
By

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Supervisor: Prof Nasila Selasini Rembe

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ABSTRACT

This study primarily sets out to examine the cultural practice of child marriage in Africa with a focus on the comparative study of South Africa and Nigeria. This practice has been prohibited in a number of international human rights instruments such as the African Charter on the Rights and Welfare of the Child, and the Protocol to the African Charter on Human and Peoples’ Right on the Rights of Women in Africa. However, overwhelming statistics show that the overall prevalence of child marriage in Africa is still very high and if current trends continue, Africa will become a region with the largest number of the global share of child marriages, by 2050.

Different interconnecting factors promote and reinforce child marriage which makes this practice very complex. The challenge of cultural traditional practices and religious beliefs that promote child marriage in Africa are evaluated in this study. The complexities surrounding these cultural practices mainly relate to the conflict that exists between adhering to customs and traditional practices, and promoting the practical implementations and enforcement of human rights standards within communities. In particular, the age at which most girls are given out in marriage conflicts with the minimum legal age of marriage, lack of free and full consent to marriage and the mixed legal system, which mainly comprises of customary law, Islamic law and common or civil law and legislation, that often conflict with one another in most African States. Discussions on these contradictions, as in the case of child marriage, often lead to a seemingly endless debate between the universality of human rights and cultural relativism within African societies. Therefore, this study bears heavily on the debate and relationship between culture and human rights, and the extent to which they can be reconciled in order to achieve a realisation of the fundamental rights of the girl-child.

A qualitative research method based on an extensive literature analysis from different disciplines is adopted. In addition, is a comparative study of South Africa and Nigeria which seeks to provide insight into the nature and extent of the practice of child marriage, as well as evaluate the adequacy, effectiveness and shortcomings of national legislations that relate to the rights of a girl-child in the context of child marriage, in both jurisdictions.
Among the different findings in this study is the fact that child marriage poses a major challenge for each African State and millions of African girls face the risk of becoming child brides in the future. This is because the different factors responsible for the practice and prevalence of child marriage are linked together, and the practice of child marriage is deeply rooted in cultural traditions and religious beliefs. Cultural practices that promote child marriage are preventable and should not be justified. At a national level, transformative Constitutions play a significant role in advancing the rights of women and girls from discrimination, gender inequality and harmful practices. Lastly, human rights frameworks are an imperative to end child marriage together with practical non-legal strategies such as education and awareness in order to change deeply ingrained cultural perceptions and attitudes as well as promote support for human rights frameworks.

This study concludes with recommendations to human rights specialised mechanisms particularly the African Committee on the Rights and Welfare of the Child as well as recommendations to South Africa and Nigeria on the need to adopt a more specific legislation that clearly prohibits child marriage.

**KEYWORDS**

Child marriage; Cultural practice; Human rights; Girl-child; Africa; Universality of human rights; Cultural relativism; Cultural legitimacy; Education, Awareness
DECLARATION

I declare that this thesis titled, ‘The Cultural Practice of Child Marriage as a Challenge to the Realisation of the Human Rights of the Girl-Child: A Comparative Study of South Africa and Nigeria’, is my own work and has not been submitted for any degree at any other university/institution. All the sources and materials used or quoted have been duly acknowledged and properly referenced.

Signed: ...........................................
Date: ...........................................

Supervisor: Professor Nasila Selasini Rembe
Signature: ...........................................
Date: .............................................
ACKNOWLEDGEMENTS

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<tbody>
<tr>
<td>AAA</td>
<td>American Anthropological Association</td>
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<tr>
<td>ACERWC</td>
<td>African Committee of Experts on the Rights and Welfare of the Child</td>
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<td>ACHPR</td>
<td>African Commission on Human and Peoples’ Rights</td>
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<td>ACPF</td>
<td>African Child Policy Forum</td>
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<td>ACRWC</td>
<td>African Charter on the Rights and Welfare of the Child</td>
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<td>AHRLJ</td>
<td>African Human Rights Law Journal</td>
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<td>AHRLR</td>
<td>All Human Rights Law Journal</td>
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<tr>
<td>AIDS</td>
<td>Acquired Immune Deficiency Syndrome</td>
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<td>ANPPPCAN</td>
<td>African Network for the Prevention and Protection against Child Abuse and Neglect</td>
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<td>AU</td>
<td>African Union</td>
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<td>AUC</td>
<td>African Union Commission</td>
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<td>AWP</td>
<td>The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa</td>
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<td>BCLR</td>
<td>Butterworths Constitutional Law Reports</td>
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<td>CC</td>
<td>Constitutional Court</td>
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<td>CCR</td>
<td>Centre for Conflict Resolution</td>
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<td>CCR</td>
<td>Constitutional Court Review</td>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination Against Women</td>
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<td>CEE</td>
<td>Commonwealth of Eastern Europe</td>
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<tr>
<td>CFCR</td>
<td>Centre for Constitutional Rights</td>
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<tr>
<td>CHRLR</td>
<td>Colombia Human Rights Law Review</td>
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<tr>
<td>CIA</td>
<td>Central Intelligence Agency</td>
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<td>CIS</td>
<td>Commonwealth of Independent States</td>
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<td>CJHR</td>
<td>Canadian Journal of Human Rights</td>
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<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
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<td>CONTRALESA</td>
<td>Chairperson of the Congress of Traditional Leaders of South Africa</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<td>CYPA</td>
<td>Children and Young Persons Act</td>
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<td>DAC</td>
<td>Day of an African Child</td>
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<td>DHS</td>
<td>Demographic and Health Survey</td>
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<td>EJIL</td>
<td>European Journal of International Law</td>
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<td>FAO</td>
<td>Food and Agriculture Organisation</td>
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<td>FIDH</td>
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<td>FGM</td>
<td>Female Genital Mutilation</td>
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<td>FWLR</td>
<td>All Federation Weekly Law Report</td>
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<td>FORWARD</td>
<td>Foundation for Women’s Health Research and Development</td>
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<td>GC</td>
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<td>GCPEA</td>
<td>Global Coalition to Protect Education from Attack</td>
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<td>GNB</td>
<td>Girls Not Bribe</td>
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<td>HIV</td>
<td>Human Immunodeficiency Virus</td>
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<td>Human Rights Commission</td>
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<td>Human Rights Watch</td>
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<td>ICC</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>International Covenant on Economic Social and Cultural Rights</td>
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<td>ICRW</td>
<td>International Centre for Research on Women</td>
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<td>IEJ</td>
<td>International Education Journal</td>
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<td>IEP</td>
<td>Institute of Economics and Peace</td>
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<td>IJCL</td>
<td>International Journal of Constitutional Law</td>
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<td>IJCR</td>
<td>International Journal of Children's Rights</td>
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<td>IJMGR</td>
<td>International Journal on Minority Group Rights</td>
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<td>IMADR</td>
<td>International Movement Against All Forms of Discrimination and Racism</td>
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<td>IPPF</td>
<td>International Planned Parenthood Federation</td>
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<td>Muslim Rights Concerns</td>
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<td>NQHR</td>
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<td>OAU</td>
<td>Organisation of African Unity</td>
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<td>OHCHR</td>
<td>Office of the High Commissioner on Human Rights</td>
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<td>OMCT</td>
<td>Organisation Mondiale Contre la Torture</td>
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<td>OPAC</td>
<td>Optional Protocols to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict</td>
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<td>Description</td>
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<td>OPIC</td>
<td>Optional Protocol on the Convention of the Rights of the Child on Communications</td>
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<td>PL</td>
<td>Public Law</td>
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<td>Parliamentary Monitoring Group</td>
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<td>Pretoria University Law Publications</td>
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<td>RCMA</td>
<td>Recognition of Customary Marriages Act</td>
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<td>SABC</td>
<td>South African Broadcasting Corporation</td>
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<td>SADC</td>
<td>Southern African Development Community</td>
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<td>SADC-PF</td>
<td>Southern African Development Community Parliamentary Forum</td>
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<td>SAFPI</td>
<td>South African Foreign Policy Initiative</td>
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<td>South African Human Rights Commission</td>
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<td>SAJHR</td>
<td>South African Journal on Human Rights</td>
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<td>SALRC</td>
<td>South African Law Reform Commission</td>
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<td>SAPA</td>
<td>South African Police Authority</td>
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<td>SAPL</td>
<td>Southern African Public Law</td>
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<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
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<td>SOAWR</td>
<td>Solidarity for African Women’s Rights</td>
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<td>SRRWA</td>
<td>Special Rapporteur on the Rights of Women in Africa</td>
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<td>SRSG</td>
<td>Special Representative of the Secretary-General on Violence against Children</td>
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<td>STIs</td>
<td>Sexually Transmitted Infections</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UK</td>
<td>United Kingdom</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organisation</td>
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<td>UNFPA</td>
<td>United Nations Population Fund</td>
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<td>UNICEF</td>
<td>United Nations Children Fund</td>
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<td>UNIFEM</td>
<td>The United Nations Development Fund for Women</td>
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<td>UNPA</td>
<td>United Nations Postal Administration</td>
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<td>US</td>
<td>United States</td>
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<td>USAID</td>
<td>United States Agency International Development</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<td>WAC</td>
<td>World Aids Campaign</td>
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<td>WLUML</td>
<td>Women Living Under Muslim Laws</td>
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CHAPTER ONE

INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 General Background of the Phenomenon of Child Marriage

Culture and tradition plays a valuable role amongst African people and all over the world. Across regions, different cultural and traditional practices have been widely recognised, accepted and experienced as a way of life for centuries. Over the years though, some of these practices have become harmful and exploitative in nature, thereby becoming a global phenomenon with an ever increasing outcry regarding the condition of the victims of these practices. In particular, the practice of child marriage has affected millions of children all over the world, with each girl-child having a unique story to tell.

Culture and tradition place great emphasis on marriage and family, and as a result child marriage is deeply rooted in culture, tradition and religious beliefs. The various cultural practices saw the birth of child marriage, which violates the fundamental human rights of the child to be free from discrimination, degrading treatment and slavery. Marriage has been defined in its widest sense as “a betrothal or union between two people, recognised under civil law, religious law and/or customary rites, and understood to be binding by the spouses concerned, their family and the wider community, whether or not it has been formally registered in law.” Child marriage is

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recognised as the union of one or both spouses below 18 years of age, although increasingly of late, new forms of marriage such as same sex marriage have come to the fore.

In this study the term ‘child marriage’ is often used interchangeably with ‘early marriage’, ‘forced marriage’ or in extreme cases ‘servile marriage’, even though their meanings differ. Early marriage affects both children and adults, in relation to child marriage, the term ‘early’ is often criticised as it does not directly emphasise the young nature of the girl-child. Forced marriage on the other hand occurs when a marriage is entered into without “the free and full consent of intending spouses” as provided in Article 16(2) of the Universal Declaration of Human Rights (UDHR) 1948. Forced marriage also involves compelling the child, in most cases the girl-child, either through force, threat or coercion into marriage. Servile marriage is recognised based on practices similar to slavery that often occur within forced marriages, such practices as forced labour, bonded labour, trafficking for sexual marriages, such practices as forced


7 Nour 2009 Reviews in Obstetrics and Gynaecology 51-52.

8 Adopted by UN General Assembly Resolution 217A (III) of 10 December 1948.

9 Prosecutor of the Special Court v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, Special Court for Sierra Leone SCSL-2004-16-A, Appeals Chamber, Judgment, Feb. 22, 2008. This judgement was the first of the Appeals Chamber since the United Nations and Sierra Leone established the SCSL in January 2002; See also Jalloh & Osei-Tutu 2008 http://www.asil.org/insights/volume/12/issue/10/prosecutor-v-brima-kamara-and-kanu-first-judgment-appeals-chamber (accessed 19-08-2014).
labour, bonded labour, trafficking for sexual exploitation and labour exploitation. Despite the difference in the meaning of these three terms, they relate to one another and provide important categories for understanding the context of child marriage.

Various reports on the global assessment of child marriage have shown that “one in three girls in developing countries (excluding China) will probably be married before they are 18. One out of nine girls will be married before their 15th birthday.” In addition, South Asia and sub-Saharan Africa are recognised as regions with the greatest proportion of married girls between the ages of 15-19 years. Similarly, a UNICEF 2014 report on progress and prospects of ending child marriage equally confirms the high rate of child marriage in the two regions. The report states that the percentage of women between the age of 20 to 49 years who were married before 18 years by region are: 56 percent in South Asia; 46 percent in West and Central Africa; 38 percent in Eastern and Southern Africa; 24 percent in middle East and North Africa; 30 percent in Latin America and the Caribbean; 21 percent in East Asia and the Pacific Central and 14 percent in Eastern Europe and the Commonwealth of Independent States (CEE/CIS).

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12 Ibid.

13 Ibid. According to UNICEF the global estimates provided are based on a subset of countries covering around 50 per cent of the global population of women aged 20 to 49 years. The data presented as regional estimates covers at least 50 per cent of the regional population. Also due to the lack of comparable data on child marriage for China in UNICEF global databases, the data coverage is below 50 per cent for East Asia and the Pacific region.
Although the practice of child marriage affects both boys and girls, the focus of many studies and reports however are on the girl-child, this is because the practice predominantly affects girls in a disproportionate way and with more serious implications.\textsuperscript{15} The number of girls affected by the practice of child marriage are greater in number than boys, with a global estimate of about 720 million women in comparison to 156 million men married before 18 years.\textsuperscript{16} At a regional level, in Africa, Niger for example, has an estimated 77 percent of women aged 20 to 49 years married before their eighteenth birthday, in comparison to five percent of men of the same age group.\textsuperscript{17}

Therefore, the existence of disproportionate gender dimensions indicates that child marriage is a gender specific practice with a wide range of discriminatory gender-based violence.\textsuperscript{18} This can be attributed to the fact that gender is an important aspect of culture with various roles and responsibilities.\textsuperscript{19} Albertyn notes that “the enforcement of traditional gender roles defined largely by women’s sexual and reproductive capacity tends to maintain women in an inferior position dependent upon men for status and resources.”\textsuperscript{20} Therefore, identifying the role of gender in human rights violations helps prevent a “distorted picture of patterns of human rights abuses, and can lead to androcentric definitions of substantive norms.”\textsuperscript{21}

\begin{thebibliography}{99}
\bibitem{15} UNFPA “Marrying Too Young: End Child Marriage” 2012 11; Lane “Stealing Innocence” 2011 9.
\bibitem{17} \textit{Ibid.} See also Girls Not Brides (GNB) “Child Marriage Around the World: Niger”. Available at: www.girlsnotbrides.org/child-marriage/niger/ accessed 20-03-2016). Report shows that Niger has the highest rate of child marriage in the world with a 76% prevalence of women 20-24 years old who were married before 18 years.
\bibitem{20} \textit{Ibid.}
\bibitem{21} Byrnes “Women, Feminism and International Human Rights Law – Methodological Myopia, Fundamental Flaws or Meaningful Margination?” 1988-1989 \textit{Australian Year Book of International Law} 211; Rwezaura \textit{Law, Culture and Tradition in Eastern and Southern Africa} 31.
\end{thebibliography}
Furthermore, the prevalence of child marriage has raised growing concerns amongst global communities. A United Nations Population Fund (UNFPA) 2012 report on global prevalence of child marriage states that:

Over 67 million women 20-24 years old in 2010 had been married as girls. Half were in Asia, one-fifth in Africa. In the next decade 14.2 million girls below 18 years will be married every year; this translates into 39,000 girls married each day. This will rise to an average of 15.1 million girls a year, starting in 2021 until 2030, if present trends continue.

Similarly, the UNICEF report cited above states that: “Worldwide, more than 700 million women alive today were married before their 18th birthday.” At this rate of prevalence, millions of future generations of girls are at risk of child marriage. The report provides a projection on future statistics of child marriage as thus:

If there is no reduction in the practice of child marriage, up to 280 million girls alive today are at risk of becoming brides by the time they turn 18. Due to population growth, this number will approach 320 million by 2050. The total number of women married in childhood will grow from more than 700 million today to approximately 950 million by 2030, and nearly 1.2 billion by 2050. The number of girls under the age of 18 married each year will grow from 15 million today to 16.5 million in 2030 and to over 18 million in 2050.

This report also notes that there is a slow reduction in the prevalence of child marriage particularly marriages of girls below 15 years, with a decline from 12 percent to 8


23 UNFPA “Marrying Too Young” 2012 6 & 18. According to this report the data analysis of child marriage was generated through household surveys from Demographic and Health Survey (DHS) and the Multiple Indicators Cluster Survey (MICS). The data generated is analysed according to each country, region and global environment in order to provide the extent of child marriage and to compare trends for a decrease or increase in the prevalence of child marriage.


25 Ibid.

26 Ibid., p.6.
percent. Similarly, the percentage of women between 20-24 years who were married after 15 years but before 18 years slowly declined from 33 percent in 1985 to 26 percent in 2010.

Despite these reports, the rate of reduction in the prevalence of child marriage has been quite slow and uneven across some countries and regions, and this decline is barely rapid enough to keep up with the population growth in these areas. In Africa, Nigeria presents an example of this situation with a high population growth and only about one percent per year decline in child marriage over the past three decades. Other African countries are also faced with the challenge of reducing the prevalence of child marriage, as “15 out of the 20 countries with the highest rates of child marriage are in Africa.” An example is Niger with 76 percent of women 20-24 years married before they were 18 years.

This shows that a serious concerted effort is needed to reduce and end the practice of child marriage, as the probability of Africa having the highest number of child marriages in the world by 2050 is very likely, as “a growing child population combined with a slow decline in the practice of child marriage in Africa will put millions more girls at risk.”

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28 Ibid., p. 5-6.


32 Ibid., p. 87.

Many African States are vulnerable to the various factors that reinforce the practice and prevalence of child marriage. Such factors include cultural traditions and religious beliefs, poverty, lack of education, gender discrimination, political instability, natural disasters and conflict situations such as war,\textsuperscript{34} as well as fear/attack from Islamic extremist groups like \textit{Boko Haram}.\textsuperscript{35} Cultural traditions and interpretations of religious beliefs contribute greatly to promoting the practice of child marriage because it is often tolerated as a norm in some societies.\textsuperscript{36}

Each society presents diverse and unique customs, beliefs and practices that guide its way of life.\textsuperscript{37} Culture provides an identity to each individual and group, and also provides a sense of continuity with past and existing norms.\textsuperscript{38} Amongst such traditional norms are the patriarchal and male superiority system, protective practices against female sexual activity, family honour, financial benefits from payment of the bride price and the belief that the adolescent period between puberty and adulthood is alien, as every girl-child that has reached puberty is a woman.\textsuperscript{39}

Various international human rights organisations, advocacy groups and civil societies share critical views on the practice of child marriage. Equality Now, for example, states that:

\begin{quote}
Child marriage legitimizes human rights violations and abuse of girls under the guise of culture, honour, tradition, and religion. It continues a sequence of discrimination that begins at a girl's birth and is reinforced in her community, in her marriage and which continues throughout her entire life. Child marriage, therefore, is a way of dealing with the perceived problems that girls represent for families, the problems that arise from the low value given to women and girls.\textsuperscript{40}
\end{quote}

\textsuperscript{34} UNFPA “Marrying Too Young” 2012 11-12.
\textsuperscript{36} Equality Now “Protecting the Girl-Child” 2014 15.
\textsuperscript{37} De la Rey “Culture and Tradition and Gender: Let’s Talk About It.” 1992 Agenda 78-85.
\textsuperscript{38} \textit{Ibid.}
\textsuperscript{39} UNFPA “Marrying Too Young” 2012 12; UNICEF “Early Marriage: Child Spouses” 2001 6-7.
\textsuperscript{40} \textit{Ibid.}, p. 3.
The effects of child marriage are not only borne by the girl-child, as it affects the entire community, the nation and global development as a whole.\textsuperscript{41} For the girl-child, various fundamental human rights are violated. These rights include the right to consent to marriage; right to life; education; health; non-discrimination; dignity; freedom from degrading, inhuman and cruel treatment; and protection from harmful traditional practices.\textsuperscript{42} The development of international and regional laws focusing on the protection of the rights and welfare of children at a national level has not prevented, or significantly reduced, the continuous violation of these rights across Africa and elsewhere.\textsuperscript{43}


This thesis focuses on the CRC, African Children’s Charter and the African Women Protocol as human rights frameworks for the promotion and protection of the rights of

\begin{itemize}
\item \textsuperscript{41} Ibid., p. 7.
\item \textsuperscript{43} Equality Now “Protecting the Girl Child 2014” 15.
\item \textsuperscript{44} Adopted by UN General Assembly Resolution 217A (III) of 10 December 1948.
\item \textsuperscript{45} G.A. Res. 1763 A (XVII) (1962), entered into force Dec. 9 1964.
\item \textsuperscript{46} Adopted UN General Assembly Resolution 34/180 of 18 December 1979, entered into force 3 September, 1981.
\item \textsuperscript{47} Adopted by UN General Assembly resolution 44/25 of 20 November 1989, entered into force 2 September 1990.
\item \textsuperscript{48} Adopted by Organisation of African Unity (OAU) now African Union (AU) 11 July 1990, entered into force 29 November 1999.
\end{itemize}
the girl-child. The CRC is the first international children’s rights legislation widely ratified or acceded to by 196 States with the most recent ratification by Somalia on 1 October 2015.\textsuperscript{50} It is recognised for its comprehensive, legally binding framework. However, it is not without its shortcomings especially when addressing critical contemporary issues in Africa.\textsuperscript{51} For instance, the practice of child marriage is not directly addressed in the CRC, however there are other rights provided in the CRC that are linked to the practice of child marriage which include the right to nondiscrimination; right to freedom of expression; right to be protected from harmful traditional practices and right to protection from all forms of abuse.\textsuperscript{52}

The African Children’s Charter, on the other hand is the main regional legislation that focuses on children’s rights. It is recognised as “the most progressive of the treaties on the rights of children”\textsuperscript{53} especially when compared to the CRC. The African Children’s Charter also notes in its preamble the critical challenges which African children experience and directly prohibits child marriage and betrothal of children.\textsuperscript{54} The African Women Protocol equally plays a vital role in the protection of the rights and welfare of the girl-child and in prohibiting harmful practices such as child marriage.\textsuperscript{55} African Women’s Protocol is a legally binding supplementary treaty to the African Charter on Human and Peoples’ Rights (ACHPR or African Charter),\textsuperscript{56} it

\begin{itemize}
\item \textsuperscript{51} Viljoen \textit{International Human Rights Law in Africa} 2 ed (2012) 87.
\item \textsuperscript{52} Article 2, 12, 19 of the CRC. See also UNICEF “Early Marriage: A Harmful Traditional Practices” 2005 1; UN 1995 Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children. Available at: http://www.refworld.org/docid/479477410.html (accessed 02-07-2014).
\item \textsuperscript{54} Article 21 (2) of the African Children’s Charter.
\end{itemize}
addresses the shortcomings of the African Charter and elaborates on the scope of women’s rights. For example, it broadens substantive provisions relating to discrimination against women, harmful practices and women’s reproductive health, to mention a few. As a gender specific and more recent legal instrument, it complements and reinforces the rights and obligations in the African Children’s Charter in order to achieve a more effective protection of the rights of the girl-child.

As stated above, the practice of child marriage is a global issue with a high prevalence in Africa. Addressing this challenging practice remains a controversial issue in Africa, especially in the context of African cultural/religious practices surrounding child marriage. The legal traditions of most African States is a mixed legal system or a plural legal system and are made up of customary law, religious law, common law and legislation. The role of each component of the legal system at the national level is distinct from the other, resulting in a challenging relationship in the protection of the rights of children in Africa. What is prohibited under national legislation and international human rights standards may be widely acceptable in customary or religious law and practice. For example, the practice of child marriage is prohibited in civil law, but widely accepted and established in some customary and religious law and practice, which is therefore not in harmony with international and national human rights standards.

57 Chirwa 2006 NILR 64.
58 See Article 1, 2, 5 and 14 of the African Women’s Protocol.
59 Ibid.
60 Ndulo “African Customary Law, Customs and Women’s Rights” 2011 Cornell Law Faculty Publications paper 187 87-120 87-90. Customary law relates to African customs and traditions, common or civil law is received English laws from a history of colonialism, and religious laws or Islamic laws operate mostly in countries with a high Islamic population, for example the Northern part of Nigeria.
61 Ibid; customary law governs matters that deal with personal law such as marriage, inheritance and traditional authority, religious law governs mostly Islamic beliefs and practices.
The contradictions that exist in the practical application of human rights standards and the promotion of customs and traditional practices prevent efforts aimed at the full realisation of the fundamental rights of an African girl-child. This inevitably leads to an endless debate between universality of human rights and cultural relativism. The principle that human rights are universally valid is at the core of every international, regional and national human rights legislation. The claim to universality is affirmed in various international, regional and national human rights instruments. In particular, it is affirmed in the UDHR “as a common standard of achievement for all peoples and all nations,” and further reiterated in paragraph 5 of the 1993 Vienna Declaration and Programme of Action which states:

All human rights are universal, indivisible, and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.

The broad emphasis on the application of human rights to all irrespective of cultural diversity has raised the question of the validity and applicability of human rights standards based on western values. This question forms the basis of the argument advanced by many cultural relativists. This is because cultural relativism recognises the diversity that exists in different cultures and that all values and principles are

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66 The preamble to the UDHR; Grant 2006 Journal of African Law 2.


68 Pollis and Schwab Human Rights: Cultural and Ideological Perspectives 1.

69 This is discussed in section 3.4 of Chapter Three.
culture-bound; therefore relativists argue that there should be no universal standard of rights based on western culture to judge all other cultures by.\(^{70}\)

In further assessing the underlying debate and principles surrounding universality and relativism, this thesis will consider the African perspectives to this discussion.\(^{71}\) This is in the context of the communitarian nature of African societies which contrasts with the nature of western societies.\(^{72}\) Consideration is also given to the extent to which African traditions and human rights can co-exist in order to reconcile the contradictions that exist between the practical application of the human rights of the girl-child and the promotion of cultural/religious practices.\(^{73}\)

In particular, the relevance of cultural legitimacy of human rights, largely discussed by Abdullahi An-Na’im\(^{74}\), is examined in the context of child marriage.\(^{75}\) Cultural legitimacy is defined as “the quality or state of being in conformity with recognised principles or accepted rules and standards of a given culture.”\(^{76}\) In other words, the people within a given society need to give validity to a human rights norm for it to be acceptable and subsequently internalised within that society, thereby resolving existing conflicts between rights and culture.\(^{77}\) In addition, the role and relevance of practical non-legal strategies such as education, awareness, and dialogue are


\(^{71}\) This is discussed in section 3.5 of Chapter Three.


\(^{75}\) Discussed in section 3.5.2 of Chapter Three.

\(^{76}\) An-Na’im Human Rights in Africa Cross-Cultural Perspective 336.

\(^{77}\) Ibid., p. 331-336.
considered as a support to the human rights framework in order to change cultural perceptions and attitudes on child marriage within societies. These strategies are equally important for the achievement of effective implementation and enforcement of the fundamental rights of the girl-child in Africa.\textsuperscript{78}

In examining the extent of child marriage and how this practice varies substantially from one State to another, the study makes a comparative study of Nigeria and South Africa. Africa is rich in economic and cultural diversity, and this diversity is evident in Nigeria and South Africa. Both countries are recognised as “the two economic powers in Africa and pivotal States in the region.”\textsuperscript{79} They also have a multi-cultural society with different traditional/religious practices. For example, Nigeria is made up of over 250 ethnic groups with different indigenous languages and South Africa similarly has different tribes with 11 official languages.\textsuperscript{80}

Nonetheless, both countries are faced with the challenge of child marriage. The practice of child marriage exists across Nigeria, however, there is a higher prevalence of the practice among the Hausa-Fulani tribe in the Northern region of Nigeria. The Hausa-Fulani tribe are predominantly Muslim with a culture and tradition greatly influenced by Islam and strict adherence to the Quran and the Prophet Muhammad’s \textit{Sunnah}.\textsuperscript{81} Their belief systems and traditions promote child marriage which results in a higher prevalence of child marriage when compared with South Africa.\textsuperscript{82} For example, the 2005 Population Council report states that “Nationwide, 20 percent of girls were married by age 15 and 40 percent were married by age 18.”\textsuperscript{83} In the Northern region, “48 percent of the girls were married by age 15 and 78 percent were married

\textsuperscript{78} Discussed in Chapter Three.
\textsuperscript{80} Discussed in Chapter Five.
\textsuperscript{83} \textit{Ibid.}
by age 18.”\textsuperscript{84} Similarly, the 2015 UNICEF State of the World’s Children’s report states that “43% of girls are married off before their 18\textsuperscript{th} birthday, and 17% are married before they turn 15.”\textsuperscript{85}

In South Africa, the traditional practice of \textit{ukuthwala} is especially prevalent among the Xhosa tribe in the Eastern Cape and in some parts of KwaZulu-Natal.\textsuperscript{86} \textit{Ukuthwala} which means “to pick up” or “to take,” involves a young man taking a girl by force in order to compel the girl’s family to start marriage negotiations.\textsuperscript{87} This practice is recognised as a form of child and forced marriage, and it is illegal under the current South African Law.\textsuperscript{88} According to a UNICEF 2005 Report, the prevalence of child marriage for girls aged 15-19 is about 3 percent.\textsuperscript{89} Similarly, the UNICEF State of the World’s Children’s 2015 report states that “6% of girls are married off before their 18\textsuperscript{th} birthday, and 1% is married before they turn 15.”\textsuperscript{90} These reported statistics on the prevalence of child marriage in South Africa are fairly low. This may be due to the belief that \textit{ukuthwala} is an age-old tradition, hence not recognised as child marriage or because a number of cases of \textit{ukuthwala} are believed to be concealed.\textsuperscript{91} There is also the belief that a general culture of silence exists around issues of sexuality and

\textsuperscript{84} Ibid.

\textsuperscript{85} This statistic is based on “percentage of women 20-24 years old who were married or in union before they were 15 years old and percentage of women 20-24 years old who were first married or in union before they were 18 years old” between 2005 to 2013. See UNICEF “The State of the World’s Children 2015” Statistical Table 9: Child Protection 87; Girls Not Brides Child Marriage Around the World: Nigeria available at: http://www.girlsnotbrides.org/child-marriage/nigeria/ (accessed 31-03-2016).


\textsuperscript{87} Plan Int’l and SRSG “Protecting Children from Harmful Practice in Plural Legal Systems 2012 30.

\textsuperscript{88} This is discussed extensively in Chapter Five of this thesis.


violence against women and girls,\(^92\) as well as the challenge with producing accurate data on the prevalence of child marriage.

The impact of the practice of *ukuthwala* on the girl-child is confirmed by an investigation and report conducted by the South African Law Reform Commission (SALRC).\(^93\) Similarly, media reports such as the 2012 report on the abduction of 22 girls from the Bergville district in KwaZulu-Natal,\(^94\) as well as the documentary “*Ukuthwala - Stolen innocence*” by the World Aids Campaign (WAC)\(^95\) have created a wider awareness on the nature and extent of the practice and prevalence of *ukuthwala* in South Africa. These media reports allow for the possibility of a higher number of child marriages than the reported statistics.

The nature of the cultural practice of child marriage in South Africa and Nigeria differs to some extent there are however, other similar factors that reinforce the practice of child marriage in both countries. Such factors include a high level of poverty; gender inequality; the preservation of virginity; limited education and ineffective legal frameworks.\(^96\) Other major areas of commonality and difference in both jurisdictions include the emergence from a history of colonialism and apartheid in South Africa and successive military dictatorships in Nigeria.\(^97\) This history no doubt had a destabilizing...


\(^93\) SALRC “Discussion Paper 132 on the Practice of *Ukuthwala*” 1.


\(^95\) Plan Int'l and SRSG “Protecting Children from Harmful Practice in Plural Legal Systems 2012 30; Odendal “Forcing the Issue” Mail and Guardian 4 April, 2011 1.


\(^97\) Discussed in section 5.2 and 5.3 of Chapter Five. For a discussion on the historical development of both South Africa and Nigeria, see Liebenberg “Human Development and Human Rights South
effect on the development as well as the promotion and protection of human rights\textsuperscript{98} of both adults and children in both jurisdictions.

Nonetheless, both countries have embraced the era of constitutional democracy,\textsuperscript{99} with the South African Constitution strongly grounded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.\textsuperscript{100} In the case of Nigeria, the Constitution seeks to promote the principles of human rights, freedom, equality and justice for all.\textsuperscript{101} However, South African Constitution has been regarded as a more progressive and transformative Constitution.\textsuperscript{102} This is evident, for example, in the Constitutional Court judicial decisions on the principles of equality, human dignity and freedom that progressively moved the situation of women and girls in the direction of gender equality in South Africa.\textsuperscript{103} In the context of child marriage or the practice of \textit{ukuthwala}, the recent judicial decision in the case of \textit{Jezile v State} 

\textsuperscript{98} Dada 2012 \textit{Annual Survey of International and Comparative Law} 67- 92. See also Landsberg & Mackay \textit{Reflections on Democracy and Human Rights: A Decade of the South African Constitution} 1-2.


\textsuperscript{100} Preamble in the Constitution of the Republic of South Africa Act 108 of 1996.


and Others also provides a good example and precedence as to why the defence of culture and religion is no excuse for any form of criminality.\textsuperscript{104}

Both South Africa and Nigeria operate a mixed legal system: South African legal system is based on Roman-Dutch civil law, English common law and African customary law;\textsuperscript{105} while Nigerian legal system is based on English common law, Islamic law and customary law.\textsuperscript{106} The application of these legal systems in both jurisdictions has wide variations even though they are pluralistic in nature. There are inconsistencies between the laws specifically with regard to the minimum age of marriage, and, entrenched customary and/or religious laws evident in both jurisdictions. For instance, South Africa’s Constitution recognises the legal definition of a child as set at 18 years and this sets a constitutional standard for the end of childhood and the attainment of adulthood.\textsuperscript{107} However, in practice underage girls are given out in marriages, and the Recognition of Customary Marriages Act 120 of 1998\textsuperscript{108} equally recognises marriage of persons below 18 years\textsuperscript{109} which contravenes international standards on minimum age of marriage.

Similarly, in Nigeria the 1999 Constitution does not provide specifically for a definition of a child to confirm attainment of adulthood, this is recognised as a major problem.\textsuperscript{110} However, the Child’s Rights Act, 2003 recognises the legal definition of a child\textsuperscript{111} as well as the minimum age of marriage as set at 18 years.\textsuperscript{112} However, this Act is not applicable in all of the 36 States, 12 States are yet to domesticate the Act and these

\begin{itemize}
\item \textsuperscript{104} Jezile v S and Others (A 127/2014) [2015] ZAWCHC 31 (23 March 2015). The appellant was convicted at Wynberg regional court for human trafficking, rape, assault with intention to cause grievous bodily harm.
\item \textsuperscript{106} Oba “Religious and Customary Laws in Nigeria” 2011 Emory International Law Review 881-895 881.
\item \textsuperscript{107} Section 28 (2) of the South African Constitution of 1996.
\item \textsuperscript{108} Date of commencement 15 November 2000.
\item \textsuperscript{109} Section 3 (3)(a) of the Recognition of Customary Marriages Act.
\item \textsuperscript{110} Ukwuoma Child Marriage in Nigeria: The Health Hazards and Socio-Legal Implications 2014 10.
\item \textsuperscript{111} Section 277 of the Child’s Right Act, 2003.
\item \textsuperscript{112} Ibid., section 21.
\end{itemize}
States are in the region with high prevalence of child marriage. These examples confirm the high level of tolerance of cultural and religious norms in both jurisdictions, particularly because they shape private family life and the institution of marriage.

In addition, the role of international and regional human rights legislations, in particular the CRC and the ACRWC in the development of children’s rights in both jurisdictions is recognised with the ratification of the two instruments and their domestication. These legislations place obligations on State parties to protect the rights and welfare of the child; and confirm the State party’s commitment to advancing the rights and welfare of the child.

1.2 Statement of the Problem

The situation of many girls across Africa is critical due to the challenge of child marriage and several factors responsible for the practice. In particular, child marriage is deeply entrenched in traditional practices and religious beliefs that result in the following challenging problems:

Firstly, is the conflict arising from legislation on the minimum age of marriage of a girl-child. The international and regional children’s rights instruments, the CRC and African Children’s Charter, define a child to be a person under the age of 18 years. This signifies the end of childhood and the attainment of full maturity for every boy and


117 Article 1 of the CRC; Article 2 of the ACRWC; Article 6(b) of the African Women’s Protocol.
Article 21(2) of the African Children’s Charter and Article 6 (b) of the African Women’s Protocol, provide that minimum age of marriage shall be 18 years. This legal age of marriage contrasts with what exists in many African customary/religious practices, as puberty of a girl-child often connotes maturity for marriage.\(^{118}\)

Secondly, is the problem surrounding consent of the girl. Article 16 (2) of the UDHR states that “marriage shall be entered into only with the free and full consent of the intending spouses”.\(^{119}\) However, in most child marriage cases, parental consent and choice play a more significant role than the consent of the girl; the use of force and coercion is often applied to cause the girl to agree to the choice of her spouse.\(^{121}\)

Thirdly, the inherent gender identity of a girl-child subjects her to traditional roles and responsibility within her family and community.\(^{122}\) However, due to the patriarchal system operating in many African societies, this gender identity reinforces gender inequality, violence and discrimination against women and girls.\(^{123}\) This is a major problem and often a contentious debate in African societies. However, there is need to develop gender equality within and outside of marriage in order to overcome gender specific violence and discrimination.

Fourthly, in the context of child marriage, conflicts arise between the practical application of human rights and the promotion of culture. Reasons for this conflict are based on the contradictions that surround factors such as the age of the girl, consent


\(^{120}\) See also Article 16 of the CEDAW.


\(^{123}\) Lane “Stealing Innocence” 2011 27.
to marriage and gender roles which human rights legislation seeks to promote.\textsuperscript{124} Discussions on these contradictions often result in a debate between universality and relativism. Many relativists share a consensus that human rights is a western concept alien to non-western cultures.\textsuperscript{125} This argument, no doubt, condones or reinforces harmful cultural practices such as child marriage. There is thus a need to question arguments advanced in the defence of relativism and whether such should be a yardstick for the defence of harmful practices. There is also need to consider strategies that best address harmful practices and promote respect for human rights within African societies.

Fifthly, a major problem surrounding child marriage is the grave impact of the practice on the girl-child and the serious violation of the fundamental human rights of the girl-child.\textsuperscript{126} Such fundamental rights include the right to dignity; life; non-discrimination; survival development; education; health and welfare; and participation.\textsuperscript{127} The physical and mental immaturity of a girl-child makes her vulnerable to violence, abuse and exploitation. Therefore, once married, every aspect of her life is affected, such as her health, physical, psychological and emotional wellbeing, and personal development.\textsuperscript{128}

Sixthly, African States are faced with the challenge of addressing the many complex factors that reinforce the practice of child marriage such as poverty, natural disasters and conflict, to mention a few. They are also faced with the challenges of effective implementation and enforcement of human rights laws, policies and initiatives within their plural legal systems.

\textsuperscript{124} Contradictions in the context of child marriage are discussed in detail in Chapter Three.

\textsuperscript{125} Freeman Politics in the Developing World 281; Cobbah 1989 Human Rights Quarterly (HRQ) 309.


\textsuperscript{127} Ibid.

\textsuperscript{128} Ibid.
1.3 **Research Questions**

This research intends to answer the following research questions:

1. What does the concept and nature of ‘child marriage’ mean?
2. What are the factors responsible for the prevalence of child marriage?
3. How does the cultural practice of child marriage affect the rights of the girl-child provided in various human rights legislations and treaties?
4. What is the relationship between child marriage and the cultural conceptions of childhood?
5. How can culture and human rights be reconciled in order to guarantee the rights of the girl-child, what practical strategies are needed to promote such reconciliation in the context of child marriage?
6. To what extent is the national legislation of South Africa and Nigeria adequate and effective for addressing child marriage?

1.4 **Aims and Objectives of the Study**

This study aims at examining and analysing the phenomenon of child marriage within the scope of the human rights framework and the context of cultural traditional practices and religious beliefs. The notion of childhood and culture will be considered along with a critical examination of the different factors and circumstances responsible for the practice and the prevalence of child marriage, as well as the impact of the practice on the girl-child.

Secondly, this study seeks to analyse the principle of universality of human rights vis-à-vis cultural relativism, and establish clarity on the contentious debate between universality and relativism in the context of child marriage. An interdisciplinary approach will be preferred through an analysis of African philosophy and feminist perspectives on how this debate has been addressed particularly with regard to cultural relativism, gender equality and harmful cultural practices. Alternative non-legal
strategies such as education, awareness and the role of relevant key stakeholders will be considered in order to support the human rights framework in addressing the continuous prevalence of child marriage in Africa.

Thirdly, the study seeks to evaluate the existing human rights frameworks, in particular the CRC, African Children’s Charter and African Women’s Protocol. This is to determine the adequacy of the provisions on the rights of the girl-child and State party obligations. In addition, the role and relevance of the special mechanisms, the Committee on the Rights of the Child (also known as CRC Committee), the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the African Commission on Human and Peoples’ Rights (ACHPR) as well as the African Union initiatives relative to child marriage in Africa will be evaluated.

Fourthly, the study reviews the nature of the practice of ukuthwala in South Africa and child marriage in Northern Nigeria. The study also assesses the legal framework, specifically the Constitution and other national laws that relate to the protection of the girl-child in the two jurisdictions.

1.5 Assumptions of the Study

This study assumes that child marriage is a serious human rights violation prohibited under different international, regional and national human rights laws. It is a practice that constitutes a grave threat to a girl’s life, health and development.

Secondly, children are immature both mentally and physically; they are one of the vulnerable groups of people who can easily be abused and exploited. Consequently, they require special care and adequate legal protection from their childhood to adulthood.

Thirdly, cultural practices and beliefs are a way of life that plays an important role within African communities. Nonetheless, some of these age old traditions and practices promote human rights abuses such as child marriage, without due regard for

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129 Albertyn 2009 Constitutional Court Review 170.
the best interests of the child. All harmful practices and violence against children are preventable and thus should not be justified.\textsuperscript{130}

Fourthly, international, regional and national laws play a significant role in ensuring the promotion and protection of the rights of the child. Despite ratification of international instruments and the enactment of national laws and policies by different African States, their ineffective implementation and enforcement is still a major challenge across Africa.

1.6 Rationale for the Study

The practice of child marriage is a global phenomenon affecting most regions. Recent reports reveal a high prevalence of child marriage across Africa, with a predominance of the practice involving the girl-child, and consequently the grave impact of the practice affecting the life, health and development of the girl-child. This study is an exploratory research study on child marriage with a particular focus on South Africa and Nigeria. It is undertaken in order to clearly provide a critical analysis of the nature and extent of child marriage, as well as the legal framework protecting the rights of the girl-child internationally, regionally and locally in both jurisdictions.

In this regard, the study intends to provide an in-depth analysis of the phenomenon of child marriage which is deeply rooted in a number of complex and interrelated factors such as African traditional practices and religious beliefs. The requirement for a valid legal marriage including 18 years as a minimum age of marriage as well as the recognition of free and full consent to the marriage, are clearly reflected in the human rights and children’s rights legislations.\textsuperscript{131} However, this contrasts with existing norms and reality in African traditional practices and religious beliefs where girls are given out in marriage at very young ages.

This study also attempts to analyse the concept of childhood, the significance of the boundary between childhood and adulthood (or maturity), and the importance of


\textsuperscript{131} Article 21 (2) of the African Children’s Charter and Article 16 (2) of UDHR.
setting 18 years as the minimum age of marriage. An analysis of the causes and effects of child marriage on the girl-child is also provided with statistics and examples to support this discussion. Against this background, the study relies on well documented and detailed reports and publications from human rights organisations and civil societies that have worked tirelessly to provide a clearer understanding of child marriage. Examples of such organisations are UNICEF;132 UNFPA;133 Equality Now;134 Girls Not Brides;135 and Anti-Slavery International;136 to mention a few.

For instance, a report by Equality Now, views child marriage as a human rights violation that is inextricably linked to other harmful practices such as Female Genital Mutilation (FGM); sex trafficking; forced feeding; and honour based violence, and thus cannot be eliminated in isolation to other practices.137 The report elaborated on each harmful practice, analysing it through detailed case studies of 18 countries.138 Similarly, Anti-Slavery International’s report focused on establishing a link between child marriage and slavery/slave-like practices. The author examined how some of these practices amount to slavery and factors that increase the vulnerability of a child and prevent the effective implementation of the rights of the child.139

An additional theoretical significance of this study is to provide an insight into the phenomenon of child marriage through the multiple identities of a child, in particular a child who is of a female gender and underage, but who is faced with the reality of the impact of child marriage. The notion of ‘multiple identities’ also known as the ‘theory of intersectionality’ is “where two or more categories of identity [such as gender, age, race, religion, culture, class and social standing] overlap to present a thorough picture

133 UNFPA “Marrying Too Young” 2012 1-76.
of one’s identity.” Therefore the significance of this theory to this study is to consider the way in which the intersecting identities of gender and age heighten inequality and disadvantages for the girl-child in child marriage cases. Similarly, Amoah argues that it is rare for a girl-child to experience oppression or violence on the basis of one identity at any given time, as every person has multiple identities.

The development of international and regional children’s rights frameworks emerged from the need to provide child specific rights to protect children from human rights abuses provided in the CRC; to address the specific shortcomings that relate to children in Africa provided in the African Children’s Charter; and to recognise the complementary role of the Women’s Protocol in reinforcing the protection of the human rights of the girl-child in Africa. Therefore, it is pertinent for this study to examine the laws surrounding the protection of the girl-child, as well as provide a theoretical analysis of the latter in order to determine the effectiveness of the rights and obligations contained therein.

