African Charter on Human and Peoples' Rights of Women in Africa* (2003).

<sup>146</sup> Maswikwa *et al* 2015 *International Perspectives on Sexual and Reproductive Health* 58.

<sup>147</sup> UNICEF 2019 <https://data.unicef.org/topic/child-protection/child-marriage/>.

practice that remains popular and receives much attention from communities in areas where it is practiced.<sup>148</sup>

Child marriage can be widely acknowledged as a harmful cultural and religious practice, essentially leading to the cause and result of several human and children's rights violations.<sup>149</sup> It impacts the child's physical and mental health, right to education, and protection from any form of abuse and degradation. The prevention of child marriages has been placed as a priority from both a human rights point of view and in an effort to accomplish the SDG targets.<sup>150</sup>

Laws and policies play an essential role in the step towards eradicating child marriage.<sup>151</sup> Significant investment has been made towards the enactment of laws and policies at an international, regional and domestic level to decrease, and ultimately eradicate, the practice of child marriage in line with the 2030 SDGs.<sup>152</sup> However, irrespective of whether progress is being made towards the accomplishment of the SDGs, it is argued that child marriage is most likely to persist amongst children who come from poorer backgrounds as these are the children who are in communities where child marriage is practiced.<sup>153</sup>

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<sup>148</sup> Mwambene and Sloth-Nielson 2011 *AHRLJ* 3.

<sup>149</sup> Maswikwa *et al* 2015 *International Perspectives on Sexual and Reproductive Health* 58.

<sup>150</sup> Kalamar, Lee-Rife and Hindin 2016 *Journal of Adolescent Health* S16.

<sup>151</sup> Girls Not Brides date unknown <https://www.girlsnotbrides.org/how-can-we-end-child-marriage/>.

<sup>152</sup> Kalamar, Lee-Rife and Hindin 2016 *Journal of Adolescent Health* S19.

<sup>153</sup> UNICEF 2018 *Progress for Every Child in the SDG era* 68.

## CHAPTER 3 THE INTERNATIONAL LEGAL FRAMEWORK ON COMBATING CHILD MARRIAGE

### 3.1 Introduction

There are typically two primary sources of international law; namely, customary international law and treaty law. Customary international law is the aspect of international law involving the principle of custom and has been defined as the "evidence of general practice which has been accepted as law".<sup>154</sup> On the other hand, international human rights law has evolved over the years to include a pool of human rights treaty bodies. A treaty is:

... an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.<sup>155</sup>

Emphasis has been placed on the fact that all treaties are to be interpreted in good faith without shying away from that treaty's ordinary meaning.<sup>156</sup> Once a State Party has ratified a treaty, it agrees to be bound by the provisions of that treaty. Human rights treaties have been adopted by the United Nations to assist in promoting peace, justice and freedom, as well as a better standard of living.<sup>157</sup> They play a vital role in establishing the importance of human rights, with particular emphasis placed on individual rights and a State Party's obligations in promoting and protecting these rights.<sup>158</sup> As a result of this, and through the development of children's rights, there are various measures put in place to combat the harmful practice of child marriage at the international level.

This chapter aims to establish what the international legal framework is on the rights of children and what role it has played in combating child marriage. It commences by providing a historical overview of the development of children's rights by outlining the various international measures that have been adopted

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<sup>154</sup> Article 38 of the *Statute of the International Court of Justice* (1946).

<sup>155</sup> Article (2)(1)(a) of the *Vienna Convention on the law of treaties* (1969).

<sup>156</sup> Article 31 (1) of the *Vienna Convention on the law of treaties* (1969).

<sup>157</sup> Van Bueren *The international law on the rights of the child* xv.

<sup>158</sup> Mechlem 2009 *Vanderbilt Journal of Transitional Law* 905.



prior to the inception of the CRC. An analysis of the CRC, as one of the most important international legal instruments regulating children's rights today, will follow. The CRC will be evaluated with specific reference to the four basic principles, relevant provisions linked to child marriage, as well as the implementation thereof and its monitoring body.

It is important to note that the CRC does not stand in isolation by virtue of General Comment 5 on the implementation of the CRC which urges State Parties to adhere to the six major human rights instruments. Consequently, these instruments will be dealt with during the content of this chapter. The chapter will conclude by tying the international measures with the harmful cultural and religious practice of child marriage as it seeks to determine whether these measures have assisted in promoting the SDG goals with specific reference to the eradication of child marriage.

### ***3.2 The development of international children's rights***

Before the establishment of international legal instruments, State Parties followed the principle of custom, which involves the use of international common laws that have not been addressed in treaties.<sup>159</sup> It is for this reason that the importance of a child's legal status was placed more as "needs" as opposed to their "rights".<sup>160</sup> As a result of this, children were previously taken advantage of by being classified as human beings who were regarded as seen but never heard.<sup>161</sup> Today, the need to protect children has evolved significantly through the establishment of various treaties.

The development of international children's rights commenced in the 1900s with the International Labour Organisation (ILO) as an agency that recognised the need to set labour standards aiming to promote decent work for all persons.<sup>162</sup> The ILO adopted the *International Labour Organisation Constitution* (ILO

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<sup>159</sup> Dugard *International Law A South African Perspective* 47.

<sup>160</sup> Memzur 2008 *SA Public Law* 1.

<sup>161</sup> Memzur 2008 *SA Public Law* 1.

<sup>162</sup> ILO 2019 <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm>.

Constitution)<sup>163</sup> as the first legally binding treaty. The *ILO Constitution* was signed in 1919 with the goal of combating child labour by setting a limitation on the type of work that a child could perform and by prohibiting children from working in environments that could be hazardous to their wellbeing.<sup>164</sup> The ILO was built on the fundamental principle that universal and long-lasting peace can only be established if it is based on social justice.<sup>165</sup>

It was shortly thereafter that a number of countries approved a proposal to establish the League of Nations at the Paris Peace Conference in 1920 in order to maintain peace after World War One.<sup>166</sup> Article 23 of the *Covenant on the League of Nations* (the *Covenant*)<sup>167</sup> establishes the requirement of members of the *Covenant* to protect children against unfair and inhumane conditions of labour and child trafficking.<sup>168</sup>

In addition to efforts made to advance children's rights, the League of Nations further adopted the *Geneva Declaration of the Rights of the Child* (the *Geneva Declaration*) in 1924 with the purpose of protecting children's rights as well as the responsibility of adults towards children.<sup>169</sup> Although this instrument only consisted of five articles, it was a significant step in the establishment of an international movement for children's rights. The *Geneva Declaration* highlights that children are owed the right to protection from exploitation,<sup>170</sup> economic freedom,<sup>171</sup> as well as a proper and developmental upbringing.<sup>172</sup>

The *Geneva Declaration* was later expanded in 1948 to include seven principles, with its final expansion in 1959 based on the structure and content of the original 1924 *Geneva Declaration* to highlight ten core principles protecting the children's rights.

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<sup>163</sup> *International Labour Organisation Constitution* (1919).

<sup>164</sup> Fass 2011 *The Annals of the American Academy of Political and Social Sciences* 17.

<sup>165</sup> Preamble of the *International Labour Organisation Constitution* (1919).

<sup>166</sup> Waxman 2019 <https://time.com/5507628/league-of-nations-history-legacy/>.

<sup>167</sup> *Covenant of the League of Nations* (1920).

<sup>168</sup> Article 23 (a) and (c) of the *Covenant of the League of Nations* (1920).

<sup>169</sup> *Geneva Declaration of the Rights of the Child* (1924).

<sup>170</sup> Article 4 of the *Geneva Declaration of the Rights of the Child* (1924).

<sup>171</sup> Article 2 of the *Geneva Declaration of the Rights of the Child* (1924).

<sup>172</sup> Article 1 and 5 of the *Geneva Declaration of the Rights of the Child* (1924).

However, the League of Nations failed about 23 years after its creation, leading to the establishment of the United Nations in 1945 after World War Two. Subsequent to its establishment, the United Nations adopted the *Charter of the United Nations*<sup>173</sup> with significance placed on reiterating the fundamental importance of human rights.<sup>174</sup>

In promotion of these human rights and in compliance with the *Charter of the United Nations*, the United Nations further adopted the *Universal Declaration of Human Rights* (UDHR) in 1948.<sup>175</sup> This document is considered a milestone in the history of human rights as it sets out the need for State Parties to co-operate with the United Nations in order to promote the fundamental human rights which ought to be protected at an international level.<sup>176</sup> Children are only referred to twice in the content of this document. The first is directly in the context of guaranteeing their right to social protection,<sup>177</sup> and the other is indirectly through the parent in the context of guaranteeing the child's right to education.<sup>178</sup>

The UDHR was one of the first initiatives to recognise the principle of "all are equal before the law" by making provision for an equality protection clause.<sup>179</sup> Article 16(1) of the UDHR provides that:

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

It is clear from this provision, and by use of the wording "men and women of full age", that marriage is intended for adults and not children.<sup>180</sup> It further states that such a marriage can only be concluded with the full and free consent of the intending spouses.<sup>181</sup>

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<sup>173</sup> *Charter of the United Nations* (1945).

<sup>174</sup> Preamble of the *Charter of the United Nations* (1945).

<sup>175</sup> *Universal Declaration of Human Rights* (1948).

<sup>176</sup> Preamble of the *Universal Declaration of Human Rights* (1948).

<sup>177</sup> Article 25(2) of the *Universal Declaration of Human Rights* (1948).

<sup>178</sup> Article 26(3) of the *Universal Declaration of Human Rights* (1948).

<sup>179</sup> Mtshali 2014 *Child Abuse Research in South Africa* 53.

<sup>180</sup> Mtshali 2014 *Child Abuse Research in South Africa* 54.

<sup>181</sup> Article 16(2) of the *Universal Declaration of Human Rights* (1948).

Both the *Charter of the United Nations* and the UDHR recognised that it would be in the best interests of children if their rights were given full and legally binding recognition.<sup>182</sup> This recognition inspired the inception of the *Declaration of the Rights of the Child*<sup>183</sup> in 1959 as the first human rights instrument to explicitly provide extensive recognition to children's rights. The *Declaration of the Rights of the Child* embodies a total of ten rights which give recognition to, amongst others, the child's right to be protected from any form of exploitation,<sup>184</sup> the child's right to health care,<sup>185</sup> and the child's right to be raised in a supportive environment.<sup>186</sup>

Although not a human right's instrument, the *Marriage Convention*<sup>187</sup> is one of the international law instruments that contributed towards advancing children's rights through the prohibition of child marriages. By mirroring the UDHR,<sup>188</sup> it also provides that no marriage shall be legally entered into without the full and free consent of the intending spouses.<sup>189</sup> This was done with the aim of eliminating child marriages and the betrothal of young girls before they reach the stage of puberty.<sup>190</sup>

However, there are several elements that are lacking in the *Marriage Convention*. Firstly, consent has not been defined in this convention. Achan-Okitia points out that the *Marriage Convention's* failure to provide a definition of the term "consent" together with its determining factors may lead to the creation of doubt, which could be unhelpful since the *Marriage Convention* targets people whose consent is given as a result of manipulation.<sup>191</sup> It would be difficult to argue that the

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<sup>182</sup> Fass 2011 *The Annals of the American Academy of Political and Social Sciences* 17.

<sup>183</sup> *Declaration of the Rights of the Child* (1959).

<sup>184</sup> Article 9 of the *Declaration of the Rights of the Child* (1959).

<sup>185</sup> Article 4 of the *Declaration of the Rights of the Child* (1959).

<sup>186</sup> Article 10 of the *Declaration of the Rights of the Child* (1959).

<sup>187</sup> *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* (1964).

<sup>188</sup> Article 16(2) states that marriage will only be concluded with the full and free consent of the intending spouses.

<sup>189</sup> Article 1(1) of the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* (1964).

<sup>190</sup> Preamble of the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* (1964).

<sup>191</sup> Achan-Okitia *The internal displacement crisis in Africa: implementation of national and international law on the child marriage phenomenon in Uganda* 32.

requirement of consent is not present in child marriages if there is no description of what the elements of consent are.

Secondly, although this convention directs State Parties to implement legislation specifying a minimum age for marriage, this convention is not effective in combating the practice of child marriage because the convention itself has failed to impose a mandatory requirement on the age of marriage which in essence should mirror the CRC by placing it at 18 years old.<sup>192</sup> Therefore, it can be argued here that if the one convention which has been adopted to combat child marriage specifies a minimum age which all other regional and domestic legislation should follow, it would be possible to see a significant change in the eradication of child marriages as this would make it easier to enforce laws.

In addition to these two omissions, there are also no monitoring or reporting requirements for the *Marriage Convention*. This could hinder the convention's level of effectiveness in prohibiting the conclusion of child marriages as State Parties have no reporting obligations imposed on them in terms of this convention.<sup>193</sup> Furthermore, the *Marriage Convention* does not stop by illegalising the conclusion of marriages by persons who are below the age set in legislation, but rather goes further by placing a limitation on the first part of the provision by allowing such marriages to be concluded where there is a competent authority that has granted an exemption to the minimum age if the matter is of a serious nature or in the interests of the intending spouses.<sup>194</sup> It is argued that no exemptions should be granted as there should be no justification for allowing a child to engage in a marriage. It is for this reason that the implementation of legislation in accordance with this provision in the *Marriage Convention* may pose a serious challenge when it comes to the enforcement of these laws.

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<sup>192</sup> Achan-Okitia *The internal displacement crisis in Africa: implementation of national and international law on the child marriage phenomenon in Uganda* 32.

<sup>193</sup> Achan-Okitia *The internal displacement crisis in Africa: implementation of national and international law on the child marriage phenomenon in Uganda* 32.

<sup>194</sup> Article 2 of the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* (1964).

However, despite all the omissions in the *Marriage Convention*,<sup>195</sup> it is a convention that proposes some admirable goals towards the eradication of child marriages as it specifically places an obligation on State Parties to take legislative action by adopting domestic legislation to ensure that a minimum age for the conclusion of marriages is specified.<sup>196</sup> This can be viewed as taking a step towards the achievement of the SDGs as there will be laws put in place to regulate that no marriages where persons are below this age can be concluded, and in the case where there are such marriages, they shall be deemed illegal.