It is also important to evaluate the role and relevance of the mandate of specialised mechanisms such as the CRC Committee, ACERWC and the African Commission, in addressing the harmful practice of child marriage. Scholarly literature from different human rights and children’s rights experts provide an analysis of the role, 

140 The theory of intersectionality is recognised as a feminist theory that has been widely discussed in relation to African American women’s experiences with the law and how identities such as race, gender and often class, reinforce disadvantages, marginalisation and discrimination experienced by these groups of women. For further discussion, see Crenshaw “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour” 1991 Stanford Law Review. 1241-1299; Taefi “The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child” 2009 IJCR 345-376 347; Amoah 2007 Essex Human Rights Review 6. Amoah 2007 Essex Human Rights Review 17.

141 This is discussed in Chapter Two of this thesis.

142 Amoah 2007 Essex Human Rights Review


144 Viljoen International Human Rights Law in Africa 392

145 Chirwa 2006 NILR 64. See also Viljoen 2009 16 WASH & LEE J.C.R& SOC. JUST. 24.

significance and framework of each legislation. These scholars have also critiqued these instruments and identified the shortcomings or obstacles impeding their effective implementation as well as accomplishments of the special mechanisms. For instance, Mezmur and Viljoen have critically analysed the CRC and African Children’s Charter, showing similarities and differences as well as the shortcomings of the CRC in particular, and the justification for the drafting and adoption of the African Children’s Charter. In addition, they provided detailed updates on the mandate of the CRC Committee, ACERWC and the African Commission. This is analysed in Chapter Four of this thesis in the context of child marriage. Furthermore, an evaluation of the role and relevance of the African Women’s Protocol in the African regional human rights system is also provided by Chirwa. The complementary role of the Protocol to the African Children’s Charter is analysed with regard to the protection of the girl-child in the context of child marriage.

As indicated in the background to this study, the question of the validity and applicability of human rights based on western values forms the main basis of the argument, particularly by cultural relativists, which is pointed out by many scholars in African philosophy. However, An-Na’im and Ibahown state that rather than focusing on the debate between universality and relativism, emphasis should be placed on the cultural legitimacy of human rights standards. Human rights standards are

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147 Viljoen International Human Rights Law in Africa 392; Memzur 2008 23 SAPR/PL 1-29.
148 Chirwa 2006 NILR 63-96.
150 Cobbah 1987 HRQ 309-331.
enhanced through such strategies as internal cultural discourse and cross-cultural dialogue in order to conform to acceptable standards of a given community, thereby resolving the conflicts between rights and culture.\textsuperscript{152} This is also in order to create a better chance for the realisation of human rights and children’s rights in Africa.\textsuperscript{153}

This study shares the views of the aforementioned scholars, and in addition, considers the possibility of codifying the outcomes or decisions produced from resolving the conflicts that exist between culture and human rights through internal cultural discourse and cross-cultural dialogue.\textsuperscript{154} Codification according to Meyer means “the formulation and reduction to a written instrument of rules of law that elaborate established doctrines and precedents, which, even if nonbinding, have legal consequences.”\textsuperscript{155} It is submitted that the sense in which the term codification is being considered in this study is with regard to those parts of customs and traditions which conflict with human rights, and to which deliberations have been made, and clarification given, thereby resulting in an outcome or decision. Therefore, this study argues that codification has an important role to play in the protection of the rights and welfare of the girl-child.

In addition, the human rights framework is an imperative for the protection of the girl-child in Africa. However, the nature of culture and its influence on the individual and community require more than a legal framework to change deeply-entrenched perceptions and attitudes towards a harmful practice or human rights violation. In addition, the nature of other interconnecting factors reinforcing child marriage, equally require more than a legal framework. Therefore, this study will consider supporting strategies to further strengthen the effectiveness of the human rights framework in order to change the orientation and attitudes of individuals and communities. Such strategies include education, awareness especially social media awareness, as well as the role of key stakeholders like family members, traditional and religious leaders.

\textsuperscript{152} An-Na’im Human Rights in Africa Cross-Cultural Perspective 21.

\textsuperscript{153} Ibhowon 2000 HRQ 841.

\textsuperscript{154} This is discussed in section 3.5.2 of Chapter Three.

Furthermore, an attempt is made to provide a comparative study of South Africa and Nigeria. The analysis will not be limited to the national legal framework relative to children’s rights in both jurisdictions, but will provide a brief overview of the historical development of South Africa and Nigeria as well as a situational analysis of child and forced marriage in order to reveal the variation and extent of the nature of child marriage in both jurisdictions. With regard to the legal framework, consideration will be given to the important role of the Constitution, which is the supreme law of the land.\textsuperscript{156} For instance, it has been emphasised that South Africa’s Constitution is committed to an agenda of transformation.\textsuperscript{157} This is confirmed in Chief Justice Langa’s statement that: “commitment ... to transform our society...lies at the heart of the new constitutional order.” Therefore, “the notion of transformation has played and will play a vital role in interpreting the Constitution.”\textsuperscript{158}

In addition, the core constitutional values of human dignity, achievement of equality and advancement of human rights and freedom\textsuperscript{159} are relevant to the protection of the rights of the girl-child, and pivotal in deciding whether an act or practice is justifiable or unjustifiable.\textsuperscript{160} Similarly, in Nigeria, the practice of democracy is considered a “fundamental constituent of constitutionalism”\textsuperscript{161} which seeks to advance the protection of children’s rights. The Nigerian Constitution is equally founded on such values as freedom, equality, democracy and social justice.\textsuperscript{162} However, Nwauche notes that: “It would appear, however, that these constitutional values are only regarded as aids for constitutional interpretation in Nigeria.”\textsuperscript{163}

\textsuperscript{156} See the preamble to the South African Constitution, 1996 and section 1 (1) of the 1999 Constitution of Nigeria.


\textsuperscript{158} Langa “Transformative Constitutionalism” Prestige lecture delivered at Stellenbosch University on 9 October 2006 1.

\textsuperscript{159} Section 9,10 & 12 of the 1996 Constitution.

\textsuperscript{160} SALRC “Discussion Paper 132 on the Practice of Ukuthwala” 27.


\textsuperscript{162} The preamble and section 14 of the 1999 Constitution of Nigeria.

\textsuperscript{163} Nwauche “Country Reports on Nigeria” 3.
Nonetheless, assessing the South African and Nigerian legal systems to determine how transformative the Constitutions are with regard to children’s rights and protection of the girl-child from harmful practices, discrimination and gender inequality is most important to this study. In addition, identifying the obstacles and shortcomings in the constitution that prevent efforts at transformation is equally important. Other national laws such as child rights laws,\textsuperscript{164} marriage laws,\textsuperscript{165} and criminal law,\textsuperscript{166} relative to the protection of the rights of the girl-child in the context of child marriage as well as offences linked to the practice of child marriage such as rape, trafficking, abduction and assault will also be assessed.\textsuperscript{167} The emphasis is to determine the extent of the adequacy of these national laws in protecting and promoting the rights of the girl-child in a deeply patriarchal society, and what the challenges and obstacles affecting effective implementation and enforcement are.

The significance of this study also lies in constructing an intellectual contribution to the ongoing discourse and research on the practice of child marriage. There is need to continuously address the disadvantages associated with children and women under the auspices of culture, in order to achieve the full protection of their rights and dignity. Viljoen notes that different cultural milieu pose dilemmas to our understanding, interpretation and application of human rights norms and standards. He further states that:

As human rights law itself guarantees variety in cultural expression, it must follow that human rights manifest themselves in a variety of forms. In one society, paying bride wealth may for example, be an accepted part of cementing a marriage into a layer of communal relationships and as an intricate part of upholding the dignified existence of the individuals and families involved. In another society, it may be regarded as commodification and as violating the dignity of the subject of the ‘price’. In my view, this variance may be regarded as an expression of different cultural life worlds, each of which should be accepted. However, cultural-specific manifestations - or manipulations thereof - fly in the face of an evolving common sense of


\textsuperscript{167} Discussed in Chapter Five of this thesis.
humanity on what dignity entails if these interpretations support oppression or affront women’s rights [children’s rights] to life or health.168

The study shares a consensus with Viljoen’s argument and equally advances that, although generally an expression of difference in culture should be acceptable, the manifestations that result from the practice of child marriage often negatively impact the girl-child’s human dignity and self-worth thus the protection of the girl-child is a human rights imperative.169

Lastly, the basis of this study is not to argue for uniformity in the application of human rights norms and standards, but to argue for the recognition of the minimum standards needed for the protection of the fundamental rights of an African girl-child. Equal emphasis is placed on the elimination of the disadvantages and experiences which child marriage promotes. Therefore, this study will provide a better understanding of child marriage generally in South Africa and Nigeria. It will also show the importance of the need to continuously address critical issues that affect vulnerable groups such as women and girls, in order to realise their human rights and end child marriage.

1.7 Delimitation of the Study

The phenomenon of child marriage is a global problem with interrelated factors responsible for the practice. This study limits its scope to an evaluation of the cultural challenge of child marriage, although this study recognises the different factors responsible for the practice as they are interconnected. This study focuses on the girl-child in Africa, because the practice affects a greater number of girls than it does boys, and the consequences of the practice are far greater for the girl-child. The role of gender and age are also considered as factors that heighten the violence, inequality and discrimination experienced by many girls in Africa.

The scope of the comparative study is limited to South Africa and Nigeria because the practice of child marriage is prevalent in both jurisdictions and cultural practices/religious beliefs are major factors responsible for this prevalence.

168 Viljoen International Human Rights Law in Africa 8.

Furthermore, with regard to the legal framework, South Africa’s Constitution is regarded as more transformative in its application, when compared to Nigeria. Therefore, an assessment of the legal systems of both jurisdictions is necessary in order to identify their strengths and weakness in the protection of the rights of the girl-child.

This study also limits its focus to a critical analysis of the CRC, African Children’s Charter and African Women’s Protocol, although relevant provisions of other international and regional human rights instruments are referred to when necessary. This research recognises the existence of different philosophies on culture, gender equality, discrimination, violence and oppression, but focuses on an interdisciplinary approach on African philosophy and feminist theories in relation to women and girl-child.

1.8 Definition of Concepts

1.8.1 Girl-child

For the purpose of this research, the term ‘girl-child’ may be used interchangeably with ‘woman’. The African Women Protocol defines “women” as persons of female gender, including girls.170 The traditional roles and responsibility of a girl or woman within a community is defined largely by her gender, and irrespective of her age, once married she acquires the traditional roles, responsibilities and experiences of an adult and a woman.171

1.8.2 Cultural and traditional practices

Within the context of this research, cultural and traditional law and practices will include religious beliefs and practices. Religion is often recognised as an integral and institutionalised part of culture.172 Within international forums, religious norms have

170 Article (1) (k).
been regarded as part of cultural practices.\textsuperscript{173} There are different meanings attached to customary law and practices which are often contentious in nature.\textsuperscript{174} However, the term ‘culture’ represents customary law, traditional practices, customs as well as religious laws and practices that are recognised as a way of life for an individual or community.\textsuperscript{175} These practices and traditions give continuity and meaning to people’s lives and are often not questioned.\textsuperscript{176}

1.8.3 Gender based violence

Gender is a societal definition of the sexual identity of men and women.\textsuperscript{177} Within each culture and religion are norms in terms of roles and responsibilities for each individual to follow, these norms define gender.\textsuperscript{178} Therefore, gender based violence is a form of discrimination that affects the human rights and fundamental freedoms of women on the basis of equality with men.\textsuperscript{179} The UN General Recommendation No. 19 also defines discrimination against women to include “gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or threats of such acts, coercion or deprivations of liberty.”\textsuperscript{180}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{173} Raday 2003 \textit{IJCL} 680.
\item \textsuperscript{174} Himonga “Implementing the Rights of the Child in African Legal Systems: The Mthembu Journey in Search of Justice” 2002 \textit{IJCR} 89-122 95.
\item \textsuperscript{175} Wadesango, Rembe and Chabaya “Violation of Women’s Rights by Harmful Traditional Practices” 2011 \textit{Anthropologist} 121-129 121; Amoah 2007 \textit{Essex Human Rights Review} 3; Olowu “Children’s Rights, International Human Rights and the Promise of Islamic Legal Theory” 2008 \textit{Law Democracy and Development} 62-85 66.
\item \textsuperscript{176} Amoah 2007 \textit{Essex Human Rights Review} 3.
\item \textsuperscript{177} Raday 2003 \textit{IJCL} 665-669.
\item \textsuperscript{178} \textit{Ibid}.
\end{itemize}
\end{footnotesize}
1.8.4 Harmful traditional practices

From the perspective of women and girls, and within the context of this research, harmful traditional practices are practices that “maintain the subordination of women [and girls] in society and legitimize and perpetuate gender based violence.”\(^\text{181}\) These practices emanate from deeply entrenched views, perceptions and attitudes on the inferior position and role of women in families and the society,\(^\text{182}\) which is evident in many child marriage cases. The UN Secretary-General's study on violence against children prohibits all forms of violence which include harmful traditional practices such as child marriage practices,\(^\text{183}\) and which affect the girl’s physical, sexual, mental and emotional wellbeing.

1.8.5 Patriarchy

Patriarchy is a norm or social practice within a cultural or religious setting that dominates women and resists gender equality.\(^\text{184}\) In the context of this research, patriarchy is part of those interconnected factors that reinforce child marriage.

1.9 Research Methodology

In view of the research questions raised above, and the conceptual and theoretical framework of this research, this study adopts a qualitative research approach based on an extensive literature review. This study relies on legal instruments which include Declarations, Conventions, Charters and Protocols. In addition, legislations and judicial decisions of some African States including South Africa and Nigeria are also referenced, where applicable, to provide more insight into the principles of human rights and the fundamental rights of the girl-child in the context of child marriage.

\(^{181}\) Wadesango, Rembe and Chabaya 2011 *Anthropologist* 121.

\(^{182}\) Ibid.


\(^{184}\) Raday 2003 *IJCL* 670-672.
This research on child marriage is not limited to a normative legal analysis but cuts across different disciplines such as history, sociology, anthropology, medicine, philosophy and education. Therefore, this is an interdisciplinary research study that is focused on a brief analysis of the history and concept of childhood; the sociological construction and conception of childhood; the reproductive health risks of a child; African philosophy regarding the validity and viability of human rights and the broad distinctions that exist between African traditional culture and western culture; Feminist perspectives relative to rights and culture and the role of the education and educational development of a girl-child.

Different relevant sources from this discipline in textbooks, journals, articles, repositories and encyclopaedias are analysed. This study will also rely on sources from online media and newspaper reports, digital reports, statistical reports, factsheets and publications provided by different international and regional human rights organisations such as the UNFPA, UNICEF, and Human Rights Watch, to mention a few. These organisations have provided in-depth studies, recommendations, statistics, and data on the situational analysis of the practice and prevalence of child marriage at a global, regional and national level.

In addition, intersession activity reports, annual activity reports, concluding observation reports or general comments of supervisory bodies; Committee on the Rights of the Child; African Committee of Experts on the Rights and Welfare of the Child; African Commission; Special Rapporteurs; and Special Representative of the UN Secretary-General on Violence against Children (SRSG), will be relied upon where relevant. These reports are important for assessing the role, relevance and involvement of supervisory bodies in addressing human rights violations, promotion of the rights of women and children, and State party obligations.

According to the Black’s law dictionary, comparative law is defined as “the scholarly study of the similarities and differences between the legal systems of different jurisdictions.” In the context of this research study the relevance of this comparative

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study is to provide an understanding of the culture of child marriage and the laws that protect the rights and welfare of the girl-child in the context of child marriage. As such this research study undertakes a comparative study of Nigeria and South Africa for the following reasons.

Firstly, child marriage is a harmful practice with grave impact on the rights and welfare of girls in South Africa and Nigeria. A comparative study will provide an insight into this common and unique challenge facing both jurisdictions. Particularly in terms of the nature and extent of the practice, as well as the unique factors that reinforce the practice. This is in order to reveal the variations that exist in the practice of child marriage between South Africa and Nigeria.

Secondly, both countries have ratified and applied the provisions of the CRC and the African Children’s Charter in their legislations. They have also ratified the African Women’s Protocol which is specific to the protection of persons of female gender. The extent of the acceptability of these international laws and the challenges with implementation and enforcement of laws that protect the rights and welfare of girls is examined through this research method.

A comparative study will also provide an insight into the national laws specifically the Constitutions of South Africa and Nigeria, child rights legislations and other legislations that relate to the protection of the rights of a girl-child, and the prohibition of child marriage and other related sexual offences. For example, the South African Constitution has been regarded as a more progressive and transformative Constitution especially in advancing the rights and welfare of women and girls within a patriarchal African tradition and culture. Therefore, this comparative study will provide more insight and understanding into this progressive and transformative Constitution.

Lastly, the comparative method will provide an understanding of the shortcoming(s) or lapse(s) that exist in the current legislations of both jurisdictions. It will also enable

recommendations to be made for law reforms\textsuperscript{187} and/or enactment of specific laws prohibiting the practice of child marriage.

1.10 Ethical Considerations

The framework of this research involves an extensive literature review. Therefore, ethical considerations to address and maintain confidentiality of participants will not be required. Given that this research will involve the extensive use and review of different textual or internet based sources, the researcher will acknowledge in textual and footnote references all the sources used in conformity with the University of Fort Hare policy on research. This will therefore prevent any form of plagiarism and will also promote respect for copyright laws.

1.11 Limitations of the Study

The scope of this study is limited to the cultural practice of child marriage as a challenge to the achievement of the fundamental human rights of a girl-child. The research method and analysis provided are also limited to an extensive literature review due to limited financial resources.

The problem of child marriage as a global issue has attracted a lot of attention with available materials specific to the subject being primarily reports, studies and publications from different organisations and bodies. However, there are limited judicial decisions specific to child marriage. This study therefore relies on landmark judicial decisions that have emphasised the importance of the constitutional principles and values of human rights.

1.12 Outline of the Chapters

This research study is structured into six chapters. Chapter One provides an introduction and outline of the structure and context of this study. It sets out a brief general analysis of the study, problem statement, research questions, rationale for the study and research methodology.

\textsuperscript{187} Okeke 2011 Roger Williams University Law Review 4.
Chapter Two considers the concept and significance of childhood under the law and within traditional cultural societies. It draws insight from the history of childhood to provide a clearer understanding on the distinction that exists between childhood and adulthood. This chapter also critically analyses the legal definition of a child, the different forms of child marriage and the causes and effects of child marriage, with statistics and examples across regions and States to support the analysis provided.

Chapter Three focuses on the theoretical and philosophical framework of the study. The focus being on the inconsistencies between human rights and culture, and the debate surrounding the universality of human rights and cultural relativism in the context of child marriage in Africa. This chapter also considers an interdisciplinary approach to the debate between universality and relativism with African and feminist perspectives on human rights and culture. In addition, it examines the challenge in resolving the conflict between human rights and culture in the context of child marriage and the need for change of deeply entrenched cultural perceptions and attitudes. This chapter considers practical strategies to support the human rights framework in order to create change in cultural attitude, to prevent violations of human rights and to achieve advancements in human rights protection.

Chapter Four analyses the human rights frameworks as they relate to the rights of the girl-child, in particular, the prohibition of child marriage in Africa. It analyses the substantive provisions of the CRC, African Children’s Charter and African Women’s Protocol. It also briefly highlights the rationale for the adoption of the Women’s Protocol to the African Charter, and its complementary role and relevance to the African Children’s Charter in relation to the rights of the girl-child; State Parties’ obligations; and measures for addressing the key implications of child marriage. These three legislations complement each other and reinforce the promotion and protection of children’s rights. In addition, the obstacles limiting the advancement of the rights of the girl-child are also considered. This chapter describes the supervisory responsibilities of the UN and AU bodies in protecting and promoting the rights of the girl-child from harmful cultural practices.

Chapter Five attempts a comparative study of South Africa and Nigeria, in relation to the extent of the practice of child marriage and other related practices. This chapter also examines the legal system in both jurisdictions in order to determine the extent of
the effectiveness of the legal framework in transforming the rights of the girl-child in a highly patriarchal society.

Chapter Six is the concluding chapter of the study. This chapter focuses on recommendations and suggestions for transformation and reform particularly with regard to international and regional human rights bodies and initiatives and at a national level.
CHAPTER TWO

ESTABLISHING THE CONCEPTUAL LINK BETWEEN CHILDHOOD, CHILD MARRIAGE AND CULTURE IN CONTEMPORARY AFRICA

2.1 Introduction

Child marriage is a phenomenon that legitimises human rights violations and abuses of the girl-child especially through the defence of cultural practices and religious beliefs.\textsuperscript{188} Within some African traditional societies, biological and physical developments of a girl-child are often considered a requirement for marriage rather than age.\textsuperscript{189} This cultural practice more often than not, results in grave risks to a girl-child who is not biologically and psychologically mature.\textsuperscript{190}

The purpose of this chapter is to analyse and establish the connection between culture, child marriage and the girl-child. In providing the link, a conceptual framework of childhood is considered with a brief analysis of the history of childhood as a foundation to this discussion. This is conducted in order to provide a background and understanding into the significance of childhood. In addition, the legal definition of a child is examined to determine why the minimum age of marriage is set at 18 years.\textsuperscript{191}

The different forms of child marriage, namely, early, forced and servile marriages are examined in order to determine the nature and circumstances surrounding the practice. This chapter also considers the uniqueness of the practice in different jurisdictions in Africa. This analysis is supported with examples and statistics from Africa as well as other regions where child and/or forced marriage is practiced. The examples provided from outside of Africa are included to further strengthen the discussion and show the extent of the impact of child marriage in other regions.

\textsuperscript{188} Equality Now “Protecting the Girl Child” 2014 7.

\textsuperscript{189} Himonga Law, Culture, Tradition and Children’s Rights in Eastern and Southern Africa 100.

\textsuperscript{190} UNICEF “Early Marriage: Child Spouses” 2001 2.

Furthermore, a girl-child possesses different categories of identities such as gender, age, race, religion, culture, class and social standing, all of which, once combined, result in disadvantage, marginalisation and discrimination. Hence, the theory of intersectionality is briefly examined in order to provide an understanding into the challenges of discrimination and marginalisation that surround a girl-child. This chapter will examine the various interrelated factors that are responsible for the practice and prevalence of child marriage in addition to with the consequences of the practice on the girl-child.

2.2 The Concept and Nature of Childhood

Childhood is a phase in human life where a child lacks the certain cognitive capacities, power and skills of adulthood, such as being physically independent and rational, having a sense of identity and consciousness of one’s beliefs, and making informed decisions for which one can be accountable. The concept of childhood and what the nature of childhood entails is dependent on the diversity that exists across different societies as well as on the historical, social, economic, traditional and cultural dynamics of a given society. Therefore, there are major variations in the understanding of the concept of childhood globally.

Different disciplines have contributed to the understanding of the meaning and nature of childhood. Prout and James, for example, view an understanding of childhood in terms of the social construction of childhood. They argue that:

193 Ibid.
195 Ibid.
198 James and Prout Constructing and Deconstructing Childhood 2 ed (1997) 7-8. See also Dahlberg, Moss and Pence Beyond Quality in Early Childhood Education and Care: Postmodern Perspectives (1999) 43-49. Similarly, Childhood has also been described to mean a phase that is constructed by
The immaturity of children is a biological fact of life but the ways in which this immaturity is understood and made meaningful is a fact of culture. It is these ‘facts of culture’ which may vary and which can be said to make childhood a social institution.\(^{199}\)

In other words, although childhood is a biological fact, it should not be understood only as a preparation stage, but as a component of society.\(^{200}\) This is so as childhood is a variable of social analysis that changes over time and space, but needs to be considered with other variables such as class, gender and ethnicity.\(^{201}\)

From a historical perspective, the concept of childhood through the work of French historian Philippe Aries, titled *L’Enfant et la vie familiale sous l’Ancien régime*\(^ {202}\) is briefly considered, particularly with regard to Aries’s main argument that:

In medieval society the idea of childhood did not exist; this is not to suggest that children were neglected, forsaken or despised. The idea of childhood is not to be confused with affection for children: it corresponds to an awareness of the particular nature which distinguishes the child from the adult, even the young adult. In medieval society, this awareness was lacking.\(^ {203}\)

This argument on childhood has provided a foundation for many other intellectual discussions on the study of childhood. It has also been subjected to critical debates from various authors.\(^ {204}\) According to Clarke, most critics reject Aries’ main argument that childhood was not known in the medieval days, and is thus a modern concept.\(^ {205}\) They are of the view that the nature of childhood only became more abstract in modern

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2. James and Prout 7-8; Waller 4.
4. Archard 19-24. This French work was published in 1960, and translated into English as *Centuries of Childhood* 1962.
5. *Ibid*.
6. *Ibid*; Veerman *The Rights of the Child and the Changing Image of Childhood* (1992) 3-8; Pollock *Forgotten Children: Parent-Child Relations from 1500-1900* (1983); Clarke “Histories of Childhood” in Wyse (ed) *Childhood Studies: An Introduction* 2004 3-12; Hutton “The History of Mentalities: The New Map of Cultural History” 1981 History and Theory 237-259. The criticisms identified include the problem with the English translation of Aries work which did not convey the exact meaning provided in his French work. Also the research method used in generating evidence such as the use of paintings and diary records of Louis XIII’s childhood were criticised and the claim on the non-existence of the awareness of the idea of childhood has been criticised as wrong.
society. In other words, unlike in medieval society, more attention seems to be paid to childhood in today’s societies than was the case in medieval society. 206

Furthermore, Pollock acknowledged Aries’ work as most influential in the history of childhood but argues that as far as history of childhood is concerned, changes should be investigated against the background of continuity in child rearing practices.207 Veerman shares a similar view as he states: “there are not only changes but also continuity. We must not over-stress the changes that have taken place, and we must not take for granted that every change is also an improvement.”208

Hutton points out that the recognition of childhood as a distinct and separate phase from adulthood, and as a preparatory stage emerged around the end of the Middle Ages, and this awareness in western society increased in the eighteenth century.209 As such, Aries had no knowledge of the developmental link that existed between the child’s and the adult’s mentality.210 Hutton also states that although Aries’ work recognised the stages of life, it was “subsumed under the general conception of life as a microcosm of the cosmic cycle of repetition.”211

Archard provides a clearer way of restating the main criticisms of Aries’ work by drawing a distinction between the “concept” of childhood and the “conception” of childhood.212 To have a concept of childhood simply means recognising that children differ from adults based on some unspecified set of attributes. Aries’ work showed that after the infant stage, that is, children below seven years, a child is regarded as a smaller adult and treated in a similar way than adults.213 For example, children are both dressed in similar garments and play the same games.214 However, this does not

206 Archard 39.
207 Pollock viii; Veerman 9
208 Ibid.
209 Hutton 244.
210 Ibid.
211 Ibid.
212 Archard 27.
213 Ibid.
clarify that the concept of childhood was lacking; what was lacking was the modern concept of childhood as it clearly indicates the separate nature of the child.\textsuperscript{215}

A conception of childhood, on the other hand, is the specification of what those distinguishing attributes really are.\textsuperscript{216} To have a conception is having a particular view of the attributes that separate a child from an adult. For example, Aries’ evidence showed that a child was not protected from sexual actions of adults in medieval society, while in modern society children are often more protected from the adult world and those sexual actions.\textsuperscript{217}

This distinction has provided clarity on the concept of childhood and, at a minimum, the young age of a child is an important factor in understanding childhood.\textsuperscript{218} Archard states that contrary to Aries’ main argument, there are reasons to believe that all societies at all times have had a concept of childhood but with different conceptions.\textsuperscript{219}

In evaluating the different conceptions of childhood, Archard considers three basic ways in which they can differ.\textsuperscript{220} Firstly, is the ‘boundary’ of childhood.\textsuperscript{221} This involves determining when childhood is deemed to end.\textsuperscript{222} Different practices, roles and responsibilities determine the end of childhood from which time a child becomes an adult.\textsuperscript{223} Secondly, the conception of childhood may differ in its ‘dimensions’.\textsuperscript{224} Several perspectives such as moral, juridical or political perspectives may be considered in understanding childhood and in distinguishing children from adults.\textsuperscript{225}

\begin{flushleft}
\textsuperscript{215} \textit{Ibid.}
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\begin{flushleft}
\textsuperscript{216} Archard 20.
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\begin{flushleft}
\textsuperscript{218} Archard 29.
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\begin{flushleft}
\textsuperscript{219} \textit{Ibid.}, p. 31.
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\begin{flushleft}
\textsuperscript{220} \textit{Ibid.}, p. 31-33.
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\begin{flushleft}
\textsuperscript{221} \textit{Ibid.}
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\begin{flushleft}
\textsuperscript{222} Determining the boundary of childhood will be discussed fully in section 2.2.1.
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\begin{flushleft}
\textsuperscript{223} Archard 31-33.
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\begin{flushleft}
\textsuperscript{224} \textit{Ibid.}, p. 32.
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\begin{flushleft}
\textsuperscript{225} \textit{Ibid.}
\end{flushleft}
Thirdly, the ‘divisions’ of childhood may differ in society. Based on a child’s development process, the period of childhood can be sub-divided into ‘infancy’ and ‘adolescence’, or even ‘early childhood’, ‘middle childhood’ and ‘adolescence’. Archard notes that the conceptions of childhood will differ based on what that society sets as the boundary, dimension and division. This will also determine the perception of the extent, nature and significance of childhood within a society.

Within an international human rights framework, the understanding of the concept and nature of childhood began with the development of laws focusing on children. Around the twentieth century notable development of law began. This development is particularly important because of the perception that children require special protection and rights due to their vulnerability and their lack of maturity, sound judgment and experience in the adult world. Ncube rightly observed that:

> The international human rights law approach to childhood is that it is a special, precarious and weak stage in the development of a human being which requires special protection is conceived as a special Childhood is conceived as a special time of life, separate and distinct from adulthood and as such it is viewed as a preparatory stage for adulthood which must be

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226 Ibid., p. 33-34.

227 Ibid. Adolescence is a transitional period of growing up in a child’s development. It involves the physical and psychological development of a child from puberty to adulthood, and also building up of capacities to assume adult behaviour and roles. See Arnett “Emerging Adulthood: What Is It, and What Is It Good For?” 2007 Society for Research in Child Development 68-73.

228 Early childhood is the first stage of child development, which is from birth to eight years.

229 This is the second stage of child development considered to be from eight years to twelve years.


231 Archard 35.

232 Ibid.

233 Van Bueren International Documents on Children 2 ed (1998) xv; Burke Encyclopaedia of Children and Childhood in History and Society 1. Burke states that; “The necessity of formulating a precise legal definition of childhood grew out of demographic, economic, and related social and attitudinal changes in the industrialized world that together forged a new recognition of the significance of childhood at the end of the nineteenth century and the beginning of the twentieth.”

234 Ibid.

managed properly to ensure that children grow up to be responsible, well-rounded, autonomous adults able to stand on their own in the adult world.\textsuperscript{236} The Declaration of the Rights of the Child states that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”\textsuperscript{237} This is reflected in the preamble of the CRC and the African Children’s Charter. This legal perception of childhood reinforces the understanding that childhood is a gradual process of development, and at the attainment of the legal age, the child is at liberty to assume responsibilities, risks and experiences to which they will be responsible and accountable for.\textsuperscript{238}

Within the context of African cultural traditions, understanding childhood involves examining children under the authority of their parents and family, training and preparing for adulthood.\textsuperscript{239} The development, ability, status and purpose of a child are used to determine childhood and adulthood.\textsuperscript{240} Hence a child may attain maturity for adulthood at an earlier age.\textsuperscript{241} Therefore prescribing a specific age limit is not a relevant factor when determining the end of childhood or the beginning of adulthood, in African cultures.\textsuperscript{242}

In addition, the inter-generational obligations of support and reciprocity from the child to his or her parents are also considered within the context of childhood.\textsuperscript{243} Childhood is conceived as a training period for children to become adults with roles and responsibilities towards the needs and expectations of their parents and grandparents.\textsuperscript{244} The traditional period of childhood is associated with respect and

\textsuperscript{236} Ibid., p. 15.
\textsuperscript{237} Declaration of the Rights of the Child Adopted by UN General Assembly Resolution 1386 (XIV) of 10 December 1959. See also The Preamble to the CRC and ACRWC.
\textsuperscript{238} Lansdown 2005 \textit{UNICEF Innocenti Research Centre} x.
\textsuperscript{239} Himonga \textit{Law, Culture, Tradition and Children’s Rights in Eastern and Southern Africa} 100-101.
\textsuperscript{240} Ibid.
\textsuperscript{241} Ibid.
\textsuperscript{242} Ibid.
\textsuperscript{243} Ncube Law, Culture, Tradition and Children’s Rights in Eastern and Southern Africa 18-19.
\textsuperscript{244} Ibid.
obedience to parents and elders.\textsuperscript{245} The system of inter-generational dependency of the child on their parents has in turn created a reciprocal obligation on the child towards the parents at all times.\textsuperscript{246} Hence, the child’s contribution to the family is often underplayed due to their childhood, as is the case of a girl-child who is given in marriage in exchange for financial benefits such as bride price or cattle.\textsuperscript{247}

This thesis adopts the legal and rights-based approach to the concept of childhood as defined in the African Children’s Charter and the CRC.\textsuperscript{248} Article 2 of the African Children’s Charter defines a child as “every human being below the age of 18 years”, in other words, the period between 0 to 18 years. This thesis recognises that childhood is a relative concept subject to change and is based on local, cultural and social imperatives of a given society.\textsuperscript{249} However, as stated above, attainment of 18 years is most appropriate and important for every girl-child’s physical, biological and psychological development, and for marriage.

2.2.1 Significance of the boundary between childhood and adulthood

Child development processes involve three stages, namely early childhood, middle childhood and adolescence.\textsuperscript{250} Child marriage can occur in any of these stages depending on the circumstances, such as a betrothal, abduction, or even forced marriage, thereby cutting short the childhood of the girl-child.\textsuperscript{251}

A child’s capacities are perceived to be developing during the period of childhood.\textsuperscript{252} The presumption as to the level of these capacities distinguishes childhood from adulthood.\textsuperscript{253} Biological and psychological growth determines an adolescent’s

\textsuperscript{245} \textit{Ibid.}
\textsuperscript{246} \textit{Ibid.}, p. 21-22.
\textsuperscript{247} \textit{Ibid.}
\textsuperscript{248} Article 1 of the CRC and Article 2 of the African Children’s Charter.
\textsuperscript{249} Ncube Law, Culture, Tradition and Children’s Rights in Eastern and Southern Africa 26.
\textsuperscript{250} Tomonari & Feiler \textit{Encyclopedia of Education} 1.
\textsuperscript{251} UNICEF “Early Marriage: Child Spouses” 2001 1.
\textsuperscript{253} \textit{Ibid.}
development, but a child’s experience of adolescence varies across cultures.\textsuperscript{254} The transitional period which children experience from childhood to adulthood is determined, and celebrated, based on cultural and historical contexts.\textsuperscript{255}

Within the context of culture, Tomonari and Feiler define adolescence “as a culturally constructed period that generally begins as individuals reach sexual maturity and ends when the individual has established an identity as an adult within his or her social context.”\textsuperscript{256} Crockett explains that although, in many cultures adolescence may not be a recognised stage of life, preparations are made for adulthood which may be comparable to adolescence.\textsuperscript{257} Adulthood can be determined by a number of factors such as completion of formal education, employment, moving out of parent’s house and becoming financially independent.\textsuperscript{258} Culturally, adulthood is determined by a child’s biological and physical developments and not age.\textsuperscript{259} These developments are marked by factors such as attainment of puberty, marriage, circumcision, initiation or rite of passage ceremonies, and the ability to procreate.\textsuperscript{260}

Different customs and traditions have their own distinct method of celebrating adulthood. For example, in Sudan and Somalia, female genital mutilation (FGM) is considered as a form of a rite of passage ceremony and is used to mark the coming of age of a female child.\textsuperscript{261} It is a precondition for marriage and to maintain the girl’s chastity.\textsuperscript{262} In other regions such as Malaysia, the practice of coming of age mostly

\begin{itemize}
\item \textsuperscript{255} Ibid.
\item \textsuperscript{256} Tomonari & Feiler \textit{Encyclopedia of Education} 1.
\item \textsuperscript{257} Crocket \textit{Health Risks and Developmental Transitions During Adolescence} 25.
\item \textsuperscript{258} Ibid.
\item \textsuperscript{259} Himonga Law, Culture, Tradition and Children’s Rights in Eastern and Southern Africa 100.
\item \textsuperscript{260} Ibid.
\item \textsuperscript{261} UN Office of the High Commissioner for Human Rights (OHCHR) Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children 1995 4 (Hereafter UN Fact Sheet No.23). Available at: http://www.refworld.org/docid/479477440.html (accessed 21-08-2014). [hereafter UN Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children]
\item \textsuperscript{262} Ibid.
\end{itemize}
recognised by the Malay race is determined by biological changes in the body. For a girl-child the start of her menstrual cycle determines womanhood, and for boys the process of male circumcision determines adulthood. These practices also exist in Africa, an example is the traditional male circumcision in South Africa performed as a rite of passage into manhood.

With these cultural and traditional circumstances, the majority of these indicators manifest earlier than envisaged in the CRC, especially for the girl-child. The philosophy behind this cultural approach to adulthood is that initiation ceremonies are critical for identity formation, and they provide a foundation for personal, sexual and gender identity. They also provide a sense of belonging and facilitate the process of socialization within the family.

However, the traditional perception of attainment of adulthood, and the non-recognition of the legal age of marriage particularly for a girl-child (in the case of child marriage) are associated with high risks. For example, among the various risks associated with child marriage is early pregnancy and childbirth. This has been identified as a leading cause of maternal and infant mortality for girls, especially those between the ages of 15-19 years. This occurs as the girl-child is far from being

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263 Abdul Manaf “Coming of Age: Malaysia” 2006 Encyclopaedia of Women and Islamic Cultures: Family, Body, Sexuality and Health 68 -71 68. Malay culture and tradition are based on the teachings and practice of Islam; therefore, an individual is categorized as either a child or an adult. The period of adolescence is not recognised, as a child is seen as immature, but maturity is determined by biological changes in the body.

264 Ibid. These biological changes in boys and girls are not publicly celebrated or seen as a ritual occasion.


266 Ibid.


269 The risks associated with the practice of child marriage will be discussed in section 2.7.

physically and psychologically developed enough for pregnancy and childrearing. In
addition, UNFPA’s report equally notes that:

"Reaching puberty should mark the beginning of a gradual transition to a healthy and productive
adulthood. Instead, for many girls, puberty marks an accelerating trajectory into inequality. Child
marriage is a primary source of this, curtailing a critical period for growth, learning, identity
formation and experimentation: each of which is essential if maturation into fully rounded human
beings is to be unhindered."

2.3 The International Law on the Definition of a Child

The legal definition of a child emerged gradually overtime and has been seen to reflect
the understandings of the meaning, nature and significance of childhood. Article 1
of the CRC and Article 2 of the African Children’s Charter defines a child as “every
human being below the age of eighteen years” and this signifies the end of childhood
and the attainment of full maturity for every boy and girl. This definition is based on
the United Nations’ recognition of the diversity in social and cultural norms and
practices across different regions and traditions with regards to child development.
However, this recognition cannot be used to justify the low ages which are
incompatible with the age of 18 years as provided in the CRC and the African
Children’s Charter

The proviso in the definition of a child, Article 1 of the CRC: “unless under the law
applicable to the child, majority is attained earlier” is often subject to interpretation as
the purpose for which the age of maturity is defined in some customary/religious law
and practices usually takes place earlier than 18 years. This is evident in child

271 UNFPA “Marrying Too Young” 2012 6.
272 Burke Encyclopaedia of Children and Childhood in History and Society 1.
273 See CEDAW, General Recommendations made by the Committee on the Elimination of
discrimination against Women No. 21: Equality in Marriage and Family Relations, at the 13th
23-03-2016); UN Committee on Rights of the Child General Comment No. 4 (2003): Adolescent
Health and Development in the Context of the Convention on the Rights of the Child, at the 33
Session held between 19 May-6 June. CRC/GC/2003/4, paragraph 9.
274 Turner “Out of the Shadows: Child Marriage and Slavery” 2013 14; Himonga Law, Culture, Tradition
275 Ibid.
marriage cases and strong recommendations have been made by international bodies such as the Committee on the Rights of the Child that:

…minimum ages should be the same for boys and girls (article 2 of the Convention) and closely reflect the recognition of the status of human beings under 18 years of age as rights holders, in accordance with their evolving capacity, age and maturity…

The Committee on the Elimination of Discrimination against Women equally states that notwithstanding the definition of a child in the CRC, and bearing in mind the provisions of the Vienna Declaration, strong recommendations are made “that the minimum age for marriage should be 18 years for both man and woman [or boy and girl].” The Committee recognised the need to avoid harmful cultural practices especially for the girl-child and the need for a child to attain full maturity with the capacity to act. Hence valid marriages should only be for those who have attained 18 years as clearly reflected in the African Children’s Charter and the African Women Protocol.

In addition, as Himonga also rightly states, a child attaining majority earlier than 18 years may be unable to access the rights provided in the CRC, but he or she may have access to other rights not specific to the child. However, attainment of adulthood for a girl-child not at 18 years leads to a wide range of risks to the girl’s health, development and education, and this has raised a lot of concerns.


278 Ibid.

279 Ibid.

280 Article 21(2) of the African Children’s Charter and Article 6 (b) of the African Women’s Protocol.


Furthermore, in understanding the interpretation of the legal age of marriage, Article 2 (1) of the CRC provides that State parties should ensure that the application of rights in the Convention must be without any kind of discrimination, including sex.\textsuperscript{283} Therefore, when the application of any legislation or practice on the age of marriage results in one gender being treated differently from the other, this will be a violation of the non-discrimination principle.\textsuperscript{284} However, in some countries this definition does not equally apply to both boys and girls.

For instance, the 2013 report by African Child Policy Forum\textsuperscript{285} states that “A total of 33 African countries have set the minimum age of marriage at 18 for both girls and boys,\textsuperscript{286} while a further four have set it above the age of 18 for both.\textsuperscript{287} In the remainder of African countries, the minimum age is either discriminatory or below 18.”\textsuperscript{288} For example, in Niger the legal age of marriage with or without parental consent for girls is 15 years and 18 years for boys.\textsuperscript{289}

\begin{itemize}
  \item \textsuperscript{283} Lane “Stealing Innocence” 2011 14.
  \item \textsuperscript{284} Ibid.
  \item \textsuperscript{286} These are Angola, Benin, Botswana, Cape Verde, Central African Republic, Comoros, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Kenya, Liberia, Madagascar, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Nigeria, São Tomé and Príncipe, Sierra Leone, Somalia, South Africa, South Sudan, Togo, Tunisia, Uganda and Zimbabwe.
  \item \textsuperscript{287} Algeria, Lesotho, Libya, and Rwanda.
  \item \textsuperscript{288} Burundi, Congo (Brazzaville), Burkina Faso, Côte d’Ivoire, Chad, Senegal, DRC, Gabon, Seychelles, Cameroon, Niger, Swaziland, United Republic of Tanzania, Guinea-Bissau, Zambia, Malawi, Sudan. However, Malawi has recently banned child marriage and has lifted the minimum age of the girl child to 18 years. See Batha “Malawi bans Child Marriage, Lifts Minimum Age to 18”. Reuters reports 17 February 2015. Available at: http://mobile.reuters.com/article/idUSKBN0LK1Z020150217?rpc=932 (accessed 19-02-2015).
  \item \textsuperscript{289} African Child Policy Forum, The African Report on Child Wellbeing 2013 34; UNFPA Marrying Too Young, Annex 1: Profile of 10 Countries with the Highest Rates of Child Marriage. 62. This is provided in the Children’s Code and Civil Code. Niger has highest child marriage prevalence rate, based on 2006 data analysis 75% of women aged 20-24 were married before 18 years.
\end{itemize}
The report also notes the inconsistency between the legal age of marriage and the legal age of sexual consent.\textsuperscript{290} Consummation is a prerequisite for marriage; therefore the legal age of marriage should be higher.\textsuperscript{291} However, this is not the case in the Sudan, as the legal age of marriage for both boys and girls is set at 10 years, while the legal age of sexual consent for girls is 18 years. The law therefore protects the husband from sanction for sex within the marriage, to a girl below 18 years.\textsuperscript{292}

2.4 Understanding the Concept and Context of Culture

The contexts and perspectives in which culture is defined vary, as it ‘touches every facet of human existence.’\textsuperscript{293} An-Na’im defines culture in its widest meaning to be “the totality of values, institutions and forms of behaviour transmitted within a society, as well as the material goods produced by man [and woman] ... this wide concept of culture covers Weltanschaung [world view], ideologies and cognitive behaviour.”\textsuperscript{294} This broad definition implies that every aspect of human activity is affected by cultural dimensions.\textsuperscript{295}

The importance of culture among the individual and the community cannot then be underestimated.\textsuperscript{296} Culture represents custom, practices and beliefs, and it is the sum of these elements that gives the individual and the community a sense of belonging and identity.\textsuperscript{297} Therefore, culture is recognised as a primary force in the socialisation

\textsuperscript{291} Ibid.
\textsuperscript{293} Kaime The African Charter on the Rights and Welfare of the Child 32.
\textsuperscript{296} Ibid., p. 32.
\textsuperscript{297} Wadesango, Rembe and Chabaya “Violation of Women’s Rights by Harmful Traditional Practices” 2011 Anthropologist 121-129 121.
of individuals and a major factor that determines the consciousness and experience of the community. 298

Furthermore, religion is also recognised as an integral and institutionalised part of culture. 299 More often, religion and culture have much in common particularly with regard to the defence of human rights principles. 300 Raday rightly points out that within international forums; religious norms have been regarded as part of cultural practices. He states that “The interwoven nature of culture and religion, in so-far-as they affect women’s rights [and children’s rights] has resulted in a merging of the two by all agencies and bodies involved with the application and enforcement of human rights treaties.”

Raday further explains that “religion, as part of culture, must influence and be influenced by social and ideological culture. However, the flow of influence is not necessarily symmetrical and, indeed, religion forms, both theoretically and empirically, the core of cultural resistance to human rights and gender equality.” 302 Raday’s argument is evident in child marriage cases, cultural religious practices and belief are often used as justification for the practice. This is particular to States like Nigeria (Northern region) and Sudan.