In 1966, the United Nations member States undertook to uphold equal rights by adopting the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)<sup>197</sup> and the *International Covenant on Civil and Political Rights* (ICCPR).<sup>198</sup> Although these two human rights instruments are not directed at children specifically, both embody provisions that protect children. State Parties have been directed to ensure that children are protected from economic and social exploitation.<sup>199</sup> This has been emphasised by illegalising any work done by a child that is harmful to his or her development, morals, health or danger to their life in general.<sup>200</sup> Accordingly, State Parties are to recognise the rights of a child to physical and mental health development.<sup>201</sup>

The ICESCR and ICCPR determine the need for marriage to be entered into only with the full and free consent of both the intending spouses.<sup>202</sup> However, as previously discussed, children are not in a position to fully understand the implications of child marriage and what they are consenting to, thereby leaving

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<sup>195</sup> *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* (1964).

<sup>196</sup> Article 2 of the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* (1964).

<sup>197</sup> *International Covenant on Economic, Social and Cultural Rights* (1966).

<sup>198</sup> *International Covenant on Civil and Political Rights* (1966).

<sup>199</sup> Article 10(3) of the *International Covenant on Economic, Social and Cultural Rights* (1966).

<sup>200</sup> Article 10(3) of the *International Covenant on Economic, Social and Cultural Rights* (1966).

<sup>201</sup> Article 12(2)(a) of the *International Covenant on Economic, Social and Cultural Rights* (1966).

<sup>202</sup> Article 10(1) of the *International Covenant on Economic, Social and Cultural Rights* (1966).

the child vulnerable to their family and having to comply with the family's cultural demands against the child's will.<sup>203</sup>

It is essential that children are accorded equal protection under the law ensuring that no child is discriminated against.<sup>204</sup> The ICESCR and ICCPR both have established monitoring bodies. The Committee on Economic, Social and Cultural Rights (CESCR) consists of 18 independent experts who monitor the implementation of the ICECSR,<sup>205</sup> and the Human Rights Committee – also a body of 18 independent experts – who monitor the implementation of the ICCPR. Both Committees have placed State Parties under the obligation to ensure that the provisions of the respective covenants are implemented.

Whilst the CESCR requires State Parties to submit regular reports every five years,<sup>206</sup> the Human Rights Committee requires the submission of these reports every four years.<sup>207</sup> Both Committees also have the jurisdiction to receive complaints from individuals who have allegations that their rights under the respective covenants have been violated, and the powers to hear and investigate inter-State disputes.<sup>208</sup> This is where a State that believes that another State is not adhering to its obligations in terms of these instruments and lays a complaint against the respective State with the relevant Committee.

During 1968, an International Conference was held in order to monitor the progress made by countries during the 20 years since the 1948 adoption of the UDHR.<sup>209</sup> During this International Conference, the commitment to upholding

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<sup>203</sup> Achan-Okitia *The internal displacement crisis in Africa: implementation of national and international law on the child marriage phenomenon in Uganda* 32.

<sup>204</sup> Article 24(1) of the *International Covenant on Civil and Political Rights* (1966).

<sup>205</sup> United Nations Human Rights Office of the High Commissioner date unknown <https://www.ohchr.org/EN/HRBodies/CESCR/pages/cescrindex.aspx>.

<sup>206</sup> United Nations Human Rights Office of the High Commissioner date unknown <https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx>.

<sup>207</sup> United Nations Human Rights Office of the High Commissioner date unknown <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>.

<sup>208</sup> United Nations Human Rights Office of the High Commissioner date unknown <https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx>. ; United Nations Human Rights Office of the High Commissioner date unknown <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>.

<sup>209</sup> UNICEF date unknown <https://www.unicef.org/child-rights-convention/history-child-rights>.

human rights was greatly supported and an agenda to promote this commitment was tabled.<sup>210</sup> One thing that should be noted at this point is that there are no human rights instruments adopted that define childhood. This was until 1973 when the ILO adopted the *Minimum Age Convention*<sup>211</sup> as a legally binding instrument. This convention was a steppingstone towards identifying children by defining a child as every human being below the age of 18 years.<sup>212</sup>

Following the ICESCR and the ICCPR in addressing the issue of non-discrimination, CEDAW was adopted in 1979. As can be noted from the wording of the provisions, CEDAW is a human rights instrument that aims to address the inequalities between men and women. Children's rights have not been directly protected in this instrument except in two instances; the right to have their best interests considered as of paramount importance in all cases,<sup>213</sup> and the illegal effect of a marriage concluded by a child.<sup>214</sup> It provides for the elimination of discrimination against women in all matters relating to marriage and family relations with particular emphasis placed on the equality of men and women by allowing both the same rights to enter into marriage and freely choose their spouse.<sup>215</sup> CEDAW highlights the unlawfulness of child marriage by stating 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.<sup>216</sup>

In 1993, an attempt was made to resolve the issue of justifying child marriage as a cultural and religious practice.<sup>217</sup> State Parties were directed to repeal any

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<sup>210</sup> UNICEF date unknown <https://www.unicef.org/child-rights-convention/history-child-rights>.

<sup>211</sup> *Minimum Age Convention* (1973).

<sup>212</sup> Article 1 of the *Minimum Age Convention* (1973).

<sup>213</sup> Article 16(d) and (f) of the *Convention on the Elimination of All Forms of Discrimination Against Women* (1979).

<sup>214</sup> Article 16(2) of the *Convention on the Elimination of All Forms of Discrimination Against Women* (1979).

<sup>215</sup> Article 16(1) of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979).

<sup>216</sup> Article 16(2) of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979).

<sup>217</sup> CEDAW Committee 1994 *General Recommendation No. 21: Equality in Marriage and Family Relations* para 36.



existing laws or regulations and remove all customs and practices which showed any form of discrimination or caused any form of harm against the girl child.<sup>218</sup> CEDAW, therefore, operates in a way that strives for progressive development to eliminate all forms of discrimination against women and ensures that there is equality between both men and women.<sup>219</sup>

It has been expressly noted that marriage, where the child is below the age of 18 years, should not be permitted.<sup>220</sup> CEDAW explicitly makes use of the term "shall have no legal effect", therefore also covering the gaps from the *Marriage Convention* by outlawing child marriage in its entirety.<sup>221</sup>

Children have been protected in all other provisions of CEDAW through the rights of their families. One of the positive attributes of CEDAW is that in addition to highlighting particular areas of discrimination, it also sets out several means by which the goal of eradicating the practice of child marriage can be pursued.<sup>222</sup> This is through the establishment of its monitoring body, the Committee on the Elimination of Discrimination against Women (CEDAW Committee). The CEDAW Committee is an independent monitoring body established to contribute towards achieving the goal of eliminating these forms of discrimination by continuously observing the behaviour of State Parties to ensure that they adhere to their obligations under CEDAW.<sup>223</sup>

The CEDAW Committee consists of 23 experts on human rights from around the world who also dedicate their time to formulating general recommendations which are directed towards State Parties to ensure that there is compliance and enforcement of laws.<sup>224</sup> The *Optional Protocol to the Convention on the Elimination*

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<sup>218</sup> CEDAW Committee 1994 *General Recommendation No. 21: Equality in Marriage and Family Relations* para 36.

<sup>219</sup> Cook 1989 *Virginia Journal of International Law* 647.

<sup>220</sup> CEDAW Committee 1994 *General Recommendation No. 21: Equality in Marriage and Family Relations* para 36.

<sup>221</sup> Achan-Okitia *The internal displacement crisis in Africa: implementation of national and international law on the child marriage phenomenon in Uganda* 33.

<sup>222</sup> Cook 1989 *Virginia Journal of International Law* 647.

<sup>223</sup> Cook 1989 *Virginia Journal of International Law* 647.

<sup>224</sup> Committee on the Elimination of Discrimination against Women date unknown <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Introduction.aspx>.

*of All Forms of Discrimination against Women* (Optional Protocol to CEDAW)<sup>225</sup> further assists in regulating the enforcement of laws by placing a mandate on the CEDAW Committee to receive communications from individuals, or groups of individuals, who wish to submit claims of violations against any rights which are protected under CEDAW.<sup>226</sup>

The CEDAW Committee, in collaboration with the Committee on the Rights of the Child, has addressed the issue of child marriage in a report upon the observation of the increase in children who are married without their full, free and informed consent.<sup>227</sup> This report, namely the Joint General Recommendation No. 31 on the Committee on the Elimination of Discrimination against Women/General Comment No.18 of the Committee on the Rights of the Child on Harmful Practices (Joint General Recommendation on Harmful Practices), will be discussed in more detail below.<sup>228</sup>

As a further development in 1979, the Commission on Human Rights tabled a draft of the CRC for consideration by member States and agencies, as well as both inter-governmental and non-governmental organisations; ultimately leading to the adoption of the CRC in 1990, which today is recognised as a widely acclaimed landmark achievement for human rights.<sup>229</sup>

### **3.3 The protection of children's rights under the CRC**

The CRC is an international human rights instrument incidental to international laws' commitment to the promotion of children's human rights.<sup>230</sup> It is the world's most widely ratified human rights treaty, consequently reflecting a positive sign

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<sup>225</sup> *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (2000).

<sup>226</sup> Article 2 of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (2000).

<sup>227</sup> Para 21 of the Joint General Recommendation No. 31 on the Committee on the Elimination of Discrimination against Women/General Comment No.18 of the Committee on the Rights of the Child on Harmful Practices (2014).

<sup>228</sup> See para 3.3.5 below.

<sup>229</sup> UNICEF date unknown <https://www.unicef.org/child-rights-convention/history-child-rights>.

<sup>230</sup> Fass 2011 *The Annals of the American Academy of Political and Social Sciences* 17.

that there is universal support in accepting that there is a need to promote and respect human rights, and more specifically, children's rights.<sup>231</sup>

The CRC serves as a comprehensive framework for the protection of children's rights as it not only contains civil and political rights, such as the rights to freedom of expression<sup>232</sup> and religion,<sup>233</sup> but it also contains economic, social and cultural rights, such as the right to an adequate standard of living,<sup>234</sup> the right to adequate health care services,<sup>235</sup> and right to education.<sup>236</sup> This international law instrument has been ratified by 196 countries to date with the exception of one; namely the United States of America (USA).<sup>237</sup>

### *3.3.1 The underlying principles of the CRC*

The CRC is built on four principles; namely non-discrimination,<sup>238</sup> the best interests of the child,<sup>239</sup> the right to survival and development,<sup>240</sup> and participation.<sup>241</sup> The principle of non-discrimination is envisaged in the CRC as a form of protection for the child by which State Parties are placed under the obligation to ensure that appropriate measures are taken to prevent any form of discrimination or punishment that may be based on the child's status or the beliefs of the child's parents or family members.<sup>242</sup> The principle of the right to survival and development is an obligation that is placed on State Parties to ensure that a child's right to life, coupled with the child's right to survival and development, is recognised.<sup>243</sup> And finally, the principle of participation places an obligation on

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<sup>231</sup> Kaime 2005 *AHRLJ* 222.

<sup>232</sup> Article 13 of the CRC (1990).

<sup>233</sup> Article 14 of the CRC (1990). See also Article 30 of the CRC (1990).

<sup>234</sup> Article 27 of the CRC (1990).

<sup>235</sup> Article 24 of the CRC (1990).

<sup>236</sup> Akari 1998 *Southern California Review of Law and Women's Studies* 8.

<sup>237</sup> It is argued that the reluctance by the USA to ratify the CRC is motivated by the fear that such ratification may lead to a limitation of the United States sovereignty or otherwise cause an interference in the lives of families. Source: Minasyan 2018 <https://atlascorps.org/the-united-states-has-not-ratified-the-un-convention-on-the-rights-of-the-child/>

<sup>238</sup> Article 2 of the CRC (1990).

<sup>239</sup> Article 3(1) of the CRC (1990).

<sup>240</sup> Article 6(2) of the CRC (1990).

<sup>241</sup> Article 12 of the CRC (1990).

<sup>242</sup> Article 2(2) of the CRC (1990).

<sup>243</sup> Article 6(1) and (2) of the CRC (1990).

State Parties to have the child's views considered in all matters affecting him or her.<sup>244</sup>

The significance of the "best interests of the child" principle has been recognised as early as 1924 with the adoption of the first *Geneva Declaration*, which in its Preamble states that "mankind owes to the child the best that it has to give."<sup>245</sup> It went further to emphasise in the 1959 *Geneva Declaration* that the best interests of the child are the deciding factors in the child's upbringing and rest firstly with the child's parents.<sup>246</sup>

The CRC determines that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.<sup>247</sup>

The term "shall be" in this principle places an obligation on State Parties to disregard the exercise of their own discretion as to whether the child's interests are of importance and to rather place significant weight on the best interests of the child as the decisive factor in all actions concerning the child.<sup>248</sup> The term "primary consideration" reflects that the best interests of the child may not be considered on the same level as any other consideration.<sup>249</sup>

The best interests of the child principle is an overarching principle to the other three principles of the CRC as it links with each of them individually. Firstly, the best interests of the child are linked to the right to non-discrimination as State Parties are obligated to take proactive steps to ensure that the child is not exposed to any form of discrimination in the promotion of equality.<sup>250</sup> Secondly,

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<sup>244</sup> Article 12(1) of the CRC (1990).

<sup>245</sup> Preamble of the *Geneva Declaration of the Rights of the Child* (1924).

<sup>246</sup> Principle 7 of the *Geneva Declaration of the Rights of the Child* (1959).

<sup>247</sup> Article 3 (1) of the CRC (1990).

<sup>248</sup> CRC 2013 *General Comment No. 14: The right of the child to have his or her best interests taken as primary consideration* para 36.

<sup>249</sup> CRC 2013 *General Comment No. 14: The right of the child to have his or her best interests taken as primary consideration* para 37.

<sup>250</sup> CRC 2013 *General Comment No. 14: The right of the child to have his or her best interests taken as primary consideration* para 41.

the best interests of the child are linked to the right to life, survival, and development by virtue of the fact that State Parties are obligated to promote the development of the child by creating an environment that respects and promotes human dignity.<sup>251</sup> Lastly, article 12 of the CRC aims to address the social status of children who are bearers of rights but lack the full legal capacity of an adult.<sup>252</sup>

Despite this, where the matter concerns the child in any way, the child still has the right to have his or her views heard in accordance with his or her age and maturity.<sup>253</sup> The best interests of the child can be linked to the right of the child to be heard as State Parties are required to give the views of the child considerable weight where the matter affects the child's life.<sup>254</sup> It is, therefore, in the best interests of the child to not be discriminated against, to have their human dignity respected and promoted, and to have their views considered in all matters affecting them and their wellbeing.

Although child marriage has been culturally legitimised, this cultural practice comes into conflict with all four principles of the CRC.<sup>255</sup> For example, the practice of *ukuthwala* is one that establishes itself as forced marriage because it is orchestrated by the parents or family members of the child. Therefore, because it is forced, there is no consideration of the child's views or opinions as this practice is purely motivated by the beliefs of the child's parents and family members.

As previously established, this practice is harmful to the child's development because children who are forced into child marriage are too young to shoulder the responsibilities of being a husband or wife.<sup>256</sup> Furthermore, a child's lack of access to educational opportunities may also be considered a hindrance to the child's development.<sup>257</sup> In most cases, a child who is forced into marriage will also be

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<sup>251</sup> CRC 2013 *General Comment No. 14: The right of the child to have his or her best interests taken as primary consideration* para 42.

<sup>252</sup> CRC 2009 *General Comment No. 12: The right of the child to be heard* para 1.

<sup>253</sup> CRC 2009 *General Comment No. 12: The right of the child to be heard* para 1.

<sup>254</sup> CRC 2013 *General Comment No. 14: The right of the child to have his or her best interests taken as primary consideration* para 43.

<sup>255</sup> Kaime 2005 *AHRLJ* 221.

<sup>256</sup> See para 2.2 above.

<sup>257</sup> See para 2.3.3 above.

forced to participate in sexual activities that they may not want to participate in. Their reluctance to do so may result in physical abuse which places a child's life in significant danger. It is therefore clear that there is a clear contravention of the principles of non-discrimination, participation, and the right to survival and development, and by virtue of the fact that all these principles are in the best interests of the child, the conclusion of child marriage is in no way in the best interests of the child.

### *3.3.2 The prohibition of child marriage illuminated under the provisions of the CRC*

Child marriage violates various children's rights which are protected under the CRC. It has already been identified above that a child's lack of access to educational opportunities is a key problem that increases the incidences of child marriage.<sup>258</sup> In principle, every child has the right to education on the basis of promoting equal opportunities.<sup>259</sup>

Article 29(a) of the CRC determines that education should be directed at all aspects that relate to the development of the child, such as the child's personality,<sup>260</sup> respect for human rights,<sup>261</sup> and preparing the child for a responsible life.<sup>262</sup> Therefore, a child who is vulnerable to child marriage is more prone to having a lack of access to formal education.<sup>263</sup> This is because these children are taken out of school when they marry, therefore showing a clear contravention of the provisions of the CRC.<sup>264</sup> In the same vein, it can also be stated that a child who has lower attendance, or even no attendance, at school has a higher chance of marrying young.<sup>265</sup> As a result of this, children – more particularly girls – are often seen to be defined by social custom as wives and

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<sup>258</sup> See para 2.3.3 above.

<sup>259</sup> Mtshali 214 *Child Abuse Research in South Africa* 54.

<sup>260</sup> Article 29(a) of the CRC (1990).

<sup>261</sup> Article 29(b) of the CRC (1990).

<sup>262</sup> Article 29(c) of the CRC (1990).

<sup>263</sup> Centre for Human Rights 2018 *A Report on Child Marriage in Africa* 41.

<sup>264</sup> Centre for Human Rights 2018 *A Report on Child Marriage in Africa* 41.

<sup>265</sup> Centre for Human Rights 2018 *A Report on Child Marriage in Africa* 41.

mothers as opposed to being regarded as children with potential and opportunities in their lives.<sup>266</sup>

A further right which is protected by the CRC can be found in Article 13(1) which determines the right to freedom of expression.<sup>267</sup> As discussed, all cases of child marriage are cases where the child was forced into that marriage.<sup>268</sup> Although children have the freedom to profess or practice their own religion,<sup>269</sup> they should be protected by ensuring that all effective and appropriate measures are taken by State Parties to abolish any traditional practices which are harmful and which prejudice the health of the child.<sup>270</sup> So, although this provision does not expressly make mention of child marriage, it is a prime example of a measure to invoke against child marriage because it can be linked to the principle of participation, where a child's right to express their views has been taken away.

Article 19(1) of the CRC further places an obligation on State Parties who have ratified the convention to ensure that all appropriate legislative, administrative, social and educational measures have been taken to protect the child from all forms of mental or physical violence or exploitation.<sup>271</sup> This includes sexual abuse while either being in the care of the child's parents or the person who at the time is responsible for taking care of the child.<sup>272</sup> Upon analysis of this provision, one can see that there is a clear obligation placed on State Parties to assist the parent or guardian of a child to protect a child from sexual exploitation. It is argued that an obligation is not only placed on State Parties, but also on the parents of the child to contribute towards the protection of the child from any harm or sexual exploitation by any person.

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<sup>266</sup> Mathur, Greene and Malhotra 2003 *ICRW* 1.

<sup>267</sup> Article 13 (1) of the CRC (1990).

<sup>268</sup> See para 2.2 above.

<sup>269</sup> Article 30 of the CRC (1990).

<sup>270</sup> Article 24 (3) of the CRC (1990).

<sup>271</sup> Article 19 (1) of the CRC (1990).

<sup>272</sup> Article 19 (1) of the CRC (1990).

### 3.3.3 Implementation of the CRC

In order to have the rights of the CRC protected and promoted, State Parties must ensure that they take all appropriate legislative, administrative and other measures to implement these rights.<sup>273</sup> General Comment 5 was developed to assist State Parties to carry out their duty of implementation by ensuring that domestic legislation complies with the principles and provisions of the CRC and that the provisions in domestic legislation are enforceable.<sup>274</sup>

Implementation of the CRC includes the need to take active measures in making the principles and provisions of the CRC known to everyone; inclusive of children and adults in their State.<sup>275</sup> In considering that children have not always been bearers of rights, this measure is to ensure that the implications of the CRC are made known to everyone.<sup>276</sup> If children or adults are not made aware of these implications, it may pose a risk of failing to recognise the rights of children as set out in the CRC.<sup>277</sup>

The process of promoting awareness of the principles and provisions of the CRC can be done by way of State Parties' obligation to make their periodic reports available to the public within their State.<sup>278</sup> The reporting process is important because the periodic reports must be made available at a national level in order to increase the chances of them having a substantial impact on children's lives.<sup>279</sup> In addition to the periodic reports, State Parties are to make any other

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<sup>273</sup> Article 4 of the CRC (1990).

<sup>274</sup> CRC 2003 *General Comment No. 5: General measures of the implementation of the Convention on the Rights of the Child* para 1.

<sup>275</sup> Article 42 of the CRC (1990).

<sup>276</sup> CRC 2003 *General Comment No. 5: General measures of the implementation of the Convention on the Rights of the Child* para 66.

<sup>277</sup> CRC 2003 *General Comment No. 5: General measures of the implementation of the Convention on the Rights of the Child* para 66.

<sup>278</sup> Article 44(6) of the CRC (1990).

<sup>279</sup> CRC 2003 *General Comment No. 5: General measures of the implementation of the Convention on the Rights of the Child* para 71.



documentation that may be relevant for the examination of the reports available to the public.<sup>280</sup>

Where rights are of a social, economic or cultural nature, the implementation of these rights has been limited to the extent that State Parties have available resources.<sup>281</sup> In this case, the CRC acknowledges that there are some provisions which involve a longer process to implement in State Parties' jurisdictions due to financial constraints,<sup>282</sup> such as the right to health care and the right to education being the only two rights under the CRC which have been noted as needs to be "progressively" realised.<sup>283</sup> The duty of implementation in this regard therefore obliges State Parties to give priority to children by allocating the maximum available resources for the implementation of the principles and provisions under the CRC, irrespective of the States' financial constraints.<sup>284</sup>

### 3.3.4 *The Committee on the Rights of the Child*

The Committee on the Rights of the Child (the Committee) is a body of independent experts established to monitor the implementation of the CRC and the Optional Protocols to the CRC; namely the *Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed conflict* (OPAC)<sup>285</sup> and the *Optional Protocol the Convention on the Rights of the Child on Sale of Children, Child Prostitution and Child Pornography* (OPSC).<sup>286</sup> The Committee further monitors the progress made by State Parties in realising their obligations under the CRC and the respective Optional Protocols to the CRC.<sup>287</sup>

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<sup>280</sup> CRC 2003 *General Comment No. 5: General measures of the implementation of the Convention on the Rights of the Child* para 73.

<sup>281</sup> Article 4 of the CRC (1990).

<sup>282</sup> Section III of Fact Sheet No. 10: *The Rights of the Child* (1993).

<sup>283</sup> Article 24(4) and 28(1) of the CRC (1990).

<sup>284</sup> Section III of Fact Sheet No. 10: *The Rights of the Child* (1993).

<sup>285</sup> *Optional Protocol to the Convention on the Rights of the Child on involvement of children in armed conflict* (2002).

<sup>286</sup> *Optional Protocol the Convention on the Rights of the Child on sale of children, child prostitution and child pornography* (2002).

<sup>287</sup> Article 43(1) and (2) of the CRC (1990).

State Parties are mandated to submit periodic reports to the Committee, highlighting the measures adopted to implement their obligations under the CRC.<sup>288</sup> These reports must be genuinely accessible to the public in such a way that they can be easily interpreted by adults, children and disabled persons by ensuring that there are no language barriers preventing access.<sup>289</sup> In order to ensure that State Parties adhere to the implementation of the provisions under the CRC, the Committee will analyse these reports and then provide State Parties with feedback addressing its concerns and providing recommendations on the general measures that State Parties can consider in compliance with their obligations under the CRC.<sup>290</sup> It is in accordance with this that the Committee has identified a variety of measures to assist State Parties with the effective implementation of the CRC.<sup>291</sup>

The Committee further has the powers to hear complaints from individual persons within their jurisdiction who raise allegations on any violated rights which are protected by the CRC or under the Optional Protocols.<sup>292</sup> The Committee, in this case, will bring it to the attention of the State Party concerned, and provide the State Party with an opportunity to remedy the matter and submit a response to the Committee.<sup>293</sup> The Committee will consider the response, together with any other documentation submitted by the State Party, prepare its views and recommendations, and then provide feedback to the State Party concerned.<sup>294</sup> The State Party will consider these recommendations and provide the Committee with further feedback on the steps it has taken to implement these

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<sup>288</sup> Article 44(1) of the CRC (1990).

<sup>289</sup> CRC 2003 *General Comment No. 5: General measures of the implementation of the Convention on the Rights of the Child* para 72.

<sup>290</sup> CRC 2003 *General Comment No. 5: General measures of the implementation of the Convention on the Rights of the Child* para 2.

<sup>291</sup> CRC 2003 *General Comment No. 5: General measures of the implementation of the Convention on the Rights of the Child* para 2.

<sup>292</sup> Article 5(1) of the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* (2014).

<sup>293</sup> Article 8(2) of the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* (2014).

<sup>294</sup> Article 10(1) and (2) of the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* (2014).

recommendations.<sup>295</sup> In addition to individual complaints, the Committee is empowered to receive complaints from a State Party who alleges that there may be a violation of, or non-compliance with, the CRC by another State Party.<sup>296</sup> This process is investigated by means of an inquiry.<sup>297</sup>

In 2014, the Committee collaborated with the Committee on the Elimination of Discrimination against Women to create a Joint General Recommendation on Harmful Practices.<sup>298</sup> This instrument provides clarification to State Parties on measures that must be taken to eliminate harmful practices.<sup>299</sup> It defines harmful practices as practices linked to discrimination on the grounds of sex, gender or age, and these often involve violence, whether physical or physiological.<sup>300</sup> Child marriage has been addressed in this instrument as a harmful practice that should be eliminated.

These Committees can be applauded for the adoption of the Joint General Recommendation on Harmful Practices, as it reflects that the Committees recommend ways by which child marriages can be eliminated, which include a change in social and cultural norms by providing free education, access to sexual and reproductive health rights, as well as raising awareness of, and access to, justice.<sup>301</sup> However, these Committees have not practically dealt with child marriage. Therefore, the Committees should shy away from merely providing recommendations and take more steps to be practically involved in combating child marriage.

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<sup>295</sup> Article 10(5) of the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* (2014).

<sup>296</sup> Article 12 of the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* (2014).

<sup>297</sup> Article 13 of the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* (2014).

<sup>298</sup> Joint general recommendation on harmful practices (2014).

<sup>299</sup> Para 2 of the Joint General Recommendation on Harmful practices (2014).

<sup>300</sup> Para 15 of the Joint General Recommendation on Harmful practices (2014).

<sup>301</sup> Para 87 of the Joint General Recommendation on Harmful practices (2014).

### 3.3.5 *The Optional Protocol to CRC on the Sale of Children*

The *Optional Protocol to the CRC on the Sale of Children*<sup>302</sup> has been adopted in light of the increase in international child trafficking for the purposes of child prostitution, child pornography, and the sale of children.<sup>303</sup> Once again, although this instrument does not directly make mention of child marriage, it is an instrument which indirectly protects a child from this harmful practice.

As discussed previously, the practice of *ukuthwala* involves the payment of *lobolo*, which is a sum of money to be transferred from the family of the bride to the family of the groom.<sup>304</sup> Article 2 of the *Optional Protocol to the CRC on the Sale of Children* defines the sale of children as:

Any means or act or transaction whereby a child is transferred by any person or group or group of persons to another for remuneration or any other consideration.<sup>305</sup>

Directly interpreted, the payment of *lobolo* can be perceived as the sale of a child in light of the fact that the family of the groom is obligated to transfer some sort of financial means to the family of the bride for the payment of *lobolo* before the groom is allowed to take the child. Child marriage, therefore, constitutes a clear violation of this instrument which State Parties are obligated to address by enforcing the provisions that prohibit the sale of children in its entirety.<sup>306</sup>

## **3.4 Conclusion**

Children's rights have significantly evolved since the early 1900s. There has been an increased adoption of various human rights treaties, thereby reflecting significant development in the protection of children's rights over the years. This

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<sup>302</sup> *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (2002).

<sup>303</sup> Preamble of the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (2002).

<sup>304</sup> See para 2.3.2 above.

<sup>305</sup> Article 2 of the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (2002).