Various international human rights instruments recognise and reflect the role and significance of culture. The African Children’s Charter, for example, takes into consideration “the virtues of their cultural heritage, historical background and the values of the African civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child.” 303 However, these international


300 Ibid., p. 669.


302 Ibid., p. 669.

303 The Preamble to the ACRWC; See also the last paragraph, the Preamble to the CRC and also the schedule to the African Charter on Human and Peoples’ Rights.
human rights instruments equally prohibit custom, tradition, cultural or religious practice as they are inconsistent with the rights and obligations contained therein.\textsuperscript{304}

Despite the role and significance of culture, and the values and beliefs held by each individual and community, there are some practices that are harmful to specific groups such as women and girls.\textsuperscript{305} Such practices include FGM; forced feeding of women; child/early marriage; practices that prevent women from controlling their fertility; nutritional beliefs; traditional birth practices; son preference; female infanticide; early pregnancy; and exploitative dowry price.\textsuperscript{306}

The defence of culture is often used to justify such practices as discussed previously, which in turn results in a normative clash with human rights.\textsuperscript{307} However, as Raday succinctly points out there are two differing perceptions of culture.\textsuperscript{308} One perception is that culture is a relatively static and homogenous system, which is bounded, isolated and stubbornly resistant.\textsuperscript{309} The other is that culture is adaptive, subject to constant change, and rife with internal conflicts and inconsistencies.\textsuperscript{310} While considering these differing perceptions within the context of child marriage, one can say that while some cultures have a stubbornly resistant defence to the cultural practice of child marriage, others recognise that such practice can be subject to change. This second position is what many human rights/child rights activists are raising awareness and vehemently fighting for, in order to end the cultural practice of child marriage.

\begin{flushright}
\textsuperscript{304} Article 24 (3) of the CRC; Article 2(f) of CEDAW; Article 1 (3) & Article 21 of the ACRWC.
\textsuperscript{305} UN Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children 1.
\textsuperscript{306} Ibid.
\textsuperscript{307} Raday 2003 \textit{IJCL} 666-667.
\textsuperscript{308} Ibid.
\textsuperscript{309} Ibid.
\textsuperscript{310} Ibid.
\end{flushright}
2.5 Patterns of Child Marriage

2.5.1 Forms of child marriage

The term “Child Marriage” is often used interchangeably with early, forced or servile marriage, but these terms have different connotations. The different forms of child marriage are predominantly linked by the gender and legal age of the girl-child, as well as the absence of free, full and informed consent by the girl-child. This violates Article 16 (2) of the UDHR which states that marriage should only be entered into with the free and full consent of intending spouses.

2.5.2 Early marriage

Early marriage applies to adults as well as children depending on the circumstances. Nour is of the opinion that the term ‘early’ in relation to child marriage is not ideal. He argues that: “Early marriage does not imply that children are involved, and the term is vague because an early marriage for one society may be considered late by another.” However, the term ‘early’ relates to the practice of child marriage and provides a classification for the nature of child marriage.

The UN Secretary-General in his report on violence against women defines early marriage as “marriage of a child, i.e. a person below the age of 18. Minor girls have not achieved full maturity and capacity to act and lack the ability to control their sexuality.” Early marriage is prevalent across regions globally, and greatly affects a girl’s health, education and economic autonomy. According to the 2014 UNICEF Report, globally more than 700 million women alive today were married before their

312 Ibid., p. 51-52.
313 Report of UN Secretary-General “In-depth Study on all Forms of Violence against Women” 2006, paragraph 121.
314 Ibid.
18th birthday.315 Out of the world’s 1.1 billion girls, 22 million are already married and hundreds are at risk due to population growth.316 As the report further states:

If there is no reduction in the practice of child marriage, up to 280 million girls alive today are at risk of becoming brides by the time they turn 18. Due to population growth, this number will approach 320 million by 2050. The total number of women married in childhood will grow from more than 700 million today to approximately 950 million by 2030, and nearly 1.2 billion by 2050. The number of girls under the age 18 married each year, will grow from 15 million today to 16.5 million in 2030, and to over 18 million in 2050.317

2.5.3 Forced marriage

This type of marriage involves lack of free and full consent of at least one of the spouses.318 The UN Secretary-General in his report also notes that forced marriage in its extreme form involves threatening behaviour, abduction, imprisonment, physical violence, rape and, in some cases, murder.319 Although forced marriage is not explicitly defined in international human rights instruments, it covers a wide range of practices,320 among them are sexual slavery, enslavement, rape, forced impregnation and kidnapping.321 In the case of the Prosecutor of the Special Court v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, forced marriage is defined as:

A situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.322

316 Ibid.
317 Ibid. However, the report equally states that if current rates of progress continue, there will be a decrease in the proportion of women married as children from 33 percent in 1985 to 22 percent by 2030 and 18 percent by 2050. But the rate of decrease in proportion of women is not at a pace with population growth.
318 Report of UN Secretary-General 2006, paragraph 122.
319 Ibid.
321 Ibid.
322 Special Court for Sierra Leone SCSL-2004-16-A, Appeals Chamber, Judgment, Feb. 22, 2008. This judgement was the first of the Appeals Chamber since the United Nations and Sierra Leone
Bunting argues that despite this definition, the judicial decisions of the Special Court for Sierra Leone (SCSL) did not provide a coherent approach for which perpetrators can be held responsible or a theory for holding perpetrators responsible for practices of forced marriage.\footnote{Bunting 2012 CJHR 169.}

Nonetheless, marriage should only be entered into with the free and full consent of both parties, as indicated in various international human rights instruments such as the Universal Declaration;\footnote{Article 16 (2) of the UDHR.} the 1964 Convention on Consent to Marriage, Minimum Age for Marriage and Registration for Marriages;\footnote{Article 1 & 2, opened for signature and ratification by General Assembly resolution 1763 A (XVII) of 7 November 1962. Entry into force 9 December 1964.} and the 1979 Convention on the Elimination of All Forms of Discrimination against Women.\footnote{Article 16 (1), adopted by UN General Assembly 18 December 1979, A/RES/34/180.} In order to protect this right, Article 3 of the 1964 Convention on the Consent to Marriage and Article 21 of the African Children’s Charter states that all marriages should be registered by a competent authority.

The practice of child marriage is considered as part of forced marriage. Forced marriage is, however, not limited to the girl-child since it also occurs in adult marriages.\footnote{Foundation for Women’s Health Research and Development (FORWARD) “Child Marriage” Available at: http://www.forwarduk.org.uk/key-issues/child-marriage (accessed 24-08-2014).} In relation to child marriage, forced marriage undermines the importance of the right to marry and the recognition that a girl-child below eighteen years is incapable of giving informed consent to marry or choose a partner.\footnote{Ibid; Turner “Out of Shadows: Child Marriage and Slavery” 2013 23; Bunting 2012 CJHR 166.}

In many cultures, parents and family heads often make binding marital choices on behalf of their children.\footnote{UNICEF “Early Marriage: Child Spouses” 2001 5-6.} Force, coercion, emotional and other forms of pressure or

intimidation are placed on the girl-child to accept the choice of a spouse. Reliable statistics specific to forced marriages may be difficult to obtain though as they are mostly unofficial and undocumented. Research conducted by Kleinbach, on non-consensual bride kidnapping in Kyrgyz Republic provides an example of the extent of forced marriages. The research presents a survey of 1322 marriages with girls as young as twelve years forced into ethnic Kyrgyz marriages.

2.5.4 Servile marriage

The practice of child marriage is often not considered in relation to slavery and slavery-like practices, but the experiences of many underage girls clearly show the link. This is confirmed in the thematic report of the UN Special Rapporteur on Contemporary Forms of Slavery:

Under the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, all forms of forced marriage are defined as practices similar to slavery, which reduce a spouse to a person over whom any or all of the powers attached to the right of ownership are exercised. International law has further reiterated and reinforced the provisions within the Convention that prohibit forced and early marriages. Over the years, however, the idea that forced and early marriages are forms of slavery and, therefore, servile marriage has been lost.

\[330\] Ibid.


\[332\] Kleinbach “Frequency of Non-Consensual Bride Kidnapping in the Kyrgyz Republic” 2013 Available from http://faculty.philau.edu/kleinbachr/bride_ki.htm (accessed 19-08-2014). See also Report of UN Secretary General 2006, paragraph 122; Thomas 2009 Expert Paper on Forced and Early Marriage. The Kyrgyz Republic (Kyrgyzstan) is a former Soviet Republic in central Asia, with a population of approximately 4.7 million and 58% of the population being ethnic Kyrgyz.

\[333\] Ibid.

\[334\] Special Rapporteur on Contemporary Forms of Slavery: Thematic Report on Servile Marriage 2012, paragraph 13. See also Article 1 (1) of the 1926 Slavery Convention and Article 7 (a) of the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. Adopted by a Conference of Plenipotentiaries convened by Economic
In other words, the practice of forced marriage subjects an individual to servile marriage and to such practices as forced labour, bonded labour, and trafficking for sexual and labour exploitation. Servile marriage affects both adults and children. However, in the case of women and girls, the impact and experience of the practices involved are far greater as they are sexually and physically abused. A girl-child in servile marriage, just as in a forced marriage, is below the recommended minimum age of marriage, 18 years, and cannot provide the free and full consent necessary for marriage.

The UN Special Rapporteur asserts that it is of utmost importance to reaffirm forced and early marriages as slavery-like practices, in order to understand the violations that victims experience and how possible to prevent, monitor and prosecute servile marriages. Therefore, Turner notes the following three main conditions under which child marriage constitutes slavery:

Firstly, as stated above, the absence of free, full and informed consent of the girl-child in child marriage constitutes slavery, as consent is an important principle of the right to marry, as reflected in the various international human rights instruments. Secondly is the treatment in marriage in terms of the control and ownership exercised on the girl-child. The girl is subjected to control without the ability to make her own choices and is sexually and physically abused. Thirdly, the inability of the girl-child having the choice to leave and end a marriage also amounts to slavery as she is

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336 Ibid.
338 Ibid.
341 Ibid.
343 Special Rapporteur on Contemporary Forms of Slavery: Thematic Report on Servile Marriage, paragraph 15.
restrained from her freedom.\textsuperscript{344} The problem of financial dependence on the spouse and low levels of education often prevents a girl from leaving the financial security in her marriage.\textsuperscript{345} In addition, any attempt to leave the marriage is faced with public disapproval and humiliation from the family, friends and the community.\textsuperscript{346}

2.6 The Girl- Child within the Context of Intersectionality

2.6.1 The theory of intersectionality

The theory of intersectionality is a feminist theory that has been widely discussed in relation to African American women’s experiences with the law and how identities such as race, gender and often class reinforce disadvantage, marginalisation and discrimination experienced by these groups of women.\textsuperscript{347} According to Amoah, the theory of intersectionality is “where two or more categories of identity overlap to present a thorough picture of one’s identity.”\textsuperscript{348} Amoah argues that the more categories of identity such as gender, age, race, religion, culture, class and social standing one is able to identify, the more information will be known about a particular group or individual.\textsuperscript{349} Once these identified categories of identity intersect, the more complex a person’s identity becomes.\textsuperscript{350}

In the context of child marriage, the theory of intersectionality shows that gender and age interact to shape the multiple dimensions of a girl-child’s experiences. Gender plays a significant role in how children are treated within a society. The gender identity of a girl-child results from expected norms of behaviour provided by culture and

\textsuperscript{344} Turner “Out of Shadows: Child Marriage and Slavery” 2013 18-19.
\textsuperscript{345} Lane “Stealing Innocence” 2011 30.
\textsuperscript{346} Ibid; Turner “Out of Shadows: Child Marriage and Slavery” 2013 19.
\textsuperscript{348} Ibid.
\textsuperscript{349} Ibid.
\textsuperscript{350} Ibid.
religion. The practice of child marriage manifests in gender inequality, with social norms that perpetuate discrimination against girls. These identities are also necessary for an analysis of the equality rights of the girl-child. A girl-child is marginalised within the categories of ‘children as females’ and ‘children as minors’, and this further confirms that female children are disproportionately subjected to inequality, particularly in the form of harmful practices.

Furthermore, Amoah explains that it is rare for a girl-child to experience oppression or violence on the basis of one identity at any given time, as every person has multiple identities. The significance of the theory of intersectionality is to identify those categories of a girl-child’s identity that impact on her level of human rights enjoyment and to reinterpret these multiple identities in a way that results in the increased enjoyment of human rights. Furthermore, a girl-child is marginalised by these various categories of identity to which she has no control. Although the age of a girl is subject to change as she will eventually grow into womanhood, other identities like religion and class are changeable and subject to different societal factors that relate to the power and decision-making capacity of the girl-child.

However, the theory of intersectionality is not without its criticisms. According to Nash, the theory of intersectionality has become the primary analytic tool that feminist and anti-racist scholars deploy for theorizing identity and oppression. He argues that the intersectional methodology is not clearly defined: the question of analysis of the experience of black women as quintessentially intersectional subjects the vague

351 Raday 2003 *IJCL* 669.
353 Ibid.
354 Taefi 2009 *IJCR* 345.
357 Ibid., p. 17.
358 Ibid.
359 Ibid.
definition of intersectionality and the empirical validity of intersectionality. McCall shares the same view in terms of the limited information on the methodology to study intersectionality.

It is postulated that despite the criticisms identifying the categories of identity and how they overlap and reinforce the situation of girls in child marriage, it is important to understanding the seriousness of the problem and circumstances of child marriage.

2.7 Factors Responsible for the Practice and Prevalence of Child Marriage

2.7.1 Traditional cultural practices and religious beliefs

Different traditional cultural practices and religious beliefs have been used to justify the practice of child and forced marriages. These practices are often used as a means of consolidating family relationships, settling disputes or sealing deals over land and property. There are a number of examples across Africa, a common one in West Africa, and in particular the South Eastern part of Ghana, is the traditional practice known as trokosi or ‘slaves of the gods’. This practice involves a family giving out their virgin daughter to the village priests as his property and sexual slave, in order to appease the gods for the crimes committed by the family. In other regions, an example is in Southern Punjab, Pakistan, where the tradition of Watta Satta known as exchange marriage is practised. Girls are mutually exchanged between two families in order to strengthen family ties. There is also the traditional practice of vani or

361 Ibid.
365 Ibid.
366 Lane “Stealing Innocence” 2011 4; Myers and Harvey “Breaking Vows: Early and Forced Marriage and Girls’ Education” 8.
swara in *Pakistan* where girls are offered to a family in order to appease or compensate for a wrong done to the family.\(^{367}\)

Dowry and bride price payment in the form of money, cattle or other livestock is also a very common cultural practice and it involves negotiations between the man’s family and the girl’s family in order to arrive at an amount to be paid for the girl.\(^{368}\) This practice is recognised as a major factor reinforcing the practice and prevalence of child marriage in Tanzania because it is considered a means of securing work and financial security.\(^{369}\)

Interpretations of religious beliefs have also been used to justify the practice of child marriage. This is common among African communities strongly influenced by Islam and the teachings of the holy prophet Muhammad, they believe that Islam permits child marriages.\(^{370}\) Therefore, once a girl reaches puberty, it is a sin for her not to be married.\(^{371}\) This Islamic belief is evident in countries such as Nigeria, Sudan, and Niger, to name a few.\(^{372}\) Another example is in Zimbabwe where the religious beliefs of the Apostolic Faith church are deeply ingrained in African traditional culture and practices and permits child marriage.\(^{373}\)

Furthermore, great importance is placed on family honour and preservation of a girl’s virginity within some communities' honour provides a moral framework of expected


\(^{371}\) *Ibid*.


behaviour, norms and values of a man or a woman within a family or community. Such expected behaviour must be accepted by family members without challenging any patriarchal authority. An example is the culture of “Kunya” in the Northern part of Nigeria, which means a girl is to maintain modesty or shyness. In other words, she must maintain modesty or shyness until she is given out in marriage.

With regard to a girl-child or woman, honour is understood to mean sexual integrity and chastity, in order to prevent pre-marital sex and pregnancy as well as prevent any reduction in the amount of dowry that will be paid to the girl’s family. Hence, the honour of a woman is used to control, direct and regulate her sexuality, socialisation and movement. Child marriage is therefore used to justify the protection of the family honour, and also to reinforce the high value placed on sexual integrity and virginity of the girl-child. Where a girl or a woman’s actions bring dishonour, this will result in harsh consequence for herself and her family. An example of the harsh consequence of not complying with family honour is the recent case of the stoning to death of a pregnant Pakistani woman by her family.

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377 Ibid.


380 Ibid.


The need to be protected from HIV/AIDS is also another reason why child marriage is practiced.\textsuperscript{383} Parents give out their children in early marriage to prevent early sexual activities and possible infection, while older men marry younger women who are virgins to avoid HIV/AIDS infection.\textsuperscript{384} In addition to these practices is one of the many myths surrounding HIV, wherein the belief is that if a man infected with HIV sleeps with a virgin he will be cured.\textsuperscript{385} With reference to the HIV/AIDS pandemic, young girls are often left to survive on their own due to the death of one or both parents\textsuperscript{386} and this increases the incidence of child marriage.

\section*{2.7.2 Poverty and economic hardship}

Poverty is recognised as a “global problem of huge proportions” affecting both developed and developing countries.\textsuperscript{387} According to a World Bank report, in 2012 an estimated 12.7 percent of the world’s population, which is 896 million people lived on or whose income level was less than $1.90 a day.\textsuperscript{388} Previously, poverty was often considered to mean insufficient income to buy basic needs for an average living standard in society.\textsuperscript{389} However, according to the Committee on Economic, Social and Cultural Rights, the term ‘poverty’ covers a much broader scope than income as it is


\textsuperscript{384} Ibid.

\textsuperscript{385} Odendal “Forcing the Issue” Mail and Guardian 4 April, 2011.

\textsuperscript{386} Black “Growing up Alone: The Hidden Cost of Poverty” 2000. UNICEF UK 9.


\textsuperscript{388} World Bank “Poverty: Overview” 1. Available at: www.worldbank.org/en/topic/poverty/overview (accessed 17-03-2016). Although reports states that there seems to be a reduction when compared with the 1990 report with 37 percent of world population which is 1.95 billion people who has lived on less than $1.90 a day. However, despite this reduction extreme poverty globally still remains high.

multi-dimensional in nature with no specific acceptable definition. The Statement of Commitment for Action to Eradicate Poverty issued by the UN Administrative Committee on Coordination states that:

Poverty is a denial of choices and opportunities; it is a violation of human dignity. It means lack of basic capacity to participate effectively in society. It means not having enough to feed and clothe a family, not having a school or a clinic to go to, not having the land on which to grow one's food or a job to earn one's living, nor having access to credit. It means insecurity, powerlessness and exclusion of individuals, households and communities. It means susceptibility to violence and it often implies living in marginal and fragile environments, and not having access to clean water and sanitation.

In the context of child marriage this definition provides some or similar examples of the lack of opportunities for income or employment that exist for families that practice child marriage. For this reason, poverty is recognised as a major contributory factor reinforcing the practice and prevalence of child marriage particularly in rural communities in Africa. However, Turner warns that caution must be taken in interpreting the link between poverty and child marriage, especially because this practice is not limited to the rural areas or the poorest communities, it may occur among all income brackets within different communities. Although, Turner makes a valid argument, especially where the practice is “virtually universal” in a community, it would then be common practice for all whether rich or poor. However, reports have shown that girls living in poorer households are almost twice as likely to marry than those living in higher income households. For example, Niger has the highest rate of child marriage in Africa with 75% of girls married before 18 years. The World

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391 Statement of Commitment for Action to Eradicate Poverty issued by the Administrative Committee on Coordination (ACC) through a press release ECOSOC/5759 ON 20 May, 1998, UNESCO Website, para 3. Available at: http://www.unesco.org/most/acc4pov.htm (accessed 18-03-2016) [Hereinafter referred to: Statement of Commitment for Action to Eradicate Poverty by ACC].
392 Equality Now “Protecting the Girl Child” 2014 10; UNFPA “Marrying Too Young” 2012 12.
396 Ibid.
Bank 1996 report shows that poverty is worse in rural areas when compared to urban areas, as rural areas constitute 86% of the total poverty in Niger.\textsuperscript{397}

Different reports have also shown how poverty is deeply rooted in many African States due to a number of factors such as corruption;\textsuperscript{398} political/economic instability; natural disasters such as drought or floods; conflict situations such as war; and epidemics such as HIV/AIDS resulting in loss of jobs, assets and income generation.\textsuperscript{399} Many families accept child marriage as a solution to their financial crisis or as a way to secure their daughter’s future.\textsuperscript{400} As such, the girl-child bears the effect of poverty and economic hardship for her family.\textsuperscript{401} In other words, the girl bears the burden of being treated as a commodity or a means to settle family debts or disputes and/or secure social, economic or political alliances. \textsuperscript{402} This practice therefore becomes a continuous cycle of intergenerational poverty.\textsuperscript{403}

2.7.3 Gender inequality and discrimination

Gender inequality and discrimination are also major factors reinforcing the practice and prevalence of child marriage across the globe. In many societies with deeply entrenched traditional attitudes and customs, women and girls occupy traditional gender roles which are often reinforced by their sexual and reproductive capacity, and are also controlled by the existing patriarchal system and dependence on men.\textsuperscript{404} This

\begin{itemize}
\item \textsuperscript{398} Olaniyan Corruption and Human Rights Law in Africa 2014 106-108.
\item \textsuperscript{399} Statement of Commitment for Action to Eradicate Poverty by ACC, para 18; World Bank Report Niger Poverty Assessment: A Resilient People in a Harsh Environment 28 June, 1996 1.
\item \textsuperscript{400} UNFPA “Marrying Too Young” 2012 12.
\item \textsuperscript{402} UNFPA “Marrying Too Young” 2012 12.
\item \textsuperscript{404} Albertyn 2009 Constitutional Court Review 171; Myers and Harvey “Breaking Vows: Early and Forced Marriage and Girls’ Education” 2011 Plan UK, 7. Available at: http://www.plan-
therefore often places women in a position of inequality and subordination when compared with men in a given society. The Human Rights Committee (HRC) in its General Comment No 28 equally confirms that: “Inequality in the enjoyment of rights by women [and young girls] throughout the world is deeply embedded in tradition, history and culture, including religious attitudes.”

Greater value is placed on men and boys, than is placed on women and girls, as the former offer greater economic benefit to the family. For this reason families discount the benefits of educating and investing in the future of their girl-children. The economic benefit of the girl to her family is only realised when she attains puberty and this increases the prevalence of child marriage. In addition, gender inequality is experienced in the national laws of some countries where the minimum age of marriage for a boy differs from the minimum age of marriage for a girl. An example is Niger, the legal age of marriage with or without parental consent is 15 years for girls and 18 years for boys. This legal age of marriage is discriminatory and contravenes the legal age of marriage espoused in Article 21(2) of the African Children’s Charter.

2.7.4 Conflict situations and natural disasters

Conflict situations such as war/armed conflict, genocide, political instability, as well as natural disasters such as floods, droughts, famine, earthquake/tsunamis and fire outbreaks have occurred in different countries causing disruptions to household and

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405 Albertyn 2009 Constitutional Court Review 171.
407 UNFPA “Marrying Too Young” 2012 12; Lane “Stealing Innocence” 2011 27.
408 Ibid.
409 UNFPA “Marrying Too Young” 2012 12.
social structures, as well as causing the displacement of many families. These situations have also increased economic pressures on many affected families and their households. Therefore, many parents in poor economic situations marry off their underage girls for some income to meet their financial needs or to secure some protection for the girl in order to prevent sexual exploitation.

In conflict situations women and girls especially are often vulnerable and become subjected to rape, assault, kidnapping, confinement, forced labour, forced impregnation and forced marriage. The ten-year conflict situation in Sierra Leone between 1992 to 2002 provides an example of sexual and gender violations of young girls who were yet to attain puberty but were taken and forced to become ‘bush wives’ of rebels and soldiers. Similarly, another example is the long period of conflict in Liberia, also characterised with different sexual violations and forced marriage. This is confirmed in the Truth and Reconciliation Commission of Liberia which determined that:

All factions to the conflict systematically targeted women mainly as a result of their gender and committed sexual and gender based violations against them including, rape of all forms, sexual slavery, forced marriages, forced recruitment.

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414 Ibid.

415 UNFPA “Marrying Too Young” 2012 12.

416 Bunting 2012 CJHR 166.

417 Ibid., p. 171-172.

418 Ibid.

In addition, reports on the food insecurity situation in Kenya which started around 2008 provide an example of how natural disasters have put economic pressure on families and their households, thereby reinforcing forced marriage. These marriages and the girl-children of them are also referred to as ‘famine brides’. Similarly, recent reports reveal that with the refugee crisis in Syria “as many as one-third of registered marriages among Syrian refugees in Jordan between January and March 2014 involved girls under 18," with some as young as 11”. In many cases, parents give out their daughters in marriage because they believe their daughter will either be safer in asylum centres, or protected from sexual exploitation. They marry their daughters to men planning to leave Syria for the West, with the hope that they, the parents, can legally join them later.

2.7.5 Terrorism and religious extremist groups

Another crisis-related factor responsible for the prevalence of child marriage is the sudden rise of terrorism and attacks from Islamic extremist groups around the world. Since the year 2000, terrorism has increasingly become a global phenomenon needing drastic solutions because of the different violations and abuses of human rights as well as the disruption and displacement of families. It has also created concerns as these attacks have become major national security risks for many


421 Ibid. Plan UK Report cited in Singh “Disasters Fuel Forced Marriages” The UN Office for Disaster Risk Reduction 11 October, 2012 1. Available at: http://www.unisdr.org/archive/29042 (accessed 19-03-2016). Other reported examples in other regions include the drought and conflict in Afghanistan resulting in farm owners forcing their daughters into marriage for money. The impact of tsunamis in Indonesia, India, and Sri Lanka has caused parents to marry off their girls to the so-called ‘tsunami widowers’ in order to receive State subsidies for starting a family.


423 Ibid.

424 Ibid.

countries. Terrorist groups such as ISIS, Boko Haram, the Taliban and Al-Qaida that operate in Iraq, Afghanistan, Pakistan, Syria and Nigeria share similar religious ideologies on extreme interpretations of Islam, even though they have different strategic goals.

An example of this is the Islamic extremist group in Nigeria known as Jama’atu Ahlis Sunna Lidda’ awati wal-Jihad, or popularly known as Boko Haram, which means “western education is forbidden.” The strategic goal of Boko Haram is to seek the establishment of an Islamic State in Nigeria with a strict form of Sharia law. In a bid to impose Islamic law, Boko Haram has continued to engage in violent campaigns with various human rights violations and gender based violence such as forced labour, forced marriages, forced conversion to Islam, and sexual abuse including rape. The abduction of the 276 Chibok school girls in Borno State, Nigeria, in April, 2014 brought the extent of gender-based violence into the spotlight. It is strongly believed that the abducted girls have been subjected to rape, forced marriage, forced labour, false imprisonment, child trafficking and kidnapping. These Islamic extremist groups are a major challenge across regions and their activities impact immensely on the girl-child and in reinforcing forced marriage.

2.7.6 Ineffective implementation and enforcement of laws

Many countries have ratified and domesticated different international and regional human rights legislations as well as enacted national laws with specific provision for

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426 Ibid., p. 2.
427 Ibid.
432 Ibid.
the prohibition of child marriages or prohibition of offences relating to child marriage.\textsuperscript{433} However, implementation and enforcement of laws is a major challenge and concern in many countries across the globe.\textsuperscript{434} The practice of child marriage which is deeply rooted in harmful cultural traditions that allow violations of human rights of the girl-child to continue is a major contributing factor to the ineffectiveness of the laws.\textsuperscript{435} An example of this challenge is the situation in the Northern part of Nigeria where the defence of the Islamic cultural practice of child marriage prevents efforts at effective implementation and enforcement of laws that prohibit child marriage.\textsuperscript{436}

2.8 Establishing the Implications of the Practice of Child Marriage

2.8.1 Educational development challenges

Different documented reports, like UNFPA, for example, note that child marriage often brings an end to a girl's chance of continued education.\textsuperscript{437} This is because girls are either removed from school before marriage, or once married, their chance of continued education is very low.\textsuperscript{438} A UNICEF Report on Malawi, notes that nearly two thirds of women with no formal education in Malawi were married in their childhood.\textsuperscript{439}

Different studies conducted by various individuals and organisations, confirm that most girls are prevented from attending school due to family honour as their parents fear early child exposure to sexual activities.\textsuperscript{440} Similarly, the belief that investment in girl’s education is a waste as she will be married off also discourages some parents from supporting the educational development of female children.\textsuperscript{441} As such, different international and regional organisations have emphasised the need for heightened

\textsuperscript{433} Equality Now “Protecting the Girl Child” 2014 10.
\textsuperscript{434} Ibid.
\textsuperscript{435} Ibid.
\textsuperscript{436} Ibid. This is discussed fully in Chapter Five of this thesis.
\textsuperscript{437} UNFPA “Marrying Too Young” 2012 11.
\textsuperscript{438} Ibid.
\textsuperscript{440} UNICEF “Early Marriage: Child Spouses” 2001 11.
\textsuperscript{441} Ibid.
awareness on the role and importance of education as a strategy to end child marriage.

2.8.2 Reproductive health risks

A girl-child is exposed to sexual and reproductive risks as well as early child birth once married.\textsuperscript{442} This is because more often than not there is pressure on the girl to become pregnant immediately or soon after marriage, even though the young girl has little or no knowledge of sex, pregnancy and childbirth.\textsuperscript{443} About 16 million teenage girls between the ages of 15-19 years in developing countries give birth every year, and in nine out of ten cases, the mother was already married.\textsuperscript{444} Pregnancy and childbirth are major risks for the girl-child as her body is not physically matured.\textsuperscript{445} In addition, UNFPA notes that complications from pregnancy and childbirth are some of the main causes of death of adolescent girls between 15 to 19 years in developing countries.\textsuperscript{446} Similarly, Nour asserts that:

\begin{quote}
Girls between the ages of 10 and 14 years are 5 to 7 times more likely to die in childbirth; girls between the ages of 15 and 19 years are twice as likely. High death rates are secondary to eclampsia, postpartum haemorrhage, sepsis, HIV infection, malaria, and obstructed labour. Girls aged 10 to 15 years have small pelvises and are not ready for childbearing. Their risk for obstetric fistula is 88\%.\textsuperscript{447}
\end{quote}

\textsuperscript{442} Lane “Stealing Innocence” 2011 4.
\textsuperscript{443} UNFPA “Marrying Too Young” 2012 11.
\textsuperscript{444} Ibid; Nour 2009 Reviews in Obstetrics and Gynaecology 54.
\textsuperscript{445} Ibid; See also Brown “Out of Wedlock into School” 2014 16.
\textsuperscript{446} This report identified linked risks associated with early child birth to include obstetric fistula, an injury which leaves girls in constant pain, vulnerable to infection, incontinent, and often shunned by their husbands, families and communities. UNFPA “Marrying Too Young” 2012 11. See also Brown “Out of Wedlock into School” 2014 17. Nigeria has high number of Obstetric fistula cases among young girls.
\textsuperscript{447} Nour 2009 Reviews in Obstetrics and Gynaecology 54.
Beyond the reproductive health risks of child marriage on the girl-child, the child born from this marriage is also affected by such risks as low birth weight, malnutrition and impaired cognitive development.\textsuperscript{448}

2.8.3 Psychological risks

The effects of change in environment, loss of childhood, parents, freedom, personal development, and the experience of domestic and sexual violence, as well as early motherhood affect the mental and emotional state of the girl-child.\textsuperscript{449} According to a report based in Rajasthan, India, girls in child marriages are subjected to “inadequate socialisation, discontinuation of education, and great physiological and emotional damage due to repeated pregnancies.”\textsuperscript{450} These effects no doubt also greatly affect African girls subjected to child or forced marriage. Most of these girls remain unhappy and isolated having to endure these traumatic experiences alone, as these experiences are regarded as an “unavoidable part of life”.\textsuperscript{451}

The situation becomes even worse for the girl where the spouse either dies before or after consummation, as she then becomes a widow.\textsuperscript{452} For example, the situation in the \textit{Nata pratha} customs and tradition in Rajasthan, confirms the challenges of a young widow who becomes the common property of all male family members, especially the widowers.\textsuperscript{453} The acquired experiences of being married, in addition to the status of a widow, further impact gravely on the girl-child.\textsuperscript{454} As a widow she is faced with discrimination, loss of status, and property, and often financial hardship due to a lack of employment and/or education.\textsuperscript{455}

\begin{thebibliography}{99}
\item\textsuperscript{448} \textit{Ibid.}
\item\textsuperscript{449} Lane “Stealing Innocence” 2011 29.
\item\textsuperscript{451} \textit{Ibid.} They receive very little or no empathy from the family they are married into or from their parents.
\item\textsuperscript{452} Saxena “Who cares for Child marriage?” 1-4; UNICEF “Early Marriage: Child Spouses” 2001 9.
\item\textsuperscript{453} \textit{Ibid.}
\item\textsuperscript{454} UNICEF “Early Marriage: Child Spouses” 2001 9.
\item\textsuperscript{455} \textit{Ibid.}
\end{thebibliography}
In the case of a forced or servile marriage, the violations experienced by the girl-child are severe and long lasting.\textsuperscript{456} They face physical and sexual abuse specifically rape, forced pregnancy, child bearing and economic hardship.\textsuperscript{457} This in turn impacts negatively on the girl and young woman’s psychological and emotional wellbeing.

\textbf{2.8.4 Risk of HIV/AIDS and other sexually transmitted infections (STIs)}

Early marriage is often used as a strategy to prevent HIV infection and other sexually transmitted diseases. However, married girls are more likely than single girls to be infected with sexually transmitted diseases.\textsuperscript{458} Clark, Bruce and Dude note in their study that the prevalence of HIV among women aged 15-24 years, especially in sub-Saharan Africa, is two to eight times more than among men in the same age-group.\textsuperscript{459} There is a high rate of HIV infection for married adolescents especially for those whose spouses have multiple sex partners.\textsuperscript{460} This is because they are likely to find it difficult to either refuse sex or to insist on the use of a condom by their older and more sexually experienced husbands.\textsuperscript{461}

For girls in forced or servile marriage, they are exposed to domestic and sexual violence which could lead to commercial exploitation\textsuperscript{462} and thereby subject these vulnerable girls to HIV and other sexually transmitted infections.


\textsuperscript{457} Ibid.

\textsuperscript{458} Nour 2009 Reviews in Obstetrics and Gynaecology 54.

\textsuperscript{459} Clark, Bruce and Dude “Protecting Young Women from HIV/AIDS: The Case against Child and Adolescent Marriage” 2006 International Family Planning Perspectives 79-88 79.

\textsuperscript{460} Ibid.

\textsuperscript{461} UNFPA “Marrying Too Young” 2012 11.

\textsuperscript{462} Ibid.
2.8.5 Sexual and domestic violence

The younger a girl is in marriage the more likely it is that she will be subjected to sexual and domestic violence.\textsuperscript{463} In the case of sexual violence within a marriage, sex is believed to be a \textit{priori} consensual, therefore sexual consent is irrelevant.\textsuperscript{464} The financial security attached to marriage often reinforces violence. This is mainly so for a girl-child with little or no educational background and who is totally dependent on their spouse.\textsuperscript{465}

2.9 Summary

This chapter explored the link between culture, child marriage and the girl-child. The discussion on the context of childhood and the legal definition of a child showed that the understanding of childhood is not simple, rather variety exists and it is because of this variety of perspectives in understanding childhood that children are treated differently especially in terms of the violation and abuse of their rights. For child marriage cases, the minimum age of 18 years is particularly important for the attainment of an end to childhood, and the start of adulthood and maturity in terms of the girl meeting the required physical, biological and psychological development.

The different forms of child marriage factors responsible for the practice as well as the impact of the practice on the rights and welfare of the girl-child were discussed in this chapter. This is to provide an understanding into the extent of the nature of child marriage and circumstances in which the practice can occur. The different factors responsible for the practice and prevalence of child marriage are often identified as reinforcing the practice, especially within African States. For example, in Nigeria and South Africa, cultural practices, poverty and lack of education amongst other factors, are recognised as reinforcing child marriage.\textsuperscript{466} This is not to say there cannot be one factor independent of the other factors that may be causing child marriage in a State,

\textsuperscript{463} Lane “Stealing Innocence” 2011 5.
\textsuperscript{465} Lane “Stealing Innocence” 2011 30.
\textsuperscript{466} The cultural practice and religious beliefs that promote child marriage in South Africa and Nigeria are discussed in Chapter Five.
but studies and reports have shown these factors are linked together. Therefore, it is submitted that the different factors identified in this chapter often exist together and reinforce the practice and prevalence of child marriage, although one factor may be more dominant than the others in each State.

Discussions on harmful cultural practices such as child marriage, often lead to contradictions that exist between the application of human rights standards and promotion of cultural values and norms. This in turn leads to a wider debate on universality of human rights and cultural relativism. These discussions and debates will be analysed fully in chapter three.
CHAPTER THREE

THEORETICAL ANALYSIS OF THE PARADOXICAL RELATIONSHIP BETWEEN UNIVERSALITY OF HUMAN RIGHTS AND CULTURAL RELATIVISM IN THE CONTEXT OF CHILD MARRIAGE IN AFRICA

3.1 Introduction

The preceding chapter focused on the conceptual analysis of childhood, child marriage and culture. It considered the connection and significance of childhood to the practice of child marriage in Africa. The purpose of this chapter is to provide a theoretical and philosophical analysis on the contradictions and conflict between human rights and culture with regard to child marriage, and in the context, of the debate between universality of human rights and cultural relativism.

On one hand is human rights which is the rights of all persons in the world and applies to all persons irrespective of race, colour, sex, language, religion, nationality or social origin, birth or other status. Therefore the application of human rights principles to all humans is universal. This is affirmed in the preamble to the UDHR, where the General Assembly of the United Nations proclaimed the UDHR “as a common standard of achievement for all peoples and all nations” and subsequently in the Vienna Declaration. Cultural relativism on the other hand, opposes the idea of ‘universally’ human rights because it conflicts with the cultural diversity that exists in the world. Cultural relativists argue that human rights are based on western values and that all values are culturally relative. Therefore, the defence of the principles of

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468 Article 1 (3) UN Charter; Article 2 of the UDHR.
469 Paragraph 11 of the preamble to the UDHR; Paragraph 5 of the Vienna Declaration.
471 Ibid.
cultural relativism are often emphasised against human rights principles. This debate often seems endless within African societies especially when it is considered in relation to certain harmful practices and its effect on women and children, and fundamental human rights.

This chapter recognises that children’s rights are human rights, which applies to all humans, hence universal. It also recognises the valuable role of culture and traditions within African communities. However, a human rights approach is taken to access the debate between the universality of human rights and cultural relativism in the context of the harmful cultural practice of child marriage and the need to protect the rights and welfare of the girl-child.

Therefore, in the context of child marriage, the major conflict on minimum age of marriage, right to consent and the mixed legal system in most African States are examined. The concept and nature of universality of human rights and cultural relativism is analysed together with arguments in defence of, and against, universality and relativism from different scholars including African philosophers and feminists. The relevance of African philosophy is to provide insight into the debate between universality of human rights and cultural relativism. This is especially, with regard to the dominant question on the validity and viability of international human rights standards, which are western-biased and a neo-colonial imposition on non-westerners, as well as the broad distinctions that exist between African traditional culture and western culture.

In addition, the scope of cultural legitimacy is considered in relation to reconciling the conflict relationship that exists between human rights and culture. This is done in order to enhance support for the enforcement of human rights standards and address

472 This is discussed further in this Chapter.
the harmful practice of child marriage. Therefore, the possibility of codifying the outcomes and goals from the cultural legitimacy of human rights is considered in this study. This study argues that codification will play an important role in strengthening culturally legitimate human rights standards.

The relevance of the feminist perspective in this chapter stems from the fact that child marriage transforms a girl into a woman irrespective of her age, as her experiences, roles and responsibilities are dictated by cultural norms, some of which are deeply rooted in gender inequalities and marginalisation. Feminism recognises these experiences in societies and great advancements have been made to transform the status of women under international human rights protection. Therefore, a discussion on feminism, relative to rights and culture, will be considered briefly.

In addition, despite the fact that the human rights framework is an imperative for the protection of the girl-child, the nature of culture and other interconnecting factors reinforcing harmful practices requires more than the human rights framework. Therefore, this chapter also considers the role of practical non-legal strategies and institutions that will support and strengthen the human rights framework in order to avert practices that are detrimental to the protection and the realisation of universally affirmed human rights. Different studies have analysed and re-emphasised the role and relevance of such strategies as education, internal dialogue and awareness as positive measures to change deeply ingrained cultural perceptions, orientation and attitudes in the context of child marriage. This study equally reiterates the importance of these strategies and in addition briefly points out the relevance of social media awareness and key stakeholders such as family members and traditional/religious leaders in reinforcing an end to child marriage.

3.2 Contradictions between Human Rights and Culture in the Context of Child Marriage

Within the context of child marriage in Africa contradictions exist between the practical application of human rights standards and the promotion of customs and traditional practices hence preventing efforts at the full realisation of the fundamental rights of an African girl-child.

The first main contradiction relates to the minimum legal age of marriage of a girl-child. The definition of a child as “every human being below the age of eighteen years” has been discussed in Chapter Two. This definition confirms the attainment of adulthood and autonomy of a child. The African Children’s Charter, in particular, Article 21 (2) clearly specifies minimum age of marriage to be 18 years. Similarly, Article 6 (b) of the African Women’s Protocol complements the provisions of the African Children’s Charter by clearly setting the minimum age of marriage for women at 18 years thereby affirming the rights of girls to be protected from child marriage. Article 16 (2) of CEDAW also directly prohibits child marriage, however, this Convention makes no direct mention of 18 years as the minimum age of marriage. However, strong recommendations have also been made by the Committee on the Elimination of Discrimination against Women for the minimum age of marriage to be set at 18 years.

From the perspective of African traditional practices and religious beliefs that promote child marriage the minimum legal age for marriage is not recognised. Rather the biological and physical developments of a girl-child determined by such factors as

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477 Article 2 of the African Children’s Charter.
480 CEDAW, General Recommendations made by the Committee on the Elimination of Discrimination against Women No. 21: Equality in Marriage and Family Relations, paragraph 36; UN Committee on Rights of the Child General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child, paragraph 9.
attainment of puberty or circumcision are often considered a requirement for marriage rather than age.\textsuperscript{482}

Conflict arises in an attempt to implement and enforce the minimum age of marriage within African communities with practices that promote child marriage. On one hand is the need to protect an underage girl from the abuse of her rights and from risks associated with child marriage. On the other hand, is the need to adhere to traditional values and beliefs in a community. In order to protect the rights of the girl-child and end child marriage, there is thus a need for this conflict to be resolved.\textsuperscript{483}

The second contradiction relates to the right to “full and free consent” of intending parties to a marriage provided in Article 16 (2) of UDHR, as well as other human rights instruments such as Article 6 (a) of the African Women’s Protocol and Article 16 (1)(b) of CEDAW. The lack of free and full consent of a girl-child in marriage is forced marriage. However, the reality in most child or forced marriages is that a girl-child is not given a choice to consent to such marriages.\textsuperscript{484} This is because marital choices are often made on her behalf, based on the circumstances of the family or the reason(s) behind the early marriage.\textsuperscript{485} In addition, the laws of some African States allow under-age marriages with parental consent.\textsuperscript{486} For example, Article 24 of the Angola Family Code provides that persons over the age of 18 years may marry but, exceptionally, a boy may marry at 16 and a girl at 15 with parental consent.\textsuperscript{487}

In addition, the minimum age of sexual consent is also a concern in some States. For example, a June, 2015 media report on Zimbabwean courts treating 12 years as age of sexual consent even though the minimum age of marriage is 18 years is an example
of this consent related issue. In this case a man who had intercourse with a girl-child less than 12 years has no justification(s) for his actions and can be liable for rape, but if the child is 12 years or above then it can be argued that the girl-child consented to sex, especially if he is faced with rape charges. Similarly, in Nigeria, the Senate passed the Sexual Offences Bill on the third of June 2015 which prescribes life imprisonment for rapists and those who have sexual intercourse with children less than 11 years; this Bill has created national debate on whether the age of sexual consent has been reduced from 18 years. No doubt this prescribed punishment raises questions on what happens to rapists or those who have sexual intercourse with children above 11 years and below 18 years.

Another example is Sudan, with a minimum age of sexual consent set at 18 years, while the age of marriage is at puberty for Muslim marriages, or 13 years for other marriages. Odala rightly argues that it is important that the minimum age of sexual consent be set at 18 years and for the minimum age of marriage not to be lower in order to avoid sexual exploitation of girls. No doubt the issues arising from the consent of a girl-child discussed above need to be resolved.

Thirdly, the legal systems of most African States are pluralistic in nature comprising of customary law, religious law, common or civil law and legislation. The role of each component of the legal system is distinct from the other. For instance, Ndulo rightly states that customary law governs matters that deal with personal law such as marriage, inheritance and traditional authority, and religious law relates to a State where there is a significant Muslim population with Islamic beliefs and practices.

\[\text{\footnotesize 489 Ibid.}\]
\[\text{\footnotesize 491 Ibid.}\]
\[\text{\footnotesize 492 Ibid.}\]
\[\text{\footnotesize 493 Ndulo 2011 Cornell Law Faculty Publications 87-88.}\]
\[\text{\footnotesize 494 Ibid.}\]
Customary and religious laws often conflict with national and international human rights standards, especially the human rights principles of human dignity, equality and non-discrimination based on gender. Furthermore, constitutional recognition of customary marriages exists within some States. An example is Kenya with Article 45 (4) of the 2010 Constitution of Kenya, which provides for parliament to recognise marriages concluded under any tradition. The Constitution also emphasises the supremacy of the Constitution vis-à-vis any law, including customary law, inconsistent with the Constitution, and the minimum age of marriage is set at 18 years. However, the reality is that in Kenya and many other African States child marriage is a well-established customary and religious practice and in spite of existing laws prohibiting the practice, implementation and enforcement of these laws is a major challenge.