<sup>306</sup> Article 1 of the *Optional Protocol to the Sale of Children, Child Prostitution and Child Pornography* (2002).

chapter has shown that there are various international legal instruments placing a duty on State Parties to safeguard the rights of children and protect them from all forms of abuse, exploitation and violence.

The CRC is now the most important international legal instrument dealing with the protection of all children's rights. With the best interests of the child as the determining factor when dealing with all matters affecting the child, State Parties are prohibited from using their own discretion in any regard, and the effect of all actions concerning the child should be primarily considered to ensure that the same action will not be detrimental to the child's wellbeing. Therefore, what must be borne in mind is that the child's interests must have the highest priority and a larger weight must be attached to what is best for the child.<sup>307</sup> In light of this, State Parties must be held accountable for their failure to ensure that the requirements of international legal instruments are upheld and followed through to prevent the occurrence of all forms of child abuse.<sup>308</sup> This accountability is monitored by the international instruments which have monitoring bodies regulating the implementation of their provisions. However, these monitoring bodies have been unsuccessful in their responsibilities to sufficiently protect children against child marriage. Although the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women have made efforts to adopt a Joint General Comment, this document only serves as a guideline on the steps to be taken in order to prevent child marriage. Consequently, very little action has been taken practically by the committees, to combat child marriage.

In conclusion, despite the wide protection of international children's rights against child marriage under the various international measures, the harmful practice still persists as a cultural and religious practice and its continued practice poses a significant challenge towards the achievement of the 2030 SDGs. This is due to

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<sup>307</sup> CRC 2013 *General Comment No. 14: The right of the child to have his or her best interests taken as primary consideration* para 36.

<sup>308</sup> Achan-Okitia *The internal displacement crisis in Africa: implementation of national and international law on the child marriage phenomenon in Uganda* 30.

the reluctance of State Parties to completely abolish harmful cultural practices, because of their desire to respect and preserve the cultural norms of others.

## CHAPTER 4 THE REGIONAL LEGAL FRAMEWORK ON COMBATING CHILD MARRIAGE

### 4.1 Introduction

There are numerous children's human rights violations that have scarred the face of the African continent.<sup>309</sup> As discussed, children's rights have not always been recognised as rights that require attention; both internationally and in Africa.<sup>310</sup> Although there were rights contained in treaties that generally applied to both adults and children, children were, for the most part, denied these rights.<sup>311</sup> But as the need to protect children under international law has increasingly developed, Africa as a regional block has also been placed at the forefront of recognising that children have rights and that these rights must be protected. In light of this, Africa has therefore established the necessity to develop the protection of children's rights in order to provide a voice for Africa's children.<sup>312</sup>

It is against this background that this chapter aims to establish the legal framework put in place to protect children against child marriage at the regional level, by providing recognition of the standards of international law and adapting them to the African context. It will proceed with an outline of the historical development of children's rights in the African context by discussing the measures put in place to recognise children's rights in general, as well as the protection of children against child marriage.

It is important to note that the international legal framework is applicable to Africa. International law is therefore used as a basis to adopt regional law. Accordingly, the CRC was used as a basis for creating the most significant instrument regulating children's regionally, namely, the *African Charter*. In light of this, the *African Charter* will be analysed and compared with the CRC by specifically referring to the relevant provisions that protect children against child

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<sup>309</sup> Viljoen 1998 *Comparative and International Law Journal of Southern Africa* 200.

<sup>310</sup> See para 3.2 above.

<sup>311</sup> Lloyd 2002 *AHRLJ* 13.

<sup>312</sup> Lloyd 2002 *AHRLJ* 13.

marriage. It will then analyse the implementation of these measures with specific reference to the monitoring bodies; namely, the African Commission on Human and Peoples' Rights (African Commission) and the African Committee of Experts on the Rights and Welfare of the Child (African Committee), and conclude by illustrating some positive approaches taken in the African context to end child marriage.

## **4.2 The regional development of children's rights**

The development of children's rights in the African context began as early as the 1960s. The Organisation of Africa Unity (OAU) was created in 1963 with the focus placed on the eradication of *apartheid*.<sup>313</sup> Although the OAU endorsed the principles set out in the UDHR, the priority at the time was not placed on the protection and promotion of human rights, but rather the promotion of political and economic dependence, as well as non-discrimination in Africa.<sup>314</sup>

It was in 1979 when the OAU Assembly of Heads of State and the Government came together with the decision to ensure that its members were protected by international obligations.<sup>315</sup> This led to the formation of a Committee of experts who began to draft the Banjul Charter during 1979, and accordingly produced the draft document in 1981 for adoption by the OAU Heads of State and the Kenyan government.<sup>316</sup> It is important to note that the OAU has now been replaced with the African Union (AU) since 2002, following a declaration by Heads of State and the Government of the OAU to move towards an African continent that continues to address its role on social, economic and political problems.<sup>317</sup>

### **4.2.1 The Banjul Charter**

Created by the AOU, as it then was in 1986, the *Banjul Charter* is one of the significant human rights instruments on the African continent providing recognition

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<sup>313</sup> African Commission on Human and Peoples' Rights 2019 <https://www.achpr.org/history>.

<sup>314</sup> African Commission on Human and Peoples' Rights 2019 <https://www.achpr.org/history>.

<sup>315</sup> African Commission on Human and Peoples' Rights 2019 <https://www.achpr.org/history>.

<sup>316</sup> African Commission on Human and Peoples' Rights 2019 <https://www.achpr.org/history>.

<sup>317</sup> African Union date unknown <https://au.int/en/overview>.



to basic civil, political, economic and social rights. It is now regulated by the AU and its *Constitutive Act of the African Union* (Constitutive Act).<sup>318</sup> Section 3 of the *Constitutive Act* sets out the aims of the AU; one of which is promoting and protecting human and peoples' rights in accordance with the *Banjul Charter*.<sup>319</sup>

The *Banjul Charter* reaffirms the notion of equality between all persons and the equal protection of the law.<sup>320</sup> It does, however, not expressly make reference to children's rights or their protection. However, despite the fact that children are not explicitly mentioned in the *Banjul Charter*, this legal instrument makes use of the phrase "every individual" in its provisions. Because children form part of society as much as any other group,<sup>321</sup> it is argued that its provisions can be viewed as also relating to children. In the *Banjul Charter*, emphasis is placed more on the rights of the child's family and the child's duty to the family.<sup>322</sup> In fact, in the context of this entire regional instrument, children are only referred to once and as an afterthought in addition to women's rights.<sup>323</sup> This is in article 18(3) of the *Banjul Charter* which provides that:

The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.<sup>324</sup>

Upon analysis of this provision, it appears that the protection of rights stipulated in international declarations and conventions extends to both women and children.

Article 5 of the *Banjul Charter* protects the right of every individual to have their inherent dignity respected and their legal status recognised.<sup>325</sup> This right includes the right not be subjected to any form of exploitation or degrading activity.<sup>326</sup> It is argued here that the practice of child marriage is in clear violation of this provision

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<sup>318</sup> *Constitutive Act of the African Union* (2002).

<sup>319</sup> Article 3(h) of the *Constitutive Act of the African Union* (2002).

<sup>320</sup> Article 3 of the *African Charter on Human and Peoples' Rights* (1986).

<sup>321</sup> Lloyd 2002 *AHRLJ* 24.

<sup>322</sup> Van Bueren *The international law on the rights of the child* 24.

<sup>323</sup> Viljoen 1998 *Comparative and International Law Journal of Southern Africa* 205.

<sup>324</sup> Article 18(3) of the *African Charter on Human and Peoples' Rights* (1986).

<sup>325</sup> Article 5 of the *African Charter on Human and Peoples' Rights* (1986).

<sup>326</sup> Article 5 of the *African Charter on Human and Peoples' Rights* (1986).

under regional law because any child who is subjected to marriage is exposed to the risk of having their dignity impaired. This reasoning emerges from the fact that a forced marriage involves the child as the victim, and the child engaging in the marriage with a person older than him or her. As soon as the child enters into such a marriage, they are forced to engage in activities which they would most likely not want to engage in, such as sexual activities. Once a child starts to engage in these sexual activities, they are automatically stripped of their dignity, resulting in loss of respect from others as well as the loss of self-respect.

Article 17 of the *Banjul Charter* protects the right to education and to freely partake in the cultural life of one's community.<sup>327</sup> After having evaluated this provision, it is argued that this right poses a stumbling block towards achieving an end to child marriage. Communities continue to engage in this harmful cultural and religious practice by justifying it as a right protected by law.<sup>328</sup> However, it is clear to see that this raises a conflict between the right to freely practice one's culture and the rights of children protected under international and regional instruments.

It is further argued that the fact that this provision also does not have any limitations attached to it serves as a challenge to the protection of children's rights where harmful practices are involved, as the provision is interpreted to protect only the cultural rights of people, thus outweighing children's rights. Therefore, there is a flaw in this instrument which should be addressed by the AU by, for example, placing a limitation on this right by prohibiting any cultural practices that are harmful to the child's wellbeing, just as the CRC discourages traditional practices. Failure to do so could lead to ongoing harmful practices justified by this provision, despite its harmful effects on the rights of children.

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<sup>327</sup> Article 17 of the *African Charter on Human and Peoples' Rights* (1986).

<sup>328</sup> See para 2.3.4 above.

#### 4.2.2 *The African Charter on the Rights and Welfare of the Child*

Although adopted in 1990, the *African Charter* was only entered into force during 1999. The AOU, as it then was, was the first regional organisation to adopt this binding legal document that solely focuses on the rights of the child.<sup>329</sup> It provides that State Parties guarantee the protection of children's rights as per international declarations and conventions.<sup>330</sup> It is built on the same principles as the CRC but with a specific focus on the African context.<sup>331</sup> It has therefore been considered comprehensive in all regional systems because it covers children's social, economic, civil and political rights from an African perspective.<sup>332</sup> It deals specifically with the protection of children's rights and accordingly includes the protection of children against child marriage.<sup>333</sup>

There are a number of children's rights in the *African Charter* that can be viewed as contributing to the protection of children against child marriage. The point of departure in the *African Charter* which forms the basis of protection for the child is the definition of the child. Article 2 defines a child as "every human being below the age of 18 years".<sup>334</sup> Upon evaluating this provision, it is argued that this provision sets a positive contribution towards the protection of the children's rights set in the *African Charter* as there is no uncertainty with regards to who would be regarded as a child or not.

In comparison with the CRC, this provision reflects consistency with the definition articulated in the CRC. However, there is a significant difference that can be highlighted. Whilst the CRC places a condition on the definition of the child by stating that a child will be 18 years unless majority is attained earlier,<sup>335</sup> the

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<sup>329</sup> Van Bueren *The international law on the rights of the child* 22.

<sup>330</sup> Article 18(3) of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>331</sup> Laftman 2011 *A Guide to the monitoring mechanisms of the Child Rights Committee, the UN Universal Periodic Review and the Regional Child Rights Mechanisms* 12.

<sup>332</sup> Mukombachoto *The best interests of the child in cultural and religious practices in respect of child marriages* 34.

<sup>333</sup> Article 21 of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>334</sup> Article 2 of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>335</sup> Article 1 of the CRC (1990).

*African Charter* has no such conditions attached to it.<sup>336</sup> This leaves no room for further interpretation. This is significant as it serves as a positive attribute of the *African Charter* because it eliminates the chances of having State Parties decide. It should also contribute towards the consistency of the definition of a child in the domestic law of countries who are parties to the *African Charter*.

The *African Charter* is a significant instrument in protecting children against child marriages as it explicitly prohibits child marriage. Article 21 starts off by mandating State Parties to ensure that harmful social and cultural practices that affect the child's welfare, dignity and development are eliminated.<sup>337</sup> It then goes further by stating that:

Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.<sup>338</sup>

This provision makes it clear that child marriages are viewed as harmful regionally. Article 1(3) can be read with this provision which discourages any custom, tradition, cultural or religious practices that is inconsistent with the rights entrenched in the *African Charter*.<sup>339</sup> Unfortunately, the CRC has no corresponding provision relating to the discouragement of traditional practices but only prohibits traditional practices to the extent that they are harmful to the child's health.<sup>340</sup> Arguably, this is problematic because the conclusion of a child marriage not only affects the child's health, but also affects other rights such as the child's right to dignity, normal growth,<sup>341</sup> and a life free from sexual exploitation.<sup>342</sup> Therefore, by limiting the prohibition of traditional practices only to the extent that it affects the child's health, they also limit the protection of the child against child marriage because the provision is then understood to mean that child marriage would be permissible as long as it does not affect the child's health. The *African Charter*,

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<sup>336</sup> See para 2.2 above.

<sup>337</sup> Article 21(1) of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>338</sup> Article 21(2) of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>339</sup> Article 1(3) of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>340</sup> Article 24(3) of the CRC (1990).

<sup>341</sup> Article 21(1) of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>342</sup> Article 27 of the *African Charter on the Rights and Welfare of the Child* (1990).

therefore, extends more protection than the CRC by discouraging the practice of child marriages in its entirety.

The *African Charter* further addresses the issue of child marriage by providing that the registration of all marriages in an official registry shall be compulsory.<sup>343</sup> These registration systems should be accessible and cost-effective for all.<sup>344</sup> The extension of this provision, by inserting the condition of compulsory registration, can be viewed as a mechanism to ensure that no marriages where a party is below the age of 18 years old are registered. However, upon an analysis of this provision, it is argued here that this provision offers little protection for the child. This is because perpetrators of child marriages will continue to engage in child marriage by taking advantage of the fact that there is no regulation thereof, especially in rural areas where it is more often practiced, and they simply do not register the marriage.

Article 4 of the *African Charter* strengthens the protection of children's rights by stating that the best interest of the child shall be the primary consideration in all decisions affecting the child.<sup>345</sup> The best interest of the child is referred to in the *African Charter* as an interpretative principle through which all other provisions are to be analysed and there are no other conditions or obligations attached to it.<sup>346</sup>

Chapter three demonstrated this principle as the overarching principle linked to three other principles in the international context.<sup>347</sup> It is argued here that, regionally, the same principles are demonstrated. The best interests of the child are linked to the right to non-discrimination,<sup>348</sup> survival and development,<sup>349</sup> and the right to participation;<sup>350</sup> all of which have been entrenched in the *African Charter*. It is argued here that each of these rights is related to the best interests

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<sup>343</sup> Article 21(2) of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>344</sup> Para 28 of the *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 Marriage* (2017).