3.3 Reflections on the Debate between Universality and Relativism

3.3.1 The concept and nature of universality of human rights

The concept of human rights was primarily derived from the United Nations Charter, and generally defined as “rights that one has simply because one is human.” As Donnelly states:

…they [human rights] are equal rights, because we either are or are not human beings, equally. Human rights are also inalienable rights, because being or not being human usually is seen as

495 Ibid., p. 89. See also Odala “Why is it Important for Countries to have Minimum Legal Age of Marriage?” 7.

496 Ibid., p. 5-7. This report states that customary marriages are constitutionally recognized in ten African countries namely Kenya, Liberia, Malawi, Mozambique, Namibia, Uganda, Sudan, Sierra Leone, Eritrea and Ethiopia.

497 Promulgated 27 August, 2010. See also Odala “Why is it Important for Countries to have Minimum Legal Age of Marriage?” 5-7.

498 Article 2 of the 2010 Constitution of Kenya; Odala “Why is it Important for Countries to have Minimum Legal Age of Marriage?” 5-7.

499 Section 4 of Kenya Marriage Act No. 4 of 2014, date of commencement 20 May, 2014.

500 Odala “Why is it Important for Countries to Have Minimum Legal Age of Marriage?” 6.

an inalterable [unchangeable] fact of nature, not something that is either earned or can be lost. 502

The preamble to the UN Charter “reaffirms faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women [boys and girls] and of nations large and small.” 503 This is in order to create a global society that promotes and encourages respect for human rights and for fundamental freedoms for all persons without any distinction as to race, sex, language or religion. 504 It is also to show that the recognition of the inherent dignity as well as the equal and inalienable rights of all humans is the foundation for freedom, justice and peace in every society. 505

The application of human rights principles is therefore ‘universal’ because it applies to all human beings. 506 Similarly, Zechenter states: “universalism [universality] holds that there is an underlying human unity which entitles all individuals, regardless of their cultural or regional antecedents, to certain basic minimal rights, known as human rights.” 507

As such, the concept of ‘universality’ emphasises a broader consensus in the application of human rights standards, especially human dignity to all persons, irrespective of nationality, ethnicity, religious beliefs, cultural beliefs and other traits. 508

Similarly with regard to the application of human rights to all persons, Brems argues that “the understanding of universality of human rights comes down to all-inclusiveness within the human race. It signifies the rejection of the notion of “non-persons” or inferior human beings.” 509


504 Article 1 (3) of the UN Charter.

505 Preamble to the UDHR, paragraph 1.

506 Donnelly 2007 HRQ 283.


The claim to universality is affirmed in the UDHR as “a common standard of achievement for all peoples and all nations.”\textsuperscript{510} The UDHR is a foundational instrument that provides inspiration and standard setting\textsuperscript{511} from which various other international, regional and national human rights instruments and frameworks have built on in order to establish standards based on the principles of universality.\textsuperscript{512} An example is the Vienna Declaration which states that: “All human rights are universal, indivisible, and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”\textsuperscript{513}

Based on this analysis, human rights ultimately lay emphasis on the human being and the universal quest for the protection of his/her human dignity.\textsuperscript{514} This is also confirmed in the Vienna Declaration which states that “... the human person is the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary...”\textsuperscript{515}

Human dignity, according to Glensy, is an elemental part of a human being, and it involves “respect for the intrinsic worth of every person.”\textsuperscript{516} Therefore, an individual should not be subjected to unfair treatment or become an object at the will of others.\textsuperscript{517} With every human interaction there is need to maintain mutual respect for human life, needs, age and wisdom of all adults and children.\textsuperscript{518} Thus the concept of human rights is based on the moral ideas of how all individuals should be treated.\textsuperscript{519} Therefore,

\begin{itemize}
\item \textsuperscript{510} Preamble to the UDHR, paragraph 11.
\item \textsuperscript{511} Paragraph 8 of the Preamble to the Vienna Declaration.
\item \textsuperscript{512} Rembe 2002 \textit{Connecticut Journal of International Law} 303-304.
\item \textsuperscript{513} Paragraph 5 of the Vienna Declaration.
\item \textsuperscript{514} Deng \textit{A Companion to African Philosophy} 499.
\item \textsuperscript{515} Preamble to the Vienna Declaration, paragraph 2.
\item \textsuperscript{516} Glensy “The Right to Dignity” 2011 \textit{Colombia Human Rights Law Review (CHRLR)} 72-73.
\item \textsuperscript{517} \textit{Ibid}.
\item \textsuperscript{518} Viljoen \textit{International Human Rights Law in Africa} 3.
\end{itemize}
enforceable claims or entitlements made by all individuals against the State and society are through legal rights.\footnote{Ibid; Donnelly 2007 HRQ 284-285.}

On the historical development of human rights, Pollis and Schwab rightly state that: “From the seventeenth to the twentieth centuries in England, France and the United States, the legal and political roots of human rights were formulated.”\footnote{Pollis and Schwab Human Rights: Cultural and Ideological Perspectives 2.} In other words, the foundation of international human rights and its subsequent development is based on western political philosophy.\footnote{Ibid., p. 1-4.} Human rights was formulated mainly through the philosophy and legal writings of Grotius, Locke, Montesquieu and Jefferson.\footnote{Ibid., p. 2.} These legal writings created a new conception of political sovereignty and individual rights that focused on the nature of humans and the relationship of each individual to others, and to society.\footnote{Ibid.}

These historical developments of human rights have been widely criticised by many non-westerners,\footnote{In the context of this thesis, relativists will be used interchangeably with non-westerners (Indonesians, Africans, Indians and Chinese), and referred to as people who do not believe in the viability of universality of human rights or who question the applicability of human rights globally. See Statement on Human Rights submitted to the Commission on Human Rights, United Nations by Executive Board, American Anthropological Association, American Anthropologist, Volume 49, 1947 539-543 543. Available at: http://franke.uchicago.edu/aaa1947.pdf (accessed 11-12-2014).} especially concerning the imposition of western values and philosophies on different cultures that do not accept the validity of such values.\footnote{The criticisms of universality of human rights is discussed fully in section 3.4 of this chapter. See also Gubo Blasphemy and Defamation of Religions in a polarized World 20-21.} However, Ayton-Shenker points out that:

Human rights emerge with sufficient flexibility to respect and protect cultural diversity and integrity. The flexibility of human rights to be relevant to diverse cultures is facilitated by the establishment of minimum standards and the incorporation of cultural rights.\footnote{Ayton-Shenker “The Challenge of Human Rights and Cultural Relativism” 4.}
Therefore, on the inherent flexibility of human rights, the Vienna Declaration provides that:

…the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.\(^{528}\)

Regarding this characteristic of the universality of rights, Viljoen points out that the principle of universality does not connote uniformity in application\(^ {529}\) but rather human rights should be viewed in different contexts as they are not fixed and pre-determined.\(^ {530}\)

In conclusion, universality provides a legal basis for an adherence to human rights standards.\(^ {531}\) However, once its development was linked to western ideals of human rights founded on natural law theory, its acceptance has not been without contestation.

### 3.3.2 Children’s rights as universal human rights

Based on the above analysis, the underlying principles of universality of human rights apply to all human beings irrespective of their age. The birth and development of children’s rights stem from the need to protect the child and to ensure “that mankind gave [all] children the best it had to give”.\(^ {532}\) In this regard and in line with other international human rights instruments, a girl-child is entitled by virtue of her common humanity to “a basic modicum of human dignity”.\(^ {533}\) This protects her intrinsic self-worth and entitlement to be treated as a human being.\(^ {534}\)

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\(^{528}\) Article 5 of the Vienna Declaration.

\(^{529}\) Viljoen *International Human Rights Law in Africa* 8.

\(^{530}\) Ibid.

\(^{531}\) Zechenter 1997 *Journal of Anthropological Research* 321.


\(^{533}\) Zechenter 1997 *Journal of Anthropological Research* 319.

\(^{534}\) Ibid. p. 320.
Universality applies to all rights of a girl-child, and in the context of child marriage such rights include, among others, protection against harmful social and cultural practices including child marriage,\textsuperscript{535} right to free and full consent to marriage,\textsuperscript{536} right to marry at minimum legal age of marriage,\textsuperscript{537} right to non-discrimination,\textsuperscript{538} best interest of the child,\textsuperscript{539} right to education,\textsuperscript{540} right to health,\textsuperscript{541} and freedom from degrading inhuman and cruel treatment.\textsuperscript{542} However, despite these rights, Freeman rightly notes that in many States full implementation of all human rights is weak with various violations and abuses occurring, due to a number of barriers such as traditional cultural practices, and corruption and incompetent governments.\textsuperscript{543} Despite the recognised challenges, numerous writers have provided plausible arguments in defence of universality of human rights especially when considered in the context of harmful cultural practices such as child marriage.\textsuperscript{544}

Firstly, the values and principles of human rights are recognised as an effective response to injustice,\textsuperscript{545} and any threat to human dignity.\textsuperscript{546} Hence the need to comply with human rights standards such as Article 21 (2) of the African Children’s Charter that prohibits child marriage. In other words, there is a need to comply with the rights of the girl-child provided in the CRC, the African Children’s Charter and other international human rights instruments. This is in order to protect the rights and welfare

\textsuperscript{535} Article 21 (1) and (2) of the African Children’s Charter and Article 5 and 6 of the African Women’s Protocol.
\textsuperscript{536} Article 16(2) of the UDHR and Article 16 (1)(b) of CEDAW.
\textsuperscript{537} Article 21 (2) of the African Children’s Charter and Article 6 (b) of the African Women’s Protocol.
\textsuperscript{538} Article 2 of the CRC and Article 3 of the African Children’s Charter.
\textsuperscript{539} Article 3 of the CRC and Article 4 of the African Children’s Charter.
\textsuperscript{541} Article 14 of the CRC and Article 15 of the African Children’s Charter.
\textsuperscript{542} Article 16 (1) of African Children’s Charter and Article 3 & 4 of the African Women’s Protocol.
\textsuperscript{543} Freeman Politics in the Developing World 280.
\textsuperscript{544} Viljoen International Human Rights Law in Africa 3-8; Ayton-Shenker “The Challenge of Human Rights and Cultural Relativism” 1-6.
\textsuperscript{546} Donnelly 2007 HRQ 287.
of the girl-child as well as address the grave impact of child marriage. The report by Equality Now\textsuperscript{547} states that:

When a young girl is married and gives birth, the vicious cycle of poverty, poor health, curtailed education, violence, instability, disregard for rule of law and legal and other discrimination often continue into the next generation...\textsuperscript{548}

The reality of the consequences of child marriage, no doubt places into perspective the need to effectively implement and enforce human rights standards as an “empowering framework for protecting vulnerable and at-risk girls” from harmful cultural practices.\textsuperscript{549} It is often on the strength of this defence that many human rights scholars and activists question the concept and the defence of cultural relativism, and argue that it is problematic as it tolerates harmful practices such as child marriage, female genital mutilation, gender inequality, arbitrary killings and torture.\textsuperscript{550} It is also argued that the defence of relativism poses a threat to the effective implementation and enforcement of international human rights law and systems,\textsuperscript{551} relative to the protection of the rights of the girl-child.

Another justification in defence of universality is focused on the fundamental nature of human rights that offers one legal standard of minimum protection necessary for human dignity.\textsuperscript{552} Viljoen alludes to this defence in his argument that “‘human rights’ serve as a yardstick against which the nature and extent of these obligations [or rights] may be assessed, an ideal towards which to strive, and an inspiration for struggles to improve the current state of affairs [or acceptable behaviour].”\textsuperscript{553} Similarly, UNICEF states that the CRC “constitutes a common reference against which progress in meeting human rights standards for children can be assessed and results

\textsuperscript{547} Equality Now “Protecting the Girl Child” 2014 9-10.
\textsuperscript{548} Ibid., p. 15.
\textsuperscript{550} Ibhawon 2001 \textit{NQHR} 43-62 47.
\textsuperscript{551} Ayton-Shenker “The Challenge of Human Rights and Cultural Relativism” 2.
\textsuperscript{552} Ibid., p. 4.
Therefore the principle of universality is not about uniformity in the application of human rights standards, this is because various human rights instruments emphasise the significance of cultural diversity. For instance, Article 5 of the Vienna Declaration states that "...the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind."

The third justification is on the ratification of various international human rights instruments as binding treaties by many countries and this implies universal validity. For example, the CRC is recognised as the most widely ratified international children’s rights legislation with 196 States affiliated, which confirms the recognition of the universality of children’s rights. In addition, confirmation of human rights standards is also recognised in the ratification of the African Children’s Charter and African Women’s Protocol by 47 and 36 African States respectively out of the 54 member States of the African Union. Viljoen, also rightly notes that the inclusion of “both the concept of justiciable rights in national constitutions and the notion of ‘international’ human rights are premised on the universality of human rights.”

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556 Zenchenter 1997 Journal of Anthropology Research 221.


559 Viljoen International Human Rights Law in Africa 7. See also Zenchenter 1997 Journal of Anthropology Research 221.
No doubt there is a wide difference in the theoretical ideals of human rights and the reality of the practice of human rights in many African societies. Therefore, based on the need to protect the vulnerable groups from harmful cultural practices, consideration is given to the question on why the defence of cultural relativism is seen to be relevant to issues of harmful cultural practices, even when countries are legally bound to human rights standards. Within many African societies it seems the defence of relativism can be attributed to a number of reasons such as the following:

1. Traditional cultural practices and religious beliefs have been passed from one generation to another; as such the people within that culture are deeply influenced, and only see harmful practices as the norm and not a violation of human rights.

2. Such rights that address harmful traditional practices and promote the equality of women in a highly patriarchal society are still very contentious, especially for those who fear that promoting the rights of women and girls is an attempt at men losing their perceived authority over women.

3. Many have also argued in the words of Viljoen that “Africa is associated more with human rights problems and humanitarian crises than with their solutions.” But then, there are consistent violations of different human rights standards everywhere in the world. Therefore, focus should not be largely on condemning the violations in Africa alone while other parts of the world with similar violations are left alone.

However, should these arguments be used as a yardstick for the defence against harmful cultural practices? What further practical protective mechanisms should


566 Ibid.
Africans put in place to properly deal with violations of human rights in Africa? In the words of Emilie Hafner-Burton,

> Ever since the adoption of the UDHR more than six decades ago, it has been clear that the world needs to do more to respect the human rights that are integral to life with dignity. That's not the issue. Instead, today the questions concern strategy. What's the best strategy for promoting respect for human rights [fundamental rights of the girl-child]?^567

In the context of child marriage and the analysis provided above, the question of best strategies for promoting respect for the rights of the girl-child is most important. Therefore, practical non-legal strategies to support the human rights framework in addressing the challenge of child marriage as well as the conflict between human rights and culture will be considered later in this chapter.

### 3.3.3 Understanding the cultural relativism debate

Cultural relativism conflicts with the idea of universality of human rights, because it is recognised on the basis of diversity in cultural values rather than natural or universal rights.\(^568\) The basis for the defence of cultural relativism began with anthropology and moral philosophy.\(^569\) The former is now characterised as a relativist position.\(^570\)

The rise in contention or criticism of the values of universality and the defence of cultural relativism began during deliberations for the adoption of the UDHR.\(^571\) The American Anthropological Association (AAA) submitted a statement to the UN Commission on Human Rights criticising the UDHR and the universal application of human rights to all human beings.\(^572\) As The Association notes in the following

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\(^{567}\) Hafner-Burton 2.  
\(^{568}\) Iovane 2007 *IJMGR* 231- 236.  
\(^{571}\) Gubo *Blasphemy and Defamation of Religions in a polarized World* 21-22.  
statement: “How can the proposed Declaration be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America?”

Moral philosophy, on the other hand, focuses on the issue of cultural imperialism and the individualistic approach to moral values. According to Iovane, “moral relativism is the doctrine which confines the validity of all values to particular times and places, and to particular perspectives, societies and cultures”. Therefore, the differentiation of values to show one culture’s values as universal or more objective to another is not recognised.

According to Mayer the term ‘cultural relativism’ is generally understood by many relativists to mean:

The idea that all values and principles are culture-bound and that there are no universal standards by which cultures may be judged. Similarly, they [cultural relativists] deny the legitimacy of using alien values to judge a culture and specifically reject any application of standards taken from Western culture to judge the institutions of non-western cultures.

Also important to understanding the nature and extent of cultural relativism is Jack Donnelly’s classification of cultural relativism into strong and weak cultural relativism. He states that:

Strong cultural relativism holds that culture is the principal source of the validity of a moral right or rule. In other words, the presumption is that rights (and other social practices, values, and moral rules) are culturally determined, but the universality of human nature and rights serves

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574 Freeman Politics in the Developing World 281. Cultural imperialism is simply the practice of promoting one culture over other culture(s) that has Western values on which human rights are based above other cultures beliefs.

575 Iovane 2007 IJMGR 237.

576 Ibid.

577 Ibid.

578 Mayer 9.

579 Donnelly “Cultural Relativism and Universal Human rights” 1984 HRQ 400-401

580 Ibid., p. 401.
as a check in the potential excesses of relativism...Weak cultural relativism holds that culture may be an important source of the validity of a moral right or rule. In other words, there is a weak presumption of universality, but the relativity of human nature, communities, and rights serves as a check on potential excesses of universalism.

Donnelly argues for weak cultural relativism as against claims for a strong/radical relativism or radical universalism. This position allows limited deviations from the universal human rights standards mainly at the level of form and interpretation without affecting the whole of the human rights legislations. In other words, this position “views human rights as prima facie universal, but recognises culture as a limited source of exceptions and principles of interpretation”.

Over the year’s cultural relativists have critically questioned the validity and applicability of human rights based on western values. As Pollis and Schwab clearly point out:

Western political philosophy upon which the [UN] Charter and the [UDHR] Declaration are based provides only one particular interpretation of human rights, and [that] this western notion may not be successfully applicable to non-western areas.

In other words, a fundamental link exists between the origin of a cultural practice or principle and the validity of such practice to its culture. Therefore, ideas of what practice is right and appropriate in one culture may be wrong and unlawful in another

581 Ibid., p. 400. Although, radical cultural relativism is recognised as the core argument of most relativist as seen in the statement by the American Anthropological Association and the definition above. However, Brems points out that “Most often, cultural relativists either reject specific rights, or reject the specific content or interpretation of those rights.” This is especially true as in the contradictions in the implementation of the human rights of a girl-child and the promotion in the context of child marriage. See also Brems “Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse” 1997 HRQ 136-164 143.

582 Donnelly 1984 HRQ 400. Radical universalism maintains that “culture is irrelevant to the validity of moral rights and rules, which are universally valid”.

583 Ibid., p. 401.

584 Ibid., p. 402.

585 Pollis and Schwab Human Rights: Cultural and Ideological Perspectives 1.

586 Ibid.

An example is Viljoen’s illustration of payment of bride price: some cultures see this practice as appropriate while other cultures strongly object and regard it as violating the dignity of women. However, Viljoen points out that the challenge is when a cultural practice becomes harmful and affects the dignity of a person.

Consequently, the principles of universality and its global application are criticised as promoting cultural imperialism of the west. According to Panniker, many relativists argue in defence of relativism due to fear for the identity of their culture, particularly because of past colonisation and western cultural domination. Therefore they argue strongly that the application of universality is either with a hidden agenda, or an attempt at global political and economic domination of non-westerners.

In addition, other relativists have argued that human rights emphasise individual autonomy as opposed to non-western cultures that emphasise communal autonomy. Iovane also argues this position when she states that relativists argue that “human rights are unduly biased towards morally individualist societies and cultures at the expense of the collective moral character of many non-European societies”. However, Brems points out that non-western culture “do not define themselves in the first place as autonomous individuals, but instead experience themselves as having an ascribed status as members of a larger group or community, such as family, tribe, class, nation, or other group.”

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588 Viljoen International Human Rights Law in Africa 8.
589 Ibid.
590 Ibid.
591 Ibid.
596 Freeman Politics in the Developing World 281.
597 Ibhawon 2001 NQHR 46.
598 Iovane 2007 IJMGR 237.
599 Brems 1997 HRQ 145.
African traditional societies in which the community is recognised as the primary focus and not the individual.\footnote{600} This African traditional nature is emphasised by many authors. For instance, Cobbah in his study on African perspectives argues forcefully in defence of African values and the broad distinctions between African culture and western culture.\footnote{601}

However, Freeman further points out that there is need to take human rights seriously in order to protect the oppressed.\footnote{602} He argues that the reasons advanced in defence of relativism that focus on human rights expressing a western concept are not convincing in this regard.\footnote{603} This is because oftentimes this defence is used as “a mere cloak for self-interest and arbitrary rule”,\footnote{604} which is evident with harmful cultural practices. Tharoor equally shares a similar position and states that “the traditional culture that is sometimes advanced to justify the non-observance of human rights, including in Africa, in practice no longer exists in a pure form at the national level anywhere”.\footnote{605} This is because all societies have been subjected to change through internal and external forces evolving into modern societies.\footnote{606} Culture too, is ever evolving, an example of such being the abolition of slavery.\footnote{607}

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\footnote{600} Himonga Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa 115.

\footnote{601} Cobbah 1989 HRQ 328-329. The broad distinction between African culture and western culture is discussed in section 3.4 of this chapter.

\footnote{602} Freeman Politics in the Developing World 277-280.

\footnote{603} Ibid.

\footnote{604} Ibhawoh 2001 NQHR 55.

\footnote{605} Tharoor 1999/2000 World Policy Journal 3.

\footnote{606} Ibid.

\footnote{607} Ibid; UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. Adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956 and done at Geneva on 7 September 1956 Entry into force: 30 April 1957.
3.4 African Perspectives on Universality of Human Rights and Cultural Relativism

3.4.1 African communitarianism

Many non-western scholars and writers have provided diversity in their contributions, perspectives and critiques of the dominant discourse between universality and relativism. However, the focus of this thesis is on views advanced by various African scholars and the relevance of their arguments to the dominant issues raised. Some of these African scholars include Abdullahi An-Na’im, Francis Deng, Josiah Cobbah, Kwame Gyekye, Makau Mutua, and Bonny Ibhawoh, among others.

Central to the arguments advanced by African scholars, is the claim that African traditional societies are communitarian in nature. This cultural context is used to advance the broad distinctions that exist between African societies and western societies. According to Gyekye, “communalism is a doctrine about social organisation and relations... the group (that is, the society) constitutes the focus of the

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610 Deng A companion to African Philosophy 499-518.
611 Cobbah 1987 HRQ 309-331.
615 Cobbah 1987 HRQ 320; Gyekye 154. In the context of this thesis, the terms communitarian, communitarianism and communalism are used interchangeable. This is to emphasis the communal basis and the social order of African traditional societies.
616 Ibid.
617 Gyekye 154-155.
activities of the individual members of the society”. In essence, society plays a necessary as well as a natural role in human existence. This doctrine is also postulated by authors such as Himonga who states that the community is the ‘primary focus and interest’ and not the individual. Menkiti equally shares a similar position in his study on the person and community in African traditional thought. He strongly argues that in African societies an individual is defined by his community and this contrasts the idea of a lone individual, characteristic of western society.

Therefore, the concept of a ‘human being’ with inherent rights is not recognised in traditional African societies. Instead, an individual is identified by the group membership or social status. Against this background, African scholars like Menkiti and Cobbah have argued that African’s philosophy of existence is summed up as “I am because we are, and because we are, therefore I am.” The work of Gyekye on African philosophy makes significant contributions to this discourse. He points out that although the community is recognised as the dominant entity of African social organisations, the place of the individual within the African community is often misunderstood. He argues further that African social order is both communal and individualistic in nature, and not purely communalistic as some people believe it to be.

618 Ibid.
620 Menkiti “Person and Community in African Traditional Thought” 171. Available at: http://www2.southeastern.edu/Academics/Faculty/mrossano/gradseminar/evo%20of%20ritual/afri
621 can%20traditional%20thought.pdf (assessed 10-02-2015).
622 Ibid.
623 Ibhawon 2001 NQHR 51.
624 Ibid.
625 Ibid.
626 Ibid.
627 Ibid.
Therefore, when an individual identifies with the community to which he/she belongs, a reciprocal relationship exists between the individual and the community.\textsuperscript{628} Gyekye elaborates this view through an analysis of Akan social thought, where he states the following:

Communalism as conceived in Akan thought is not a negation of individualism; rather, it is the recognition of the limited character of the possibilities of the individual, of which limited possibilities whittle away the individual’s self-sufficiency.\textsuperscript{629}

As such, the limitations of the individual show the value of African communalism.\textsuperscript{630} It also shows that the defining characteristic of an African society is its communal nature.\textsuperscript{631} Similarly with regard to the distinction between African communitarianism and western individualism, Cobbah points out the importance of groupness, sameness and commonality in African communities.\textsuperscript{632} Of equal importance is the sense of cooperation, interdependence and collective responsibility expected of members of the community.\textsuperscript{633} The social organisation of an African community focuses on the family and the kinship system.\textsuperscript{634} The family is described in the UDHR as the natural and fundamental group or unit of a community.\textsuperscript{635} Within western society it is the nuclear family, which is widely different from the extended family unit that exists in traditional African society.

\textsuperscript{628} Ibid.
\textsuperscript{629} Gyekye 156. Although Gyekye illustrated the role of the individual through Akan thought this can be related to the limited possibilities of an individual in other African societies because as stated in one of Gyekye’s proverbs “One finger cannot lift up a thing.”
\textsuperscript{630} Ibid.
\textsuperscript{632} Cobbah 1987 HRQ 320. See also Ibhawon 2001 NQHR 53.
\textsuperscript{633} Ibid.
\textsuperscript{634} Within African societies, the social significance of kinship is broader in meaning, therefore the concept kinship relates to relationships between individuals through birth, blood (descent lines) or through relationships with someone outside of the family, but recognised as full family members. See Cobbah 1987 HRQ 320; Ayisi An Introduction to the Study of African Culture East African Educational Publishers Ltd 1997 17-18; Tegan Kinship Systems in Stanton (ed) Cultural Sociology of the Middle East, Asia, and Africa: An Encyclopedia 2012 161-162.
\textsuperscript{635} Article 16 (3) of the UDHR.
In addition, the communal and kinship systems that exist in African society determine an individual’s roles and responsibilities. These roles represent rights which each member must possess based on his obligations and corresponding duties, although with regards to the concept of rights, Donnelly shares a contrary view as she argues that, “traditional” societies do not recognise the concept of rights inherent in a human being. Donnelly further argues that:

A concern for human dignity is central to non-western cultural traditions, whereas human rights, in the sense in which westerners understand that term-namely, [universal] rights held simply by virtue of being a human being [not community] -are quite foreign to, for example, Islamic, African, Chinese and Indian approaches to human dignity.

However, El-Obaid and Appiagyei-Atua have argued that contrary to this view, all societies, irrespective of their level of development, have a concept of rights, as they are essential for the strengthening of all societies and the achievement of human development and human dignity. Ibhawon shares a similar view and states that:

“…the right of one kinship member was the duty of the other and the duty of the other kinship member was the right of another. Although certain rights attached to the individual by virtue of birth and membership of the community, there were also corresponding communal duties and obligations. This matrix of entitlement and obligations, which fostered communal solidarity and sustained the kinship system, was the basis of the African conception of human rights.”

This African conception of human rights is also reflected in the African Charter, specifically in the preamble, Articles 18 and 27 (2). The latter states that “the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.” According to Mutua, Article 27 (2) provides an example of indirect duty which limits certain rights of an

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636 Cobbah 1987 HRQ 321.
637 Ibid.
638 Donnelly 1984 HRQ 404.
641 Ibid., p.832.
642 Ibhawon 2001 NQHR 54.
individual. He states further that this duty “recognises the practical reality that in African societies... individual rights are not absolute.” In other words, the focus of communal rights and duties is not for the individual to fulfil the self.

Further distinctions between western and African societies are also shown in Cobbah’s analysis of Sudarkasa’s complexity of rights and duties based on four underlying principles. The principles of respect, restraint, responsibility and reciprocity are important in determining appropriate behaviour within an African society. Although these principles are important and essential values in communalism and within African societies, they can also be related in a negative way to the circumstances that surround harmful cultural practices.

Respect is a very important principle for appropriate standards of behaviour within an African family or culture. The communal nature and hierarchical structure of the family emphasise the importance of this principle. It is also evident in most child marriage cases, as it is often difficult for a girl-child to reject the command of her parents or family elders to marry at an early age as this is considered disrespectful. Cobbah confirms this in his statement that: “It has been said that the African child learns to respect his [her] elders even before he [she] learns to speak”.

The principle of restraint makes communalism possible within African society. This is because an individual is restricted within the group or family to which he or she

644 Ibid.
645 Ibid.
647 Ibid.
648 Ibid.
649 Ibid.
651 Cobbah 1987 HRQ 321.
652 Ibid.
belongs and the individual’s rights are based on the requirements of the group. For child marriage cases this restriction is evident, for example, where a girl-child sacrifices her freedom and quality of life for the bride price and financial benefit of her family members.

The principles of responsibility and reciprocity can be linked to the communal nature of a traditional African family. Responsibility becomes a burden of obligation from one family member to another which in turn can lead to reciprocity of obligation or other forms of generosity. This can also be related to child marriage cases where a girl-child carries the responsibility of being married in order to fulfil the obligation of the family honour or financial benefit. She also fulfils the reciprocity of the responsibility of care that the parents have given her.

3.4.2 Striking a balance with cultural legitimacy of human rights

Despite an analysis of these broad distinctions, to what extent can African traditions and values accept human rights? Or to what extent can human rights co-exist with African cultural practices? There is growing consensus on the need to find a balance in order to reconcile the contradictions between the theory and practice of human rights and the promotion of culture. This is especially true with regard to individual human rights standards, guaranteed at international and national levels, which conflict with collective cultural rights, religious beliefs and the orientations of people within a given culture. According to An-Na’im, certain standards of human rights are

653 Ibid; See also Zechentner 1997 Journal of Anthropological Research 337. Zechentner stated that the degree of individual freedom may vary according to the socioeconomic organisation of a culture. As an individual in a non-stratified communitarian society many have more access to freedom from group in comparison to an individual in a stratified communitarian society.


655 Cobbah 1987 HRQ 322.

656 Ibid.


658 Ibid.
frequently violated because they are believed to not be culturally legitimate within a given society.\textsuperscript{659}

An-Na‘im has discussed largely the role and significance of cultural legitimacy as a ‘positive strategy’ for the observance of human rights standards.\textsuperscript{660} He defines cultural legitimacy as “the quality or state of being in conformity with recognised principles or accepted rules and standards of a given culture.”\textsuperscript{661} Therefore, within a given culture, the distinguishing factor for cultural legitimacy will be the “authority and reverence derived from the internal validity” of the people of that culture,\textsuperscript{662} as they are more likely to believe and observe standards that exist within their culture.\textsuperscript{663} An-Na‘im further explains that:

Given the organic relationship between culture and human behaviour, any system of human rights standards is more likely to be observed in practice if its norms are perceived by the people concerned as valid and legitimate in terms of their own culture. That is to say, the more human rights norms are accepted and internalised by a particular population as an integral part of their local culture, the more that population will articulate and implement those norms in daily practice, including action to ensure enforcement in cases of violations of those norms.\textsuperscript{664}

Consequently, this argument further confirms that practical applications of human rights alone cannot resolve the conflict between human rights and culture especially within African societies. Hence, there is need for children’s rights standards to have a cultural experience that will provide a better chance at ensuring the protection of children from various human rights violations, as well as reduce the debates of western values having dominance over African values.\textsuperscript{665}


\textsuperscript{660} Ibid., p. 20.

\textsuperscript{661} An-Na‘im \textit{Human Rights in Africa Cross-Cultural Perspective} 336.

\textsuperscript{662} Ibid. See also Kaimé \textit{African Charter on the Rights and Welfare of the Child} 36-37.

\textsuperscript{663} An Na‘im \textit{Human Rights in Cross-Cultural Perspectives: A Quest for Consensus} 20.


Therefore “internal cultural discourse” and “cross-cultural dialogue” are recommended as practical strategies to achieving cultural legitimacy.\textsuperscript{666} Internal cultural discourse is aimed at “the struggle to establish enlightened perceptions and interpretations of cultural values and norms [practice]”,\textsuperscript{667} in order to reach an agreement on the scope and method of implementing the rights of the girl-child within that society.\textsuperscript{668} While cross-cultural dialogue aims to broaden and deepen international (or rather intercultural) consensus”,\textsuperscript{669} especially on the rights of women and girls.

For example in the context of child marriage, internal cultural discourse will involve the participation of different stakeholders such as government officials, family heads, religious/traditional leaders, and affected groups of women/girls to challenge existing harmful cultural practices or the interpretation of the practice.\textsuperscript{670} This process can also involve constructive dialogue, negotiations, persuasion\textsuperscript{671} and adjustments based on the flexibility that is permitted within the culture, in order to present an alternative choice(s) to the harmful cultural practice.\textsuperscript{672} Although traditional African cultures are often conveyed as “monolithic and unchanging”, this is not the case as culture is subject to change depending on internal or external circumstances.\textsuperscript{673}

Conversely, writers such as Reilly criticise An-Na’im’s cultural legitimacy approach as posing a threat to women’s human rights.\textsuperscript{674} She argues that the cross-cultural dialogue suggested still has a hierarchical and communitarian undertone,\textsuperscript{675} which can

\begin{itemize}
\item \textsuperscript{666} An Na’im \textit{Human Rights in Cross-Cultural Perspectives: A Quest for Consensus} 21.
\item \textsuperscript{667} \textit{Ibid.}, p. 27.
\item \textsuperscript{668} \textit{Ibid.}, p. 21.
\item \textsuperscript{669} \textit{Ibid.}, p. 27.
\item \textsuperscript{671} An-Na’im \textit{African Islam and Islam in Africa: Encounters between Sufis and Islamists} 86-87.
\item \textsuperscript{672} An-Na’im, \textit{Human Rights in Cross-Cultural Perspectives: A Quest for Consensus} 27.
\item \textsuperscript{673} Ibhawon 2000 \textit{HRQ} 841.
\item \textsuperscript{674} Reilly \textit{Women’s Human Rights} 2009 24.
\item \textsuperscript{675} \textit{Ibid.}
\end{itemize}
result in monopolised contributions and ideas of privileged elites of that culture.\textsuperscript{676} However, An-Na’im recognises this criticism and states that:

\begin{quote}
Given the extreme importance of cultural legitimacy, it is vital for disadvantaged individuals and groups to challenge this monopoly and manipulation. They should use internal cultural discourse to offer alternative interpretations to solutions in support of their own interests. This internal discourse must utilize intellectual, artistic, and scholarly work as well as various available forms of political action.\textsuperscript{677}
\end{quote}

Therefore, as a contribution to this discourse on cultural legitimacy of human rights, consideration is given to the possibility of codifying the outcomes of internal cultural discourse as written laws. Codification according to Meyer means “the formulation and reduction to a written instrument of rules of law that elaborate established doctrines and precedents, which, even if non-binding, have legal consequences.”\textsuperscript{678}

Generally, African customary laws are largely unwritten. However, written customary laws are often criticised generally as excluding some of the principles and values of unwritten customary law and preventing a unified understanding of customary law.\textsuperscript{679} An example of a written customary law is the KwaZulu Act on the Code of Zulu Law (KwaZulu Act)\textsuperscript{680} and Natal Code of Zulu Law (Natal code),\textsuperscript{681} which became laws during the colonial period.\textsuperscript{682} However these codes still have contentious issues on unfair discrimination of women\textsuperscript{683} which are inconsistent with the provisions of the South African Constitution.\textsuperscript{684}

\begin{thebibliography}{99}
\bibitem{676} Ibid.
\bibitem{677} An-Na’im Human Rights in Africa Cross-Cultural Perspective 27-28.
\bibitem{678} Meyer “Codifying Custom” 2012 University of Pennsylvania Law Review 1003.
\bibitem{680} The KwaZulu Act on the Code of Zulu Law, 16 of 1985.
\bibitem{681} Proclamation R151 of 1987.
\bibitem{682} Goodsell 2007 Brigham Young University (BYU) Journal of Public Law 129.
\bibitem{683} Bennet and Pillay “The Natal and Kwazulu Codes: The Case for Repeal” 2003 South African Journal on Human Rights (SAJHR) 217- 238; See also Gumede v President of the Republic of South Africa and Others (CCT 50/08) [2008] ZACC.
\bibitem{684} Sections 2 & 8 (1) of the Constitution of the Republic of South Africa, 1996.
\end{thebibliography}
Nonetheless as Herskovitz rightly states “culture is flexible and holds many possibilities of choice within its framework.” As such, the sense in which the term codification is being considered has to do with that part of customs and traditions of which clarification has been given with no vagueness or ambiguity. This is with regard to bringing people together within a culture to initiate a process of change of a cultural tradition through internal cultural discourse in a highly patriarchal African society, and arrive at an alternative view and outcome that is culturally legitimate.

Therefore, it is suggested that consideration be given to codification of the outcome/choices reached through internal cultural discourse. The relevance of codification will be to further deepen consensus for culturally legitimate international human rights standards; to promote compliance due to fear of sanction for violating the law; to help prevent any attempt at self-interested monopolising or manipulating of the choices from internal dialogue, as well as further strengthening disadvantaged individuals and groups especially women and girls to challenge any attempt at any harmful practice or manipulation thereof. In a case where internal cultural discourse does not ultimately result in codification or adoption of a statute, it may generate policy(ies) or good practice(s) for future application on dealing with harmful cultural practices like child marriage.

3.5 Feminism, Human Rights and Culture

3.5.1 The Nature of Feminism

Feminism is described as a social movement whose basic goal is addressing equality between men and women. Historically, the struggle for female equality began in

688 Ibid.
691 Ibid.
Europe, America and Japan in the nineteenth century with the first wave,\(^6\) second wave\(^6\) and third wave feminists.\(^5\) Modern feminism focuses on the significance of gender, societal inequalities and the need for the liberation of women,\(^6\) as well as the need to make women and men more equal legally, socially, and culturally.\(^6\)

An important feature of feminism, according to Fineman, “is that it represents the integration of practice and theory”.\(^6\) In other words, feminism presents an analysis of women’s experiences and subordination due to the realities of inequalities and seeks to create a change to liberate women.\(^4\) This is evident with different feminist jurisprudence that covers different theories, strategies and perspectives that represent an analysis and critique of women’s positions in society.\(^4\) According to Fellmeth, all feminist discourse focuses on:

The recognition of a general and undesirable male hegemony that disadvantages women, a commitment to the equality (however defined) of women and their perspectives as an empirical or normative matter, and concentration on the methods of bringing about de facto as well as de jure equality.\(^4\)

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\(^6\) Ibid., p. 1-5. Between the nineteenth century and early twentieth century, the first wave feminist (also referred to as suffragists) movement fought for the legal status of women in society through liberal political philosophy as the concept of equality then did not include all women irrespective of their social status. Their fight for equal legal rights was central to the right to vote or suffrage. This fight led to the attainment of other rights (rights to property, earnings and education) which helped to improve the status of women in society and also led to further feminist movements.

\(^5\) Ibid., p. 3-4. The publication of Simone de Beauvoir’s The Second Sex in 1949 led to the gradual development of the second wave feminist movement in the late 1960s. The publication focused on showing the position of women in western countries and argued that “men set the standards and values, and women are the Other who lack the qualities the dominant exhibits. Men are the actors, women the reactors. Men thus are the first sex, women always the second sex”. Thus the second wave feminist movement focused on identifying and analysing the difference between men and women with interpersonal, political and legal approaches to dealing with the differences.

\(^4\) Ibid., p. 4. The third wave feminist movement began in the 1990s.


\(^9\) Lorber 4.


\(^5\) Ibid.


\(^4\) Fellmeth 2000 HRQ 664. However, Fellmeth pointed out that even though this is a general understanding of most feminist literatures, it should not be considered that all literatures will have
This recognition is based on the fact that women and female children suffer from oppression and inequality based on their gender identity as well as other intersecting identities such as race, age, religion and culture. Lorber also points out that, “gender inequality is built into the structure of the gendered social order because the two statuses - women and men - are treated differently and have significantly different life chances”. This is true as these forms of gender inequality are often seen as acceptable by social, cultural and religious institutions. Lorber further notes that:

The main point feminists have stressed about gender inequality is that it is not an individual matter, but is deeply ingrained in the structure of societies. Gender inequality is built into the organisation of marriage and families, work and the economy, politics, religions, the arts, other cultural productions, and the very language we speak.

The practice of child marriage is an example of this ingrained structure of inequality where a woman is vulnerable to sexual and domestic exploitation. This inequality is also recognised in the laws of some States as they are gender biased in substance and enforcement. As stated above some African States have minimum age of marriage that is either discriminatory or below 18 years.

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702 Ibid., p. 660.
704 Lorber 7.
705 Ibid., p 6.
707 Fellmeth 2000 HRQ 660.
The experiences of women and the struggle for equality as a response to this disadvantaged position such as stated above, have been characterised in different feminist theories, in particular, popular theories such as liberal, cultural and radical feminist theories. African societies in general are patriarchal in nature and radical feminist theory seems more relevant as it theorises “the way patriarchy controls all women”.\textsuperscript{709} This is especially true with regard to men’s pervasive oppression and exploitation of women in private as well as public occurrences,\textsuperscript{710} as seen in child marriage cases. Lorber points out that some Radical feminists argue that patriarchy is hard to eradicate particularly within African societies because of male dominance and a deeply embedded belief that women are different and inferior.\textsuperscript{711}

3.5.2 Feminism, human rights and culture

Women’s rights have gained increased focus in international and regional human rights debates. The recognition of the legal status of women and their human rights is reflected in various international and regional human rights instruments. These include, among others: UDHR;\textsuperscript{712} CEDAW (1979);\textsuperscript{713} the International Covenant on Civil and Political Rights ICCPR (1966);\textsuperscript{714} the International Covenant on Economic, Social and Cultural Rights ICESCR (1966);\textsuperscript{715} the Vienna Declaration and Programme of Action;\textsuperscript{716} the African Charter on Human and Peoples Rights;\textsuperscript{717} and the Protocol to African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2003).\textsuperscript{718}

\textsuperscript{709} Lorber “The Variety of Feminisms and their Contribution to Gender Equality” 16-17.
\textsuperscript{710} Ibid.
\textsuperscript{711} Ibid.
\textsuperscript{712} UDHR op. cit. n. 8 above.
\textsuperscript{713} CEDAW op. cit. n. 46 above.
\textsuperscript{716} Vienna Declaration, op. cit. n. 67 above.
\textsuperscript{717} African Charter, op. cit. n. 56 above.
\textsuperscript{718} African Women’s Protocol op. cit. n. 49 above.
International human rights protection is often relied upon by many feminists and child’s rights activists to oppose cultural relativism.\(^719\) This is so as its protection as a strategy outweighs its weakness,\(^720\) and it is considered a necessary option to obtain global attention to the needs of women and female children especially against harmful cultural practices.\(^721\) This is evident in the increasing recognition and attention to gender issues at international and national levels.\(^722\)

Notwithsanding this universal protection, many feminists still challenge and criticise the position of women under international human rights frameworks. Bunting notes that feminists “see ‘universality’ as deeply gendered and women's concerns as largely marginalized in the international human rights community.”\(^723\) For instance, Schmidt argues that “male centric terminology”, particularly in the UDHR, neglected the representation, integration and concerns of women.\(^724\) Charlesworth, on the other hand, is of the view that had women been more involved in the development of international human rights, it would have been constructed in a gender sensitive way and more responsive to the violations and oppressions that dominate women's lives.\(^725\) However, Brems rightly states that these criticisms are to ensure “all strands of feminist critique aim at the inclusion of women in the human rights system”.\(^726\)

Similarly, on the ineffectiveness of international human rights frameworks in redressing these violations and oppressions, Cook\(^727\) argues that efforts to redress these problems and effectively enforce human rights are met with complex challenges which vary from one country to another. She explains further that women are in a


\(^{720}\) Brems 1997 *HRQ* 138-139.


\(^{722}\) For example, through recommendations, publications and conferences. See UN Human Rights Office of High Commission “Women’s Rights Are Human Rights” 2014 UN Publications HR/PUB/14/2; UN Conference on Sustainable Development (Rio + 20) 2012.

\(^{723}\) Bunting 1993 *Journal of Law and Society* 8.

\(^{724}\) Schmidt “Women’s Rights Evaluating the Application of Gender-Specific Rights” 2010 Undergraduate Transitional Justice Review 296.

\(^{725}\) Cook 1993 *HRQ* 235.

\(^{726}\) Brems 1997 *HRQ* 141.

\(^{727}\) Cook 1993 *HRQ* 231.
disadvantaged position in society with challenges that range from socio-economic problems to a lack of understanding of the context of women’s subordination.\textsuperscript{728} Therefore, as a way forward, Cook suggests that achieving the goal of women’s equal human rights will involve a mix of strategies.\textsuperscript{729} Such strategies as improvement in education and training in human rights laws and processes, providing women with legal services, developing research and fact-finding capacities and promoting representatives from feminist’s groups in human rights committees, courts and commissions, are suggested.\textsuperscript{730}

In the context of cultural relativism, Brems also argues that feminist’s view of culture is focused on the continuation of male dominance and women’s oppression.\textsuperscript{731} However, black feminists such as Tamale\textsuperscript{732} take a different approach in their contribution to feminist discourse. Tamale explores the relationship between African feminism and African culture through women’s sexuality instead of the polar opposites of gender and culture that is mostly emphasised by other feminists.\textsuperscript{733} She argues that:

\begin{quote}
The war cry for feminists in Africa is: “pay attention to gender”, while that of the relativists is: “pay attention to culture”. When one recognises that the institution of gender is constructed within the context of ‘culture’, and the two are closely linked, one begins to appreciate the potential for the harmonisation of the chanting of the war cries. Indeed, the close connection between gender, sexuality, culture and identity requires that African feminists work within the specificities of culture.
\end{quote}

However, many feminists view culture in a negative way due to evidently negative practices and consider these practices a challenge to the effective implementation and enforcement of human rights.\textsuperscript{735} In this regard, Tamale argues that such a view may
obscure any potential of culture being an emancipatory tool to enhance women’s lives. Therefore focus should be on “careful and creative deployment of the more familiar cultural norms and values,” in order to achieve the goal of equality and total liberation of women.

3.7 The Role of Practical Non-Legal Strategies and Institutions in supporting the Human Rights Frameworks

3.7.1 Education

The role of education as a key strategy to ending child marriage is one of the most important, as education is “a human right in itself and an indispensable means of realizing other human rights.” As stated above, the lack of access to education is a major factor reinforcing the practice of child marriage. The role of education is critical to ending child marriage and to transforming the life of a girl-child, such that she acquires the knowledge needed to empower her to have a better chance at life. Education is also critical for knowledge-building, to provide clarity in conflict situations such as in child marriage cases in order to foster dialogue and respect for diversity.

The strength of education in making huge positive change is why education has been identified as one of the key goals which the Millennium Development Goals (MDGs) seek to achieve. The second goal of the MDGs aims to achieve universal primary education.

736 Ibid.
737 Ibid.
739 Lane “Stealing Innocence” 2011 34.
741 IPPF “Ending Child Marriage: A Guide for Global Policy Action” 2006 15. Available at: http://www.refworld.org/docid/48abd594c.html (accessed 18-02-2015). Millennium Development Goals MDGs are eight goals which 191 UN member states signed in 2000 and agreed to achieve by 2015. These goals are: to eradicate extreme poverty and hunger; to achieve universal primary education; to promote gender equality and empower women; to reduce child mortality; to improve maternal health; to combat HIV/AIDS, malaria and other diseases; to ensure environmental sustainability; and to develop a global partnership for development. See also Millennium Development Goals (MDGs). Available at: http://www.who.int/topics/millennium_development_goals/about/en/ (accessed 22-04-2015).
education, and to ensure that by 2015, children are able to complete a full course of primary schooling and progressively develop through a sustainable system to reach their full potential. Therefore, in order to achieve the objective of delaying marriage through education, Brown suggests educational policies with “tipping point strategies” be put in place. Such strategies as reducing school fees, provision of transportation to school, building schools closer to those communities with high prevalence’s of child marriages, providing support and incentives in the form of textbooks, uniforms and other relevant materials and services such as free meals and basic health facilities.

Other strategies include incentives such as stipends, bursaries for the girl’s education and/or conditional agreements on income or offsetting financial pressures if a girl is kept in school. This is especially important for the parents, family members and other beneficiaries of child marriage. An example is the Berhane Hewan programme in Ethiopia, this is an income earning project for families who send their daughters to school and upon graduation, the girl and her family are presented with a pregnant ewe.

However, in as much as effort is being made to put more girls in school, various reports show that many girls are still out of school and faced with attacks that prevent them from having access to education. In particular is the attack by Islamic extremist groups in different countries which has affected the education of some girls. Many

746 Ibid.
749 Ibid.
attacks involve burning schools, killing, injuring and kidnapping of students and teachers.\textsuperscript{750} This has left many schools deserted for fear of future attacks.\textsuperscript{751} An example is the abduction of more than 200 school girls by Boko Haram in Nigeria, which has prevented access to education and has forced the girls into marriage.\textsuperscript{752} The impact of these attacks has also caused some parents to stop sending their children to school due to fear and displacement.\textsuperscript{753} The recent burning of 17 schools by protesters in Vuwani, in the Vhembe District of Limpopo, in South Africa provides a similar example of attacks on schools and access to education.\textsuperscript{754}

### 3.7.2 The role of various key stakeholders

#### 3.7.2.1 Family members

Within the African context, family members generally include parents, grandparents, brothers, sisters, uncles, aunts, cousins or a person who assumes parental responsibilities and rights with respect to the child or who has established a family relationship with the child.\textsuperscript{755} The decision to give a girl out in marriage at an early age is often made by family heads, while other family members are either beneficiaries of the financial gains of child marriages or have cultural attitudes that see child marriage as a norm.\textsuperscript{756}

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\textsuperscript{750} Ibid., p. 8.

\textsuperscript{751} Ibid.


\textsuperscript{753} Ibid.


\textsuperscript{755} Section 1(1) of South Africa's Children's Act 38 of 2005.

\textsuperscript{756} Malhotra et al “Solutions to End Child Marriage: What the Evidence Shows” 13.
Therefore the role of every family member is important to change cultural attitudes and cultural practices that promote child marriage.\textsuperscript{757} There is need to educate parents, family members and other beneficiaries of child marriage on the importance of delayed marriage, the impact of child marriage and on the need to change attitudes on the traditional roles and expectations of a girl-child.\textsuperscript{758} There is also a need to develop programmes and activities on education and awareness for the parents, family members and the community in order to prevent stigmatisation and sanctions on families for failing to meet societal or cultural expectations in terms of early marriage.\textsuperscript{759} Such programmes and strategies can be a one on one meeting with parents and family members; education sessions on alternatives to the practice of child marriage; delayed marriage of the girl-child; sexual reproductive health campaigns; public announcements and pledges from parents, family members/heads and community members. In addition, there is a need to educate children, especially young boys, to grow and develop a deeper appreciation of human rights values.\textsuperscript{760}

\section*{3.7.2.2 Traditional and religious leaders}

Traditional leaders, chiefs, counsellors and elders are recognised as custodians of culture, customs, traditions and values in their communities.\textsuperscript{761} They provide information on the source of a tradition, custom or practice as well as interpret and enforce same for the whole community.\textsuperscript{762} Traditional leaders have a compelling authority in their communities such that they can validate the practice of early marriages.\textsuperscript{763} Religious leaders equally hold great influence within the community and

\begin{flushright}
\textsuperscript{757} \textit{Ibid.}
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\textsuperscript{759} Malhotra et al “Solutions to End Child Marriage: What the Evidence Shows” 13.
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\textsuperscript{760} Rembe 2002 Connecticut Journal of International Law 307-308.
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\begin{flushright}
\textsuperscript{762} \textit{Ibid.} This institution is widely recognised especially within African societies and also within modern Constitution like the South African Constitution (section 211-212).
\end{flushright}

\begin{flushright}
\textsuperscript{763} \textit{Ibid.}
\end{flushright}
in the interpretation of religious beliefs which can influence parents in giving their
daughter out early or in a forced marriage.\textsuperscript{764}

These institutions are widely recognised across African societies, such as South Africa
where the institution of traditional leadership is constitutionally recognised.\textsuperscript{765}
Therefore, traditional and religious leaders have a key role to play in relation to the
protection of children in communities.\textsuperscript{766} As stated above, within communities and
even among traditional/religious leaders lie deeply entrenched perceptions,
orientations and cultural attitudes which justify child marriages and other gender
related issues of violence and discrimination.\textsuperscript{767} This is due to a fear that promoting
the rights of women and girls is an attempt at men losing their perceived authority over
women.\textsuperscript{768} However, there is a need to change these perceptions, orientations and
cultural attitudes through such strategies as education, dialogue, and awareness, and
to share information on the rights of the girl-child, the consequences of child marriage
and the importance of gender equality.\textsuperscript{769} There is also a need to create a forum for
dialogue between traditional/religious leaders and community members, both men and
women, on the rights of women and girls and discriminatory cultural practices.\textsuperscript{770}

There is a need for traditional leaders, religious leaders, chiefs and family heads to
make public announcements and pledges condemning child marriages; to make every
effort to stop any attempt by community members engaging in child marriages; and to
provide support and mobilisation for change of cultural norms of violence and
discrimination against women and girls.\textsuperscript{771} An example of cultural change is the recent

\textsuperscript{764} Malhotra et al “Solutions to End Child Marriage: What the Evidence Shows” 13; Martin and Mbambo
An Exploratory Study on the Interplay between African Customary Law and Practices and
Children’s Protection Rights in South Africa 2011 81-82.

\textsuperscript{765} See section 211-212 of the South African Constitution.

\textsuperscript{766} Martin and Mbambo An Exploratory Study on the Interplay between African Customary Law and

\textsuperscript{767} Discussed in Chapter Two under caused of child marriage. See also IPPF “Ending Child Marriage:


\textsuperscript{770} Ibid.

\textsuperscript{771} Martin and Mbambo An Exploratory Study on the Interplay between African Customary Law and
report on a female Chief Inkosi Kachindamoto, a senior traditional leader in Malawi who annulled 330 child marriages in the district of Dedza, suspended the village heads that consented to the child marriages, and sent the girls back to school.\textsuperscript{772} This example shows a transformation from many years ago, when discourse on child marriage was of a sensitive nature and people in traditional/religious positions rarely attempted to stop such practices due to backlash from their community or its environs. However, this gradual change is not enough to address the probability of Africa having the highest number of child marriages in the world by 2050.\textsuperscript{773}

As such, there is need for more men who are influential traditional/religious leaders and chiefs to make public announcements and pledges within the community in order to achieve a cultural change.\textsuperscript{774}

3.7.3 Social and media awareness

Awareness raising campaigns are recognised as a positive practical approach to stopping the practice of child marriage.\textsuperscript{775} The level of importance of awareness is also indicated in human rights instruments, in particular the African Women’s Protocol. Article 5 (a) of the Women’s Protocol provides that with regard to the elimination of harmful practices, States parties are obligated to take all necessary legislative and other measures including the “creation of public awareness in all sectors of society…through information, formal and informal education and outreach programmes.”\textsuperscript{776} Many international and local NGOs, civil societies and government agencies have engaged in awareness raising through different programs, strategies

\textsuperscript{772} Special Representative of the Secretary-General (SRSG) Santos Pais Welcomes the Decision by Senior Traditional Leader to Annual 330 Child Marriages in Malawi, available at: https://srsrg.violenceagainstchildren.org/story/2015-09-02_1371 (accessed 7-12-2015).

\textsuperscript{773} UNICEF “A Profile of Child Marriage in Africa” 3.


\textsuperscript{775} Lane “Stealing Innocence” 2011 33; Malhotra et al “Solutions to End Child Marriage: What the Evidence Shows” 6.

\textsuperscript{776} Article 5 (a)of the Women’s Protocol.
and initiatives on education, information sharing, skills development and mobilisation of parents and communities.\textsuperscript{777}

The whole world now lives in an era of digital technology, with the use of internet, mobile phones, digital cameras and other tools to collect, store and share information digitally.\textsuperscript{778} In particular, there is growing use of social media by many people in different sectors and societies.\textsuperscript{779} Social media is an online transformative medium for communicating, collecting and sharing information.\textsuperscript{780} It is also an effective method of raising awareness on contemporary issues across different societies to as many people as possible.\textsuperscript{781} Examples of popular platforms recognised on social media include Facebook, Youtube, Twitter, Google+, and Instagram.\textsuperscript{782} In addition, there are also online newspaper websites and blogging websites that provide daily news reports.

The burden of creating awareness on ending harmful practices now lies with every individual in various capacities such as the press, academics, entertainers, NGOs, UN and AU bodies and agencies.\textsuperscript{783} As social media is used by different groups of people, such as citizens, government agencies and NGOs, its role and relevance are significant to reinforcing human rights laws and addressing child marriage issues in a number of ways.

\textsuperscript{777} Malhotra et al “Solutions to End Child Marriage: What the Evidence Shows” 11-12; Lane “Stealing Innocence” 2011 33.


\textsuperscript{780} Ibid.

\textsuperscript{781} Ibid.

\textsuperscript{782} Ibid., p. 8-10; Lupton 9.

Firstly, social media is a strategy that has grown and contributed to improving information sharing and knowledge as well as popularising discussions on contemporary issues that affect women and children in Africa.\(^\text{784}\) It is a mechanism that has “the ability to catalyse citizens voices and collective action” in order to hold the government accountable or provide feedback.\(^\text{785}\) In other words, people react to news, reports and information that circulate on social media and they respond and react with emotive comments and reactions in the form of online protests or demonstrations in order for the government to improve on its capabilities.\(^\text{786}\)

Secondly, social media is recognised as a medium for ‘naming and shaming’ offenders and perpetrators of human rights violations.\(^\text{787}\) This is confirmed by Lupton who postulates that:

> The news media have traditionally exercised disciplinary power by ‘naming and shaming’ people who have come before the courts for criminal acts or otherwise gained public attention for wrongdoing. Now that many newspapers publish their news reports digitally, there is the potential for minor wrongdoings, offences [child marriage] and misdeeds to be reported online, circulated from the original source and remain in a digital format for perpetuity. Once an individual’s name is linked many times on digital networks with criminal or antisocial behaviour, this association is impossible to eradicate.\(^\text{788}\)

Different online reports often include photographs and full identification details of the perpetrator of human rights violations. Social media as a medium for shaming and naming is mainly to deter people who engage in the practice of child marriage without impunity.

Although social media has a lot of benefits, a major challenge is its inaccessibility especially to those in poor rural areas, which is mainly due to the financial cost of the facilities and availability of internet access.\(^\text{789}\) There is also the challenge of spreading

\(^{784}\) USAID “Social Networking: A guide to Strengthening Civil Society through Social Media” 8-9.


\(^{786}\) Ibid., p. 175.

\(^{787}\) Lupton 161.

\(^{788}\) Ibid.

the wrong information or misinformation.\footnote{Ibid., p. 150.} However, these are areas that each government needs to address in terms of providing communication facilities such as phones and internet access to poor rural communities.\footnote{Ibid.} There is also a need to engage in fact-checking of information that circulates on the internet\footnote{Ibid.} especially with regard to addressing incidences of harmful practices. Each government or agency and international human rights organisation must make intensive efforts to share information on the various laws that protect the rights of the girl-child as well as the impact of the practice of child marriage on the girl-child within a society.

### 3.8 Summary

This chapter presented a conceptual, theoretical and philosophical approach to the controversial debate on universality of human rights and cultural relativism. The analysis provided focused on the arguments in defence for and against universality and relativism from the unique works of different scholars, placing into consideration the question of how culture and human rights can be reconciled in order to guarantee the rights of the girl-child, what practical strategies that are needed to promote such reconciliation in the context of child marriage.

The problem of child marriage is recognised globally as a growing concern for present and future generations of girls in Africa and the complexities surrounding the practice are very challenging. The debates surrounding the universality of human rights and cultural relativism provide good foundations for clarity and understanding of the opposing concepts although efforts to resolve the conflicts between the fundamental rights of a girl-child, and the promotion of cultural practices goes beyond this debate.

One important point that is obvious, is that realising the protection of the universally-affirmed human rights of the girl-child in Africa does not involve a one-way solution. The process of cultural legitimacy of human rights is very important for the success of the practical implementation of children’s rights in Africa. The role of education, dialogue and awareness equally cannot be ignored because they offer positive
approaches to changing deeply entrenched cultural perceptions and attitudes within many African States.
CHAPTER FOUR

HUMAN RIGHTS FRAMEWORKS, SPECIAL MECHANISMS AND INITIATIVES
RELATIVE TO CHILD MARRIAGE IN AFRICA

4.1 Introduction

The previous chapter considered the dynamics in the relationship between the universality of human rights and cultural relativism in the context of child marriage in Africa. It provided insight into the contradictions that exist between human rights and culture in the context of child marriage, and into the practical non-legal measures needed to enhance the support for the human rights framework and changes in cultural perceptions and attitudes.

The purpose of this chapter is to examine the core international and regional human (children’s) rights instruments, namely the CRC, African Children’s Charter and the African Women’s Protocol. The rationale behind this examination is to determine the level of significance of the legislations and the extent to which they are capable of protecting the rights of the girl-child, as well as obstacles limiting the effectiveness of the rights and obligations provided in these legislations.

Following reports and statistics on the high prevalence of child marriage in the region and the grave consequences of the practice which affect not only the girl-child but the development of each African State, there is urgency in the region to increase awareness on ending child marriage. This chapter therefore considers the relevant human rights bodies and specialised agencies responsible for monitoring the compliance of State parties to those rights and obligations in the CRC, and the African Children’s Charter and African Women’s Protocol. These human rights bodies include the Committee on the Rights of the Child; the African Committee of Experts on the Rights and Welfare of the Child; the African Human Rights Commission; the Special

Representative of the Secretary-General on Violence against Children; Special Rapporteur on the Rights of Women in Africa and the African Union Special Rapporteur on ending child marriage in Africa.

The role, relevance and involvement of these mechanisms in promoting and protecting the rights of women and girls in child marriage are also examined. However, special focus is placed on AU mechanisms, as well as the AU initiatives in ending child marriage in Africa.

4.2 The Convention on the Rights of the Child (CRC)

The history of the drafting of the CRC presented the need to provide more comprehensive and specific international children’s rights. The initiative started with the development of children’s rights from the Declaration of the Rights of the Child adopted in 1959, which is recognised as the “first major international consensus on the fundamental principles of children’s rights.” To this has been added the CRC as well as other human rights instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on

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796 Ibid. The origin of the Declaration of the Rights of the Child stem from the adoption of the Geneva Declaration by the League of Nations (LON) in 1924 a document which provided specific provisions on the rights of the child and the responsibilities of adults to children.


Civil and Political Rights (ICCPR)\textsuperscript{799} which apply to all human beings, adults and children alike.\textsuperscript{800}

Presently, the CRC has been ratified or acceded to by 196 States with the most recent ratification by Somalia on 1 October 2015,\textsuperscript{801} while the United States is a signatory since 1995 but is yet to ratify.\textsuperscript{802} As the first international treaty with specific provisions dealing with children’s rights, the Convention aims to “protect children from a wide range of human rights abuses, and to ensure that children can realise their individual rights, develop to their fullest potential, and contribute to their communities, initially as children and ultimately as adults”.\textsuperscript{803}

In other words, the CRC provides a comprehensive, legally binding framework for children’s rights and protection from human rights abuses.\textsuperscript{804} The Convention has been strengthened by the adoption of the Optional Protocols to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict (OPAC),\textsuperscript{805} the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC),\textsuperscript{806} as well as the most recent Optional Protocol to the Convention of the Rights of the Child on Communications (OPIC).\textsuperscript{807}

\begin{itemize}
\item \textsuperscript{800} Detrick 1. See also Revaz \textit{The U.N Convention on the Rights of the Child: An Analysis of the Treaty Provisions and Implications of the U.S. Ratification} 13.
\item \textsuperscript{802} OHCHR “Status of Ratification Interactive Dashboard”. Available at: http://indicators.ohchr.org/ (accessed 23-10-2015).
\item \textsuperscript{803} Todres, Wojcik and Revaz \textit{The U.N Convention on the Rights of the Child: An Analysis of the Treaty Provisions and Implications of the U.S. Ratification} 3.
\item \textsuperscript{804} Memzur 2008 SAPR/PL3-4.
\item \textsuperscript{805} Adopted by the UN General Assembly Resolution A/RES/54/263 ON 25 May 2000, and entered into force 12 February 2002.
\item \textsuperscript{806} Adopted by UN General Assembly Resolution A/RES/54/263 on May 2000, and entered into force 12 February 2002.
\item \textsuperscript{807} Adopted by the UN General Assembly Resolution A/RES/66/138 on 19 December 2011, and entered into force 14 April 2014.
\end{itemize}
With regard to the protection of the girl-child from early marriage, the CRC does not directly address the practice of child marriage for which it has been criticised.\textsuperscript{808} Although, it does instead address some rights that can be linked to child marriage such as the right to freedom of expression;\textsuperscript{809} the right to be protected from harmful traditional practices; and the right to protection from all forms of violence/abuse.\textsuperscript{810}

At the core of the CRC’s comprehensive provisions are the four cardinal principles of non-discrimination;\textsuperscript{811} the best interest of the child\textsuperscript{812}; the right to life, survival and development;\textsuperscript{813} and respect for the views of the child.\textsuperscript{814} As rightly stated by scholars, these cardinal principles are of great importance to the interpretation and implementation of the provisions of the CRC.\textsuperscript{815} They are equally important when considered in relation to the challenge of child marriage which violates these principles.

Regarding the principle of non-discrimination, Article 2(2) places an obligation on States parties to take appropriate measures to protect children against all forms of discrimination, including on the basis of sex. In other words, the protection in the principle of non-discrimination guarantees respect and equality of opportunity for all, both boys and girls.\textsuperscript{816} However, gender discrimination is a major factor that reinforces the cultural practice of child marriage.\textsuperscript{817}

\begin{itemize}
\item \textsuperscript{808} Memzur 2008 SAPR/PL 20. See also UNICEF “Early Marriage: A Harmful Traditional Practice” 2005 1.
\item \textsuperscript{809} Article 13 of the CRC.
\item \textsuperscript{810} Ibid., Article 19. See also UNICEF “Early Marriage: A Harmful Traditional Practice” 2005 1.
\item \textsuperscript{811} Article 2 of the CRC.
\item \textsuperscript{812} Ibid., Article 3.
\item \textsuperscript{813} Ibid., Article 6.
\item \textsuperscript{814} Ibid., Article 12.
\item \textsuperscript{815} Olowu 2002 IJCR 129; Memzur 2008 SAPR/PL 3.
\item \textsuperscript{816} Olowu 2002 IJCR 129.
\item \textsuperscript{817} Discussed in Section 2.8.4 of Chapter Two.
\end{itemize}
The best interest principle, according to the CRC, shall be “a primary consideration” in addressing issues that deal with all children.\textsuperscript{818} Memzur confirms the importance of this principle as a standard setting measure as he states:

The principle of the best interests of the child connotes the yardstick by which to measure all those actions, laws and policies affecting children. Its transformation into a principle that applies to all actions concerning children, both individually and as a group, is arguably one of the most significant accomplishments of the CRC.\textsuperscript{819}

However, despite the importance of this principle Lloyd criticises its vagueness and the ability to subject the principle to some manipulation particularly in a cultural setting.\textsuperscript{820} Memzur further states that when compared with the provision in the African Children’s Charter which recognises the best interest principle as “the primary consideration”, the phrasing in the African Children’s Charter “elevates its role in the advancement of children’s rights”, as well as in dealing with the human rights abuses and violations surrounding the practice of child marriage.\textsuperscript{821}

The practice of child marriage has grave impacts on the health and development of a girl-child, therefore the right to life, survival and development\textsuperscript{822} is a very appropriate and fundamental principle for the protection of the rights and welfare of the girl-child, and for dealing with the impact of child marriage on the girl-child. Concerning the right to freedom of expression, Olowu elucidates that what is fundamental to this principle is that “children have the right to be heard and to have their views taken seriously in any proceedings affecting them.”\textsuperscript{823} In other words, this principle recognises children as autonomous human beings.\textsuperscript{824} Parental autonomy plays a significant role especially

\textsuperscript{818} Article 3 of the CRC.
\textsuperscript{819} Memzur 2008 23 SAPR/PL 18.
\textsuperscript{821} Memzur 2008 23 SAPR/PL 15 &18.
\textsuperscript{822} Article 6 of the CRC.
\textsuperscript{823} Olowu 2002 IJCR 129.
\textsuperscript{824} Chirwa 2002 IJCR 160.
within traditional African societies,\textsuperscript{825}\ therefore this creates a situation where this principle bears little to no effect in child marriage cases.

Despite these general principles and the comprehensive protection which the CRC seeks to offer, it received numerous criticisms that gradually culminated in the development and adoption of a regional children’s rights treaty.\textsuperscript{826}

### 4.3 The Committee on the Rights of the Child

The Committee on the Rights of the Child (referred to as the ‘CRC Committee’) is established by virtue of Article 43 of the CRC as a monitoring body for the Convention. It was formally established on 27 February 1991,\textsuperscript{827} with the aim of “examining the progress made by State parties in achieving the realization of the obligations undertaken in the present Convention,”\textsuperscript{828} as well as the progress made in the implementation of the Optional Protocols to the CRC,\textsuperscript{829} and fostering international cooperation with multilateral agencies and various countries.\textsuperscript{830}

The Committee comprises of 18 independent experts with “high moral standings and recognised competence” in human rights.\textsuperscript{831} Members are elected based on State party nomination for a term of four years but may be re-elected if re-nominated.\textsuperscript{832} Article 44(1) of the CRC provides that the Committee should monitor the compliance of each State party to the obligations in the Convention through reports submitted to the Committee. The reports are to be submitted by each State party two years after

\begin{itemize}
  \item \textsuperscript{825}Ibid.
  \item \textsuperscript{826}Lloyd 2002 AHRLJ 14-15. The criticisms are highlighted in Section 4.4 of this Chapter.
  \item \textsuperscript{827}Viljoen International Human Rights Law in Africa 133. See also Humanium “Committee on the Rights of the Child” Available at: http://www.humanium.org/en/convention/committee/ (accessed 02-11-2015).
  \item \textsuperscript{828}Article 43 of the CRC.
  \item \textsuperscript{829}OHCHR “Committee on the Rights of the Child” Available at: http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx (accessed 23-10-2015).
  \item \textsuperscript{831}Article 43 (2) of the CRC.
  \item \textsuperscript{832}Ibid., Article 43 (3) & (6).
\end{itemize}
ratifying or acceding to the Convention and thereafter every five years. The purpose of the report is to show progress made by each State party, as well as the difficulties and challenges encountered in the implementation and enforcement of children’s rights. Therefore, the report is expected to contain comprehensive information and statistical analysis of the situation in each State as it relates to children.

In addition, the Committee is mandated to receive expert advice or information on children’s rights situations in each State from specialized agencies such as UN agencies, non-governmental and inter-governmental organisations, academic institutions and the media. As a response to reports submitted, the Committee examines each State Party’s report and addresses the concerns and challenges raised through “concluding observations.” The concluding observations act as suggestions and recommendations which each State Party can use to address their challenges and improve the implementation of its obligations undertaken under the auspices of the CRC. An example is the Concluding Observation of the Committee on the Rights of the Child in South Africa. The observation notes the positive aspect of the efforts made by South Africa, the factors and challenges encountered in the
effective implementation of the Convention, as well as strategies in place to address those challenges which have been identified.\textsuperscript{840}

However, despite the monitoring capacity of the Committee on the Rights of the Child, the concluding observations of the Committee have no legally binding authority and this may be the reason for late submission of State reports.\textsuperscript{841} It may also be part of the reason for non-implementation and non-response to suggestions and recommendations made by the Committee on the Rights of the Child.\textsuperscript{842}

4.4 African Charter on the Rights and Welfare of the Child (ACRWC)

The African Children’s Charter was adopted on 11 July 1990 by the Assembly of Heads of State and Government of the Organisation of African Unity (OAU), now known as the African Union (AU).\textsuperscript{843} The Children’s Charter came into force on 29 November 1999 by virtue of Article 47(3) after the deposit of the 15\textsuperscript{th} instrument of ratification by the Secretary-General of the OAU.\textsuperscript{844} However, twenty-five years after the adoption of the African Children’s Charter, only 47 out of the 54 African States have ratified the Charter.\textsuperscript{845}

The inspiration for the drafting and adoption of the African Children’s Charter was based on a number of factors, amongst which was a criticism of the western ideals of human rights, including the CRC.\textsuperscript{846} In addition is the omission or failure of the CRC

\begin{footnotes}
\item[840] Ibid.
\item[842] Ibid.
\item[844] Ibid.
\item[846] Lloyd 2002 *AHRLJ* 14-15.
\end{footnotes}
to address specific African cultural values and economic realities which may be due
to the limited number of African States involved in the drafting process of the CRC,\footnote{Viljoen \textit{International Human Rights Law in Africa} 392; Olowu 2002 \textit{IJCR} 128; Mezmur 2006 \textit{AHRLJ} 549. Africa was underrepresented in the drafting process with initially about three African States involved in the drafting process, by 1989 however nine African States were involved in the activities of the working group.} as well as the absence of a more inclusive regional human rights instrument to address African challenges that relate to the rights and welfare of children in Africa.\footnote{Viljoen \textit{International Human Rights Law in Africa} 392.}

Some of the omissions in the CRC were discussed at a workshop on children in conditions of armed conflict in Africa, co-organised by the African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN), and UNICEF.\footnote{Ibid. \textit{Situations of Armed Conflicts} now provided for in Article 22 of the African Children’s Charter. Other examples of omissions from the CRC include protection against apartheid and discrimination now addressed in Article 26 of the African Children’s Charter; prohibition of traditional practices that disadvantaged women and female children such as child marriage, is now addressed in Article 21 of the African Children’s Charter; individual or group communications procedure to the Committee on the Rights and Welfare of the Child is addressed in Article 44 of the African Children’s Charter; the role of duties and responsibilities of the child in Article 31 of the African Children’s Charter; broader protection for Child refugees in Article 23 of the African Children’s Charter and a more practical best interest principle in Article 4 of the African Children’s Charter.} This led to further deliberations and the development of a draft Charter by a group of African experts which eventually formed the basis of the first regional children’s rights instrument.\footnote{Viljoen \textit{International Human Rights Law in Africa} 392.} As the first regional children’s rights instrument, the African Children’s Charter notes with concern that:\footnote{Paragraph 4 of the African Children’s Charter.}

\begin{quote}
… the situation of most African children, remains critical due to the unique factors of their socio-economic; cultural; traditional and developmental circumstances; natural disaster; armed conflicts; exploitation and hunger; and on account of the child’s physical and mental immaturity, he/she needs special safeguards and care.
\end{quote}

Therefore, just as provided in the CRC, the African Children’s Charter is recognised as consistent with the principle of universality of human rights and as a common standard for the realisation of children’s rights.\footnote{Olowu 2002 \textit{IJCR} 128.} The Children’s Charter equally provides for the cardinal principles of non-discrimination;\footnote{Article 3 of the African Children’s Charter.} the best interests of the
child;\textsuperscript{854} the right to life, survival and development;\textsuperscript{855} and respect for the views of the child.\textsuperscript{856}

The African Children’s Charter is recognised by children’s rights experts as proffering a higher level of protection than the CRC.\textsuperscript{857} For instance, Lloyd notes that:

\begin{quote}
It cannot be doubted that the African Children’s Charter is a progressive development in the legal evolution of human rights protection within Africa. It stipulates a comprehensive set of children’s rights and confirms or strengthens the global standards contained in the CRC.\textsuperscript{858}
\end{quote}

However, as Olowu rightly states, the aim of the Children’s Charter is not to replace the CRC, but to act as a complementary instrument in order to further strengthen the rights and welfare of children in Africa.\textsuperscript{859} It also emphasises the significance of African cultural values and experiences in issues that relate to children.\textsuperscript{860}

In the context of child marriage, the protection provided for an African girl-child in the African Children’s Charter begins with the definition of a child as a person below the age of 18 years.\textsuperscript{861} This definition prevents any attempt at misinterpretation of the end of childhood or the attainment of maturity of a girl-child. This is different from the proviso provided in the CRC which states “…unless under the law applicable to the child, majority is attained earlier.”\textsuperscript{862} The African Children’s Charter also clearly provides for the protection of children against harmful social and cultural practices and directly prohibits child marriage. As Article 21 states:

\begin{quote}
\begin{itemize}
\item Article 2 of the African Children’s Charter.
\item Memzur 2008 SAPR/PL 16; Article 1 of the CRC. This is also discussed in Chapter Two of this thesis.
\end{itemize}
\end{quote}
1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

(a) those customs and practices prejudicial to the health or life of the child; and

(b) those customs and practices discriminatory to the child on the grounds of sex or other status.

2. 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.

This prohibition confirms the recognition of child marriage as a recurring regional challenge that needs to be addressed with concerted regional effort.\(^{863}\) It equally confirms Olowu’s statement on the African Children’s Charter as a complementary legislation since there is no direct reference to prohibition of child marriage in the CRC.\(^{864}\)

The Children’s Charter prides itself with the recognition of core African traditional values.\(^ {865}\) It also gives recognition to such values as the family as the natural unit of African societies,\(^{866}\) individual duties and duties to the family, society, State,\(^{867}\) and group rights.\(^ {868}\) Memzur notes that these distinctive features reflected in the Children’s Charter are recognised as a “value added” provision bringing positive change to the


\(^{864}\) Olowu 2002 *IJCR* 128; Viljoen 2001 *AHRLJ* 23.

\(^{865}\) Paragraph 7 of the preamble to the African Children’s Charter.

\(^{866}\) Article 18 (1) of the African Children’s Charter.

\(^{867}\) *Ibid.*, Article 31. The duties include the following:

- a) To work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in cases of need;
- b) To serve his national community by placing his physical and intellectual abilities at its service;
- c) To preserve and strengthen African cultural values in his relations with other members of society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;
- d) To preserve and strengthen the independence and the integrity of his country;
- e) To contribute to the best of his abilities at all times and at all levels, to the promotion and achievement of African Unity.

\(^{868}\) Chirwa 2006 *NILR* 64.
position of children’s rights in Africa. However, Viljoen notes that the various duties of the child should be interpreted in accordance with international human rights law and the African Children’s Charter, and be subject to the age and ability of the child. As can be seen in Article 31 which: “arguably gives effect to the subordinate role of children within the strict age-based hierarchy of traditional African societies.”

In the context of child marriage, Article 31 is not without controversies. This provision requires the child “to work for the cohesion of the family, to respect his [her] parents, superiors, and elders at all times and to assist them in cases of need.” This requirement then brings to the fore the traditional duty of obedience of the child ‘at all times’. Viljoen argues that it is important that the duty of obeying a parent must not erode the other rights of the child. In as much as a girl-child has a duty to her parents, there is a need to balance this with her other rights, for example, the right to freedom of expression. Therefore, on conflicting issues like the aforementioned, high consideration must be given to the best interests of the child principle, as an “overriding consideration in resolving interpretive disputes.”

As a final point, bridging the gap between the theory of the law and the practical realities affecting many African children is very challenging. Therefore, for effective implementation of the obligations in the Children’s Charter, provision is made for the establishment of a monitoring body which is discussed further in the next subsection.

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870 Viljoen International Human Rights Law in Africa 394.
871 Article 31 of the African Children’s Charter.
872 Viljoen International Human Rights Law in Africa 393-394.
873 Viljoen International Human Rights Law in Africa 394.
874 Ibid.
875 Ibid; Article 7 African Children’s Charter.
876 Viljoen International Human Rights Law in Africa 394.
877 Olowu 2002 IJCR 132-133.
4.5 The African Committee of Experts on the Rights and Welfare of the Child

The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) also referred to as ‘the Committee’, is established by virtue of Article 32 of the African Children’s Charter as a monitoring body that supervises State compliance with those obligations in the Children’s Charter.\(^{878}\) The Committee was formally established in July 2001 during the 37\(^{th}\) session of the AU Assembly of Heads of State and Government in Lusaka, Zambia.\(^{879}\)

Article 33(1) provides that the Committee shall consist of 11 elected members, who must be nationals of States Parties to the African Children’s Charter.\(^{880}\) The elected members serve in their personal capacity,\(^{881}\) and must have “high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child”.\(^{882}\) The tenure of members of the Committee, according to Article 37(1), is five years and members may not be re-elected. However, the term of office of four of the members elected at the first election shall expire after two years, and six of the other members after four years.\(^{883}\) This staggering tenure of membership allows continuity in the work of the Committee.

The mandate and procedure of the Committee are focused on the promotion and protection of children’s rights,\(^{884}\) State party reporting,\(^{885}\) communications\(^{886}\) and

\(^{878}\) Mezmur 2006 *AHRLJ* 550.


\(^{880}\) Article 35 of the African Children’s Charter.

\(^{881}\) *Ibid.*, Article 33 (2).

\(^{882}\) *Ibid.*, Article 33 (1).


\(^{884}\) Article 42 of the African Children’s Charter provides for the Committee to provide documentation of collected information; a commission interdisciplinary evaluation of challenging situations facing African children, as well as meetings and recommendations; formulate principles and procedures and the monitoring and implementation of the rights and welfare of the child in each State. The Committee is also tasked with providing interpretations of the provisions of the Children’s Charter at the insistence of State parties or recognised institutions of the AU, and also perform other duties provided by the Assembly of Heads of State and Government, Secretary-General or other organisations of the AU.

\(^{885}\) Article 43 of the African Children’s Charter.

\(^{886}\) *Ibid.*, Article 44.
investigations. According to Viljoen, a major part of the Committee’s activities relate to its ‘promotional mandate’. This is evidently true with the efforts made to raise awareness on the Children’s Charter in the region, through advocacy and lobbying visits to various African States, particularly those that are yet to ratify the Children’s Charter. Examples are the visits made to Burundi, Madagascar, Namibia and Sudan; with Burundi and Namibia ratifying the Children’s Charter in 2004.

Part of the Committee’s efforts is the recently launched campaign for the “Universal Ratification and Reporting on the African Charter on the Rights and Welfare of the Child”. This campaign marks the 25th Anniversary of the adoption of the African Children’s Charter and it is aimed at achieving universal ratification, fulfilment of State party reporting obligations, increased visibility of the Charter and its monitoring body.

Furthermore, the promotional mandate of the Committee is also expressed through the celebration of the Day of an African Child (DAC). This is utilised by the Committee to draw attention to the current situation of children in the region. In relation to the challenge of child marriage, the Committee gave more consideration

By virtue of Article 45 of the African Children’s Charter the Committee has the mandate to investigate alleged violations of children’s rights provided in the Charter if reported by any person, group, or NGO recognised by the AU, State party, or the UN. An example is the Investigation Mission in Tanzania on the alleged violation of the rights of children with albinism. Another example is the ACERWC’s fact-finding mission to Northern Uganda in August 2005 to ascertain the impact of the scourge of war on children in that area. See ACERWC “investigation”. Available at: http://acerwc.org/investigation/ (accessed 05-11-2015). See also Mezmur 2006 AHRLJ 564-565.

Viljoen International Human Rights Law in Africa 399.

Ibid. See also Mezmur 2006 AHRLJ 565.

Ibid.

The campaign was launched on 29th January 2014 and it is planned for a period of two-years ending on 29 November, 2015.


Mezmur 2006 AHRLJ 566. The Day of the African Child is celebrated across Africa on the 16th of June each year. It was established in 1991 by the then OAU (now AU) by Resolution CM/Res.1290 (XL) of the AU Heads of State and Government Summit. This is in honour and memory of the 16 June 1976 Soweto uprising in South Africa, where school children were killed in their protest against the inferior quality of education and the demand to be taught in their own language under the apartheid rule.

Ibid.
and focus during the 23rd session of the ACERWC held in Addis Ababa on April 11, 2014 by adopting the Addis Ababa Declaration on Ending Child Marriage in Africa. The discussions from this session further inspired the commemoration of the 2015 Day of the African Child, held in Soweto, Johannesburg, South Africa, under the theme “25 Years after the Adoption of the African Children’s Charter: Accelerating our Collective Efforts to End Child Marriage in Africa”. Previous celebrations of the DAC have focused on themes such as: education; rights of children with disabilities; and eliminating harmful and social practices affecting children.

The 2015 DAC as an advocacy tool marks a milestone in drawing attention across the region and beyond to the plight of the African girl-child and the need to promote her human rights. It equally confirms the recognition of the situational analysis of child marriage, and the Committee’s commitment and efforts at accelerating an end to child marriage in Africa.

The success of the 2015 DAC promoting accelerated efforts at ending child marriage strengthens an argument for the possibility of an annual regional forum for ending child marriage. This is in order to reduce the risk of losing the current momentum gained in the fight towards ending child marriage across the region. It will also provide a continuous platform for the region to re-assess annual progress made in promoting the rights and welfare of the girl-child and in addressing the challenges surrounding


897 The 24th DAC was held 16th June 2014 with the theme “A Child-Friendly, Quality, Free and Compulsory Education, for all Children in Sierra Leone”. Available at: http://mswgca.gov.sl/attachments/Documents/concept%20note.pdf (accessed 18-08-2015).


901 Lloyd 2002 AHRLJ 24.
child marriage. One cannot ignore the argument though that such an annual programme will place more focus on the issue of child marriage, than on other issues affecting children in Africa that equally need to be addressed.

In addition, there is the financial challenge of organising an annual programme on child marriage by the Committee. Mezmur highlights in his study the challenges that the Committee face specifically with regard to the:

…insufficient financial resources allocated to the general human rights programmes of the AU and other related ‘sensitive’ matters that tamper with the availability of basic facilities and a do not create a conducive environment necessary to optimise the work of the African Children’s Committee…

Article 43 of the African Children’s Charter provides for State party reporting and requires that all States parties submit a comprehensive report to the Committee on measures taken, progress made, and challenges encountered in the implementation of the Children’s Charter. These reports are to be prepared within two years of ratification of the Children’s Charter by the State party and periodically submitted every three years thereafter. The Committee is also mandated to receive communications from any individual, groups or non-governmental organizations recognized by the AU, member States, or the UN. It is also mandated to undertake studies, investigations and issue General Comments. The interpretation of the provisions of the Charter is generally done through General Comments and presently the Committee has issued two of such General Comments namely, General Comment No 1 (GC1) on Article 30 which deals with children of imprisoned parents, and General Comment

902 Mezmur 2006 AHRLJ 552.
903 Article 42 (1) of the African Children’s Charter.
904 Ibid., Article 43 (1). See also Mezmur 2006 AHRLJ 550.
905 Article 44 ACRWC. See also Rule 74 of the Rules of Procedure of the ACERWC. Available at: http://acerwc.org/?wpdmdl=8810 (accessed 01-12-2015).
906 Mezmur 2006 AHRLJ 550-551; Rule 72, 73 & 77 of the Rules of Procedure of the ACERWC.
on Article 6 (GC2) which deals with the issues of birth registration, name and nationality, and prevention of statelessness.\(^{909}\)

The General Comment on Article 6 is highly relevant to the challenge of child marriage. The ACERWC has expressed concern about the ineffective birth registration system in most African countries with millions of children unregistered each year.\(^{910}\) The UN News Centre equally notes that: “a 2013 UNICEF Report reveals that 230 million children under the age of five have not had their births registered, and the lowest rate of birth registration is in South Asia and in Sub-Saharan Africa.”\(^{911}\) It is also noted that in Sub-Saharan Africa, it is believed about 20 million children have not had their births officially recorded.\(^{912}\) An example is the ACERWC’s Recommendations and Observations to the government of Kenya which states that; in spite of the policy of free birth registration for all children from the time of delivery to the age of 6 months, there is still a low rate of birth registration especially in rural areas.\(^{913}\) Birth registration and the issuing of birth certificates are important in determining the age of a girl about to marry, as well as assist relevant authorities to intervene by stopping such child marriages.\(^{914}\)


\(^{911}\) See AU, ACERWC “General Comment on Article 6” para 3; UN News Centre “One in Three Children Do Not Officially Exist, UNICEF reports” 1.

\(^{912}\) See also AU, ACERWC “General Comment on Article 6” para 3. It is noted that birth registration explains a number of factors such as poverty, lack of education, discrimination against women, and membership with indigenous ethnic groups or socially vulnerable groups such as migrants or refugees.


\(^{914}\) See AU, ACERWC “General Comment on Article 6” para 3.
The importance of the different mandates of the Committee is also confirmed in Mezmur’s statement that:

Establishing a mechanism of monitoring the implementation of the obligations state[s] parties have undertaken becomes crucial. The process of treaty implementation, in particular the preparation of reports, follow-up measures to recommendations and responses to individual complaints is a critical mechanism for legislative, policy and programmatic change at the national level. 915

Therefore, at the national level, State reporting creates an opportunity for periodic review, and a platform for national dialogue among stakeholders on issues surrounding children and their rights. 916 It also raises public scrutiny of existing government policies, and encourages the involvement of different sectors of society such as civil society organizations in formulating, evaluating and reviewing policies and laws. 917

According to an ACERWC report, as at 26 August, 2015, only 29 countries out of the 47 that have ratified the Children’s Charter have submitted their initial reports,918 with many of the reports being submitted late.919 Pertaining to those reports that have been submitted Viljoen notes that: “on the whole the Committee seems reasonably satisfied with the quality of the reports although the lack of information about actual implementation and pertinent issues such as budgetary allocation towards the realization of children’s rights are recurring themes”.920 For example, the ACERWC expressed concern in its concluding observations of the initial report on Nigeria

915 Mezmur 2006 AHRLJ 558.
917 Ibid.
918 Ibid. The countries that have submitted reports include: Algeria, Angola, Bukina Faso, Cameroon, Comoros, Eritrea, Ethiopia, Gabon, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Mali, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, South Africa, Sudan, Tanzania, Togo, Uganda, and Zimbabwe.
919 Mezmur 2006 AHRLJ 561. Mezmur points out that it seems that State reporting is taken lightly by States parties. However, the Committee has provided States parties with reporting guidelines on Periodic Reports to address the problem of late submission and reinforce the obligation of preparing reports. See also ACERWC “State Parties Guidelines”. Available at: http://acerwc.org/state_parties_guidelines/ (accessed 27-08-2015).
920 Viljoen International Human Rights Law in Africa 401.
regarding “the lack of information in the State parties’ report on the measures taken and programs or strategies in place to combat early child marriages, entrenched in harmful traditional and cultural practices that hinder the best interests of the child.”

4.6 The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (also referred to as “African Women’s Protocol (AWP) or Maputo Protocol”), is recognised as a legally binding treaty that complements the African Charter on Human and Peoples’ Rights (African Charter). This is pursuant to Article 66 of the African Charter which provides for special protocols or agreements to supplement its provisions, if necessary. In 2003, the African Women’s Protocol was adopted by the Assembly of Heads of State and Government of the African Union in Maputo, Mozambique, and enforced in November 2005 after being ratified by 15 African states. Presently, the Women’s Protocol has been ratified by 36 States out of the 53 member States to the African Union.