<sup>345</sup> Article 4(1) of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>346</sup> Article 4 of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>347</sup> See para 3.3.1 above.

<sup>348</sup> Article 3 of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>349</sup> Article 5 of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>350</sup> Article 7 of the *African Charter on the Rights and Welfare of the Child* (1990).

of the child, as one principle cannot be practiced without ultimately recognising the other.

Further analysis of the CRC and the *African Charter* reflects that the *African Charter* refers to the best interests of the child as a principle which must be "the" primary consideration, and the CRC refers to the principle as "a" primary consideration. The difference in this wording demonstrates that the *African Charter* maximises the influence of this principle whilst the CRC leaves room for other principles and considerations to be taken into account.<sup>351</sup> The use of the word "the" illustrates that it is the only principle that applies. This is another significant milestone for the *African Charter* in the advancement of children's rights.<sup>352</sup>

Article 1 of the *African Charter* places a duty on State Parties to ensure that all necessary steps are taken to recognise the rights, freedoms and duties that are entrenched in the *African Charter* by implementing necessary legislation or other measures.<sup>353</sup> Unlike the CRC and other international instruments that limit the implementation of its provisions to the availability of resources, it is clear to see from this provision that no limitations have been placed in respect of the implementation of the rights entrenched in the *African Charter*. It could therefore be argued here that this provision is interpreted to provide that State Parties should adhere to their obligations under the *African Charter* irrespective of whether resources are available or not. The implementation of the *African Charter* therefore can be regarded as a stronger instrument than the CRC<sup>354</sup> as it arguably guarantees protection.

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<sup>351</sup> Memzur 2008 *SA Public Law* 9.

<sup>352</sup> Memzur 2008 *SA Public Law* 18.

<sup>353</sup> Article 1 of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>354</sup> Viljoen 1998 *Comparative and International Law Journal of Southern Africa* 210.

#### 4.2.3 *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)*

In 2003, the AU adopted the *Maputo Protocol*<sup>355</sup> as a regional instrument aimed at promoting the rights of women on an equal basis as those of men. It has been signed by 49 State Parties but only ratified by 37. It affords protection to children in a number of its provisions and serves as a regional instrument that directly addresses the issue of child marriages.

First, it places the same obligation as the *African Charter* to set the minimum age for marriage of women at 18 years.<sup>356</sup> The positive advantage of defining a child as one who is under 18 years of age and then expressly prohibiting child marriages is that this acts as a mechanism to decrease the high prevalence of child marriages as both these provisions read together make it clear that marriages of children under 18 years will not be allowed.<sup>357</sup>

The *Maputo Protocol* however, only provides extensive protection against child marriage for the girl child as the provision specifies the minimum age for women as 18 years old, expressly excluding men or the boy child.<sup>358</sup> It determines the need to address equality between women and men by placing an obligation on State Parties to ensure that both genders are regarded as equal partners in the marriage.<sup>359</sup> With this, child marriages have been addressed because State Parties have been obligated to guarantee that appropriate national legislative measures are implemented to ensure that there are no marriages concluded without the free and full consent of both parties wishing to marry.<sup>360</sup> The absence of full and free

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<sup>355</sup> *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2003).

<sup>356</sup> Article 6(b) of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2003).

<sup>357</sup> Viljoen 1998 *Comparative and International Law Journal of Southern Africa* 209.

<sup>358</sup> Article 6(b) of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2003).

<sup>359</sup> Article 6 of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2003).

<sup>360</sup> Article 6 (1)(a) of the *Protocol to the African Charter on Human and Peoples' Rights of Women in South Africa* (2003).

consent should therefore clearly be established as a legal ground for the annulment of the marriage.<sup>361</sup>

Child marriage has further been recognised as a form of discrimination against girls and women in that it has a disproportionate effect and negative impact on the them.<sup>362</sup> In their efforts to eradicate child marriage, State Parties should adhere to their obligations under the *Maputo Protocol* to ensure that all forms of discrimination against women are eliminated.<sup>363</sup>

### **4.3 Enforcement mechanisms and contributions to the fight against child marriage**

The protection of children's rights has been identified in a number of significant regional instruments, as discussed. However, the enforcement of these rights is just as important as their entrenchment because State Parties should be held accountable in cases where there is non-compliance with regional law. In light of this, some instruments have established monitoring mechanisms.

In order to ensure that State Parties adhere to the provisions of the *Banjul Charter*, the African Commission on Human and Peoples' Rights (African Commission) is a Commission established in 1986 with the aim of monitoring the implementation of the *Banjul Charter*.<sup>364</sup> The African Commission's further functions are to promote and protect human and peoples' rights in Africa by interpreting the provisions of the *Banjul Charter* and attending to any other tasks assigned to it by the OAU Assembly.<sup>365</sup>

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<sup>361</sup> *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 Marriage* 2017 para 23.

<sup>362</sup> *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 Marriage* 2017 para 16.

<sup>363</sup> Article 1(b) of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2003).

<sup>364</sup> Article 30 of the *African Charter on Human and Peoples' Rights* (1986).

<sup>365</sup> Article 45 of the *African Charter on Human and Peoples' Rights* (1986)



In order to achieve their functions, the African Commission is tasked with executing research, formulating procedures and principles, and co-operating with other African institutions with the aim of solving any African legal problems relating to human and peoples' rights.<sup>366</sup> The African Commission has powers to deal with inter-State disputes by receiving communications from any State Party that alleges that another State Party has violated the provisions of the *Banjul Charter*.<sup>367</sup>

Upon observation it can be noted that unlike the Committee on the Rights of the Child, the African Commission does not make room for receiving individual complaints. It is argued here that this poses as a significant challenge in relation to the enforcement of this instrument because individuals in this case are unable to approach the African Commission to lay complaints that they may have in respect of infringements of their rights entrenched and protected in the African Charter. Consequently, individuals do not have access to justice in this regard.

Similar to the CRC and the *Banjul Charter*, the *African Charter* also has a monitoring body to ensure that State Parties adhere to their obligations arising from the provisions of the *African Charter*. The African Committee of Experts on the Rights and Welfare of the Child was established in part two of the *African Charter* with a mandate more precise than that of the CRC Committee.<sup>368</sup> The African Committee is mandated to hear matters directed at promoting and protecting the rights and welfare of the child.<sup>369</sup> This is done by ensuring that the implementation of the *African Charter* is monitored to protect the rights enshrined therein.<sup>370</sup>

To monitor that State Parties are adhering to their obligations in the *African Charter*, State Parties have been tasked to submit reports to the African Committee every three years, reflecting the progress which they have made in

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<sup>366</sup> Article 45 of the *African Charter on Human and Peoples' Rights* (1986).

<sup>367</sup> Article 46 and 47 of the *African Charter on Human and Peoples' Rights* (1986).

<sup>368</sup> Lloyd 2002 *AHRLJ* 23.

<sup>369</sup> Article 32 of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>370</sup> Article 42(b) *African Charter on the Rights and Welfare of the Child* (1990).

adopting measures to give effect to the provisions of the *African Charter*.<sup>371</sup> The African Committee further has powers to receive communications from groups or individual persons who feel that their rights under the *African Charter* have been affected.<sup>372</sup> In this case, the African Committee is then obligated to conduct an investigation into the matter using any method which they may consider appropriate, inclusive of requesting State Parties to provide information on measures which the particular State Party has adopted in their efforts to comply with the provisions of the *African Charter*.<sup>373</sup>

Once such an investigation has been held, the African Committee is then tasked to submit a report to each Ordinary Session of the Assembly of Heads of State at least once every two years.<sup>374</sup> These reports will then be published once approved, and provided to State Parties to ensure that they are made available to the public of their own countries.<sup>375</sup>

The African Commission and the African Committee are accordingly responsible for the creation of the most recent regional development in addressing child marriage on the African continent; the *Joint General Comment of the African Commission and the African Committee on Ending Child Marriage (General Comment on Ending Marriage)*.<sup>376</sup> This instrument was created to detail State Parties' obligations arising from the marriage clauses of the *Maputo Protocol* and the *African Charter*, namely, Article 6(b) and Article 21(2) respectively.<sup>377</sup> It applies to all children who are already married and children who are at risk of getting married, as well as women who were forced into marriage as a child.<sup>378</sup>

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<sup>371</sup> Article 43 of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>372</sup> Article 44 of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>373</sup> Article 45(1) of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>374</sup> Article 45(2) of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>375</sup> Article 45(4) of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>376</sup> *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).

<sup>377</sup> Para 2 of the *General Comment on Ending Marriage* (2017).

<sup>378</sup> Para 5 of the *General Comment on Ending Marriage* (2017).

The significance of this instrument lies firstly in the fact that it sets the minimum marriageable age at 18 years.<sup>379</sup> Arguably, this clears any ambiguity with respect to the age at which a marriage may be concluded, thus allowing for the opportunity to review any legislation that provides that majority can be attained earlier through marriage.<sup>380</sup> The *General Comment on Ending Marriage* furthermore explicitly states that the conclusion of child marriage is not viewed as being in the best interests of the child due to its negative effects on the physical, psychological and social wellbeing of children.<sup>381</sup> The final aspect that can be noted, amongst other significant provisions, is the fact that the *General Comment on Ending Marriage* prohibits customary, religious or traditional practices from taking precedence over legislative measures that prohibit child marriage.<sup>382</sup> It is therefore argued here that this addresses the issue of communities that rely on the defence of the right to practice one's culture in order to justify child marriage.

Although it is a non-binding instrument, this instrument can be applauded for its positive contribution towards ending child marriage and is arguably one from which State Parties can learn and implement within their domestic legal framework.

In 2014, the African Union launched its first ever campaign to end child marriage. This campaign ran from 2014 to 2017 and was aimed at advocating for women's and girl's rights and raising awareness of the negative impacts of child marriage,<sup>383</sup> with the ultimate goal of accelerating the end of child marriages in Africa.<sup>384</sup> It serves as another initiative taken by the African Union which can be applauded for its positive contribution to ending child marriage. In essence, this campaign showed that it had been effective in placing the issue of child marriage at the forefront. However, it also reflected that should there be another campaign, more

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<sup>379</sup> Para 6 of the *General Comment on Ending Marriage* (2017).

<sup>380</sup> Mwambene 2018 *AHRLJ* 238.

<sup>381</sup> Para 8 of the *General Comment on Ending Marriage* (2017).

<sup>382</sup> Para 19 of the *General Comment on Ending Marriage* (2017).

<sup>383</sup> African Union date unknown <https://au.int/en/sa/cecm>.

<sup>384</sup> African Union date unknown [https://au.int/sites/default/files/pages/32905-file-campaign\\_to\\_end\\_child\\_marriage\\_in\\_africa\\_call\\_for\\_action-\\_english.pdf](https://au.int/sites/default/files/pages/32905-file-campaign_to_end_child_marriage_in_africa_call_for_action-_english.pdf) 6.

focus should be placed on targeting more countries as well as the improvement of the campaigns conceptual framework.<sup>385</sup>

In 2015, the Agenda 2063, which serves as a blueprint for transforming Africa into a better future, was then established.<sup>386</sup> This agenda provides for Africa's commitment towards achieving sustainable development through the delivery of seven aspirations. Aspiration number 6 is to work towards a Africa, "whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children."<sup>387</sup> As with the SDGs, child marriage has been listed under this aspiration as a harmful social practice that should be ended thereby showing Africa's commitment to ending child marriage.<sup>388</sup>

#### **4.4 Conclusion**

The development of children's rights has also been extended at the regional level. The most significant regional instruments put in place to protect children, and specifically address the issue of child marriage, are the *Banjul Charter* and the *African Charter*. The *Banjul Charter* has been identified as a significant regional law instrument dealing with economic, civil, social and political rights. Although it does not specifically deal with children, it highlights various rights which may be applicable to children in Africa.

The CRC and the *African Charter* complement each other because they are built on the same principles.<sup>389</sup> It can be argued that the *African Charter* offers a higher level of protection than that of the CRC.<sup>390</sup> This is because the *African Charter* does not limit State Parties' obligations to the availability of resources. Despite the enactment of these instruments, compliance with their provisions will always remain a challenge. It is for this reason that monitoring bodies have been

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<sup>385</sup> UNICEF date unknown  
[https://www.unicef.org/protection/files/Summary\\_Review\\_of\\_the\\_AU\\_Campaign\\_to\\_End\\_Child\\_Marriage.pdf](https://www.unicef.org/protection/files/Summary_Review_of_the_AU_Campaign_to_End_Child_Marriage.pdf) 2.

<sup>386</sup> African Union date unknown <https://au.int/en/agenda2063/overview>.

<sup>387</sup> African Union Commission 2015 *Agenda 2063: The Africa We Want* 2.

<sup>388</sup> African Union Commission 2015 *Agenda 2063: The Africa We Want* 9.

<sup>389</sup> Laftman 2011 *A Guide to the monitoring mechanisms of the Child Rights Committee, the UN Universal Periodic Review and the Regional Child Rights Mechanisms* 12.

<sup>390</sup> Lloyd 2002 *AHRLJ* 14.

implemented to hold State Parties accountable. These monitoring bodies serve as a complaint forum, and any group or individual who believes that their rights have been affected are encouraged to report State Parties to the respective monitoring bodies.

Lastly, there are some efforts made by in the African context that can be viewed as a positive contribution towards the need to curb child marriage. The most recent and significant efforts made are the *General Comment on Ending Child Marriages*, African Union campaign to end child marriage and the Agenda 2063; all of which reflect positive contributions towards ending child marriage.

This chapter illustrated that despite the development of children's rights and efforts made at the regional level to address the issue of child marriage, the harmful practice persists. It is therefore clear to see that there is still significant progress to be made. State Parties would therefore need to increase their efforts by placing more focus on child marriage and reviewing their laws accordingly. In addition to this, enforcement mechanisms would have to play an active role by placing stricter mandates on State Parties to submit their reports on efforts made to curb child marriage.