The African Charter is the primary regional human rights treaty that guarantees the rights of all men and women, and promotes advancement in the achievement of


924 Protocols are legally binding instruments to amend an aspect or aspects of existing treaties often creating new rights and obligations, thereby allowing treaties to evolve with time. See Viljoen International Human Rights Law in Africa 22.


human rights, in Africa.\textsuperscript{927} However, the rationale for the drafting and adoption of the Women's Protocol stems from the criticisms against the deficits inherent in the African Charter.\textsuperscript{928} In addition is the concern that despite ratification of the various international human rights instruments by many African States, women in Africa still continue to be victims of discrimination and harmful practices.\textsuperscript{929} In relation to women's rights, the African Charter has been criticised as being ineffective and insufficient to protect the rights of women, or in addressing the growing contemporary challenges they face in Africa.\textsuperscript{930}

For example, the vague protection in the rights of women is recognised when interpreting the provisions of Article 18(1) and (2) of the African Charter and Article 18(3).\textsuperscript{931} On the one hand, the African Charter requires States parties to eliminate every form of discrimination against women,\textsuperscript{932} whilst on the other hand, the African Charter provides that the family is “the natural unit and basis for society”, as well as “the custodian of morals and traditional values”.\textsuperscript{933} The African Charter also provides for the duty of every individual towards his [her] family, society, State and community,\textsuperscript{934} and for every individual “to preserve the harmonious development of the family and work for the cohesion and respect of the family; and to respect his [her] parents at all times”.\textsuperscript{935}

However, within the private sphere of the family, customary and religious practices take centre stage.\textsuperscript{936} Therefore, the African Charter does not give consideration to


\textsuperscript{928} Chirwa 2006 NILR 68-71.

\textsuperscript{929} The preamble to the African Women’s Protocol.


\textsuperscript{931} Chirwa 2006 NILR 68-69.

\textsuperscript{932} Article 18(3) of the African Charter.

\textsuperscript{933} Ibid., Article 18 (1) & (2).

\textsuperscript{934} Ibid., Article 27 (1).

\textsuperscript{935} Ibid., Article 29.

practices that violate women’s rights, or prevent those practices that negate the rights of women and young girls as in the case of child marriage.\textsuperscript{937} The African Charter emphasises the importance of African traditional values and practices,\textsuperscript{938} but no express clarification is made on the relationship between custom and women’s rights.\textsuperscript{939} Similarly, the African Charter does not expressly provide for the definition of important terms such as ‘discrimination against women’ or marriage related rights such as the minimum age of marriage, or the right to consent.\textsuperscript{940}

From the analysis provided above, many scholars have argued that “the African Charter places women’s rights in a ‘legal coma’ and ‘reinforces outdated stereotypes about the proper place and role of women in society.’”\textsuperscript{941} However, Chirwa shares a different view on this position as he argues:

While is it clear that the African Charter does not articulate the rights of women more explicitly and substantively, which justifies the elaboration of a gender specific Protocol to the Charter. It must be pointed out that the criticism that has been levelled against the Charter’s emphasis on African values, morals and customs is exaggerated and may harm the cause for women’s rights in Africa. It is correct that women’s rights may often conflict with traditional values and customs that the African Charter so clearly seeks to promote and uphold. However, the African Charter is not the first human rights instrument to entrench potentially conflicting provisions. In fact, the concept of human rights exists to protect interests that may be periled by others exercising their own human rights.\textsuperscript{942}

Chirwa supports this argument with an example on the conflict that often occurs between the right to freedom of expression and the right to human dignity and is as such resolved through judicial interpretation.\textsuperscript{943} Chirwa is therefore of the opinion that:

There is wisdom in promoting African cultural values, which have been under threat from many sources since the colonial era. More importantly, the idea of human rights could lose its

\textsuperscript{937} \textit{Ibid.}

\textsuperscript{938} Article 17(2) and (3) of the African Charter.

\textsuperscript{939} Chirwa 2006 \textit{NILR} 68.


\textsuperscript{941} Chirwa 2006 \textit{NILR} 68.

\textsuperscript{942} \textit{Ibid.}, p. 69.

\textsuperscript{943} \textit{Ibid.}
legitimacy in the African context if it were not grounded in traditional values of African societies.944

Chirwa’s argument, to an extent, seems true: conflicting provisions are not limited to the African Charter alone. For example, in the context of child marriage, conflicting controversy surrounds Article 31(a) of the African Children’s Charter which places a duty on the child “to work for the cohesion of the family, to respect his [her] parents, superiors, and elders at all times and to assist them in case of need.” This is considered as the African traditional duty of obedience to parents at all times945 which conflicts with Articles 3 and 7 of the African Children’s Charter on non-discrimination and freedom of expression respectively. Similarly, Viljoen argues that it is important that the duty of obeying a parent must not erode the other rights of the child.946 In as much as a girl-child has a duty to her parents, there is need for a balance to be made with her other rights though.947 Therefore parents have a responsibility of ensuring the best interests of the child especially in child marriage cases.

4.6.1 The complementary role of the African Women’s Protocol

The African Women’s Protocol has been praised for elaborating the scope and content of women’s rights in Africa, and thereby addressing critical issues concerning the rights of women and young girls.948 The Protocol is recognised as a symbol of commitment to putting an end to discrimination, violence and stereotypes against women in Africa.949 Although the Protocol partly re-states existing provisions in human rights instruments, its broad scope reinforces the rights and obligations in the African Charter as well as the African Children’s Charter.950 Therefore, it plays a significant

944 Ibid.
945 Viljoen International Human Rights Law in Africa 394.
946 Ibid., p. 394-395.
947 Ibid., p. 394.
949 Chirwa 2006 NILR 64. See also Viljoen 2009 16 WASH & LEE J.C.R& SOC. JUST. 24.
role in the African regional human rights system. Confirming this position, the Special Rapporteur of the African Commission on Human and Peoples' Rights envisages that: “Provided its [African Women’s Protocol’s] ratification and full implementation, it can represent a real tool of action for the lasting transformation of our societies.”

The Women’s Protocol is focused on the protection of the rights of women and girls, and expresses with concern in its preamble that: “despite the ratification of the African Charter on Human and Peoples’ Rights and other international human rights instruments...women in Africa still continue to be victims of discrimination and harmful practices.” The Protocol further states that “any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls should be condemned and eliminated”. However, twelve years after the adoption of the Women’s Protocol, these concerns and contemporary challenges are still a reality that requires urgent attention.

In the context of child marriage, consideration is given to the extent to which the African Women’s Protocol is able to enhance the rights of the girl-child in the African Children’s Charter in order to eliminate the practice. This complementary role is recognised firstly in Article 1(k) of the Women’s Protocol which broadly defines ‘women’ as “persons of female gender, including girls.” The inclusion of girls is a recognition and affirmation of the complex situation of all persons of female gender in Africa, whether young or old. The complex situation is recognised in child marriage cases where a young girl automatically assumes the roles and responsibilities of an adult woman once married, irrespective of her age. This is especially evident with regard to sexual relations with

951 Statement of Ms Soyata Maiga the Special Rapporteur cited in FIDH “African Union, Women’s Rights in Africa: 18 Countries are yet to Ratify the Maputo Protocol!”

952 The preamble to the African Women’s Protocol. See also Viljoen 2009 16 WASH & LEE J.C.R& SOC: JUST. 17.

953 The preamble to the African Women’s Protocol.

954 Geldenhuys, Kaufulu-Kumwenda, Nabaneh and Stefiszyn “The African Women’s Protocol and HIV: Delineating the African Commission’s General Comment on Articles 14 (1) (d) and (e) of the Protocol” 2014 AHRLJ 681-704 683.

her spouse, child bearing and child rearing, domestic work as well as cultural roles
associated with marriage.\footnote{956}{Ibid.}

Regarding marriage related rights, the African Women’s Protocol explicitly reiterates
the legal requirements of marriage as clearly stated in the African Children’s
Charter.\footnote{957}{Article 21 (2) of the African Children’s Charter.} Article 6(a) and (b) state that “no marriage shall take place without the free
and full consent of both parties” and “the minimum age of marriage for women shall
be 18 years”. These provisions complement the Children’s Charter and emphasise the
importance of preventing and prohibiting child and forced marriage which is common
in many African States.\footnote{958}{See also Nilsson Children and Youth in Armed Conflict: Volume 1 2013 43-44. See also Center for Reproductive Rights “The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights” 13.} The Protocol also affirms the provisions of the Children’s
Charter by setting the minimum age of marriage at 18 years as the Children’s Charter
is the only other international human rights legislation to specify a minimum age of
marriage.\footnote{959}{Ibid., p.14.} In addition, Article 6(d) of the Protocol states that every marriage should
be recorded in writing and registered. However, formal registration of marriages is
often not considered in African traditional marriages as they are conducted privately
by families.\footnote{960}{Nilsson 43-44.}

The Women’s Protocol also acknowledges the challenges facing women through the
definition of terms in Article 1. Terms such as ‘discrimination against women’ in Article
1(f); ‘violence against women’ in Article 1(j); and ‘harmful practices’ in Article 1(k), are
a few examples of such. The definitions of key terms in the Protocol expound the
meaning and scope of each term for clarity and the avoidance of ambiguity.\footnote{961}{Chirwa 2006 NILR 66. See also Viljoen 2009 16 WASH & LEE J.C.R& SOC. JUST. 22.} For example, the term ‘harmful practices’ is defined as “all behaviour, attitudes and/or
practices which negatively affect the fundamental rights of women and girls, such as
the right to life, health, dignity, education and physical integrity”.\footnote{962}{Article 1 (k) of the African Women’s Protocol. Other relevant definitions are “discrimination against women” in Article 1 (f) and “violence against women” in Article 1 (j) of the African Women’s Protocol.} In addition, the
Protocol provides further practical responses to addressing and eliminating harmful practices in Article 5, and imposes on States parties the obligation to:

Prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States parties shall take all necessary legislative and other measures to eliminate such practices, including:

a) creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;

b) prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them;

c) provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;

d) protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.\textsuperscript{963}

The definitions provided in Article 1 show the distinctive features of the African Women’s Protocol, and these points to the fact that the protocol provides a wider binding coverage and clarity needed for the achievement of the effective promotion, implementation and enforcement of the rights and welfare of women and young girls in Africa.\textsuperscript{964}

In addition, as a response to the implications of child marriage, both the African Children’s Charter and the Women’s Protocol address health services and education which are key relevant factors in eliminating child marriage.\textsuperscript{965} In terms of health services, the African Women’s Protocol provides for health and reproductive rights.\textsuperscript{966} This explicit complementary provision has great relevance to the practice of child marriage with high sexual and reproductive health risks, \textsuperscript{967}particularly in terms of a

\textsuperscript{963} \textit{Ibid.}, Article 5 (a), (c) & (d). Also in Article 2 (1) of the African Women’s Protocol which provides for State Party obligation to eliminate discrimination.

\textsuperscript{964} Viljoen 2009 16 WASH & LEE J.C.R& SOC. JUST. 22-23.


\textsuperscript{966} Article 14 of the African Women’s Protocol.

\textsuperscript{967} Nour 2009 \textit{Reviews in Obstetrics and Gynecology} 54. For example, Nour states that, “girls between the ages of 10 and 14 years are 5 to 7 times more likely to die in childbirth; and girls between the
women’s right to control their fertility, choose methods of contraception, protection from sexually transmitted infections and overall wellbeing. With regards to the right to education in the Protocol, the focus is on the elimination of discrimination against women through education and training. The role of education is critical to ending child marriage, as education is a human right in itself and an indispensable means of realizing other fundamental rights of the girl-child.

This provision is considered a practical response to addressing harmful practices and to efforts aimed at the effective implementation of the rights and obligations in the Protocol. The Protocol also addresses health and reproductive rights and the right to education and training as a practical response to child marriage. However, despite the strength of the Women’s Protocol in addressing the practice of child marriage in Africa, the Protocol is not without obstacles that impede its effective implementation and enforcement.

The African regional human rights system prides itself on the recognition of core African traditional values. The African Charter and Children’s Charter gives recognition to values such as the family as the natural unit of African societies, individual duties, and duties to the family, society, State and group rights. However, the Women’s Protocol has been criticised for its inconsistency with other laws in the African regional human rights system.

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968 Article 14 (1) of the African Women’s Protocol.
969 Article 12 (1) of the African Women’s Protocol.
971 Ibid., Article 14.
972 Ibid., Article 12.
973 Paragraph 5 of the preamble to the Africa Charter and paragraph 7 of the preamble to the African Charter.
974 Article 18(1) & (2) of the African Charter and Article 18(1) of the African Children’s Charter.
976 Chirwa 2006 NILR 64.
A major criticism of the Women’s Protocol is the non-recognition of the core African values in its provisions.\textsuperscript{978} This criticism reveals a contrast between the Women’s Protocol and the Children’s Charter. As stated above, the Children’s Charter emphasises in its preamble the need to take into consideration the virtues and values of African traditional cultures which should characterise the concept of the rights and welfare of the child.\textsuperscript{979} Memzur also notes that these distinctive features reflected in the Children’s Charter are recognised as a “value added” provision, bringing positive change to the position of children’s rights in Africa.\textsuperscript{980}

However, the implication of non-recognition of African cultural values raises the debate regarding the acceptability of the African Women’s Protocol as an African instrument.\textsuperscript{981} It also brings to the fore, the debate surrounding the African Women’s Protocol being western biased and “intrinsically antithetical to African values.”\textsuperscript{982} This relates to the Protocol’s individualistic nature, as it recognises women only as individual right bearers and not “people”.\textsuperscript{983} It also fails to recognise individual duties, group rights, cultural rights as well as the status of the family as a fundamental unit of African societies.\textsuperscript{984} These omissions may be primarily due to violations of women’s rights that exist within African traditional practices, and the family.\textsuperscript{985}

Furthermore, another obstacle to the realisation of the substantive provisions of the Women’s protocol relates to the challenge with non-State parties to the Protocol. Presently 18 African States are yet to ratify the Protocol.\textsuperscript{986} Ratification of the Protocol

\begin{footnotes}
\textsuperscript{978} Chirwa 2006 NILR 64 & 92.
\textsuperscript{979} Paragraph 7 of the preamble to the African Children’s Charter.
\textsuperscript{981} Chirwa 2006 NILR 67.
\textsuperscript{982} Ibid., p. 92.
\textsuperscript{983} Viljoen 2009 16 WASH & LEE J.C.R& SOC. JUST 21.
\textsuperscript{984} Chirwa 2006 NILR 91-92.
\textsuperscript{985} Ibid., p. 94.
\textsuperscript{986} Although 15 States have signed, but not fully ratified the Protocol, three States have neither signed nor ratified the Protocol. These States include: Algeria, Botswana, Burundi, Central African Republic, Chad, Egypt, Eritrea, Ethiopia, Madagascar, Mauritius, Niger, Sahrawi Arab Democratic Republic, Sao Tome and Principe, Sierra Leone, Somalia, South Sudan, Sudan, and Tunisia. See ACHPR ‘Ratification Table: Protocol to the African Charter on Human and Peoples’ Rights on the
is the first fundamental step to achieving the core objectives of the Protocol, as ratification places direct obligation on State parties to effectively implement and enforce the core objectives of the Protocol.987 It also places an obligation on State parties to refrain from such acts that will defeat the objectives of the Protocol.988

The implication of non-ratification is that States yet to fully ratify cannot be held responsible for the challenging situation of under aged girls in their countries,989 which results in the continuous practice of child marriage as well as violations and abuses of the rights of the girl-child. For example, Niger, Central African Republic and Chad are yet to fully ratify the Protocol, and a recent report shows that they top the list of 20 countries with the highest percentage ranking relating to the prevalence of child marriage with 76%, 68% and 68% respectively.990

The unwillingness to accept some of the binding obligations of the Protocol is cited as the foremost reason for non-ratification, especially for Muslim populated States that have argued that the provisions of the Protocol are at odds with Sharia law, as well as the experience of some States with reservations against CEDAW.991 An example is


989 AU, AERWC Report of the ACERWC at the Seventh Ordinary Session 28 June – 2 July 2005 Tripoli, Libya EX.CL/200/VII, para 4. Article 18 of the Vienna Convention on the Law of Treaties, 1969 provides that: A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: It has signed the treaty or has exchanged instruments constituting the treaty subject to ratifications, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty”.


991 Viljoen 2009 16 WASH & LEE J.C.R& SOC. JUST 41-42(footnote 174). See also Mujuzi “The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa: South Africa’s Reservation and Interpretative Declarations” 2008 Law, Democracy and Development 48-49. According to Article 2(1) d of the Vienna Convention on the Law of Treaties (VCLT)196, reservation means “unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”.

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that of Niger. Niger made reservations while ratifying CEDAW. This was considered incompatible with the objective and purpose of CEDAW.\footnote{The Government of Niger made reservations to Article 2, paragraphs (d) & (f); Article 5, paragraphs (a) & (b); Article 15, paragraph (4); Article 16, paragraphs (1)(c), (e) & (g) of CEDAW which concern family relations and stated that it was contrary to the existing customs and practices in the State. See Mujuzi 2008 Law, Democracy and Development 48. See also UN Women “Declarations, Reservations & Objections to CEDAW”. Available at: http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm#N50 (accessed 01-12-2015).} Similarly, in 2006, members of parliament in Niger rejected ratification of the African Women’s Protocol.\footnote{Mckaiser “Niger MPs Reject Protocol on Women’s Rights”, iol News 6 June 2006. Available at: http://www.iol.co.za/news/africa/niger-mps-reject-protocol-on-women-s-rights-1.280492#.Vly7sWy6HIV (accessed 30-11-2015).} The continued internal and political conflict within some States such as Sudan, with differing human rights violations and abuses, results in reductions of momentum towards ratifying the Protocol.\footnote{Faiza “11 Years of the Maputo Protocol: Women’s Progress and the Challenges” July 11, 2014. Equality Now Regional Africa/ Solidarity for African Women’s Rights (SOAWR) Secretariat Director. Available at: http://urgentactionfund-africa.or.ke/?p=1438 (accessed 23-11-2015).}

Certain States parties to the Protocol have however made reservations on some of the provisions of the Protocol at the time of ratification. An example is South Africa which entered three reservations;\footnote{Other South African reservations to the Protocol include Article 4(2) (j) prohibition of imposition of death penalty on pregnant and nursing mothers and Article 6 (h) which provides for equality of rights between men and women with respect to the nationality of their children, which is contrary to the national legislation. South Africa also made 2 interpretative declarations on Article 1 (f) which defines “discrimination against women” and Article 31 which deals with the question of whether South Africa offers more favourable provisions for the realisation of the rights of women. See Mujuzi 2008 Law, Democracy and Development 41-61.} one of the reservations relates to Article 6(d). This Article provides that every marriage must be registered in order to be legally recognised. However, registration is not a requirement for a valid customary marriage under South African Law as provided in Section 3(1) of the Recognition of Customary Marriages Act. Section 4(9) of the Recognition of Customary Marriages Act also provides that failure to register a customary marriage does not affect the validity of that marriage.

Although, reservations are recognised in the treaty-making process, they may minimise wider acceptance of a treaty and also weaken its global normative force.\footnote{Mujuzi “The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa: South Africa’s Reservation and Interpretative Declarations” 2008 Law, Democracy and Development 46-47.}
4.7 African Commission on Human and Peoples’ Rights (ACHPR)

The ACHPR established in 1987 is the supervisory body responsible for monitoring the implementation of the African Charter, and the African Women’s Protocol in order to further respect and promote human rights in the region. The ACHPR consists of 11 members, who are guided by its mandate in the Charter and rules of procedure.

The role and relevance of the ACHPR in the protection of the rights of a girl-child stem from its mandate under Article 45 of the African Charter. The mandate is focused firstly on the promotion of human and peoples’ rights through activities such as: “undertaking studies, organizing seminars, disseminating information, giving recommendations to governments, laying down principles and rules and co-operating with other African and International institutions”.

The annual activity reports, as stipulated by Article 54 of the African Charter highlight, amongst others, the promotional activities of the ACHPR.

Secondly, the ACHPR is responsible for the protection of all human and peoples’ rights, and this mandate is carried out through “communication procedures; friendly settlement of disputes; State reporting (including consideration of NGOs’ shadow reports).”

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997 This is by virtue of Article 30 of the African Charter.


999 Article 31 of the African Charter.


1001 Article 45 (1) of the African Charter. See also Killander The African Regional Human Rights System: 30 Years After the African Charter on Human and Peoples’ Rights 237.


1003 Article 45 (2) of the African Charter.
Thirdly, is the mandate to interpret the rights and obligations in the African Charter at the request of States parties, institutions of the AU, or individuals. The Commission has also adopted a number of resolutions to provide clarifications on some articles in the Protocol. According to the 37th Activity Report of the ACHPR for the period of June to December 2014, the Commission adopted 8 Resolutions, one of which is the Resolution on the need to conduct a study on child marriage in Africa. Apart from the Commission interpreting various rights of the Charter at the request of NGOs, the Commission has also established collaborations with different NGOs and civil societies which have helped strengthen its position and mandate in the region, as well as strengthen efforts at protecting and monitoring rights of women and girls. The attendance of different NGO representatives at the 55th Ordinary Session of the ACHPR in Luanda, Angola, in 2014, shows the strength of these collaborations.


1006 Article 45 (3) of the African Charter; ACHPR “Mandate of the Commission” 1.

1007 Ibid.

1008 Other Resolutions include: Resolution on the food crisis in Somalia; Resolution on the Need to Conduct a Study on HIV, Human Rights and the Law; Resolution on Freedom of Expression in the Kingdom of Swaziland; Resolution on Human Rights Abuses in Egypt; Resolution Condemning the Perpetrators of Sexual Assault and Violence in the Arab Republic of Egypt; Resolution Appointing an Expert Member for the Committee on the Protection of the Rights of People Living with HIV; and Resolution on the UN World Conference on Indigenous Peoples. See 37th Activity Report of the African Commission, paragraph 9.


1010 Attendance of 13 International and Intergovernmental organisations and 180 African and International NGOs. See ACHPR, 55th Ordinary Session: 28 April- 12 May 2014. Available at:
Despite the various contributions of the ACHPR in the region, the Commission is not without challenges affecting the effectiveness of its mandate and work. In assessing the ACHPR’s 25 years after its establishment, Eno argues that:

The effectiveness of the Commission has been compromised by the apparent lack of cooperation and political will from the very African leaders that established it, inadequate resources, lack of monitoring mechanisms to follow-up on its decisions or recommendations, inadequate publicity as well as lack of awareness of its existence by a majority of the population whose rights the commission is meant to promote and protect. 1011

In addition, the ACHPR faces the challenge of obtaining member States authorisation for promotional missions, or must find mutually acceptable dates for meetings between States parties and the Commission.1012 These challenges no doubt has contributed to the continuous violation and abuse of human rights. However, despite the challenges, the ACHPR has made significant achievements in work and activities in the region.1013

4.8 Special Mechanisms for Advancing the Rights of the Girl-Child

4.8.1 Special Representative of the UN Secretary-General on Violence against Children

As part of measures to address and prevent various forms of violence against children globally, the UN Secretary-General in 2006 presented a report based on an in-depth study of violence against children with strategic recommendations on how to address such.1014 The report provided discussions on different forms of violence against children that occur within the family, schools, alternative care institutions, detention


1014 UN Secretary-General “Study on Violence against Children” 29 August 2006, A/61/299. Paragraph 120. This report is prepared by an independent expert Paulo Sergio Pinheiro appointed by the Secretary-General pursuant to General Assembly resolution 57/90 of 2002.

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facilities, places of work and communities.\textsuperscript{1015} In addressing violence against children in different settings,\textsuperscript{1016} suitable recommendations were made for further implementation.\textsuperscript{1017} Among such recommendations, the Secretary-General urged all States to:

\textit{…prohibit all forms of violence against children, in all settings, including all corporal punishment, harmful traditional practices, such as early and forced marriages, female genital mutilation and so-called honour crimes, sexual violence, and torture and other cruel, inhuman or degrading treatment or punishment, as required by international treaties.}\textsuperscript{1018}

Following the presentation of this study and the establishment of the position of a special representative on violence against children,\textsuperscript{1019} Ms Marta Santos Pais of Portugal was appointed and assumed the position as the Special Representative of the UN Secretary-General on Violence against Children (SRSG) on 1 September 2009.\textsuperscript{1020} The term of office of SRSG is for a period of 3 years\textsuperscript{1021} however this has been extended for a further period of 3 years.\textsuperscript{1022}

The mandate of the SRSG stems from an in-depth study on violence against children and its strategic recommendations, to build upon the health and protective initiatives and developments for children, as well as promote the protection of children from violence as a human rights imperative.\textsuperscript{1023} The SRSG is recognised as the “global

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\textsuperscript{1015} Ibid., paragraphs 38-80.
\textsuperscript{1016} Ibid., paragraph 9.
\textsuperscript{1017} Ibid., paragraphs 94-114.
\textsuperscript{1018} Ibid., paragraph 98.
\textsuperscript{1019} Ibid., paragraph 120.
\textsuperscript{1021} Ibid., paragraph 7.
\textsuperscript{1022} See Resolution adopted by the General Assembly on 20 December 2012 [on the report of the Third Committee (A/67/453)] Rights of the Child 12 April 2013. A/RES/67/152, paragraph 48. This extension is based on the resolution adopted by the UN General Assembly which;

\textit{Recommends that the Secretary-General extend the mandate of the Special Representative on Violence against Children, as established in paragraphs 58 and 59 of its resolution 62/141, for a further period of three years, and decides that for the effective performance of the mandate and the sustainability of the core activities the mandate of the Special Representative shall be funded from the regular budget starting from the biennium 2014/2015”}.

\textsuperscript{1023} SRSG 2010 Annual Report to the UN General Assembly, paragraph 9. See also Kooijmans “The United Nations’ Special Representative of the Secretary-General on Violence against Children”.
independent advocate” working to promote, prevent and eliminate all forms of violence against children at international, regional and national levels.\textsuperscript{1024} Therefore, according to its mandate:

The SRSG acts as a bridge builder and a catalyst of action in all regions, across sectors and settings where violence against children occurs. She mobilizes action and political support to maintain momentum around this agenda and generates renewed concern at the harmful effects of violence on children; to promote behavioural and social change, and to achieve effective progress.\textsuperscript{1025}

However, the question is whether the Special Representative has to a certain extent, been able to achieve her mandate successfully. The Special Representative has the responsibility of reporting her activities directly to the Secretary-General and also acts as the Chairperson for the United Nations Inter-Agency Working Group on Violence against Children.\textsuperscript{1026} The SRSG also provides reports to the Human Rights Council and the General Assembly through its annual reports.\textsuperscript{1027} For example, the 2010 report to the General Assembly\textsuperscript{1028} outlines the vision and priority areas of focus for SRSG based on the UN study and “identified time-bound targets for three strategic overarching recommendations.”\textsuperscript{1029} These strategic recommendations include:

(a) The development in each State of a national comprehensive strategy to prevent and address all forms of violence against children, mainstreamed in the national planning process,

\textsuperscript{1024} SRSG 2010 Annual Report to the UN General Assembly, paragraph 3 & 4; UN Secretary-General “Study on Violence against Children”, paragraph 120.


\textsuperscript{1026} Ibid., paragraph 6.

\textsuperscript{1027} Ibid. See also UN Secretary-General “Study on Violence against Children” paragraph 121.


\textsuperscript{1029} SRSG 2010 Annual Report to the UN General Assembly, paragraph 13.
coordinated by a high-level focal point with leading responsibilities in this area, and supported by adequate human and financial resources to support implementation; 

(b) The introduction of an explicit national legal ban on all forms of violence against children, in all settings; 

(c) The consolidation of a national system of data collection, analysis and dissemination, and a research agenda on violence against children.

These strategies have helped to create a build-up in the activities of SRSG as reflected in the annual reports of such. The SRSG also relies on mutually supportive strategies such as ideas and contributions from strategic meetings and expert consultants; \(^{1030}\) identification and appraisal of good practice and experience at international, regional and national levels; \(^{1031}\) field missions and thematic studies and reports. \(^{1032}\)

With respect to the practice of child marriage in Africa, the mandate of SRSG, its focus and strategies are relevant to the challenging situations surrounding child marriage on the African continent. The practice of child marriage cannot be treated in isolation though, as rightly stated by Equality Now: “it is inextricably linked to abuses that affect many girls and women throughout their lives.” \(^{1033}\)

The build-up of different activities of the SRSG plays important roles either at the international, regional or national level in addressing violence against children. For example, a thematic debate on violence against children was organised by the ACERWC in collaboration with the SRSG in 2010. \(^{1034}\) The debate produced an

\(^{1030}\) An example of such meetings includes “SRSG hosts 5\(^{th}\) Cross-Regional Roundtable on the Protection of Children from Violence with Representatives from Regional Organisations and Institutions”. Available at: https://srsg.violenceagainstchildren.org/story/2015-06-26_1318 accessed 30-10-2015).

\(^{1031}\) An example of identification and appraisal of good practices include “SRSG Santos Pais Welcomes the Decision by Senior Traditional Leader to Annual 330 Child Marriages in Malawi”. Available at: https://srsg.violenceagainstchildren.org/story/2015-09-02_1371 (accessed 30-10-2015). See also “SRSG “Santo Pais Welcomes Launch of UN Stamps on Ending Violence against Children”. Available at: https://srsg.violenceagainstchildren.org/story/2015-08-20_1369 (accessed 30-10-2015). The United Nations Postal Administration (UNPA) issued six new stamps to raise awareness on eliminating violence against children and to support the work of the UN.

\(^{1032}\) SRSG 2010 Annual Report to the UN General Assembly, paragraph 10.


agreement on “strategic follow-up through enhanced advocacy to protect children from violence and promote positive alternatives to violent disciplines; support for legislative and policy reforms to ban all forms of violence; the development of an African report on this issue; and the inclusion of the protection of children from all forms of violence in the agenda of a future summit of African Heads of State and Government.”

The collaboration further led to the development of the “2014 African Report on Violence against Children” by the African Child Policy Forum (ACPF). This was done in order to have more country-specific evidence of the different human rights violations against children in the region. According to the SRSG, the African Report:

> provides a sound contribution to support Governments in their efforts to overcome persisting and emerging challenges, and to seize opportunities for improvement in violence prevention and children’s effective protection in Africa.

4.8.2 Special Rapporteur on the Rights of Women in Africa

The Special Rapporteur on the Rights of Women in Africa (SRRWA) is recognised as one of the “oldest mechanisms” of the African Commission. It was established in 1998 prior to the adoption of the Women’s Protocol, with the first appointment of the Special Rapporteur on 5 May 1999. The establishment of this mechanism is one of the African Commission’s efforts in promoting and protecting the rights of

1035 Ibid.
1037 Ibid.
1040 Ibid., paragraph 7. Mrs Julienne Ondziel Gnelenga of the Republic of Congo was appointed retrospectively from 31st October 1998 at the 25th Ordinary Session of the African Commission on Human and Peoples’ Rights held in Bujumbura, Burundi.
women and girls,\textsuperscript{1041} as well addressing the contemporary challenges of discrimination and injustice that women experience in Africa.\textsuperscript{1042} Presently, the position of the Special Rapporteur is held by Ms Soyata Maiga.\textsuperscript{1043}

The role of the Special Rapporteur is important in addressing the challenge of child marriage in Africa, especially since the mandate involves monitoring the effective implementation of the African Charter and the African Women’s Protocol.\textsuperscript{1044} According to the Special Rapporteur’s 2012 Intersession Report, the activities of the Special Rapporteur are mainly guided by the African Charter; the African Women’s Protocol; the Heads of State’s Solemn Declaration on Gender Equality in Africa; and international conventions relating to the rights of women and children duly ratified by African States.\textsuperscript{1045} The activities, among other works, include:

Serving as a focal point for the promotion and protection of the rights of women [and girls], assisting governments in the development and implementation of their policies, undertaking promotional and fact finding missions, preparing reports on the situation of women’s rights and proposing recommendations to be adopted by the Commission, carrying out a comparative study on the situation of the rights of women in various countries [African States], and developing guidelines for State reporting on women’s rights issues to the African Commission.\textsuperscript{1046}

The yearly Intersession Activity Report submitted by the Special Rapporteur to the Commission provides a broader discussion of these activities. An example is the 2015 Intersession Activity Report presented at the 56\textsuperscript{th} Ordinary Session of the African

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\item\textsuperscript{1041} 2012 Intersession Report of the Special Rapporteur on the Rights of Women in Africa, paragraph 3.
\item\textsuperscript{1042} \textit{Ibid}.
\item\textsuperscript{1043} Soyata Maiga was first appointed at the 42\textsuperscript{nd} Ordinary Session of the ACHPR held in November 2007 in Brazzaville, Republic of Congo. Although the mandate of the Special Rapporteur is for two years, Ms Soyata Maiga’s was re-elected a couple of times. The recent re-election was on the 5\textsuperscript{th} of November 2013 at the 54\textsuperscript{th} Ordinary Session of the ACHPR held from 22 October to 5 November 2013, in Banjul, The Gambia. ACHPR “245: Resolution on the Renewal of the Mandate of the Special Rapporteur on the Rights of Women in Africa”. Available at: http://www.achpr.org/sessions/54th/resolutions/245/ (accessed 06-11-2015).
\item\textsuperscript{1044} 2012 Intersession Report of the Special Rapporteur on the Rights of Women in Africa, paragraph 4.
\item\textsuperscript{1045} \textit{Ibid}.
\end{itemize}
\end{footnotesize}
Commission held in the Gambia. The report provides an update on the promotional activities of the Special Rapporteur conducted since the 55th Ordinary Session in 2014. Of particular note is the collaboration with the Office of the United Nations High Commissioner for Human Rights in a panel discussion on the theme “Preventing and Eliminating Child, Early and Forced Marriage”. The Special Rapporteur’s presentation focused on:

…the on-going elaboration of general comments on early marriage as well as studies initiated on the same subject in partnership with the Pretoria Human Rights Centre covering ten State parties where prevalence rates are very high, with prejudicial consequences (that have been extensively documented) on the lives and health of women and girls.

4.8.3 African Union Special Rapporteur on ending child marriage in Africa

The establishment of the Special Rapporteur on child marriage is the most recent mechanism of the AU based on the decision of the AU Executive Council in June 2014. This led to the appointment of Dr Fatima Delladj-Sebaa as the Special Rapporteur on Child Marriage at the first Extra-Ordinary Session of the ACERWC on 10 October 2014.

Much like other mechanisms of the UN and AU, the mandate of the Special Rapporteur is to provide advancement in the protection of the rights of women and girls. The mandate of the Special Rapporteur stems from a concern with the high prevalence of child marriage and the grave impact of the practice across Africa. As such the Special Rapporteur focuses on conducting “fact finding missions on alleged violations, seeking cooperation with State parties, and developing constructive dialogue with


\footnotesize{1048} Ibid.

\footnotesize{1049} Ibid., paragraphs 12-15.


\footnotesize{1051} Ibid.

\footnotesize{1052} Ibid.
Governments, CSOs and other actors”. Just as other mechanisms the special Rapporteur is to prepare and submit annual reports to the ACERWC on yearly activities, and to work closely with the social Affairs department on AU Campaigns to end child marriage in Africa.

4.9 African Union Initiative: The AU Campaign to end child marriage in Africa

Different reports and statistics show a high prevalence of child marriage in Africa. Similarly, documented studies, medical and media reports reveal the grave consequences of such practices. This prompted the AU to launch a regional campaign on 29 May 2014 in Addis Ababa, Ethiopia, with the aim of accelerating the end of child marriage. According to UNFPA, the activities of the campaign include:

- Organizing events with media, civil society organisations, and policy makers, to increase awareness of the problem in each country. The campaign will also increase data collection to help governments and agencies more effectively combat the practice. It will also promote the implementation of laws related to child marriage, including those addressing human rights, gender equality, and maternal and child health. Technical support will also be made available to Member States.

The AU, in collaboration with other partners like UNFPA and UNICEF, intends to run the campaign for an initial period of two years in 10 selected countries, namely: Burkina Faso; Cameroon; Chad; Ethiopia; Mauritania; Mozambique; Malawi; Niger; Sierra Leone and Zambia. However, a recent report states that by 4 August 2015, eight African States had launched a national AU campaign, namely: Ethiopia; Niger; Burkina Faso; Chad; Democratic Republic of Congo; Madagascar; Uganda; and

1053 Ibid.
1054 Ibid.
1055 Causes and consequences of child marriage is discussed in Chapter Two of this thesis.
1058 The campaign is expected to extend to other countries not yet selected and with high prevalence of child marriage. The campaign has also been extended to run until at least 2017. Girls Not Brides “African Union Extend Campaign to End Child Marriage Until 2017” 1.
In addition, the Republic of Mali launched the campaign on 11 October, 2015\textsuperscript{1060} and most recently Ghana launched the AU campaign to end child marriage on 10 February 2016.\textsuperscript{1061} The positive impact of this campaign can be seen with increased awareness and knowledge on various human rights laws, national policies, the root causes of child marriage and their consequences in the region and increased commitment towards this campaign.

### 4.10 Summary

This chapter examined the provisions on the protection of the rights of the girl-child, the obligations placed on State Parties to the CRC, ACRWC and the African Women’s Protocol as well as the role and relevance of the monitoring bodies established under the above instruments. It confirms that child marriage is a serious human rights violation which further leads to other violations of rights.

The analysis also shows and confirms the recognition of the practice as a challenge in Africa that needs urgent solutions. It also shows how the role and involvement of different monitoring bodies, specialised mechanisms and initiatives established by the AU are important to address and eliminate this challenge. In addition, it demonstrates the importance of tools of advocacy, monitoring, evaluation, and technical assistance to States parties in bringing an end to child marriage. Lastly, it shows that the strength of all stakeholders in collaboration and commitment in the region, can put an end to child marriage.


CHAPTER FIVE

THE CULTURAL PRACTICE OF CHILD MARRIAGE: A COMPARATIVE STUDY OF SOUTH AFRICA AND NIGERIA

5.1 Introduction

The substantive provisions of the CRC, African Children’s Charter and the African Women’s Protocol in relation to the rights and welfare of a girl-child in the context of child marriage has been evaluated extensively. The role and responsibilities of the supervisory bodies of the UN and AU in respect to protecting and promoting the rights of the girl-child from harmful cultural practices has also been assessed. This chapter aims to provide a comparison and contrast in the nature and extent of the practice of child marriage, and in the effectiveness and adequacy of the legislations in South Africa and Nigeria.

As stated above the challenge of child and forced marriage affects every African country, although the nature and extent of the practice differs from one country to another. Therefore, a comparative study is undertaken to provide insight into the common practice of child and forced marriage in both South Africa and Nigeria. This is in order to reveal the variations that exist in the prevalence of the practice; the nature of the practice, and the unique factors that reinforce child marriage.

Secondly, both countries have signed and ratified different international and regional human rights instruments, in particular the CRC and the African Children’s Charter. They have also signed and ratified the African Women’s Protocol which is specific to the protection of the rights and welfare of persons of female gender. Therefore, the extent of the acceptability of these international laws will be considered together with the extent to which both countries have fulfilled their state obligations in these instruments. In addition, the challenges both countries face with implementation and enforcement of laws will be considered.

Thirdly, the comparative study seeks to provide insight into the national laws, especially the Constitutions of South Africa and Nigeria, child rights legislations and
other legislations that relate to the protection of the rights of a girl-child, and the prohibition of child marriage and other related sexual offences. This is in order to reveal the extent to which the laws of both jurisdictions have adequate and effective in transforming the rights of the girl-child especially in relation to gender equality, non-discrimination and child marriage in the patriarchal societies.

Lastly, the shortcomings of these legislations in addressing child marriage and safeguarding the human rights of the girl-child will also be assessed, in order to draw a conclusion as well as to provide relevant suggestions and recommendations to assist in ending child marriages in both jurisdictions.

5.2 The National Legal Framework and Practice of Child Marriage in South Africa

5.2.1 Brief overview of the historical development

The Republic of South Africa is located in the Southern region of Africa with an estimated population of 53 million.\textsuperscript{1062} South Africa shares borders with Botswana, Lesotho, Mozambique, Namibia, Swaziland, Zimbabwe\textsuperscript{1063} and is recognised as a nation with widespread diversity in cultures, languages and religious beliefs.\textsuperscript{1064} This diversity is recognised with the 11 official languages in section 6 of the 1996 Constitution. They include Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

This diversity is also recognised in the mix of citizens who are mainly Black Africans,\textsuperscript{1065} Whites, Coloureds, Indians and Asians.\textsuperscript{1066} Based on available statistics,


\textsuperscript{1063}Ibid.

\textsuperscript{1064}South Africa.info “South Africa’s Population”. Available at: http://www.southafrica.info/about/people/population.htm#.VqrOJ49OLIV (accessed 28-01-2016).

\textsuperscript{1065}Ibid. The Africans include the Nguni tribe made up of the Zulu, Xhosa, Ndebele and Swazi people; the Sotho-Tswana tribe include Southern, Northern and Western Sotho people; the Tsonga and the Venda tribe.

Black Africans make up a major part of the population constituting about 80.2% of the population.\(^{1067}\) They are known for having strong African cultural traditions and practices entrenched in patriarchy.\(^{1068}\) Ndulo confirms this position as he states that many Africans are greatly influenced by customary law especially in the area of marriage, inheritance and traditional authority, but its application is often discriminatory to women and girls in such areas as payment of bride price, guardianship, inheritance, appointment of traditional positions, exercise of traditional roles and responsibilities and attainment of age of majority.\(^{1069}\) He states further that: “it [customary law] tends to see women as adjuncts to the group to which they belong, such as a clan or tribe, rather than equals.\(^{1070}\)

The historical background and development of South Africa is deeply-rooted in colonialism, apartheid, social inequalities and gender discrimination.\(^{1071}\) Liebenberg notes that this historical background is important for an understanding and appreciation of human rights development in South Africa.\(^{1072}\) This history of colonisation, apartheid and racial segregation can be traced back to the 17th century when South Africa was under the colonial rule of Europe, following the establishment of the Dutch East Indian Company and the arrival of Dutch settlers in the Cape in 1652.\(^{1073}\) However, the rise of apartheid began in 1948 when an all-white National

\(^{1067}\) Ibid. For other ethnic groups, white and coloured are 8.4% and 8.8% respectively, while Indians/Asians comprise 2.5% of the population.


\(^{1070}\) *Ibid*.


\(^{1072}\) The broad history of South Africa will not be fully discussed in this study as it is not within the scope of this research. Liebenberg 2000 Human Development Report Background Paper 3.

Party gained power.\textsuperscript{1074} The enforcement of policies relative to political, economic and social segregation of people along racial lines under a system of apartheid resulted in grave inequalities particularly for the African race.\textsuperscript{1075} As Landsberg & Mackay rightly state, “apartheid is [was] synonymous with the gross violation of human rights”, that gravely impacted men, women and children.\textsuperscript{1076} These restrictions were placed on the development of laws for non-whites, as well as discrimination and oppression at different levels of the educational system, lack of access to social services, economic opportunities and employment opportunities.\textsuperscript{1077}

Racial inequalities existed for over forty years and ended in 1994 with the democratic election and the establishment of a new government.\textsuperscript{1078} From 1994 the government has made huge efforts in the process of transformation in all sectors of the country, as well as in achieving gender equality.\textsuperscript{1079} This position of transformation is confirmed by Landsberg and Mackay who state that:

From 1994 to 1999, the new government placed an explicit premium on transformation: the notion that the South African state and society should change fundamentally if South Africa was to move away from racism, autocracy, poverty and inequality. The challenges of formal democratisation, state reform, expanded delivery of social services, job creation, poverty alleviation and development, all constituted salient elements of transformation. Transformation thus sought to deal with economic, political and social relations, and sought to improve the lives of the poorest South Africans.\textsuperscript{1080}

However, Liebenberg rightly points out that “redressing this legacy, and achieving human development and the realisation of all human rights remains a major challenge
for the democratic government in South Africa.\textsuperscript{1081} This is evident in gender equality related cases and more particularly with the conflict between cultural practices and the promotion of the rights and welfare of women and girls.

5.2.2 Child marriage in South Africa: The practice of \textit{ukuthwala}

The practice of \textit{ukuthwala} that affects a girl-child is recognised as a form of child, early or forced marriage, and known to be an “age-old tradition” that originated from the \textit{Xhosa} speaking tribe of the Eastern Cape province.\textsuperscript{1082} The practice has also expanded to other ethnic groups like the \textit{Sotho} as well as the \textit{Venda} and \textit{Tsonga} tribes.\textsuperscript{1083} According to the South African Law Reform Commission (SALRC) report, there are media reports of the practice of \textit{ukuthwala} occurring mainly in the Eastern Pondoland in Lusikisiki, Flagstaff, Bizana and some other areas in the Eastern Cape as well as \textit{KwaZulu-Natal}.\textsuperscript{1084} Similarly, the 2011 documentary on “\textit{Ukuthwala - Stolen Innocence}” by the World Aid Campaign (WAC) has created wider awareness of the nature and extent of the practice of ukuthwala.\textsuperscript{1085}

The term ‘\textit{ukuthwala}’ has been explained in different ways. For instance, Mwambene and Sloth-Nielsen state that \textit{ukuthwala} means ‘to carry’.\textsuperscript{1086} They further explain that,
*ukuthwala* is the “culturally-legitimate abduction of a woman whereby, as a preliminary step to a customary marriage, a young man will forcibly take a girl to his home”.\(^{1087}\) However, Bekker points out that *ukuthwala* is different from common law abduction, as the latter involves “an intention of violating the guardian’s *potestas* and of enabling somebody to marry her or have sexual intercourse with her.”\(^{1088}\)

*Ukuthwala* has also been described as “a more common irregular proposal”\(^{1089}\) or “the act of ‘stealing the bride.’”\(^{1090}\) From the perspective of a renowned customary law expert, Professor Ronald Thandabanthu Nhlapo, “*Ukuthwala* is one such irregular method [of initiating a customary marriage] which would, if the precepts of the custom were correctly followed, eventually lead to the conclusion of a valid marriage under customary law.”\(^{1091}\)

Generally, the process of customary marriages involves a proposal of marriage from the intended groom’s family to the intended bride’s family. If the proposal is accepted, it marks the commencement of negotiations for payment of *lobola* by the man to the woman’s family.\(^{1092}\) Once negotiations are concluded and *lobola* is fixed with other important ceremonies performed, then the relationship is formalised.\(^{1093}\) However, this general process contrasts with the meaning and nature of *ukuthwala*. Mwanbene and Sloth-Nielson note that *ukuthwala* is in itself not a customary marriage as many people may believe, rather, it is a preliminary procedure to a customary marriage.\(^{1094}\) As such, the traditional process of *ukuthwala* has been described to involve the following:

\(^{1087}\) *Ibid.*


\(^{1089}\) Bennet explains that irregular proposals which are different from the norm can also include a formal proposal from the girl’s family to open marriage negotiations with the groom. This practice is also known as *ukubaleka*. Bennet 2010 *University of Botswana Law Journal* 7. See also SALRC “Discussion Paper 132 on the Practice of Ukuthwala” 6-7.

\(^{1090}\) Mwambene and Sloth-Nielsen 2011 *AHRLJ* 3.

\(^{1091}\) Professor Ronald Thandabanthu Nhlapo made this statement in an affidavit for the case of *Jezile v S and Others* (A 127/2014) [2015] ZAWCHC 31 (23 March 2015), para 72 & 73.


\(^{1093}\) *Ibid.*

\(^{1094}\) Mwambene and Sloth-Nielsen 2011 *AHRLJ* 3-4.
1. The intended girl must be of marriageable age, which under customary practice, is the age of puberty or child-bearing age and not the minimum legal age of marriage as recognised in law;¹⁰⁹⁵

2. Consent of both parties is a necessary requirement to perform *ukuthwala*. It is often argued that the girl is a willing party to the abduction and the traditional practice is not synonymous with forced marriage. Although the girl is sometimes caught unawares and forcibly taken to the man’s home, this is only after consent is given. Where she does not agree, the process of *ukuthwala* will fail, and the girl’s father will institute a civil action against the man’s guardian;¹⁰⁹⁶

3. The mock abduction of the girl is also part of the process of *ukuthwala*, and the show of resistance by the girl is for the sake of modesty and to suggest to onlookers that it is against her will.¹⁰⁹⁷

4. This process also involves placing the abducted girl with the womenfolk in the man’s house to safeguard her reputation, while the man’s father or family head is notified of the presence of the girl in their home and the intention of the man to marry her. Sexual intercourse is prohibited in this process, and when violated it is punishable by payment of a fine or “*bopha*” of one herd of cattle to the girl’s father.¹⁰⁹⁸ Bennet equally confirms that: “The customs of *ukuthwala* did not contemplate sexual intercourse, at least not until the girl’s status as a bride has been fully fixed.”¹⁰⁹⁹

5. The man’s family then sends an invitation to the girl’s family on the day of the mock abduction or the following day to inform them of where she is and their

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¹⁰⁹⁵ *Jezile v S and Others*, op. cit. n. 104, para 72.1; SALRC “Discussion Paper 132 on the Practice of *Ukuthwala*” 7-8; Van der Watt and Ovens “Contextualizing the Practice of *Ukuthwala* Within South Africa” 2012 (13) (1) *Child Abuse Research* 11-26 12. Discussion on marriageable age in customary law is a contentious debate and has been discussed in Chapter Two of this thesis.

¹⁰⁹⁶ *Jezile v S and Other*, op. cit. n. 104, para 72.2; Van der Watt and Ovens 2012 *Child Abuse Research* 12.

¹⁰⁹⁷ *Ibid*; *Jezile v S and Other*, op. cit. n. 104, para 72.3.


¹⁰⁹⁹ See Bennet 2010 *University of Botswana Law Journal* 7-8. Bennet confirms this position when he states that: “The customs of thwala did not contemplate sexual intercourse, at least not until the girl’s status as a bride has been fully fixed.”
intention to commence negotiations for marriage. The consent of the girl’s family is very important in customary law.\textsuperscript{1100}

An example confirming this traditional process is seen in the briefing by the Commission for the Protection and Promotion of the Rights of Cultural, Religious, and Linguistic Communities, where Nkosi Sipho Mahlangu from the National House of Traditional Leaders states that he and his wife were in their 20s and graduates when they both agreed to enter into the process of \textit{ukuthwala} as he couldn’t afford to pay \textit{lobola} at that time.\textsuperscript{1101}

Other reasons why \textit{ukuthwala} takes place and is considered an irregular process, include: to avoid arranged marriages, to avoid wedding expenses; to hasten marriage negotiations especially when the girl is pregnant; to convince the girl of the seriousness of the suitor’s intention for marriage; to force parents to agree to the choice of spouse and payment of \textit{lobola} into the future due to financial constraints.\textsuperscript{1102}

However, in contrast to this traditional practice, and from a child marriage perspective, the rationale for the practice of \textit{ukuthwala} has changed.\textsuperscript{1103} The wrongful practice of \textit{ukuthwala} violates not only fundamental children’s rights but also the constitutional protection of the girl-child,\textsuperscript{1104} as the abuse of \textit{ukuthwala} involves girls below the minimum legal age of marriage,\textsuperscript{1105} with no free and full consent but who are forced or \textit{thwala’ed} to marry mostly older men.\textsuperscript{1106} It is in this context of \textit{ukuthwala} affecting the girl-child that the practice amounts to child, early or forced marriage.\textsuperscript{1107}

\textsuperscript{1100} \textit{Jezile v S and Other}, op. cit. n. 104, para 72.6 & 73.

\textsuperscript{1101} SAPA “\textit{Ukuthwala} can Lead to Happy Marriage” December 4, 2014 Dispatch Live. Available at: www.dispatchlive.co.za/gen/ukuthwala-can-lead-to-happy-marriage/ (accessed 28-12-2014).

\textsuperscript{1102} Mwambene and Sloth-Nielsen 2011 \textit{AHRLJ} 4-5. See also \textit{Jezile v S and Others}, op. cit. n. 104, para 72 & 73.1-73.4; SALRC “Discussion Paper 132 on the Practice of \textit{Ukuthwala}” 7-8.

\textsuperscript{1103} \textit{Ibid.}, p. 20.

\textsuperscript{1104} Mwambene and Sloth-Nielsen 2011 \textit{AHRLJ} 1-2.

\textsuperscript{1105} According to the SALRC report, girls between the ages of 11 and 15 are mostly affected by the practice, especially those from poor families or child headed households. See SALRC “Discussion Paper 132 on the Practice of \textit{Ukuthwala}” 2.


\textsuperscript{1107} SALRC “Discussion Paper 132 on the Practice of \textit{Ukuthwala}” 19.
Traditional Leaders of South Africa (CONTRALESA) states that “ukuthwala was an old custom that is now being wrongly practised in several parts of the Eastern Transkei”,\footnote{Mwambene and Sloth-Nielsen 2011 \textit{AHRLJ} 2.} and as such, forced marriages go against the custom.\footnote{Statement cited in Mwambene and Sloth-Nielsen 2011 \textit{AHRLJ} 2. See Thornbery “Validity of \textit{Ukuthwala}” depends on definition of custom” 15 July, 2013. Available at: http://www.customcontested.co.za/ukuthwala/ accessed 18-12-2015).}

Different factors have been identified as contributing to reinforcing the wrongful practice of \textit{ukuthwala}. Some of these factors include: poverty;\footnote{For example, reports show that some of these girls are sold by their parents who are in dire economic need and are tempted by the payment of \textit{lobola}. The persistence of poverty across South Africa is recognised as a major challenge and mainly attributed to the apartheid system that existed previously. See Ross “Girls ‘Sold’ for \textit{Lobola}” 1. See also Liebenberg Human Development and Human Rights South Africa Country Study” 5 at para 2.2; SALRC “Discussion Paper 132 on the Practice of \textit{Ukuthwala}” 20.} the strong belief in the myth that sexual intercourse with virgins will cure HIV/AIDS infection;\footnote{\textit{Ibid}; IPPF \textit{“Ending Child Marriage: A Guide for Global Policy Action”} 2006 13.} the continuous practice of gender inequality in which women are regarded as subordinate to men;\footnote{SALRC “Discussion Paper 132 on the Practice of \textit{Ukuthwala}” 20.} traditional beliefs in the preservation of a girl’s virginity\footnote{Essa “S African girls given student grants to remain virgins” 25 January, 2016 Aljazeera.} as well as the general culture of silence around issues of sexuality; exploitative transactions; and violence against women.\footnote{IPPF \textit{“Ending Child Marriage: A Guide for Global Policy Action”} 2006 13.}

The implications of the wrongful practice and abuse of \textit{ukuthwala} gravely affect the girl’s education, health, development and physical wellbeing\footnote{SALRC “Discussion Paper 132 on the Practice of \textit{Ukuthwala}” 14.} which are major reasons for the increased criticism of \textit{ukuthwala}. In addition, consideration is also given to the seriousness of the acts of abduction, trafficking, sexual violence such as rape in order to ensure that such crimes are not treated with levity.\footnote{\textit{Ibid.}, p. 11; Van der Watt and Ovens 2012 \textit{Child Abuse Research} 12.}

Mwambene and Sloth-Nielsen suggest that “instead of adopting an \textit{a priori} prohibitionist stance towards customs that seem to violate human rights norms, benign accommodation that promotes the positive aspects of culture should be sought”.\footnote{Mwambene and Sloth-Nielsen 2011 \textit{AHRLJ} 1.}
This suggestion is acceptable especially because people are often sensitive to any form of direct criticism(s) of their culture or practice. However, the severe implications identified above often overshadow the positive aspects of *ukuthwala*.

As part of efforts to address harmful practices such as child marriage and abuse of the rights of women and girls, South Africa has showed commitment to international human rights norms and obligations, through the signing and ratification of various international and regional human rights instruments.\(^{1118}\) These include the ICCPR;\(^{1119}\) ICESCR;\(^ {1120}\) CEDAW;\(^ {1121}\) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;\(^ {1122}\) CRC;\(^ {1123}\) ACHPR;\(^ {1124}\) ACRWC;\(^ {1125}\) and the African Women’s Protocol.\(^ {1126}\)

At a national level, South Africa’s commitment to international human rights norms and obligations is reflected in the recognition of customary international law as part of South African law.\(^ {1127}\) Section 232 of the Constitution states that: “Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.” Similarly, section 39(1)(b) provides that consideration must be given to international law when interpreting the Bill of Rights.\(^ {1128}\) These provisions...

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\(^{1118}\) Grant 2006 *Journal of African Law* 3.

\(^{1119}\) *Ibid.*

\(^{1119}\) ICCPR was signed and ratified by South Africa on 3 October, 1994 and 10 December, 1998 respectively.

\(^{1120}\) ICESCR was signed and ratified by South Africa on 3 October, 1994 and 12 January, 2015 respectively.

\(^{1121}\) CEDAW was signed and ratified by South Africa on 29 January, 1993 and 15 December, 1995 respectively.

\(^{1122}\) The Convention was signed and ratified by South Africa on 29 January, 1993 and 10 December, 1998.

\(^{1123}\) CRC was signed and ratified by South Africa on 29 January, 1993 and 16 June 1995.

\(^{1124}\) ACHPR was signed and ratified by South Africa on 9 July, 1996.

\(^{1125}\) ACRWC was signed and ratified by South Africa on 10 October, 1997 and 7 January, 2000.

\(^{1126}\) African Women’s Protocol was signed and ratified by South Africa on 16 March, 2004 and 17 December, 2004.


\(^{1128}\) *Ibid.*
confirm the key interpretative role that international laws play in South Africa’s legal system. An example of this interpretative role is seen in a number of Constitutional Court cases such as *S v Makwanyane and Another* where the Constitutional Court held that public international law in the context of its deliberations includes binding international law instruments on South Africa as well as non-binding instruments, such as the decisions of the Inter-American Court of Human Rights or the European Court of Human Rights.

### 5.2.3 The Constitution of the Republic of South Africa

Following South Africa’s democratic transition in 1994, the adoption of the 1996 Constitution is aimed at healing the divisions of the past systemic human rights violations, by establishing a society founded on democratic values, social justice and fundamental human rights. In other words, the Constitution is focused on “an agenda of transformative constitutionalism,” to transform the social, political, economic and legal culture of the country for a better future. This position is also confirmed in the case of *S v Makwanyane and Another*, where the Constitutional Court held that:

> The Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the

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1129 Section 233 of the South African Constitution which states that: “When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.” See also Liebenberg 2000 Human Development Report Background Paper 12.


1131 Ibid; See also Liebenberg 2000 Human Development Report Background Paper 12.

1132 The Preamble to the Constitution; Liebenberg Human Development and Human Rights South Africa Country Study 4.

1133 Langa “Transformative Constitutionalism” Prestige lecture delivered at Stellenbosch University on 9 October 2006 1.

recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.\textsuperscript{1135}

In this regard, the South African Constitution has great relevance to children’s rights, and in particular, to the promotion and protection of the rights of the girl-child. The objective of transformation in the Constitution is committed to achieving gender equality.\textsuperscript{1136} This transformation is recognised in the supremacy of the Constitution,\textsuperscript{1137} as “any law or conduct inconsistent with it [the 1996 Constitution] is invalid, and obligations imposed by it must be fulfilled”. The focus of the Constitution also has as its foundation the core modern international human rights principle of universality,\textsuperscript{1138} which encompasses human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism.\textsuperscript{1139}

The importance of this principles is emphasised in the case of \textit{Bhe and Others v Khayelitsha}, when the Constitutional Court deliberated on the constitutional validity of the principle of male primogeniture in the context of customary law of succession.\textsuperscript{1140} The ruling held that:

\begin{quotation}
The rights to equality and dignity are one of the most valuable of rights in any open and democratic state. They assume special importance in South
\end{quotation}

\begin{itemize}
\item \textsuperscript{1135} (CCT3/94) [1995] ZACC 3 para 7.
\item \textsuperscript{1136} Landsberg & Mackay \textit{Reflections on Democracy and Human Rights: A Decade of the South African Constitution} 5-6.
\item \textsuperscript{1137} Section 2 of the 1996 Constitution. See also the case of \textit{Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others} (CCT 31/99) [2000] ZACC 1; 2000(2) SA 674; 2000 (3) BCLR 241 (25 February 2000) para 44, Chaskalson P held that: “There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, [and customary law] derives its force from the Constitution and is subject to constitutional control.” The relevance of this judicial decision to this discussion is to show the significance of the Constitution in the South African legal system.
\item \textsuperscript{1138} Grant 2006 \textit{Journal of African Law} 2-3.
\item \textsuperscript{1139} Section 1(a)-(d) of the 1996 Constitution.
\item \textsuperscript{1140} The importance of these principles are emphasised in a number of Constitutional Court cases. For instance, the case of \textit{Bhe and Others v Khayelitsha Magistrate and Others} op. cit. n.103, para 71. The importance of these principles are also emphasised in other constitutional court cases. See \textit{Dawood and Another v Minister of Home Affairs and Others} (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 at para 35; \textit{Fraser v Children's Court Pretoria North and Others} (CCT31/96) [1997] ZACC 1; 1996 (8) BCLR 1085 1997 (2) SA 218 at para 20, Mahomed DP equally emphasise the importance the principle of equality which lies at the heart of the Constitution.
\end{itemize}
Africa because of our past history of inequality and hurtful discrimination on grounds that include race and gender.  

These principles are affirmed in the Bill of Rights, which is recognised as the cornerstone of South Africa’s democracy. Section 7(1) of the 1996 Constitution states that the Bill of Rights enshrines the rights of all people, including children, and affirms the democratic values of human dignity, equality and freedom. The Bill of Rights also applies to all law and binds all organs of government.

Therefore, the Constitution and the Bill of Rights play highly significant roles in protecting the rights of the girl-child, especially from harmful cultural practices such as ukuthwala. The South African Law Reform Commission Report on ukuthwala notes that:

Ukuthwala is unlawful if it is contrary to the community’s perception of justice or the legal convictions of society. The Bill of Rights in chapter 2 of the Constitution plays an important role in deciding whether conduct is contrary to public policy or the community’s sense of justice and is therefore unlawful. The values reflected in the Constitution – such as human dignity, the achievement of equality, and the advancement of human rights and freedoms – are crucial in deciding this issue.

In other words, human dignity, equality and freedom are core constitutional values that are pivotal in deciding whether the acts or activities conducted in the practice of ukuthwala are valid or contrary to the rights of the girl-child, as protected by the Constitution. Currie and De Waal note that the Constitution provides that courts take the responsibility and authority of interpreting the Bill of Rights and access the facts of each case in order to determine if rights have been violated.

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1141 Bhe and Others v Khayelitsha Magistrate and Others op. cit. n. 103, para 71.
1142 Sections 7-39 of the 1996 Constitution.
1143 Ibid., section 7 (1).
1146 Section 9,10 & 12 of the 1996 Constitution.
1148 Currie and De Waal 23 & 31.
In those cases, where it is found that the act or activities conducted violates the rights of the girl-child, the question is then of whether such violation is justifiable if considered subject to the criteria provided in section 36 of the Constitution.\textsuperscript{1149} The effects of the wrongful practice of \textit{ukuthwala} discussed above cannot however, be considered as justifiable.\textsuperscript{1150}

Furthermore, other important rights relevant to the protection of the girl-child include: the right to life;\textsuperscript{1151} freedom from slavery, servitude and forced labour;\textsuperscript{1152} the right to environment;\textsuperscript{1153} right to health care, food, water and social security and \textsuperscript{1154} the right to education.\textsuperscript{1155} The rights of children are also provided for in section 28(2) of the Constitution which, most importantly, defines a child to mean “a person under the age of 18 years.” It also confirms in section 28(3) that “a child’s best interests are of paramount importance in every matter concerning the child.” Langa confirms the importance of this section and states that:

Section 28 of the Constitution provides specific protection for the rights of children. Our constitutional obligations in relation to children are particularly important for we vest in our children our hopes for a better life for all. The inclusion of this provision in the Constitution marks the constitutional importance of protecting the rights of children, not only those rights expressly conferred by section 28 but also all the other rights in the Constitution which, appropriately construed, are also conferred upon children.\textsuperscript{1156}

\textsuperscript{1149} SALRC “Discussion Paper 132 on the Practice of \textit{Ukuthwala}” 30. Section 36 of the 1996 Constitution provides for limitation of rights in the Bill of rights in terms of law of general application, and to the extent that such a limitation is reasonable and justifiable, while taking into account such factors as: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relationship between the limitation and its purpose and less restrictive means to achieve the purpose.


\textsuperscript{1151} Section 11 of the 1996 Constitution.

\textsuperscript{1152} \textit{Ibid.}, section 13. See also section 28(1)(d) which provides that “every child has the right to be protected from maltreatment, neglect, abuse or degradation.”

\textsuperscript{1153} Section 24 of the 1996 Constitution.

\textsuperscript{1154} \textit{Ibid.}, section 27.

\textsuperscript{1155} \textit{Ibid.}, section 29.

\textsuperscript{1156} \textit{Bhe and Others v Khayelitsha Magistrate and Others}, op. cit. n. 103, para 52.
Hence, it is important that these fundamental human rights and values are promoted, respected and fulfilled by the State as well as by every individual,\textsuperscript{1157} especially in the case of harmful practices like child marriage. This is in order to prevent an infringement of the constitutional rights of the girl-child, as non-compliance with the Bill of Rights is unconstitutional.\textsuperscript{1158}

In the context of customary law and practice, the Constitution recognises the wide diversity of culture that exists in South Africa and the importance of protecting the cultural rights of all people.\textsuperscript{1159} Section 30 guarantees everyone the right to language and cultural life of their choice, while section 31 guarantees the right for all persons to belong to a cultural, religious and linguistic community.\textsuperscript{1160} This protection of cultural rights confirms the awareness that cultural relativism is very much part of South Africa.\textsuperscript{1161} To further strengthen this constitutional protection of cultural rights, the Constitution provides for the establishment of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.\textsuperscript{1162}

However, cultural rights may not be exercised in a manner inconsistent with any provisions of the Bill of Rights.\textsuperscript{1163} In other words, the practice of culture including \textit{ukuthwala}, should not undermine the provisions of the Bill of Rights. As such, Albertyn explains:

\begin{quote}
The 1996 Constitution addresses the apparent conflict between culture and equality by recognising the importance of cultural identity and cultural diversity and embracing legal
\end{quote}

\begin{flushleft}
\textsuperscript{1157} Section 7 (2) & 8 of the 1996 Constitution; See also Currie and De Waal 23.
\textsuperscript{1158} Currie and De Waal 23.
\textsuperscript{1159} Bennet 8-9; Grant 2006 \textit{Journal of African Law} 6.
\textsuperscript{1160} Section 31 specifically provides that persons belonging to a cultural, religious or linguistic community may not be denied their right to culture, religion, language, as well as the right to form, join or maintain cultural, religious and linguistic associations or bodies.
\textsuperscript{1161} Grant 2006 \textit{Journal of African Law} 8. See also Bennet 20-23.
\textsuperscript{1162} Section 181 (1)(c) of the Constitution. Section 185-186 provides for the function as well as composition of the Commission.
\textsuperscript{1163} Section 30 & 31 (2) of the Constitution; SALRC “Discussion Paper 132 on the Practice of \textit{Ukuthwala}” 27.
\end{flushleft}
pluralism, at the same time as it renders these subject to the values and rights of the supreme Constitution. Similarly, Grant argues that this position on the supremacy of the Constitution founded on the principles of universality is emphasised in judicial decisions of a number of cases such as *Bhe and Others v Khayelitsha*, *Shibi v Sithole & Others* and *South African Human Rights Commission v President of the Republic of South Africa*. She argues that the Constitutional Court’s decisions in these cases, on the principle of male primogeniture under customary law of succession, and its incompatibility with the right to equality in the Constitution, “brings the tension between universality and cultural diversity to a sharp relief. On a superficial level, the decision appears to cement the universalist position.” However, despite this position, Grant is of the view that these judicial decisions equally raise questions on the implications of universality of rights in a diverse society as well as argument on the insufficient regard for the importance of culture or cultural diversity. Nonetheless, Albertyn rightly argues that, the constitutional environment in South Africa has created an enabling avenue to condemn such harmful cultural practices and improve the position of women and girls.

As a final point, no doubt this universalist position which the Constitution of South Africa is based on will continue to advance the protection of the rights of women and girls. Therefore, resolving the conflict(s) that arises between rights and culture will be an ongoing process and will be decided based on the facts of the case and most importantly on the core principles of human rights.

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1164 Albertyn 2009 Constitutional Court Review 168.


1166 (CCT 69/03) 2005 (1) SA 580 (CC).

1167 (CCT 50/03) 2005 (1) BCLR 1(CC).


1169 Ibid., p. 4.

1170 Albertyn 2009 Constitutional Court Review 177.
5.2.4 The Children’s Act 38 of 2005

In line with the principles of human rights, the Children’s Act, 38 of 2005 (Children’s Act) regulates the care and protection of children in South Africa.\textsuperscript{1171} The main aims and objectives of the Act are set out in section 2. Most importantly, the Act aims to give effect to the constitutional rights of children in South Africa especially rights that deal with family, parental or alternative care; social services; protection from maltreatment, neglect, abuse or degradation; the best interests of the child and prohibition against child abduction.\textsuperscript{1172} In addition, the Children’s Act aims to give effect to the obligations with regard to the care and protection of children provided in different international and regional instruments which South Africa has ratified.\textsuperscript{1173}

The need to extend particular care and protection to the child has been emphasised in a number of international and regional instruments, such as the UN Declaration on the Rights of the Child, CRC and the ACRWC, and by different international agencies and organisations. The existence of the Children’s Act providing adequate protection for children is therefore relevant at a national level. Aucamp \textit{et al} confirms this position and states that: “The Children’s Act, if implemented correctly, will provide children in South Africa with the legal framework that will safeguard them against violations of their human rights and that will promote their overall well-being and safety”.\textsuperscript{1174}

In the context of child marriage, more importantly in the Children’s Act legal framework, is the recognition of the definition of a child as persons below the age of 18 years\textsuperscript{1175} which resonates with the constitutional provision as well as international and regional standards. The Act equally defines terms such as ‘abuse’ and ‘exploitation’\textsuperscript{1176} which are major acts that the girl-child experiences in cases of child and forced marriages.

\begin{flushleft}
\textsuperscript{1171} The preamble and long title to the Children’s Act; Kruger & Oosthuizen 2012 \textit{PELJ/PER} 303.
\textsuperscript{1172} Section 2 and the long title to the Children’s Act.
\textsuperscript{1173} Section 2 (c) of the Children’s Act.
\textsuperscript{1175} Section 1 of the Children’s Act.
\textsuperscript{1176} In particular, section 1 of the Children’s Act defines exploitation to include; a) all forms of slavery or practices similar to slavery, including debt bondage or forced marriage; b) sexual exploitation; c) servitude; d) forced labour or services; e) child labour prohibited in terms of section 141; and f) the removal of body parts.
\end{flushleft}
The Act also defines and prohibits child trafficking which is often linked to cases of *Ukuthwala*, and places an obligation on frontline officials to report a child who is a victim of trafficking to social workers for investigation. In addition, the Children’s Act confirms the best interests of the child principle, as well as child participation all of which are emphasised in international children’s rights instruments.

On social, cultural and religious practices which are a major part of the discussion in this thesis, the Children’s Act provides in section 12(1) that “every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her wellbeing”. Section 12(2) also states that “a child below the minimum age set by law for a valid marriage may not be given out in marriage or engagement.” However, Section 12(1) and (2) has been recognised as problematic. Firstly, *ukuthwala* is not specified as one of the cultural practices detrimental to the wellbeing of the child. Secondly, section 12(2)(a) prohibits giving out a child in marriage or engagement and as Mwambene and Sloth-Nielsen argues the term “giving out” and the prohibition in Section 12(2)(a) is not drafted to target *ukuthwala* as conventionally understood. They argue further that:

> The debate about whether *ukuthwala* contravenes section 12(1) in any event (in the absence of any concrete sanction being attached) requires an assessment as to whether the practice is in a social and cultural practice which is detrimental to the child’s wellbeing. Our answer to this must be context-dependent: The abduction and rape of a child without her consent falls undeniably to be outlawed as a harmful cultural practice, albeit that the sanctions of conventional criminal law might also be brought to bear. However, equally, we are convinced that not all forms of *ukuthwala* can be labelled as objectionable, harmful or detrimental...Any

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1177 Section 1 and 281-291 of the Children’s Act.

1178 These officials include Immigration official, police official, social worker, social service professional medical practitioner or registered nurse. Section 288 of the Children’s Act. See also SALRC “Discussion Paper 132 on the Practice of *Ukuthwala*” 40.

1179 Section 9 of the Children’s Act.


1181 Article 3 & 12 of the CRC and Article 4 & 7 of the ACRWC. See also SALRC “Discussion Paper 132 on the Practice of *Ukuthwala*” 39.


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consideration of the implications of section 12 is speculative, as the determination as to whether the practice is detrimental will inevitably be related to the actual circumstances which are laid before the court for adjudication.”

This argument confirms the extensive analysis of the practice and impact of ukuthwala undertaken in the case of Jezile v S. The appeal case of Jezile v S in Wynberg Regional Court concerns the appellants sentence to 22 years' imprisonment for rape, human trafficking and assault with the intent to do grievous bodily harm. Based on the facts of this case, in 2009, the appellant a 28 years old man travelled to his rural village in the Eastern Cape with the intention of finding a bride. In January 2010 the man noticed the complainant and considered her suitability as a bride. The complainant was 14 years old, in primary school and residing with her maternal grandmother and other family members as her father was deceased and her mother worked in a nearby village.

On the same day that the appellant first saw the complainant, based on his request, his family members started and concluded the traditional lobola negotiations in one day with the complainant’s male family members. The complainant was informed of the marriage and taken to the appellant’s house where she was made to change her clothes to amadaki (an attire specially designed for a new bride or makoti). The girl was unhappy, she ran away, was subsequently found and beaten and thereafter taken to Cape town by the appellant against her will. She was beaten on several occasions and raped for her refusal to have sexual intercourse with the appellant. She finally managed to escape and was assisted in locating a police station. The appellant was charged with the offences mentioned above and convicted in a magistrate’s court. The appellant appealed this conviction and raised as part of his defense the argument that he was in a customary marriage with the complainant, and that as part of ukuthwala, a mock abduction in which a girl shows resistance is required. Due to the cultural and constitutional implications in this case some of

1185 Ibid., p. 17.
1186 Jezile v S and Others op. cit. n. 104, para 5-6.
1187 Jezile v S and Others op. cit. n. 104, para 7-9.
1188 Ibid., para 11.
1189 Ibid., para 51.
which have been discussed above, legal and traditional experts and organizations were invited by the court to provide submissions on the practice of *ukuthwala* in customary law to assist as *amici curiae*.

As stated above the summary of evidence provided showed a distinction between the traditional practice of *ukuthwala* and the prevailing practice which is considered a wrongful practice. The court also rejected the appellants defence on the practice of *ukuthwala* to justify his acts of criminality and dismissed the appeal and set aside the appellant's conviction of assault.

This case affirms the importance of the continuous advancement of the rights of women and girls in South Africa. It also confirms that gender violence and the defence of the wrongful practice of *ukuthwala* cannot be justified. The prevailing practice of *ukuthwala* is an act of criminality that needs to be eradicated and the defence of culture should not be used as excuse. This case also shows the need for the enactment of laws or the amendment of laws that draw on the wrongful practice of *ukuthwala* in order to further reinforce the existing legal framework.

### 5.2.5 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (also referred to as the Sexual Offences Act of 2007) provides a comprehensive review of laws relating to sexual offences in South Africa. Prior to the Sexual Offences Act of 2007 was the Sexual Offences Act 23 of 1957 (previously known as 'the Immorality Act') which addressed the commission and prohibition of different sexual offences. Such offences include those linked with brothel-keeping.

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1194 This Sexual Offences Act 23 of 1957 became effective 12 April 1957.
procuring and detaining any female for sexual pleasure,\textsuperscript{1196} prostitution,\textsuperscript{1197} as well as the infamous provision on prohibition of sex between a white person and a person of another race.\textsuperscript{1198} However, a number of the provisions in the Sexual Offences Act of 1957 have been repealed by Section 68 of the Sexual Offences Act of 2007.\textsuperscript{1199}

The high prevalence of sexual offences, especially against women and children, as well as the inadequacy in the protection provided under common law and existing legislations were recognised as major challenges and concerns in South Africa.\textsuperscript{1200} Hence the adoption of the Sexual Offences Act of 2007 which provides a single statute dealing with various forms of sexual offences.\textsuperscript{1201} The Act aims to provide adequate and effective protection for complainants of sexual offences, who are mainly women and children.\textsuperscript{1202} It also aims to provide effective measures for all relevant organs of the government in dealing with cases of sexual offences and giving effect to the provisions of the Act, and ultimately, eradicate the relatively high incidences of sexual offences across the country.\textsuperscript{1203}

Sexual exploitation is a major risk of child marriage and it has been emphasised in many reports.\textsuperscript{1204} As stated above, the recent practice of ukuthwala and the circumstances surrounding each case has shown its connection with sexual offences of rape\textsuperscript{1205} and statutory rape; common law abduction;\textsuperscript{1206} kidnapping; human

\begin{footnotesize}
\begin{enumerate}
\item[1196] Ibid., section 10-12.
\item[1197] Ibid., section 20.
\item[1198] Ibid., section 16. However, this section was repealed by Section 2 of Immorality and Prohibition of Mixed Marriage Amendment Act 72 of 1985.
\item[1199] For example, see sections 9,11,12,12 (2),13-15, 18, 18 A and 20 A of the Sexual Offences Act 23 of 1957.
\item[1200] The preamble to the Sexual Offences Act of 2007.
\item[1201] Ibid., the preamble.
\item[1202] Ibid., section 2. Section 1 defines a complainant as a victim of any sexual offence.
\item[1203] Ibid., section 2.
\item[1204] Sexual exploitation was discussed under the risk factors of child marriage in chapter two.
\item[1205] Section 3 of the Sexual Offences Act of 2007. This section provides that rape involves “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”.
\item[1206] As stated earlier, common law abduction involves “an intention of violating the guardian’s potestas and of enabling somebody to marry her or have sexual intercourse with her.” See Bekker et al
\end{enumerate}
\end{footnotesize}
trafficking;\textsuperscript{1207} and assault,\textsuperscript{1208} all of which strongly contravene the laws and protection provided in the Sexual Offences Act 2007.\textsuperscript{1209} For instance, a perpetrator who unlawfully takes a minor or a girl-child out of the control of her custodian with the intention of forced marriage or sexual intercourse may be convicted of the common law crime of abduction after careful consideration of all circumstances.\textsuperscript{1210} This is due to the fact that the act committed is unlawful and the perpetrator has the intention of committing it.\textsuperscript{1211} Kruger and Oosthuizen note too that although the crime punishes the act committed against the girl’s custodian, especially where there is consent, the consent of the minor to the acts committed is no defence.\textsuperscript{1212}

Strong consideration is thus given to utilising the related provisions of the Act in prosecuting offenders of these criminal activities.\textsuperscript{1213} An example is seen in \textit{Jezile v S} where consideration was given to the relevant constitutional and legislative provisions including the Sexual Offences Act of 2007, as well as relevant international and regional conventions in order to arrive at a judicial decision.\textsuperscript{1214}

The Sexual Offences Act plays a significant role in the context of children’s rights and in dealing with all matters relating to sexual offences. It also gives effect to the obligations placed on South Africa in different international and regional legal

\textsuperscript{1207} Section 70 (2)(b) of the Sexual Offences Act of 2007 defines trafficking and section 71 (1) states that “A person (“A”) who traffic’s any person (“B”), without the consent of B, is guilty of the offence of trafficking in persons for sexual purposes”.

\textsuperscript{1208} Section 5 of the Sexual Offences Act of 2007. This provides that where a person intentionally sexually violates another or inspiring belief in another that she will be sexually violated.

\textsuperscript{1209} Example is \textit{Jezile v S and Others} op. cit. n. 104. The appellant was convicted at Wynberg regional court for human trafficking, rape, and assault with intention to cause grievous bodily harm.

\textsuperscript{1210} Kruger and “Oosthuizen “South Africa- Safe Haven for Human Traffickers? Employing the arsenal of existing law to combat human trafficking” 2012 Potchefstroom Electronic Law Journal (PELJ/PER) 285. See also Milton \textit{South African Criminal Law and Procedure: Common Law Crimes} 1996 554. As stated above the statutory abduction was provided by sections 12 and 13 of the Sexual Offences Act 23 of 1957 and has been repealed by the Sexual Offences Act of 2007.

\textsuperscript{1211} Kruger & Oosthuizen 2012 \textit{PELJ/PER} 285-286.

\textsuperscript{1212} \textit{Ibid}. See also Milton 554-555.

\textsuperscript{1213} Kruger and Oosthuizen 2012 \textit{PELJ/PER} 283-284.

\textsuperscript{1214} \textit{Jezile v S and Others}, op cit. above at 104, para 63.
instruments that address abuse and violence against women and children.\textsuperscript{1215} However, it has been criticised for its failure to address the specific vulnerabilities of children in the sexual sphere.\textsuperscript{1216}

The shortcoming of the Act relates to the distinction that exists between section 54(1) and section 54(2). Section 54(1) places an obligation on anyone who has ‘knowledge’ of the commission of sexual offences against children to report same to a police official, failure of which makes the person guilty of the offence which attracts a fine or imprisonment.\textsuperscript{1217} On the other hand, section 54(2)(a) places an obligation on anyone who has ‘knowledge, reasonable belief or suspicion’ of the commission of sexual offences against a person of mental disability to report same to a police official. Failure to report makes the person guilty of the offence which attracts a fine or imprisonment and where a person reports in good faith, he or she shall not be liable for civil or criminal proceedings.\textsuperscript{1218}

5.2.6 Recognition of Customary Marriages Act 120 of 1998 (RCMA)

The Recognition of Marriages Act\textsuperscript{1219} makes provision for the recognition and regulation of customary marriages in South Africa. According to the RCMA, a customary marriage is recognised as marriage concluded in accordance with customary law,\textsuperscript{1220} and it is recognised as a valid marriage.\textsuperscript{1221} Both parties to the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1215} This is noted in the preamble to the Sexual Offences Act of 2007. See also section 4 of the CRC and section 16 (1)(a) of CEDAW.
\item \textsuperscript{1217} Section 54(1)(a) & (b) of Sexual Offences Act of 2007.
\item \textsuperscript{1218} Ibid., section 54(2) (b)& (c).
\item \textsuperscript{1219} Date of commencement 15 November 2000.
\item \textsuperscript{1220} Section 1 of the Recognition of Customary Marriages Act. The Act also describes customary law as “the customs and usages traditionally observed among the indigenous African people of South Africa and which form part of the culture of those peoples”.
\item \textsuperscript{1221} Section 2 of RCMA; Maithufi “Case Note: MM v MN 210 (4) SA 286 (GNP)” 2012 4 Volume 2 De Jure 405-412 406.
\end{itemize}
\end{footnotesize}
marriage must be above 18 years, and must give consent to be married to each other under customary law.\textsuperscript{1222}

The RCMA lays down requirements for the validity of customary marriages in section 3 of the Act as follows:

1) For a customary marriage entered into after the commencement of this Act to be valid-
   a) The Prospective spouses-
      i. Must both be above the age of 18 years; and
      ii. Must both consent to be married to each other under customary law; and
   b) The marriage must be negotiated and entered into or celebrated in accordance with customary law.

With regard to these requirements, the SALRC notes in its report that: “In view of the fact that ukuthwa is a prelude to a customary marriage and should eventually lead to such a marriage, the essentials of a valid customary marriage as set out in the Recognition of Marriages Act must be complied with.”\textsuperscript{1223}

Besides recognising marriage of persons above the age of 18 years, the Act also recognises marriages of persons below the age of 18 years referred to as minors.\textsuperscript{1224} The RCMA further provides in section 3(3)(a) that if either of the prospective spouses is a minor both his or her parents or legal guardians must consent to the marriage. Where consent of parents or legal guardians cannot be obtained, Section 25 of the Marriage Act of 1961 applies.\textsuperscript{1225} The latter, section 25,\textsuperscript{1226} provides that the Commissioner of Child Welfare may grant consent after making inquiries on whether the marriage will be in the interest of the child, and that if the parent, legal guardian and Commissioner refuse to give such consent, the minor may approach a judge of a High Court.\textsuperscript{1227}

\textsuperscript{1222} Section 3(1) of RCMA.

\textsuperscript{1223} SALRC “Discussion Paper 132 on the Practice of Ukuthwa” 35. See also the case of Jezile v S and Others, op. cit. n. 104, para 82.

\textsuperscript{1224} SALRC “Discussion Paper 132 on the Practice of Ukuthwa” 36.

\textsuperscript{1225} Section 3 (3)(b) of RCMA; SALRC “Discussion Paper 132 on the Practice of Ukuthwa” 36.

\textsuperscript{1226} The Marriage Act of 1961 Gazette No 6670, Notice No. 613 dated 21 April 1961, Date of Commencement 1 January 1962.

\textsuperscript{1227} SALRC “Discussion Paper 132 on the Practice of Ukuthwa” 36.
No doubt the provision that recognises the marriage of a minor is problematic.\textsuperscript{1228} According to the SALRC report the term minor is a common law concept and the minimum age for a valid marriage concluded under common law for minors is 14 for boys and 12 years for girls. In the context of child marriage, if section 3(3)(a) is interpreted with this common law provision, then it is inconsistent with international human rights standards on minimum age of marriage and promotes child marriage.

Furthermore, where the marriage of a minor is conducted contrary to Section 25 of the Marriage Act of 1961, it becomes voidable, and a parent or guardian may approach the court for dissolution of the marriage on the ground of want of consent before the minor attains maturity or within six weeks of having knowledge of the marriage.\textsuperscript{1229} The minor can also approach the court for dissolution before maturity or within three months thereafter.\textsuperscript{1230}

The Act also provides for registration of a customary marriage as a requirement that a valid marriage was concluded between the parties.\textsuperscript{1231} However, the Act provides that failure to register a customary marriage does not affect the validity of such marriage.\textsuperscript{1232}

5.2.7 Prevention and Combating of Trafficking in Persons Act, 2013

The establishment of the Prevention and Combating of Trafficking in Persons Bill\textsuperscript{1233} emanates from the investigation carried out by the SALRC into the causes of trafficking in persons, as well as part of South Africa’s effort in fulfilling its international obligation following the ratification of the United Nations Protocol to Prevent, Suppress and

\textsuperscript{1228} Ibid., p. 38.
\textsuperscript{1229} Section 24 A of the Marriage Act of 196; SALRC “Discussion Paper 132 on the Practice of Ukuthwala” 36.
\textsuperscript{1230} Ibid.
\textsuperscript{1231} Section 4 (1) - (4) of RCMA.
\textsuperscript{1232} Ibid., section 4 (9);
\textsuperscript{1233} As introduced in the National Assembly (proposed section 75); explanatory summary of Bill published in Gazette No. 32906 of 29 January 2010.
Punish Trafficking in Persons.\textsuperscript{1234} By 2013, this bill became the Prevention and Combating of Trafficking in Persons Act, No. 7 of 2013, following the President assenting it on 28 July 2013. However, it has yet to be enacted.\textsuperscript{1235}

The relevance of this Act is recognised in its definition of forced marriage to mean "a marriage concluded without the consent of each of the parties to the marriage."\textsuperscript{1236} Section 4(2) defines trafficking in persons as:

\begin{quote}
Any person who; (a) adopts a child, facilitated or secured through legal or illegal means; (b) concludes a forced marriage with another person, within or across the borders of the Republic, for the purpose of the exploitation of that child or other person in any form or manner, is guilty of an offence.
\end{quote}

In addition, section 11(2) clearly states that there is no defence to a charge of contravening section 4(2). Therefore when a person is convicted of trafficking in persons,\textsuperscript{1237} he “is liable to a fine not exceeding R100 million or imprisonment, including life imprisonment or such imprisonment without the option of a fine, or both.”\textsuperscript{1238} The significance of the Prevention and Combating of Trafficking in Persons Act, 2013 is also recognised in the legal framework set out for consideration in the case of \textit{Jezile v S and Others}, which further confirms that the offence of trafficking in person is related to child and forced marriage cases in South Africa.\textsuperscript{1239}

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\begin{itemize}
\item \textsuperscript{1235} \textit{Jezile v S and Others}, op. cit. n. 104, para 64. \item \textsuperscript{1236} Section 1 of the Prevention and Combating of Trafficking in Persons Act, 2013. \item \textsuperscript{1237} \textit{Ibid.}, section 4 (2). \item \textsuperscript{1238} \textit{Ibid.}, section 13 (b). \item \textsuperscript{1239} \textit{Jezile v S and Others}, op. cit. n. 104, para 64. \end{itemize}
\end{footnotesize}
5.3 The National Legal Framework and the Practice of Child Marriage in Nigeria

5.3.1 Brief overview of the historical development

The Federal Republic of Nigeria is located in the Western part of Africa, with an estimated population of about 181 million. The Federal Republic of Nigeria shares borders with the Republic of Niger, Chad, Cameroon and Benin. Prior to the advent of democracy, Nigeria began as a nation-state in 1914 with the amalgamation of the Southern and Northern Protectorates by the British Colonial administration. This led to the gradual development of the colonial government and administration, the gradual decentralisation of powers to the different regions as well as the involvement of some Nigerians in governance.

Nigeria became an independent State on October 1, 1960 with a Constitution that established Nigeria as a federation consisting of the federal territory of Lagos and the regions, namely, Northern Nigeria, Western Nigeria and Eastern Nigeria. The Constitution also provided for a parliamentary system of government. Thereafter Nigeria attained Republican status within the British Commonwealth in 1963. Nigeria has a long history of military rule and dictatorship which began in 1966. In

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1243 Ibid., p. 2.

1244 Ibid. See also Nigeria Demographic and Health Survey 2013 1.

1245 Bakarr Bah Breakdown and Reconstitution: Democracy, the Nation-State, and Ethnicity in Nigeria 2005 101.

1246 Ibid.


1248 Dada 2012 Annual Survey of International and Comparative Law 78.
January 1966, the democratic government was overthrown in a violent military coup wherein the military was in power between 1966 and 1999. This occurred for the duration of this period with the exception of the period between 1979 and 1983 when there was a short return to democracy. Nigeria was therefore under military rule and dictatorship for 29 years between 1966 and 1999.

This military rule has no doubt had a destabilizing effect on the promotion and protection of human rights. With the military government under the control of autocratic dictators, the promulgation of different decrees and the suspension of the Constitution led to non-recognition and ineffectiveness of the human rights of all citizens, including women and children. The effects of military rule include amongst others: civil war; assassinations/arbitrary killings; corruption; economic
hardship and poverty; unlawful detention of human rights advocates; and attacks on student activists, academics and the press. In addition, military rule prevented any progress in promoting women’s rights and gender equality, which further encouraged a greater imposition of patriarchal norms in society.

The long military rule ended with a democratically elected government on 29th May 1999 with a new era that focused on constitutional guarantee of fundamental human rights. By virtue of section 2(2) of the 1999 Constitution, Nigeria is established as a Federation consisting of 36 States and a Federal Capital Territory with tiers of government at the federal, State and local government levels. Part II of the Constitution provides for the executive, legislature and the judiciary. Nigeria operates a mixed legal system namely English law (common law), customary law and Islamic law and is recognised for its diversity and its pluralistic nature in terms of the ethnic groups, religious groups and laws which no doubt has built-in complexities. These built-in complexities are confirmed in the words of Niki Tobi JSC:

Nigeria is a multi-lingual country with diverse and various ethnic groups, cultures and traditions. The sociology of the country is not only complex but highly diversified and heterogeneous. This

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1258 An example is the case of General Sani Abacha, Attorney-General of the Federation, State Security Service and Inspector-General of the Police v Chief Gani Fawehinmi (2001) AHRLR 172 (NgSC 2000), previously reported (2000) 6 NWLR 228. The respondent in the case was unlawfully arrested without a warrant to arrest at his residence on 30 January 1996 by men who identified themselves at State Security Service (SSS) and policemen, he was then taken to the office of the SSS where he was detained.