## CHAPTER 5 THE SOUTH AFRICAN DOMESTIC LEGAL FRAMEWORK ON COMBATING CHILD MARRIAGE

### 5.1 Introduction

The prevalence of child marriage in South Africa has significantly escalated over the past years. The most recent data available regarding the prevalence of child marriages in South Africa are recorded by Stats SA and reflect that there were a total of 72 child marriage registrations during the year 2017 alone, with 62 of these marriages recorded as girls marrying for the first time.<sup>391</sup>

It is important to note that these rates may be higher as customary marriages are rarely registered.<sup>392</sup> The issue of child marriage in South Africa has been associated with cultural and religious practices.<sup>393</sup> Chapter two discussed that the most common form of child marriage practiced in South Africa is that of *ukuthwala*, where girls as young as 12 years old are married off to much older men.<sup>394</sup>

South Africa has, however, committed to the goal of eradicating child marriage by 2030 in line with target 5.3 of the SDGs.<sup>395</sup> As a step towards achieving this goal, South Africa has signed and ratified several international and regional law instruments, including the CRC and the *African Charter* as the most significant instruments regulating children's rights from an international perspective.<sup>396</sup>

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<sup>391</sup> See para 2.1 above.

<sup>392</sup> Girls Not Brides 2019 <https://www.girlsnotbrides.org/child-marriage/south-africa/>.

<sup>393</sup> Mwambene 2018 *AHRLJ* 527.

<sup>394</sup> See para 2.3.4.1 above.

<sup>395</sup> Girls Not Brides 2019 <https://www.girlsnotbrides.org/child-marriage/south-africa/>. Target 5.3 of the SDG's aims to eliminate all harmful practices such as child, early and forced marriages.

<sup>396</sup> CEDAW and the Banjul Charter are further examples of international instruments which have been ratified by South Africa. According to Girls Not Brides, South Africa has also committed itself to ending child marriage by the end of 2020 under the Ministerial Commitment on comprehensive sexuality education and sexual and reproductive health services targeted at young people in Eastern and Southern Africa.

In an attempt to comply with international standards and obligations, the South African government has enacted legislation and passed a range of laws to protect children from the rising global problem of child marriage. South Africa is also viewed as having one of the most progressive constitutions in the world when it comes to guaranteeing women and children's rights which have been enshrined in international conventions.<sup>397</sup>

This chapter seeks to determine what measures have been put in place to reflect South Africa's commitment towards meeting the SDGs. It will evaluate the relationship between South African municipal law and international law with the aim of establishing how and why South Africa relies on international law. The South African *Constitution* is the supreme law of the country and by virtue of this supremacy, all other laws and conduct must comply with the provisions of the *Constitution*.<sup>398</sup>

In light of this, the chapter will further evaluate how children are protected against child marriage by the South African domestic legal framework. It will then conclude by testing *ukuthwala* as a harmful cultural practice in South Africa by discussing the crimes that emanate from it.

## **5.2 The relationship between South African municipal law and international law**

The South African *Constitution* has attracted international attention in relation to the protection and advancement of children's rights.<sup>399</sup> The incorporation of international and regional law is addressed in the *Constitution*. Section 39 of the *Constitution* deals with the interpretation of the Bill of Rights and places a duty on South African courts to consider international law as a mandatory requirement by stating the following:

39. (1) When interpreting the Bill of Rights, a court, tribunal or forum—

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<sup>397</sup> Mtshali 2014 *Child Abuse Research in South Africa* 53.

<sup>398</sup> Section 2 of the *Constitution*, 1996.

<sup>399</sup> Boezaart *Child Law in South Africa* 265.

(b) must consider international law;

The word "must" in this provision places a clear mandatory obligation on both South African courts and on the State. It is understood that an obligation is placed on South African courts in the sense that these courts are obligated to unequivocally consider international law as a requirement when adjudicating all cases. In light of this, international law may not be treated as secondary.<sup>400</sup>

A further obligation is placed on the State to ensure that necessary legislation is adopted in compliance with international law. The terms "monism" and "dualism" are used to describe two different ways in which international law can be incorporated into municipal law.<sup>401</sup> Monism views international law and municipal law as one system of law, thereby allowing international law to be directly enforceable before the municipal courts without having to be incorporated into municipal law.<sup>402</sup> Dualism, on the other hand, regards the two areas of law as separate legal systems that exist alongside one another, therefore requiring that international law first be incorporated into municipal law before it can be enforceable in the municipal courts.<sup>403</sup>

South Africa follows both the monism and dualism approach. It follows the monism approach in as far as customary international law is concerned by virtue of section 232 of the *Constitution*,<sup>404</sup> but follows the dualism approach where treaties are concerned by virtue of section 231 of the *Constitution*.<sup>405</sup> Therefore international treaties must first be incorporated into South African law by legislative enactment.<sup>406</sup> This is governed by section 231 of the *Constitution*. This section identifies three phases when it comes to the endorsement of international

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<sup>400</sup> Tladi 2016 *AHRLJ* 338.

<sup>401</sup> Ferreira and Snyman 2014 *PELJ* 1471.

<sup>402</sup> Ferreira and Snyman 2014 *PELJ* 1471.

<sup>403</sup> Ferreira and Snyman 2014 *PELJ* 1471.

<sup>404</sup> Section 232 provides that customary international law is law in the Republic unless it is inconsistent with the *Constitution* or an Act of Parliament.

<sup>405</sup> Section 231(4) provides that any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the *Constitution* or an Act of Parliament.

<sup>406</sup> *Azanian Peoples Organisation v President of the Republic of South Africa* [1996] (CC) para 26.



agreements.<sup>407</sup> Firstly, the international agreement will be allocated to the national executive for negotiation and signing of the agreement.<sup>408</sup> In this case, the international agreement will not be binding on the Republic unless it is of a technical, administrative or executive nature.<sup>409</sup> In order for an international agreement to become law in South Africa, it must be approved by Parliament.<sup>410</sup> Accordingly, international agreements that have been enacted into law by South African national legislation will become law within South Africa with the effect that South Africa is bound by those agreements.<sup>411</sup> Once a State Party has ratified an international treaty, it then undertakes to create domestic laws within its State in compliance with these international law obligations.<sup>412</sup>

Section 232 of the *Constitution* endorses customary international law as a constitutional mandate by stating that:

Customary international law is law in the Republic unless it is inconsistent with the *Constitution* or an Act of Parliament.<sup>413</sup>

Consequently, aspects which form part of customary international law are viewed as automatically forming part of South African law. However, where there is a provision of the *Constitution* or an Act of Parliament that clearly shows inconsistency with customary international law, that provision or Act of Parliament will take precedence over customary international law. This has been emphasised by section 233 of the *Constitution* which states that:

When interpreting any legislation, every court must prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law.<sup>414</sup>

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<sup>407</sup> *Glenister v President of the Republic of South Africa* [2011] ZACC para 89.

<sup>408</sup> Section 231(1) of the *Constitution*. See also *Glenister v President of the Republic of South Africa* [2011] ZACC para 89.

<sup>409</sup> Section 231(3) of the *Constitution*. See also *Glenister v President of the Republic of South Africa* [2011] ZACC para 89.

<sup>410</sup> Section 231(2) of the *Constitution*. See also *Glenister v President of the Republic of South Africa* [2011] ZACC para 89.

<sup>411</sup> Section 231 of the *Constitution*, 1996.

<sup>412</sup> Viljoen *International human rights law in Africa* 9.

<sup>413</sup> Section 232 of the *Constitution*, 1996.

<sup>414</sup> Section 233 of the *Constitution*, 1996.

Therefore, the *Constitution* and Acts of Parliament have greater legal weight by virtue of the fact that customary international law is considered secondary.<sup>415</sup> It is important to note that South Africa has signed and ratified a number of international and regional law instruments. These include the CRC and the *African Charter* which have been discussed previously as the child-centric instruments protecting the rights of children in Africa.<sup>416</sup>

The CRC, read with the *African Charter*, stipulates that State Parties should take all legislative and other measures to recognise the rights enshrined in both these instruments.<sup>417</sup> In addition to these, there are a number of other international agreements addressing child marriage which are currently binding on the Republic. These are the UDHR which sets the consent of both intending spouses as a requirement for marriage,<sup>418</sup> CEDAW, and the *Maputo Protocol* which prescribes that steps be taken to eliminate discriminatory customary practices and promote equality between men and women in relation to marriage, and the *Optional Protocol to the CRC on the Sale of Children* which prohibits the sale of children.<sup>419</sup>

### **5.3 The South African legal framework on child marriage**

#### *5.3.1 The Constitution of the Republic of South Africa*

The protection of human rights forms a fundamental aspect of the *Constitution*. The importance of these rights is emphasised in chapter two of the *Constitution* which is solely dedicated to protecting the rights of all people in South Africa, which includes children, and places an obligation on the State to protect, promote and fulfil these rights.<sup>420</sup>

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<sup>415</sup> Dugard *International Law A South African Perspective* 50.

<sup>416</sup> See paras 3.3 and 4.2.2 above.

<sup>417</sup> Article 4 of the CRC read with Article 1 of the African Charter.

<sup>418</sup> Article 16(2) of the Universal Declaration of Human Rights (1948).

<sup>419</sup> Article 2 of the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (2002).

<sup>420</sup> Section 7(2) of the *Constitution*, 1996.

Children have been classified as vulnerable members of South African society.<sup>421</sup> It is for this reason that children have been awarded a section specifically dedicated to the protection of their rights in the *Constitution*. However, the fact that this section is headed "children" should not be misunderstood to be the only section which is applicable to children. While it is true that section 28 applies exclusively to children, there are a number of other rights from which children benefit.<sup>422</sup>

In promoting the importance of the best interests of the child principle, the *Constitution* also highlights this principle as being of paramount importance in all matters concerning the child.<sup>423</sup> The Constitutional Court in *Minister of Welfare and Population Development v Fitzpatrick SA 422 (CC)* was the first to declare that this principle is not merely a right, but is also regarded as a guiding principle.<sup>424</sup> Therefore placing emphasis once again on the fact that the State is prohibited from using its own discretion on whether or not to consider the best interests of the child but to rather consider the best interests of the child as the decisive factor in all matters affecting the child.<sup>425</sup>

One of the challenges that arises with the *Constitution* is its contradictions between the individual rights enshrined in the Bill of Rights and its need to cherish cultural practices.<sup>426</sup> The right to practice culture in South Africa has been established in section 30 of the *Constitution* by guaranteeing everyone the right to participate in the cultural life of their own choice, provided that it is done in a manner that is not inconsistent with any other rights enshrined in the Bill of Rights.<sup>427</sup>

This right has been expanded in section 31 where it provides that no person may be denied the right to enjoy their culture or practice their religion.<sup>428</sup> However, section 31(2), as described by Judge Sachs in the case of *Christian Education*

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<sup>421</sup> Du Plessis, Van der Walt and Govindjee 2014 *Obiter* 2.

<sup>422</sup> Du Plessis, Van der Walt and Govindjee 2014 *Obiter* 2.

<sup>423</sup> Section 28(2) of the *Constitution*, 1996.

<sup>424</sup> *Minister of Welfare and Population Development v Fitzpatrick SA 422 (CC)* para 17.

<sup>425</sup> See para 3.3.1 above.

<sup>426</sup> Monyane 2013 *SARS* 72.

<sup>427</sup> Section 30 of the *Constitution*, 1996.

<sup>428</sup> Section 31 of the *Constitution*, 1996.

*South Africa v Minister of Education*,<sup>429</sup> does not allow for community members to use their right to associate on the basis of language, culture and religion as a shield to justify practices that violate any person's rights which have been protected in the Bill of Rights.<sup>430</sup>

The *Constitution* further obliges the courts to apply customary law, as well as any other legislation dealing with customary law, where the matter is one that concerns customary law.<sup>431</sup> In light of this, it is clear to see that the *Constitution* recognises customary law in the South African legal system as it expresses that customary marriages may be accommodated in as far as they do not violate the provisions set out in the *Constitution*.<sup>432</sup> Therefore, the practice of customary law enjoys the same status as any other right under the *Constitution*.<sup>433</sup> Arguably, this is problematic because customary law is often prevalent in rural areas where girls and women are most vulnerable and as a consequence are unable to enjoy their rights as guaranteed in the *Constitution*.<sup>434</sup>

In addition, the right to culture and the right to equality are two common rights that have been emphasised by courts.<sup>435</sup> The right to equality in the *Constitution*, read with international standards, makes it clear that discrimination based on gender is strictly prohibited.<sup>436</sup> The *Promotion of Equality and Prevention of Unfair Discrimination Act*<sup>437</sup> emphasises this by prohibiting unfair discrimination on the grounds of gender-based violence and traditional, customary, or religious practices which demoralise the dignity and wellbeing of female children.<sup>438</sup> However, the

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<sup>429</sup> *Christian Education South Africa v Minister of Education* 2000 (4) SA 757.

<sup>430</sup> *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 para 26. See also section 31(2) of the *Constitution*, 1996.

<sup>431</sup> Section 211(3) of the *Constitution*, 1996.

<sup>432</sup> Choma 2011 *US-China Law Review* 877. See also section 15(3) of the *Constitution*.

<sup>433</sup> *Bhe and Others v Khayelitsha Magistrate* 2005 (1) BCLR (CC) para 148.

<sup>434</sup> Monyane 2013 *SARS* 72.

<sup>435</sup> Monyane 2013 *SARS* 72.

<sup>436</sup> Section 9 of the *Constitution* provides that everyone is equal before the law and no person may unfairly discriminate against anyone based on sex. Accordingly, article 2 of the CRC provides that State Parties shall respect the rights of each child without discrimination of any kind, irrespective of the child's sex.

<sup>437</sup> 4 of 2000.

<sup>438</sup> Section 8 of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000.

enforcement of women's rights has been identified as a challenge within the rural areas, leading to the continued marginalisation of women and girls.<sup>439</sup>

In light of this, it is argued that the right to equality is violated through child marriage as girls are viewed as inferior to men with no freedom to consent, choose what they want or express how they feel before, during and after the marriage process. Furthermore, the most important rights which have been identified, and constitutionally protected in South Africa, are the right to life and the right to human dignity. The importance of these two rights has been identified in *S v Makwanyane* 1995 (6) BCLR 665 (CC) (*S v Makwanyane*) and is founded on the grounds that they are the source from which all other rights emanate.<sup>440</sup>

In light of this, it has been noted that these rights are to be valued above all other rights and this should be seen clearly in the way the State executes its mandate under its constitutional obligations.<sup>441</sup> Accordingly, section 28 of the *Constitution* places a high premium on human dignity by stating that children are not to be subjected to maltreatment, neglect, abuse or degradation.<sup>442</sup> Furthermore, section 12 guarantees the right of everyone to bodily and psychological integrity, including the right of control over a person's own body.<sup>443</sup>

As discussed in chapter two, the effect of child marriage tends to create a negative environment for the child; an environment filled with physical, sexual and emotional abuse.<sup>444</sup> It is argued that this abusive nature, coupled with its violation of the child's right to make his or her own decisions, constitutes a gross violation of a child's right to human dignity, as well as his or her right to freedom and security. Furthermore, because the practice of child marriage involves the process of the child's parents or family members choosing the child's partner for them, this

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<sup>439</sup> Monyane 2013 *SARS* 72.

<sup>440</sup> *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 144.

<sup>441</sup> *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 144.

<sup>442</sup> Section 28(d) of the *Constitution*, 1996.

<sup>443</sup> Section 12(2)(b) of the *Constitution*, 1996.

<sup>444</sup> See para 2.4 above.

practice is viewed as an act against their will and accordingly amounts to a violation of the child's human dignity and right to privacy.<sup>445</sup>

Responsibility is placed on a child's parents to protect children against this harmful practice and failure to do so will lead to sanctions against the parents as perpetrators of this act, as will be discussed in further detail in paragraph 5.4 below.

### 5.3.2 *The Children's Act*

The *Children's Act*<sup>446</sup> has certain strategies specified to protect children from child marriages.<sup>447</sup> Firstly, it mirrors the CRC, the *African Charter*, and the *Constitution* by defining a child as anyone below the age of 18 years old and further emphasising that the best interests of the child must be applied as paramount importance in all matters concerning the child.<sup>448</sup>

According to section 12(2)(b) of the *Children's Act*, a child who is above the minimum age for marriage, as set by law, may not conclude a marriage without that child's consent.<sup>449</sup> However, in disagreement with this provision, in the case where a child consents to such marriage, such consent is invalid as children are incapable of consenting to child marriage due to their lack of understanding as to what they are consenting to.<sup>450</sup> Section 12(2)(a) determines that a child who is below the minimum age may not be subjected to marriage in its entirety.<sup>451</sup> Failure to adhere to sections 12(2)(a) and 12(2)(b) of the *Children's Act* leads to a criminal offence punishable in terms of the Act.<sup>452</sup>

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<sup>445</sup> See par 4.2 above.

<sup>446</sup> *Children's Act* 38 of 2005.

<sup>447</sup> Mtshali 2014 *Child Abuse Research in South Africa* 58.

<sup>448</sup> Section 1 and 9 of the *Children's Act* 38 of 2005.

<sup>449</sup> Section 12(2)(b) of the *Children's Act* 38 of 2005.

<sup>450</sup> See para 2.2 above.

<sup>451</sup> Section 12(2)(a) of the *Children's Act* 38 of 2005.

<sup>452</sup> Section 305(1)(a) of the *Children's Act* 38 of 2005. s305(6) provides that a first offender may be fined or sentenced to a period not exceeding ten years' imprisonment. s305(7) an offender who is committed this offence more than once will be liable to a fine and may be sentenced to a period not exceeding 20 years' imprisonment.

However, upon analysis of these provisions, it is argued here that despite the *Children's Acts'* attempt to address the issue of child marriage, the Act is difficult to interpret and enforce as it does not prescribe what the minimum age for marriage is. The fact that it defines a child as a person who is 18 years old, but makes provision for the marriage of a child below the "minimum age", provides a lack of protection for the child. This is because the laws could become conflicting in the sense that where there is a law that sets the minimum age at younger than 18 years, the *Children's Act* allows such a marriage to be concluded, provided there is consent. Arguably, this provision is problematic because child marriage, in other words all marriages where the child is below 18 years of age, should be outlawed in their entirety.

The *Children's Act* specifies that a child who has been exploited or lives in an environment that causes serious harm to the child's physical, social or mental wellbeing should be removed from that environment and placed in better conditions.<sup>453</sup> In this case, specific reference is made to child protection services and places an obligation on them to carry out investigations in cases where it is suspected that abuse is taking place or where the child has been neglected or abandoned.<sup>454</sup> In light of this provision, an obligation is therefore placed on the State to ensure that a child who has been subjected to marriage is removed from that environment and placed in an environment where the child's development is prioritised.

There are a number of provisions in the *Children's Act* that make direct and indirect references to the importance of culture during childhood. For instance, the "best interests of the child" principle, as enshrined in the *Children's Act*, emphasises the need to maintain a connection with his or her family and culture and to further consider the child's cultural development.<sup>455</sup> When a child is being placed in foster care, the social worker may only place the child after producing a report stipulating that the child's culture, religious and linguistic background has

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<sup>453</sup> Section 150(1) of the *Children's Act* 38 of 2005.

<sup>454</sup> Section 150(2) of the *Children's Act* 38 of 2005.

<sup>455</sup> Section 7(1)(f)(ii) of the *Children's Act* 38 of 2005.

been considered and that it will accordingly be a match with the foster parent's background.<sup>456</sup>

A similar approach is taken when a child is being considered for adoption.<sup>457</sup> However, upon analysis of the wording in the two provisions, it is clear to see that that the consideration of the culture, religious and linguistic background of the child in comparison with the environment where they will be placed is mandatory in the case of foster care placement but not in the case of adoption.<sup>458</sup>

In addition to these provisions which reflect a positive approach by the *Children's Act* to consider culture, section 12 of the *Children's Act* is dedicated solely to social, cultural and religious practices and prohibits any activities that are detrimental to the child's wellbeing whether practiced socially, culturally or religiously.<sup>459</sup> This section only deals with male circumcision and female genital mutilation as two customary practices which have been prohibited by the *Children's Act*.<sup>460</sup> However, failure to comply with the provisions of this section does not result in a criminal offence.<sup>461</sup> Although *ukuthwala* has not been expressly prohibited in this section, it is argued that the right to freedom of culture and religion cannot be used as a defence to justify the practice thereof as child marriage contributes towards the detrimental effects of a child's wellbeing which, as noted above, is in fact expressly prohibited by the *Children's Act*.

### 5.3.3 *The Recognition of Customary Marriages Act*

Although child marriage is argued as a cultural practice and therefore viewed as accepted in various cultures, this harmful practice comes into conflict with the

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<sup>456</sup> Section 184(1)(a) of the *Children's Act* 38 of 2005.

<sup>457</sup> Section 231(3) of the *Children's Act* 38 of 2005.

<sup>458</sup> While section 184(a) of the *Children's Act* stipulates that a court "must" consider a report by the designated social worker about the cultural, religious and linguistic background of the child, section 231(3) stipulates that the social worker "may" take the cultural and community diversity of the adoptable child and prospective parent into consideration.

<sup>459</sup> Section 12(1) of the *Children's Act* 38 of 2005.

<sup>460</sup> Section 12(3) and (8) of the *Children's Act* 38 of 2005.

<sup>461</sup> There are no provisions stipulated in the *Children's Act* that sanction the practice of male circumcision and female genital mutilation.



RCMA. The requirements set out in this Act state for the prospective spouses are as follows:

- (a) Must both be above the age of 18 years; and
- (b) Must both give consent to each other under customary law<sup>462</sup>

Although the RCMA sets a minimum age for marriage, it makes provision for a minor – who is classified as a person below 18 years – to conclude a marriage subject to the consent of his or her parents or legal guardian.<sup>463</sup>

Where the consent of the parent or legal guardian cannot be obtained, the RCMA applies the *Marriage Act* which provides for such a marriage to be concluded by the Commissioner of Child Welfare (the Commissioner).<sup>464</sup> The Commissioner will conduct an investigation into the matter and if it is found that the child has no parents or the parents cannot consent, the Commissioner shall grant written consent if satisfied that the conclusion of the marriage will be in the best interests of the child.<sup>465</sup>

Arguably, both the RCMA and the *Marriage Act* reflect contraventions of the international and regional dispensation, as well as the *Constitution*, in that child marriage violates various children's rights thereby making it impossible that the conclusion of child marriage can be in the best interests of the child as suggested by the *Marriage Act*. All marriages which are entered into after the commencement of the said Act, and in compliance with the requirements thereof, shall be recognised as a marriage.<sup>466</sup> Consequently, the practice of forced child marriage contradicts the requirements of a valid marriage in terms of customary law and therefore indicates that child marriages should not be recognised as a marriage in terms of the RCMA.<sup>467</sup>

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<sup>462</sup> Section 3(1) of the *Recognition of Customary Marriage Act* 120 of 1998.  
<sup>463</sup> Section 3(3)(a) of the *Recognition of Customary Marriage Act* 120 of 1998.  
<sup>464</sup> Section 25(1) of the *Marriage Act* 25 of 1961.  
<sup>465</sup> Section 25(1) of the *Marriage Act* 25 of 1961.  
<sup>466</sup> Section 2(2) of the *Recognition of Customary Marriage Act* 120 of 1998.  
<sup>467</sup> Mtshali 2014 *Child Abuse Research in South Africa* 59.

Upon signing and ratifying the *Maputo Protocol* in 2004, South Africa made a few reservations, one which is related to the marriage provision in the *African Charter*. Article 6(d) of the *African Charter* reads:

Every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised.<sup>468</sup>

The reservation made by South Africa in respect of this provision is based on the provisions of section 4(9) of the RCMA which provide that the failure to register a customary marriage does not affect the validity of that marriage.<sup>469</sup> The justification made by South Africa for this reservation is based on the fact that it protects women who are married under customary law.<sup>470</sup>

Upon analysis, there are two observations that can be made in this regard. Firstly, the *Vienna Convention on the Law of Treaties* (Vienna Convention)<sup>471</sup> prohibits State Parties from using domestic law as a justification for its failure to adhere to a treaty.<sup>472</sup> Therefore, in this case, it is argued that by invoking section 4(9) of the RCMA as a justification, South Africa has failed to comply with the provisions of the *Vienna Convention*.

Secondly, it is argued that South Africa has failed to recognise the consequence that this reservation may have on child marriages as most of them are concluded in terms of customary law. Therefore, by justifying the reservation in terms of protecting marriages under customary law, children are seriously impacted. However, on the other hand, it is further argued that this reservation could have little significance to the child marriage, because, as argued above,<sup>473</sup> although the registration of marriages is compulsory, perpetrators will only neglect to register such marriages where there is a child involved.

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<sup>468</sup> Article 6(d) of the *Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa* (2003).

<sup>469</sup> Article 4(9) of the *Recognition of Customary Marriages Act* 120 of 1998.

<sup>470</sup> Mujuzi 2008 *Law, Democracy & Development* 53.

<sup>471</sup> *Vienna Convention on the Law of Treaties* (1969).

<sup>472</sup> Article 27 of the *Vienna Convention on the Law of Treaties* (1969).

<sup>473</sup> See para 4.2.2 above.

#### 5.3.4 *Jezile v S*

Despite the recognition of child marriage culturally, it does not justify the fact that it remains a violation of the rights of the child. The case of *Jezile v S* 2015 3 All SA 201 (WCC) (the *Jezile* case) highlights the emphasis of such violation by referring to the practice of *ukuthwala* an example. In this case, the appellant, Mr Jezile, was charged with human trafficking, rape, assault with intent to cause grievous bodily harm, as well as common assault<sup>474</sup> for having engaged in child marriage with a girl who at the time of the marriage was 14 years old.<sup>475</sup>

Mr Jezile, however, denied any wrongdoing and rather justified his actions as forming part of customary law by stating that his marrying of a younger girl was part of his culture and religion.<sup>476</sup> The practice of customary law has been recognised in section 211(3) of the *Constitution* which provides that:

The courts must apply customary law when that law is applicable, subject to the *Constitution* and any legislation that specifically deals with customary law.<sup>477</sup>

In addition to this, the RCMA was enacted to recognise customary marriages in accordance with South Africa's constitutional obligation and contains mandatory requirements for the validity of a marriage by stating that both parties must be above 18, and accordingly consent to the marriage under customary law.<sup>478</sup> In light of this, it had been argued that the minimum requirements, as prescribed by the RCMA, should be applied as necessary for the validity of *ukuthwala*.<sup>479</sup> The courts final ruling was therefore against Mr Jezile's justification.<sup>480</sup>

The significance of this case lies in the ruling of the court in that this case makes it clear that child marriage is unlawful as it contravenes the provisions of, amongst others, the RCMA. Furthermore, it is argued that the court further clarifies that,

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<sup>474</sup> *Jezile* case para 1.

<sup>475</sup> *Jezile* case para

<sup>476</sup> *Jezile* case para 42.

<sup>477</sup> Section 211(3) of the *Constitution*.

<sup>478</sup> Section 3 (1) of the *Recognition of Customary Marriages Act* 120 of 1998.

<sup>479</sup> *Jezile* case para 82.

<sup>480</sup> *Jezile* case para 106.

irrespective of the right to practice one's culture, this can in no way outweigh the rights of children which are protected by law.

#### **5.4 The criminalisation of ukuthwala in South Africa**

It is clear by now that the practice of child marriage is a violation of a number of children's basic human rights. Accordingly, a perpetrator's involvement in a child marriage gives rise to several offences punishable by law.<sup>481</sup> In terms of sections 15 and 16 of the *Sexual Offences Act*,<sup>482</sup> a person who is involved in an act of sexually penetrating a child is guilty of an offence irrespective of whether or not that child consented to the act.<sup>483</sup>

Chapter two of this study established that the crime of abduction emanates from the practice of *ukuthwala* specifically.<sup>484</sup> The crime of abduction has been described by Snyman as:

A person, either male or female... who unlawfully and intentionally removes an unmarried minor, who may likewise be either male or female, from the control of his or her parents or guardian and without the consent of such parents or guardian, intending that he or she or somebody else may marry or have sexual intercourse with the minor.<sup>485</sup>

Abduction has also been listed as a form of trafficking.<sup>486</sup> The issue of forced marriage has accordingly been criminalised in the *Prevention and Combating of Trafficking in Persons Act* (the *Trafficking Act*)<sup>487</sup> which provides that any person who concludes a forced marriage with another person, either within or across the borders of South Africa, for the purposes of exploiting the child, is guilty of an offence.<sup>488</sup> Because a child generally does not have the legal capacity to consent to acts such as sex, engaging in sexual activities with the child subsequent to the

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<sup>481</sup> Para 5.36 of the SALRC Revised discussion paper 138 on the practice of *Ukuthwala* (2015).

<sup>482</sup> Act 32 of 2007.

<sup>483</sup> Section 15 and 16 of the *Sexual Offences Act* 32 of 2007.

<sup>484</sup> See para 2.3.4.1 above.

<sup>485</sup> Snyman *Criminal Law* 403.

<sup>486</sup> Section 4(1)(f) of the *Prevention and Combating of Trafficking in Persons Act* 7 of 2013.

<sup>487</sup> 7 of 2013.

<sup>488</sup> Section 4(2)(b) of the *Prevention and Combating of Trafficking in Persons Act* 7 of 2013.

abduction gives rise to other criminal offences such as rape,<sup>489</sup> statutory rape,<sup>490</sup> and sexual exploitation.<sup>491</sup>

However, irrespective of a child's legal capacity to consent, such consent has been excluded as a defence<sup>492</sup> for the exploitation of a child and hefty penalties may be imposed on the perpetrator.<sup>493</sup>

In addition to this, third parties who are involved in the child marriage process are not exempt from these crimes. In terms of section 17 of the *Sexual Offences Act*, a person who engages the services of a child for financial or other benefit will be guilty of sexual exploitation of the child despite the child's consent.<sup>494</sup> Therefore, it is argued that parents, family members or guardians who participate in arranging the child marriage on behalf of the child by including themselves in the negotiations of *lobolo* or colluding in the abduction process, commit the crime of sexual exploitation which is a crime punishable by law.

As a recent legal response to the prevalence of child marriages in South Africa, the South African Law Reform Commission recently proposed a Bill on the Prohibition of Forced Marriages and Child Marriages (Prohibition Bill)<sup>495</sup> which seeks to outlaw and criminalise the ongoing practice of forced marriages as well as child marriages; more especially those resulting from cultural practices such as *ukuthwala*.<sup>496</sup> If this Bill were to become law, it would contribute positively towards the eradication of child marriages in compliance with South Africa's obligations as

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<sup>489</sup> Section 3 of the *Sexual Offences Act* provides that "any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape."

<sup>490</sup> Section 3 of the *Sexual Offences Act* provides that "A person ('A') who commits an act of sexual penetration with a child ('B') is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child."

<sup>491</sup> Section 17 of the *Sexual Offences Act*.

Other forms of crimes emanating from the practice of child marriage include being an accomplice to rape, common law abduction, kidnapping, assault. See Para 5.36 of the SALRC Revised discussion paper 138 on the practice of *Ukuthwala* (2015).

<sup>492</sup> Section 11(1)(a) of the *Prevention and Combating of Trafficking in Persons Act 7 of 2013*.

<sup>493</sup> Section 13 of the *Prevention and Combating of Trafficking in Persons Act 7 of 2013*.

<sup>494</sup> Section 17 of the *Sexual Offences Act*.

<sup>495</sup> *Prohibition of Forced Marriages and Child Marriages Bill*, 2015.

<sup>496</sup> Preamble of the *Prohibition of Forced Marriages and Child Marriages Bill*, 2015.

it be the first time the issue of child marriage would be criminalised in South Africa.<sup>497</sup>

Mwambene, however, points out a few shortcomings in the proposed Bill. He highlights firstly that the Bill fails to set the minimum age for marriage at 18 without any exceptions.<sup>498</sup> Secondly, it fails to repeal the provisions in the *Marriage Act* and RCMA allowing for children to get married.<sup>499</sup> And lastly, it neglects to amend the provisions of the *Children's Act* by clarifying the minimum age of marriage and betrothal of children.<sup>500</sup>

Regardless, the Prohibition Bill appears to give primacy to children's rights as enshrined in international law.<sup>501</sup> It further promotes the provisions of the *African Charter* and the *Protocol* thereto which mandates State Parties to discourage child marriages.<sup>502</sup> The criminalisation of child marriage will therefore play a crucial role in ensuring that the rights of children and women, with particular reference to their constitutional rights to human dignity and equality, are recognised without justification.<sup>503</sup> Unfortunately, no recent information is made available pertaining to the progress of the Prohibition Bill, however, it is yet to become law in South Africa.

## **5.5 Conclusion**

Based on the discussion of this chapter, it is clear to see that international and regional law is given recognition in South Africa's legal framework and rulings. Accordingly, the relationship between international law, regional and municipal law is regulated by the South African *Constitution* which is the supreme law of the country.<sup>504</sup> There are a number of legislative measures within the South African legal framework, such as the *Children's Act* and the RCMA, which directly address

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<sup>497</sup> Mudarikwa, Roos and Mathibela *Girls Must Not be Brides* 26.

<sup>498</sup> Mwambene 2018 *AHRLJ* 544.

<sup>499</sup> Mwambene 2018 *AHRLJ* 544.

<sup>500</sup> Mwambene 2018 *AHRLJ* 544.

<sup>501</sup> Mwambene 2018 *AHRLJ* 548.

<sup>502</sup> Article 21(2) of the African Charter read with A5 of the *Maputo Protocol*.

<sup>503</sup> Mwambene 2018 *AHRLJ* 548.

<sup>504</sup> Ferreira and Snyman 2014 *PELJ* 1472.

the issue of child marriage; as well as the *Sexual Offences Act* and the *Trafficking Act* which illegalise child marriage and the actions arising therefrom.

Cultural and religious practices have proven to be the driving factors of child marriages. Law reform linked to ending child marriage rooted by culture reflects conflict between children and cultural rights.<sup>505</sup> In South Africa, *ukuthwala* is the most dominant form of child marriage practiced. This chapter illustrated that there are many crimes that emanate from the practice of *ukuthwala*, such as abduction, kidnap and rape. It is further evident that a child who is forced to marry by his or her parents in terms of cultural and religious views, marries against his or her will, therefore reflecting an immense violation against various rights protected by the *Constitution*.<sup>506</sup>

This chapter therefore concludes that the practice of child marriage is found to be unconstitutional because it violates the constitutional framework.<sup>507</sup> Such rights include the right to human dignity, equality and the right to freedom and security of a person. The conclusion of child marriage furthermore suggests in no way is it in the best interests of the child. This chapter further concludes that child marriage is unlawful as it has shown that it is in clear violation of certain legal specifications such as the *Constitution*, the *Children's Act*, the RCMA, as well as the *Sexual Offences Act*.<sup>508</sup>

South Africa therefore has a duty to ensure that customary practices that result in forced marriage are abolished, by putting laws in place that prohibit these practices and providing access to justice for women and children who are subjected to these practices.<sup>509</sup> South Africa can further learn from Zimbabwe and Malawi by inserting a provision in the *Constitution*, as the supreme law of the country, that specifically deals with child marriage by expressly prohibiting it.

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<sup>505</sup> Mwambene 2018 *AHRLJ* 549.

<sup>506</sup> Mtshali 2014 *Child Abuse Research in South Africa* 59.

<sup>507</sup> Monyane 2013 *SARS* 74.

<sup>508</sup> Mtshali 2014 *Child Abuse Research in South Africa* 58.

<sup>509</sup> Para 5.15 of the SALRC Revised discussion paper 138 on the practice of *Ukuthwala* (2015).

## CHAPTER 6 CONCLUSION AND RECOMMENDATIONS

With factors ranging from gender inequality, poverty, the lack of educational opportunities, and the practice of culture and/or religion within different societal groups, the number of child marriages concluded globally remains at a staggering figure. This study has illustrated that if efforts to eliminate child marriages in compliance with the SDGs are not accelerated, then there will be more than 150 million children who will have married before reaching the age of 18 years old by 2030.

It is clear to see from the contents of this study that child marriage is a practice that has gained international attention over the past years in light of the fact that it is a continuous violation of children's rights. Children's rights, however, have in the past been marginalised and accordingly not recognised as worthy of protection. The development of children's rights dates back to the early 1900s and was first observed at an international level through the creation of many treaties. The CRC, as the first international law treaty created to extensively cover children's rights, is founded on four principles; namely, participation, survival and development, non-discrimination, and then the best interests of the child as the overarching principle. This study illustrated that child marriage comes into conflict with all four of these principles.

The international legal framework was used as a basis to create a regional legal framework. Regional instruments such as the *African Charter*, which is the main instrument regulating children's rights in the African context, is therefore mirrored in the CRC. It is based on the same principles of the CRC; all of which are violated through the practice of child marriage.

In African countries like South Africa, child marriage is practiced in different forms and is justified by members of society as a cultural and/or religious practice. The question that therefore arises is whether the practice of child marriage which is viewed as a justified cultural and/or religious practice, with specific reference to



*ukuthwala* as the most common practice in South Africa, violates the rights of the child.

Furthermore, where it is found that it does violate the rights of the child, whether this violation would be justified in terms of section 30 of the *Constitution*.<sup>510</sup> *Ukuthwala*, as a cultural and/or religious practice in South Africa, has been tested and found that, in addition to the fact that it consists of various elements leading to crimes that are punishable by law, it violates several international, regional and constitutional rights.

Boezaart, however, points out that where there are rights in the *Constitution* on which a limitation has been placed, then such rights cannot be applicable to children.<sup>511</sup> Therefore, child marriage cannot be justified as a cultural and/or religious practice. Although people's right to practice their religion and culture has been constitutionally entrenched, this right may only be practiced to the extent that it does not violate any other rights in the *Constitution*. Since child marriage is a violation of various other rights, including the best interests of the child which has also been promoted in the *Constitution*, this harmful practice can in no way be justified as a cultural or religious practice. However, due to the direct interpretation of the *Constitution*, various societies will continue to justify the practice under section 30 of the *Constitution*.

In light of the above, it is evident that there is a social problem within South Africa that largely contributes to the ongoing surge of child marriages, ultimately leading to domestic violence, especially in rural areas. It is clear from this study that the practice of child marriage is in clear violation of customary international law, as well as various applicable international and regional legal instruments.

Furthermore, the arguments articulated in this study reflect child marriage is firstly, unconstitutional, because it clearly violates a number of rights which a child

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<sup>510</sup> Section 36 allows for the Bill of Rights to be limited in terms of the law of general application to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

<sup>511</sup> Boezaart *Child Law in South Africa* 265.

is protected from under the Bill of Rights; and secondly, unlawful, because it contradicts many provisions of South African legislation, including the *Children's Act*, *Sexual Offences Act*, RCMA and *Customary Marriages Act*.

However, irrespective of its clear violation, this harmful practice is one that continues to grow rapidly; therefore showing that the incorporation of treaties, domestic laws, and policies on child marriage have thus far failed to succeed in curbing child marriage.

The goal of this study was to explore the practice of forced child marriages as a harmful practice in order to determine whether the current constitutional legal framework is sufficient in protecting children from child marriage. The answer is negative because, as a starting point, the *Constitution* itself, although it does protect children in various aspects, fails to protect children against child marriage by failing to insert a provision that specifically prohibits child marriages.

It is not too late to make a change to curb the persistent practice of child marriage and its continued violation of children's rights. The suggestions below recommend methods in respect of the way in which the State and other relevant stakeholders could possibly go about dealing with child marriage, with the aim of decreasing and ultimately eliminating the practice in its entirety.

Firstly, duty bearers will need to ensure that relevant laws and policies are worked on. For example, there are legal instruments that vary in the definition of a child. Whilst most instruments define a child as a person who is below the age of 18 years, some have exceptions to this age.<sup>512</sup> In addition, there are a number of legal instruments that deal with marriage but do not specify the minimum age of marriage. In order to curb the issue of child marriage, the legal minimum age of marriage for boys and girls that ought to be established, in accordance with international conventions, should be set at 18 years, without any exceptional circumstances. This minimum age should be incorporated in all laws and policies dealing with marriage, and should not be deviated from, irrespective of parental

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<sup>512</sup> See for example the CRC and the *Sexual Offences Act*.

consent or consent by the prospective spouses. The State should ensure that these laws and policies are enforceable.

In addition to this, the *Prohibition of Forced Marriages and Child Marriages Bill* is a positive step towards curbing child marriage in South Africa. The enforcement of legislation that specifically deals with child marriage and further not only outlaws it but criminalises it by outlining punishment for the perpetrators thereof, would make a great impact on the move towards a future free of child marriages.

South Africa should also review its *Constitution* by expanding on the section that deals with children's rights and inserting a section which specifically prohibits child marriage. This would reflect a positive approach by South Africa, as the issue of child marriage would not only be dealt with generally in South African legislation, but it will also be entrenched in the *Constitution* being the supreme law of the country. It will also address the issue of child marriages being concluded based on the right to practice one's culture.

With this, South Africa should review its constitutional provision dealing with the right to practice one's culture, by explicitly prohibiting cultural practices such as *ukuthwala*, that are harmful to the child, by listing them in the *Constitution*. This is essential as societies rely on section 30 of the *Constitution* to justify the practice of child marriage. If children who have been a victim of a child marriage know that they are protected by law, it could increase the number of victims who come forward as there would be a sound legislative instrument to rely on. With this, programmes aimed at raising awareness on access to justice should be established.

Furthermore, the State should ensure that the public is made aware of these laws and policies as a way of swiftly intervening by taking the leading role which they are bound to do in terms of children's rights which have been entrenched in, amongst others, the *Constitution*. This can be done by means of hosting free educational programmes focused on different age groups and genders, and ensuring that these programmes are accessible to all by catering for various disabilities and eliminating any language barriers that may arise.

Since child marriages have been associated with cultural and religious practices, sufficient training and skills programmes should be provided to the traditional leaders of the different communities, focusing on the various cultural and religious practices prevalent within the community and addressing the ways in which these practices affect children. This should be done in such a way that there is ultimately an attitude change in communities in respect of the effect that certain cultural practices have on children. This can only be done by starting at the top of the chain, as community members are most likely to be influenced more by their traditional leaders than they would be by a person outside their community.

The reporting structure is an important avenue to be considered in curbing child marriages, as this is the one system that monitors the States' compliance. Reporting structures such as the Committee on the Rights of the Child, the African Commission, and CEDAW should mandate the State to submit reports focused on measures implemented to reduce child marriages. Furthermore, the African Commission does not make provision for individual complaints in addition to complaints by State Parties. This is a gap that should be addressed to ensure that there is access for all at the regional level in order to hold government accountable.

Lastly, in light of the fact that child marriage has been linked to poverty and a lack of access to educational opportunities, the State should intervene by providing educational opportunities to the children whose families cannot afford to put them in school. In this case, parents or guardians of the child will have a lighter financial burden and are less likely to resort in actions such as selling their child.

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