1259 Ambrose 126.


1262 Section 3 (1) - (6) of the 1999 Constitution.

1263 For instance, at the federal level the legislative powers are vested in the National Assembly which consists of the Senate and the House of Representatives, while at the State level the legislative power is vested on the State’s House of Assembly. Section 4(1) of the 1999 Constitution. Nwauche “Country Reports on Nigeria” 2.

type of society certainly gives rise to conflict problems in our laws, particularly when that highly diversified society operates a plurality of laws.\textsuperscript{1265}

With regard to ethnicity, there are more than 250 ethnic groups in Nigeria, with each group being distinct from the other.\textsuperscript{1266} The major ethnic groups are the Hausa-Fulani, Yoruba and the Igbo, which are located in the Northern, South Western and Eastern regions of the country, respectively.\textsuperscript{1267} In terms of religious groups, Muslims and Christians are the most recognised and largest religious groups in the country.\textsuperscript{1268} As Oba rightly observes, within Nigeria, “religion is often conflated [mixed] with ethnicity and regionalism.”\textsuperscript{1269}

Nigeria is recognised as a country with a common practice of child marriage, however high prevalence of child marriage exists especially among the Hausa-Fulani tribe who are predominantly Muslims and occupy the Northern region of the country.\textsuperscript{1270} This is confirmed in the 2005 Population Council report which states that “Nationwide, 20 percent of girls were married by age 15 and 40 percent were married by age 18.”\textsuperscript{1271} While in the Northern region, “48 percent of the girls were married by age 15 and 78 percent were married by age 18.”\textsuperscript{1272}

In the Northern region of Nigeria “child marriage is a traditional cultural practice which is heavily influenced by Islam, a religion which historically has been practised in the region and which

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\textsuperscript{1266} Central Intelligence Agency (CIA) The World Factbook, Country Profile: Nigeria 1.

\textsuperscript{1267} Ibid. According to CIA World Factbook, Hausa-Fulani are 29%, Yoruba 21%, Igbo (Ibo) 18%. Others include Ijaw 10%, Kanuri 4% Ibibio 3.5% and Tiv 2.5%.

\textsuperscript{1268} The Muslims comprise 50% of the population with Christians at 40% and indigenous beliefs at 10%. See CIA World Factbook: Nigeria 1; Nwauche Law Religion and Human Rights in Nigeria 2008 \textit{AHRLJ} 568- 595 569.

\textsuperscript{1269} Oba 2011 \textit{Emory International Law Review} 882.

\textsuperscript{1270} Braimah 2014 14 \textit{AHRLJ} 474.


\textsuperscript{1272} Ibid.
\end{flushleft}
continues [today] to be practised.”

Islam was introduced to the Northern region through the Borno Empire around the 11th century and gradually spread to other parts of the region such as Kano and Katsina, with a distinctive legal system known as *Sharia* law, limited to personal and civil law.

### 5.3.2 The cultural practice of child marriage in Northern Nigeria

Child marriage and early betrothal are prevalent practices among the Hausa-Fulani tribe in Northern Nigeria. As stated above, the Hausa-Fulani tribe are predominantly Muslim and have a culture and tradition greatly influenced by Islam and strict adherence to the Quran and the Prophet Muhammad’s Sunnah. This strict adherence stems from the believe that *Sharia* law is made by the Almighty Allah sent through his messenger the holy Prophet Muhammad (SAW) and that all other laws have human origin and are not divine.

As such, it is often argued that the practice of child marriage and the age of marriage of a girl-child are based on interpretations of the Quran and not fixed by law. The determination of the age of marriage or maturity of a girl-child is greatly influenced by the attainment of puberty (menstruation), as well as the precedence of the Prophet’s marriage. This precedence has created a great influence on the determination of

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1273 Ibid., p. 475.


1275 Ibid., p 1 & 10. According to Human Rights Watch; “Sharia is a system of Islamic law based on four main sources: The Quran (God’s revelation to the Prophet Muhammed); the Sunna, or actions of the Prophet, described in the Hadith; the Qiyas or process of analogical reasoning based on understanding of the principles of the Quran or the Hadith; and the Ijma or consensus of opinion among Islamic scholars.”

1276 Braimah 2014 *AHRLJ* 475.

1277 Ibid., p. 482.

1278 Ogunniran 2011 *UNIZIK J.I.L.J* 87

1279 Ibid., p. 88.

1280 Ibid., p. 88. According to Ogunniran, the Quran 65:4 supports the view that there is no fixed age of marriage or maturity, and that a girl who has not attained the age of puberty can be married. The Quran states that: “If you are in doubt as to the prescribed period for such women as have despairof monthly courses, then know that the prescribed period for them is three months and also for such as do not have their monthly course yet”.

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the age of marriage of the girl-child.\textsuperscript{1281} This precedence also forms a main point of argument of the Nigerian senator, Ahmed Yerima in 2010, when he married a 13-year-old Egyptian girl who is alleged to have been 36 years his junior.\textsuperscript{1282} In the defence of his decision to marry her, the senator stated that: “The Prophet Muhammad married at the age of nine, therefore any Muslim who marries a girl nine years and above, is following the teaching and practices of the Prophet.”\textsuperscript{1283}

Despite this norm, Ogunniran points out that there is a caveat of delayed sexual intercourse which is more often than not abused by the girl’s husband.\textsuperscript{1284} Similarly, the Director of Muslim Rights Concerns (MURIC) Ishaq Akintola, argues in defence of Senator Yerima, but notes that “where the ‘bride’ was a minor, Islam prescribes protective solemnisation of marriage to shield the bride from abuse. This means that the girl who is deemed to be of a tender age is left untouched by the man until she attains puberty.”\textsuperscript{1285} An Islamic family law expert equally explains that:

\begin{quote}
Marriage in minority would imply a betrothal or some formal agreement, deferring final consummation to a later date...preliminary arrangements may have been made at an early age, but consummation usually took place when the parties were fit for marital congress, which depends, among other things, on their physical condition...\textsuperscript{1286}
\end{quote}

However, in practice this is not the case, which results in grave health complications for the girl-child, an example is the report on the high incidences of Vesico-Vaginal Fistula (VVF) among girls married between the ages of ten and fourteen in Northern Nigeria.\textsuperscript{1287}

\textsuperscript{1281} Braimah 2014 \textit{AHRLJ} 482; Ogunniran 2011 \textit{UNIZIK J.I.L.J} 88.
\textsuperscript{1283} \textit{Ibid}.
\textsuperscript{1284} \textit{Ibid}., p. 89
\textsuperscript{1287} This has been discussed in chapter Two. VVF is a pregnancy related/obstetric medical condition that results in damage between a girl’s bladder and her vagina which then leads to continuous
In addition to this commonly recognised Islamic/cultural practice of child marriage in Nigeria, is the sudden spate of violence, kidnapping and forcing of girls into marriage by Boko Haram (which is discussed in Chapter Two of this thesis).\textsuperscript{1288} Furthermore, the recent reports on the abduction of a 14-year-old girl from her home in the Southern Bayelsa State in August 2015 to Kano State, Northern Nigeria where she was converted to Islam and forced into marriage\textsuperscript{1289} provides another example of the nature of forced/child marriage in Nigeria. This recent report is a realisation of the existence of high rates of kidnapping, abduction and forced marriages across the various States in Nigeria. It is also a clear violation of section 21 of the Child’s Right Act and section 13(2) of the Trafficking in Persons Act, 2015.

Another fundamental legal requirement that affects the validity of a child marriage is the right to full and free consent of the girl-child to marriage recognised in the UDHR and CEDAW.\textsuperscript{1290} Within a patriarchal traditional society, parents, and mostly male elders, play active roles in selecting a spouse and consent of the girl is not always requested; she is rather informed and asked to participate in the marriage ceremony.\textsuperscript{1291} As Ajumobi notes:

\begin{quote}
In Islam, according to research, the Nikkah [marriage contract in Islam] requires consenting partners. In theory Islam does not encourage forced marriages it annuls them, but in practice, the boundaries of consent are blurred.\textsuperscript{1292}
\end{quote}

\begin{footnotes}
\item 1288 See section 2.7.5.
\item 1291 Ibid.
\item 1292 Ibid.
\end{footnotes}
Other factors contributory to the practice of child marriage in this region include amongst others, poverty, poor educational attainment, and preservation of the virginity of the girl-child.

5.3.3 The Constitution of the Federal Republic of Nigeria 1999

The Constitution of the Federal Republic of Nigeria (1999 Constitution) is referred to as the “grundnorm of the Nigerian society”, promulgated for “the purpose of promoting the good government and welfare of all citizens on the principles of freedom, equality and justice, and for the purpose of consolidating the unity of the people.” Complementary to this provision is section 14 which states that “Nigeria shall be a State based on the principles of democracy and social justice.” Therefore, the principles of freedom, equality, democracy and social justice are recognised as the foundational values of the 1999 Constitution.

The practice of democracy in Nigeria is considered a “fundamental constituent of constitutionalism,” although many have questioned this constitutionalism given the various human rights and children’s rights violations resulting from political, ethnic and socio-cultural conflicts and factors. Nonetheless, constitutionalism is recognised in

1294 Braimah 2014 AHRLJ 484.
1295 This is based on the proclamation in the preamble to the Constitution “placing the Federation of Nigeria and its Constitution as a sovereign Nation under God.” Mwalimu The Nigerian Legal System Private Law 2009 Volume 2 3.
1296 The preamble to the 1999 Constitution.
1298 Ibid.
the supremacy of the Constitution.\textsuperscript{1301} Section 1(1) of the 1999 Constitution states: “This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.” Section 1(3) also states that: “If any other law is inconsistent with the provisions of this constitution, this constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.” Therefore, the supremacy of the constitution subjects all laws and practices to the rights and obligations therein.\textsuperscript{1302}

In addition, constitutionalism is recognised in Chapter IV of the 1999 Constitution which guarantees the enjoyment of fundamental human rights by every person in Nigeria.\textsuperscript{1303} The 1999 Constitution, specifically Chapter IV, plays a fundamental role in the protection of the rights of children. Although there is no specific mention of children in Chapter IV, there is no doubt that the term “person” used in the provisions of the 1999 Constitution applies to all persons, including all children in all States in Nigeria.\textsuperscript{1304} Therefore the fundamental human rights relating to the protection of the rights of the girl-child include, among others, right to life;\textsuperscript{1305} right to dignity of human person;\textsuperscript{1306} right to personal liberty;\textsuperscript{1307} right to private and family life;\textsuperscript{1308} and the right to freedom from discrimination.\textsuperscript{1309}

\textsuperscript{1301} Section 1(3) of the 1999 Constitution states that “If any other law is inconsistent with the provisions of the Constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void”.

\textsuperscript{1302} Nwauche 2014 \textit{AHRLJ} 426.

\textsuperscript{1303} This is referred to as the Bill of Rights under South African Constitution.

\textsuperscript{1304} Iyioha and Nwabueze \textit{Comparative Health Law and Policy: Critical Perspectives on Nigerian and Global Health Law} 2015 160; Nwauche “Child Marriage in Nigeria: (Il)legal and (un) Constitutional” 2015 \textit{AHRLJ} 421- 432 424. The author argues; “That children are not specifically provided for may have been an honest omission [in Chapter IV], but in no way means that they have no protection in the states that have either not promulgated the CRA, or have CRL that is inconsistent with Nigeria’s treaty obligations”.

\textsuperscript{1305} Section 33 of the Child’s Right Act 2003.

\textsuperscript{1306} \textit{Ibid.}, section 34.

\textsuperscript{1307} \textit{Ibid.}, section 35.

\textsuperscript{1308} \textit{Ibid.}, section 37.

\textsuperscript{1309} \textit{Ibid.}, section 42. Other fundamental human rights include right to fair hearing (section 36); right to freedom of thought, conscience and religion (section 38); right to freedom of expression and the press (section 39); right to freedom of movement (section 41); and the right to acquire and own immovable property in any part of Nigeria (section 43).
With regard to the protection of the rights of the child, a major shortcoming of the 1999 Constitution for which it has been criticised, is the lack of a specific provision on the definition of a child.\textsuperscript{1310} This lapse is recognised as part of the foundational problems of child marriage in Nigeria. However, Ukwuoma notes that based on standards set in a number of provisions of the Constitution, adulthood starts from eighteen years.\textsuperscript{1311} An example is section 35(1)(d) which states that every person has a fundamental right to personal liberty and no one shall be deprived of it, even in the case of a person who has not attained the age of eighteen years and for the purpose of his/her education or welfare.\textsuperscript{1312} Another example is in sections 26-29 which relate to issues of citizenship, in particular section 29(4)(a). The latter states that for the purpose of section 29(1) which provides for renunciation of Nigerian citizenship, the term “full age” means eighteen years and above.\textsuperscript{1313}

Besides the criticism of the definition of a child, another contentious shortcoming is with regard to the age of marriage of a child. Section 4(1) of the 1999 Constitution vests legislative powers of the federal government in the National Assembly for the Federation. The National Assembly shall then have the power to make laws for matters included in the Exclusive Legislative List set out in Part 1 of the Second Schedule to the 1999 Constitution.\textsuperscript{1314} Item 61 of the Exclusive Legislative List provides for the power to make laws for “the formation, annulment and dissolution of marriages other than marriages under Islamic law and customary law, including matrimonial causes relating thereto.”\textsuperscript{1315}

Therefore, based on Item 61, the general understanding is that the power of the National Assembly to make laws for the formation of marriage, which includes the fixing of the age of marriage, applies only to statutory (civil) marriages in the country,\textsuperscript{1316} while the legislative powers of the States’ House of Assembly applies to

\textsuperscript{1310} Ukwuoma 10.

\textsuperscript{1311} Ibid.

\textsuperscript{1312} Ibid.

\textsuperscript{1313} Ibid., p. 10-11.

\textsuperscript{1314} Section 4(2) of the 1999 Constitution.

\textsuperscript{1315} Second Schedule, Part I of the 1999 Constitution.

\textsuperscript{1316} Ukwuoma 11.
Islamic and customary marriages of that State.\textsuperscript{1317} The implication of this provision results in inadequate protection of the rights of girls especially in the Northern States where the CRA has not been domesticated.\textsuperscript{1318}

As such, Braimah argues on the legality of child marriage in Nigeria and states that: “there is a strong argument to be made out that child marriage is not illegal in Nigeria under Second Schedule Part 1 Item 61 of the 1999 Constitution”.\textsuperscript{1319} He argues further that:

Nigeria operates a tripartite legal system with civil, customary and Islamic law operating simultaneously, in relation to marriage the federal government has no control over customary and Islamic marriages but only marriages conducted in a civil manner. What this means is that according to Part 1 Section 61 of the 1999 Constitution, when a person marries a child under Islamic law in Northern Nigeria and in contravention of the CRA, such a person cannot be prosecuted because the federal government would be interfering with an Islamic marriage and would be in violation of Part 1 Section 61 of the 1999 Constitution.\textsuperscript{1320}

In other words, with regard to Item 61, the Federal government cannot interfere with customary or Islamic marriages, including child marriage. However, Nwauche shares a different view and argues that the conclusion drawn in Braimah’s article seems to suggest that “religious marriages trump children’s rights in Nigeria’s Constitutional jurisprudence”\textsuperscript{1321} or that Item 61 of the 1999 Constitution “supports the legality of religious child marriages in Nigeria”.\textsuperscript{1322} Nwauche argues on the importance of Nigeria’s constitutional jurisprudence, particularly the interpretation of the Bill of Rights to address child marriage challenges.\textsuperscript{1323} He notes that it seem generally that “the protection of children in Nigeria is predicated on statutory schemes (in this case that will be item 61 and the CRA) and neglects the Bill of Rights”.\textsuperscript{1324} As Nwauche argues:

\begin{itemize}
\item It would appear that while he is correct [Braimah] that the CRA may not enable a prosecution for child marriage, it is not because of Part 1 section 61 of the 1999 Constitution, but largely,
\end{itemize}

\begin{notes}
\item \textsuperscript{1317} Ibid.
\item \textsuperscript{1318} Braimah 2014 AHRLJ 485. Child’s Right Act is a federal instrument that prohibits child marriage.
\item \textsuperscript{1319} Ibid.
\item \textsuperscript{1320} Ibid.
\item \textsuperscript{1321} Nwauche 2015 AHRLJ 421.
\item \textsuperscript{1322} Ibid., p. 421-422.
\item \textsuperscript{1323} Ibid., p. 426.
\item \textsuperscript{1324} Ibid., p. 425.
\end{notes}
and this relates to criminal prosecution, because there is neither a CRL [Child Rights Law] nor other legislation that criminalises child marriage in the manner of the CRA. For example, section 15(1) of the Jigawa State CRL 2006 which prohibits child marriage but defines a child in section 2(1) of that law as a person below the age of puberty. Accordingly, it would be correct to declare that Jigawa State criminalised child marriage to the extent that a girl has not reached puberty. This is possible because puberty is defined in section 2 of the Jigawa Law as the age at which a person is physically and physiologically capable of consummating a marriage. In addition, a court is to determine – according to the provisions of section 15(1) – the puberty of the child bride according to the circumstances of each case.\footnote{\textit{Ibid.}, p. 427-428.}

He further states that:

The lack of appropriate legislation immunises Islamic or customary marriages from the Bill of Rights because Part 1 of the Second Schedule to the 1999 Constitution merely determines how constituent parts of a federal Nigeria share power. Such exercise of power is subject to other parts of the Constitution, including the Bill of Rights, by reason of the supremacy clause of the 1999 Constitution. It is important to remember that the radical legislative changes that introduced Islamic criminal law in the northern states of Nigeria acknowledged the supremacy of the 1999 Constitution. Accordingly, CRL is subject to the Bill of Rights in a manner in which the Bill of Rights could be a sword and shield in respect of prosecutions for child marriage.\footnote{\textit{Ibid.}, p. 428. The author explains further that the Bill of Rights as a sword can address the recognition of child marriage in the CRL through the right to freedom from inhuman and degrading treatment, the right to personal liberty, the right to family and private life and the right to freedom of association, and strike down such practices as unconstitutional. While the Bill of Rights acts as a shield with respect to such rights, as the right to freedom of religion protected by section 38 of the 1999 Constitution, and the right to private and family life, as these rights become the basis of a defence to criminal prosecutions.}

It is submitted, on this debate, that the problem of child marriage in Nigeria cannot be ignored and that there is no doubt that this problem has no easy fix or a one size fits all solution. In as much as there are inadequacies in existing legislations, challenges with the applications of the legislations, and lack of appropriate legislation, there is need for the existing legislations to be supplementary to each other in order to strengthen and reinforce the protection of the rights and welfare of the girl-child. There is no excuse for using the inadequacies in existing legislations or the defence of culture and religion to perpetrate the practice of child marriage. There is also a need for an amendment to the Nigerian Constitution in order to include child specific rights and change the formation of marriage laws to apply to civil, Islamic and customary

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\footnote{\textit{Ibid.}, p. 427-428.}

\footnote{\textit{Ibid.}, p. 428. The author explains further that the Bill of Rights as a sword can address the recognition of child marriage in the CRL through the right to freedom from inhuman and degrading treatment, the right to personal liberty, the right to family and private life and the right to freedom of association, and strike down such practices as unconstitutional. While the Bill of Rights acts as a shield with respect to such rights, as the right to freedom of religion protected by section 38 of the 1999 Constitution, and the right to private and family life, as these rights become the basis of a defence to criminal prosecutions.}
marriages. In addition, Nigeria needs to enact the ‘Prohibition of Child marriage Act’\textsuperscript{1327} that will be applicable in all the 36 States and clearly criminalises child marriage.

Furthermore, the right to religion has a prevailing force in encouraging child marriage in the North. The 1999 Constitution provides for the right to freedom of thought, conscience and religion in section 38(1). This right is primarily for the purpose of protection of freedom of religion of an individual or a group.\textsuperscript{1328} But this provision is often exploited in defence of child marriage. However, the application of section 45(1)\textsuperscript{1329} to section 38(1) especially in the context of child marriage and the grave impact of the practice on the girl-child confirms that the right in section 38(1) is not absolute and it also reinforces the protection of the right of the girl-child. Similarly, regarding the scope of section 38 in the context of section 45(1) and the circumstances of each case, the Nigerian Supreme court in the case of Medical and Dental Practitioners Disciplinary Tribunals v Okonkwo held that:

The right to freedom of thought, conscience or religion implies a right not to be prevented without lawful justification from choosing the course of one’s life, fashioned on what one believes, and the right not to be coerced into acting contrary to one’s belief. The limits of these freedoms, as in all cases, are where they impinge on the rights of others or where they put the welfare of society or public in jeopardy...Law’s role is to ensure the fullness of liberty when there is a danger to public interest. Ensuring liberty of conscience and freedom of religion is an important component. The courts as the institutions of society have agreed to invest with the responsibility of balancing conflicting interests in a way to ensure the fullness of liberty without destroying the existence and stability of society.\textsuperscript{1330}

In conclusion, based on the analysis above, a wide contrast exists in the Constitutions of both South Africa and Nigeria with regard to the protection of the rights of

\textsuperscript{1327} Braimah 2014 AHRLJ 488.

\textsuperscript{1328} Nwauche 2008 AHRLJ 570. Nwauche points out that there are other rights that can be considered as secondary and not direct in enforcing the enjoyment of freedom of religion. Such rights include freedom of association (section 40); right to private and family life (section 37); right to freedom of expression (section 39) and the right to freedom of movement (section 41).

\textsuperscript{1329} According to section 45 (1) nothing in section 38 shall invalidate “any law” that is reasonably justifiable in a democratic society- (a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom of other persons. Nwauche 2008 AHRLJ 571.

The Constitution is the supreme law hence plays a significant role in advancing children’s rights. The inclusion of direct rights for children in the Constitution sets constitutional standards and signifies the country’s commitment to addressing the peculiar needs of children as well as protecting their rights and welfare. There is therefore need for reforms to the Nigerian Constitution addressing the shortcomings identified above.

5.3.4 Child’s Right Act, 2003

The Child’s Right Act is a single comprehensive legislation focused on dealing with the rights and responsibilities of the child, as well as the duties and obligations of parents, government and other relevant authorities, organisations and bodies. The Act was enacted with a view to achieve the “universal set of standards and principles for the survival, development, protection and participation of children”. These are enshrined in the CRC and the ACRWC, which Nigeria ratified in 1991 and 2001 respectively. This ratification is subject to section 12(1) of the 1999 Constitution which provides that in order for all treaties to become binding laws in Nigeria, they must be enacted into law by the National Assembly.

The Child’s Right Act has significant relevance to the rights of the girl-child and protection from harmful practices. The Act creates different offences that relate to child

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1331 See section 5.4 of this Chapter.
1334 Ibid.
1335 The signing and ratification of the CRC and ACRWC prompted the drafting of the Child’s Right Bill as steps to domesticate them at national level. The CRC was signed and ratified 26 January, 1990 and 19 April 1991 respectively and the ACRWC was signed and ratified 23 July, 2001. See UNICEF “Fact Sheet: Child Rights Legislation in Nigeria” 2011; Nwauche 2015 AHRLJ 422.
1336 Ibid.
marriages;\textsuperscript{1337} betrothal;\textsuperscript{1338} the use of drugs and psychotropic substances;\textsuperscript{1339} the use of children in any criminal activity;\textsuperscript{1340} unlawful removal and transfer of a child from lawful custody;\textsuperscript{1341} forced and exploitative child labour practices;\textsuperscript{1342} trafficking;\textsuperscript{1343} unlawful sexual intercourse;\textsuperscript{1344} and every form of exploitation of children.\textsuperscript{1345} In addition to this wide range of rights, the Child’s Right Act provides for the application of the provisions in Chapter IV of the 1999 Constitution to the needs of children in Nigeria.\textsuperscript{1346} According to Iyioha and Nwabueze, the application of Chapter IV in the Act is “a positive development as it puts to rest any doubt whether or not the human rights provisions in the Constitution can be invoked to protect the rights of children”.\textsuperscript{1347}

In the context of child marriage and most importantly, the Child’s Right Act, a child is defined as “a person under the age of eighteen years,”\textsuperscript{1348} which complements the Constitution and the criticism of no specific definition of a child. The definition thus conforms to both international and regional standards. The Act also provides for the prohibition of child marriage and child betrothal.\textsuperscript{1349} In particular, Part III Section 21 states that “No person under the age of 18 years is capable of contracting a valid marriage, and accordingly, a marriage so contracted is null and void and of no effect whatsoever.”\textsuperscript{1350} A contravention of either child marriage or child betrothal upon

\textsuperscript{1337} Section 21 of the Child’s Right Act, 2003.
\textsuperscript{1338} Ibid., section 22.
\textsuperscript{1339} Ibid., section 25.
\textsuperscript{1340} Ibid., section 26.
\textsuperscript{1341} Ibid., section 27.
\textsuperscript{1342} Ibid., section 28.
\textsuperscript{1343} Ibid., section 30.
\textsuperscript{1344} Ibid., section 31.
\textsuperscript{1345} Ibid., section 32-33.
\textsuperscript{1347} Ibid.
\textsuperscript{1348} Section 277 of the Child’s Right Act. The “age of majority” is also defined to mean “age at which a person attains the age of eighteen years.”
\textsuperscript{1349} Part III, Section 21 and 22 of the Child’s Right Act. See also Braimah 2014 AHRLJ 480.
\textsuperscript{1350} Ibid.
conviction, results in a fine of N500,000 or imprisonment for a term of 5 years, or both.\textsuperscript{1351}

However, a major challenge of this Act relates to enforcement at the State level.\textsuperscript{1352} Prior to the enactment of the Child’s Right Act, the drafting of the Child’s Rights Bill faced opposition from both religious and traditional groups, mainly because of the minimum legal age being set at 18 years.\textsuperscript{1353} The CRA was enacted at a national level and its provisions supersede all other legislations relevant to the rights of the child.\textsuperscript{1354} But domestication at State level is not automatic, States are to formally adopt and adapt the Act for domestication as State laws.\textsuperscript{1355} This is because issues that deal with child’s rights protection are provided for in the residual list of the 1999 Constitution, which gives each State exclusive responsibility and jurisdiction to domesticate laws relevant to their specific situation.\textsuperscript{1356}

Recent reports state that 24 States have domesticated the Child’s Right Act,\textsuperscript{1357} while 12 States are yet to do so.\textsuperscript{1358} For those States yet to domesticate the Act, there is the conflict in the provisions of the Child’s Right Act with Islamic and customary law and practice, this is especially with regard to the age of marriage often determined by Islamic or customary law and practice of the State, or by any applicable law made by

\begin{footnotes}
\footnote{1351}{Section 23 of the Child’s Right Act; Braimah 2014 \textit{AHRLJ} 480. The author points out that this sanction of a fine in the sum of N500,000 is worrisome, as it is not harsh enough for such a heinous act such as child marriage.}

\footnote{1352}{\textit{Ibid}.}

\footnote{1353}{According to Akinwumi, the drafting of this Child’s Rights Bill took about 10 years before it was passed into law by the National Assembly in July 2003. Akinwumi 2009 \textit{International Journal of Legal Information} 386.}

\footnote{1354}{Section 274 of the Child’s Right Act; UNICEF “Fact Sheet: Child Rights Legislation in Nigeria” 2011 2.}

\footnote{1355}{\textit{Ibid}; Akinwumi 2009 \textit{International Journal of Legal Information} 387.}

\footnote{1356}{\textit{Ibid}; UNICEF “Fact Sheet: Child Rights Legislation in Nigeria” 2011 2. In addition, State laws inimical to the rights of the child are to either be amended or annulled so as to conform to both the Act and the CRC.}


\footnote{1358}{They include Adamawa, Bauchi, Borno, Enugu, Gombe, Kaduna, Kano, Katsina, Kebbi, Sokoto, Yobe and Zamfara.}
\end{footnotes}
the House of Assembly of the State. As such, this makes it even more challenging as the courts cannot prosecute violations of children’s rights based on the Child’s Right Act if it is not binding on the state.

Furthermore, besides the controversy over the age of marriage in the Constitution, discussed above, the question of who is a child in Nigeria has been a contested issue. This is due to the fact that a number of legal instruments across the country define a child differently. Examples include Section 2 of the Children and Young Persons Act (CYPA) which defines a “child” as a person under the age of fourteen years, while a “young person” is defined as a person who has attained the age of fourteen years but is under the age of seventeen years. The Immigration Act also states that any person below 16 years is a minor, while the Marriage Act and Matrimonial Causes Act that deal with the formation, annulment and dissolution of marriage set 21 years as the age of maturity. In addition, regarding criminal offences, section 50 of the Penal Code provides:

No act is an offence which is committed by a child under seven years of age; or by a child above seven years of age but under twelve years of age, who has not attained sufficient maturity of understanding to judge the nature and consequence of such act.

1359 Ukwuoma 14.
1361 Ukwuoma 10.
1362 The CYPA is a legislation that deals with matters affecting children and young persons in Nigeria. It was enacted in 1943 by the British Colonial Government and applies to the Eastern, Western and Northern region of Nigeria. See OMCT “Rights of the Child in Nigeria” 9-10; Akinwumi 2009 International Journal of Legal Information 387.
1366 Ukwuoma 14; Akinwumi 2009 International Journal of Legal Information 387.
1368 The Penal Code is a criminal law legislation applicable to States in the Northern region of Nigeria. See also Mwalimu 38; OMCT “Rights of the Child in Nigeria” 9.
As stated above the Child’s Right Act, 2003 clearly defines a child and provides in section 274 that: “The provisions of this Act supersedes the provisions of all enactments relating to (a) children…” In other words, the provisions of the Child’s Right Act supersede the different legal instruments with conflicting definitions of a child. However, the inability to domesticate the Child’s Right Act in 12 States\(^\text{1369}\) and the challenge with effective implementation and enforcement in the remaining 24 States that have domesticated the Child’s Right Act maybe possible reason(s) why the definition of a child is a contested issue in Nigeria.

For the Northern States that have not domesticated the Child’s Right Act major reasons for the rejection of the Act relates to the conflict(s) that exists between the practical application of the rights of the child and adhering to culture and tradition deeply influenced by Islam.\(^\text{1370}\) The right to freedom of thought, conscience and religion provided in the Constitution is also often used as a defence in the practice of child marriage.\(^\text{1371}\) However, the Child’s Right Act seeks to protect the rights of children, in this case, the girl-child by clearly setting the minimum age of marriage and prohibiting child marriage.\(^\text{1372}\) In the case of such conflict, the law provides that the best interests of the child prevail\(^\text{1373}\) as the right to freedom of religion is not absolute, based on section 45(1) of the 1999 Constitution.\(^\text{1374}\)

### 5.3.5 Marriage Act and the Matrimonial Causes Act

From the time of British colonial rule to the present, the celebration of monogamous marriages, also referred to as statutory marriage, has been regulated by statutory laws in Nigeria.\(^\text{1375}\) The Marriage Ordinance of 1884\(^\text{1376}\) was the first comprehensive law

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\(^{1370}\) Braimah 2014 *AHRLJ* 481.

\(^{1371}\) *Ibid*; Section 38 (1) of the 1999 Constitution.

\(^{1372}\) Section 21 and 22 of the Child Right’s Act.

\(^{1373}\) Braimah 2014 *AHRLJ* 482.

\(^{1374}\) *Ibid*; Nwauche 2008 *AHRLJ* 571.

\(^\text{1375}\) Nwogugu *Family Law in Nigeria* 2014 3ed 37.

\(^{1376}\) No. 14 1884 cited in Nwogugu 37.
enacted for the Colony of the Gold Coast of which Lagos was a part.\textsuperscript{1377} The development of laws outside the Colony, that is the Protectorates, began around 1900 with the promulgation of the Marriage Proclamation\textsuperscript{1378}, applicable to the Protectorate of Southern Nigeria.\textsuperscript{1379} However, with the merger of the Lagos Colony and Southern Protectorate, the Marriage Proclamation was repealed and the 1884 Ordinance became applicable to the new region.\textsuperscript{1380} For the Northern Protectorate legislation for a statutory marriage was only enacted by 1907 with the Marriage Proclamation of 1907.\textsuperscript{1381} The merger of the Northern and Southern Protectorates in 1914 led to the streamlining of marriage laws in the Marriage Ordinance of 1914\textsuperscript{1382} which regulates statutory marriages throughout Nigeria.\textsuperscript{1383} Presently, the Marriage Act\textsuperscript{1384} still regulates and provides for the formation and celebration of statutory marriages in Nigeria.\textsuperscript{1385}

The Matrimonial Causes Act\textsuperscript{1386} was enacted in 1970 to regulate and provide for the annulment and dissolution of statutory marriage in Nigeria.\textsuperscript{1387} As stated above, the minimum age of marriage which is a vital element for consideration in child marriage cases is not expressly stated in either the Marriage Act or the Matrimonial Causes Act.\textsuperscript{1388} However, Ukwuoma notes that both Acts have no specific provision on age of

\textsuperscript{1377} \textit{Ibid.} However, according to Nwogugu, by 1886 Lagos had separated from the Colony of the Gold Coast, with the 1884 Ordinance still applying to Lagos. In addition, for regions outside this colony it was possible for marriages to be contracted either under customary law marriage or Christian monogamous marriage in accordance with church rites.

\textsuperscript{1378} No. 20 of 1900 cited in Nwogugu 37. This Marriage Proclamation has been amended by Proclamation No. 22 of 1901; No. 6 of 1902 and No.3 of 1903.

\textsuperscript{1379} Nwogugu 37.

\textsuperscript{1380} \textit{Ibid.}

\textsuperscript{1381} No. 1 of 1907 (Laws of the Protectorate of Northern Nigeria, 1910.541) cited in Nwogugu 37-38.

\textsuperscript{1382} No. 18 of 1914 cited in Nwogugu 38. The Marriage Ordinance of 1914 repealed previous marriage laws.

\textsuperscript{1383} \textit{Ibid.}


\textsuperscript{1385} Nwogugu 38; Ukwuoma 14.

\textsuperscript{1386} Cap. M 17 LFN, 2004.

\textsuperscript{1387} Nwogugu 128; Ukwuoma 14. See also section 114 (1) of the Matrimonial Causes Act on definition of matrimonial causes.

\textsuperscript{1388} Ukwuoma 14; Nwogugu 38.
marriage but inspiration is drawn from section 11(1)(b)\textsuperscript{1389} and section 18 of the Marriage Act.\textsuperscript{1390} Despite the recognised limitations in the Marriage Act and Matrimonial Causes Act stated above, most child marriages in Northern Nigeria are celebrated in accordance with the cultural and religious (Islamic) law and practice,\textsuperscript{1391} therefore limiting the effectiveness of the role of the Marriage Act and the Matrimonial Causes Act in child marriage cases.

5.3.6 Criminal and Penal Code Act

The Criminal Code\textsuperscript{1392} and Penal Code\textsuperscript{1393} are criminal law legal instruments that apply to Southern Nigeria and Northern Nigeria respectively.\textsuperscript{1394} The relevance of these instruments to child marriage is with its creation of various offences of sexual and gender specific nature such as rape\textsuperscript{1395} as well as other sexual offences linked to child marriage cases.\textsuperscript{1396} Section 218 of the Criminal Code states that: “a person who has unlawful carnal knowledge with a 13 year old girl is guilty of a felony and liable to imprisonment for life”. In the case of an attempt to have unlawful carnal knowledge, such person is guilty of a felony and liable to imprisonment for fourteen years.\textsuperscript{1397} In addition, section 282(1) of the Penal Code states that a man is said to commit rape when he has sexual intercourse with a woman: against her will; without her consent;

\begin{flushright}
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1389 Section 11(1)(b) of the Marriage Act deals with preliminaries to marriage and upon receipt of notice of marriage the Registrar is expected to issue a certificate before expiration of three months but he shall not issue the certificate until he is satisfied that: (b) “each of the parties to the intended marriage (not being widower or widow) is 21 years’ old, or that if he or she is under the age of consent hereinafter made requisite has been obtained in writing and is annexed to such affidavit”.

1390 Ukwuoma 14. Section 18 of the Marriage Act relates to consent to marriage and where either party is under 21 then written consent of father, mother or guardian is needed before license for marriage is granted.

1391 Discussed in section 5.3.2 of this Chapter.


1395 Section 357-359 of the Criminal Code.

1396 Nwauche 2015 *AHRLJ* 425.

1397 Section 218 of the Criminal Code.
\end{flushright}
with her consent but with fear of death or hurt; or with or without when she is under fourteen years of age.

Based on the above provisions, the Criminal and Penal Codes set 13 and 14 years respectively as ages at which a girl is incapable of consenting to sexual intercourse. However, section 282(2) of the Penal Code states that “sexual intercourse by a man with his wife is not rape, if she has attained puberty.” On this provision Nwauche argues that there is a possibility of child marriage resulting in the offence of rape especially when it can be argued that there was no consent of the girl-child to the marriage and this could destroy the immunity granted to a husband by Nigerian law.

This argument is true to an extent, wherein a girl-child is incapable of consenting and is forced into a marriage. However, destroying the immunity of the husband in a marriage may be quite challenging. The assumption of sex within marriage is considered prior consensual, and within a cultural and religious society such as Northern Nigeria, marital rape may be recognised as justifiable specifically when considered within the wording of section 282(2) of the Penal Code. Similarly, regarding the consent of the girl-child, Ajimobi argues that:

In Islam, according to research, the Nikkah requires consenting partners. In theory, Islam does not encourage forced marriages it annuls them, but in practice, the boundaries of consent are blurred. Could we argue that every “Yes” translates into consent? On the contrary, in many cases, those participating in the practice are given no other chance than to participate, which reduces their consent to mere formality. It is not a 14-year-old girl that is making the decision here. The decision is taken on behalf of her by the family, relatives or the community.

In addition, section 361 of the Criminal Code states that a person shall be guilty of a felony or imprisonment for seven years where there is an intent to marry or have carnal knowledge, or cause another person to marry or have carnal knowledge of a girl of any age by taking her away or detaining her. On the other hand, section 362 states that where an unmarried girl of under 16 years is unlawfully taken away from the

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1398 Nwauche 2015 AHRLJ 425.
1399 Ibid.
1400 Ogunniran 2011 UNIZIK J.I.L.J 90.
custody and protection of her parents or custodian, the accused person shall be guilty of a misdemeanour and liable to two years’ imprisonment.\textsuperscript{1402}

5.3.7 Trafficking in Persons (Prohibition and Enforcement) Administration Act 2015

The Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003 was passed into law by the President of the Republic in July 2003 due to the lack of adequate provisions in different legislations such as the Nigerian Criminal Code.\textsuperscript{1403} By 2015, the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2015, Act No. 4 was passed into law repealing the 2003 Trafficking in Person Act.\textsuperscript{1404} The new Act aims to “provide an effective and comprehensive legal and institutional framework for the prohibition, prevention, detection, prosecution and punishment of human trafficking and related offences in Nigeria”.\textsuperscript{1405} Part II provides for the establishment of an agency known as the National Agency for the Prohibition of Trafficking in Persons (NAPTIP) (also referred to as “the Agency”).\textsuperscript{1406} The Agency is vested with the responsibility of enforcement and administration of the Act.\textsuperscript{1407}

\textsuperscript{1402} Section 363 of the Criminal Code provides that: In the case of proceedings in respect of an offence under preceding section [section 362]- (a) it is immaterial that the offender believed the girl to be of or above the age of sixteen years; (b) it is immaterial that the girl was taken with her own consent or her own suggestion.


\textsuperscript{1404} Ibid. The Trafficking in Persons Act, 2015 commenced on 26 March, 2015.

\textsuperscript{1405} Section 1 (a) Trafficking in Persons Act, 2015.

\textsuperscript{1406} Ibid., Section 2 (1).

\textsuperscript{1407} Ibid., Section 5 (a)- (u). Other functions of the Agency include: adoption of measures to improve effectiveness of eradication of trafficking in persons; enhancing effectiveness of law enforcement agents; supervising, controlling and coordinating rehabilitation of trafficked persons as well as participating in proceedings relating to trafficking; reinforcing and supplementing measures in such bilateral and multilateral treaties and conventions on traffic in persons as may be adopted by Nigeria; taking such measures or working with agencies that may ensure the elimination and prevention of the root causes of the problem of trafficking; strengthening and enhancing effective legal means for international co-operation in criminal matters for suppressing the international activities of traffic in persons and strengthening cooperation with law enforcement officials and agencies in Nigeria.
This Act is relevant for the prosecution of perpetrators of child and forced marriages in Nigeria, especially with regard to sexual exploitation, kidnapping and abduction of girls into marriage which is recognised as a recent development in Nigeria and an act of criminality.\textsuperscript{1408} Therefore, section 13(1) of the Trafficking in Persons Act 2015 prohibits all acts of human trafficking in Nigeria. In addition, section 13(2) states that:

\begin{quote}
Any person who recruits, transports, transfers, harbours, or receives another person by means of; (a) Threat or use of force or other forms of coercion; (b) Abduction, fraud, deception, abuse of power or position of vulnerability; or (c) Giving and receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation of that person, commits an offence and is liable on conviction to imprisonment for a term of not less than 2 years and a fine of not less than \textsterling250,000.00.
\end{quote}

Other related offences include conspiracy to commit an offence of abduction,\textsuperscript{1409} illicit sex,\textsuperscript{1410} sexual exploitation,\textsuperscript{1411} and unlawful carnal knowledge. However, the major challenge is the failure to prosecute persons who have committed the offences in the legislations due to the defence of cultural/religious practice and beliefs.\textsuperscript{1412}

\section*{5.4 Comparative Analysis – Differences and Similarities}

The practice of child and forced marriage is a common practice in both Nigeria and South Africa as the legal requirements of minimum age of marriage and free and full consent of parties to the marriage are greatly contravened. Comparing the nature and extent of the practice in South Africa and Nigeria reveals the diversity and variation in the problem of child marriage. In South Africa, traditionally, \textit{ukuthwala} is recognised

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\textsuperscript{1409} Section 27 (a) of the Trafficking in Persons Act, 2015.
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\begin{quote}
\textsuperscript{1410} Section 15 (a) & (b) deals with any person who procures (by the use of deception, coercion, debt bondage) a person under 18 years for illicit intercourse; or keeps, detains or harbours for sexual exploitation, commits an offence and is liable to 5 years’ imprisonment or a fine of \textsterling500,000.00.
\end{quote}

\begin{quote}
\textsuperscript{1411} Section 16 (1) & (2) anyone who abuses, procures or recruits a person under 18 years for prostitution and other forms of sexual exploitation, commits an offence and is liable on conviction to a term of not less than 7 years and a fine not less than \textsterling1million.
\end{quote}

\begin{quote}
\end{quote}
as a ‘preliminary’ cultural tradition to marriage; however, reality reveals a prevalence of the wrongful practice of ukuthwala.\textsuperscript{1413}

In Nigeria, there is an actual ceremonious marriage of a child considered under a mix of a cultural, religious (Islam) practice.\textsuperscript{1414} Therefore, addressing the cultural challenge in the wrongful practice of \textit{ukuthwala} in South Africa and the cultural religious practice of child marriage in Nigeria may be slightly different, but still similar, as there are other similar factors that reinforce child marriage in both jurisdictions. These factors include: poverty,\textsuperscript{1415} gender inequality, lack of education and traditional belief in the preservation of virginity.\textsuperscript{1416} In addition, despite the nature of child/forced marriage in both jurisdictions, it is clearly revealed that the defence of cultural practices and religious beliefs has been mixed with perpetuating criminal activities such as rape, abduction, kidnapping, trafficking and assault.\textsuperscript{1417}

With regard to the human rights framework, both South Africa and Nigeria recognise the significance of international and regional children’s rights instruments and have ratified and incorporated provisions of the CRC and the ACRWC in their domestic laws,\textsuperscript{1418} as discussed above. The influence of the CRC and the ACRWC is recognised in a number of provisions in the Constitution and particularly in the Child’s Right

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\textsuperscript{1413} Mwambene and Sloth-Nielsen 2011 \textit{AHRLJ} 3.
\textsuperscript{1414} Braimah 2014 \textit{AHRLJ} 475.
\textsuperscript{1415} \textit{Ibid.}, p. 483-484; SALRC “Discussion Paper 132 on the Practice of \\textit{Ukuthwala}” 20; IPPF Ending Child Marriage: A Guide for Global Policy Action”2006 13; Essa “S Africa girls given student grants to remain virgins” 25 January, 2016 Aljazeera 1. An example on preservation of virginity is with the recent scholarship programme by a South African Municipality that funds studies for young women if they can prove their virginity. However, the recommendations of the Commission for Gender Equality have strongly noted that this grants scheme is fundamentally discriminatory and fails to treat girls of same age equally. See Gqirana “Scrapping of Virginity Bursary Applauded” 20 June, 2016. Available at: http://www.news24.com/SouthAfrica/News/scrapping-of-virginity-bursary-applauded-20160620 (accessed 21-06-2016).
\textsuperscript{1416} A recent example is that of a South African municipality, who enacted a scholarship programme that funds studies for young women if they can prove their virginity. This confirms the importance of a women’s honour in African tradition and efforts at preservation which includes child marriage. Essa “S Africa girls given student grants to remain virgins” 25 January, 2016 Aljazeera 1; Braiman 2014 \textit{AHRLJ} 484.
legislation of both South Africa and Nigeria.\textsuperscript{1419} For instance, in South Africa, the cardinal principles of the CRC and ACRWC, particularly the best interest principle, are enshrined in section 9 of the Children’s Act, 2005 and section 28(2) of the South African Constitution which provides that: “A child’s best interests are of paramount importance in every matter concerning the child.” While in Nigeria, section 1 of the Child’s Right Act, 2003 provides that:

\begin{quote}
In every action concerning a child, whether undertaken by an individual, public or private body, institution or service, court of law, or administrative or legislative authority, the best interests of the child shall be the primary consideration.
\end{quote}

Mezmur notes the strength of the terms of the best interests’ principle used in section 1 of Nigeria’s Child’s Right Act.\textsuperscript{1420} Although the best interests’ principle of both jurisdictions show a higher normative standard as recognised in the African Children’s Charter.\textsuperscript{1421} However, the recognition of this principle as a constitutional right in the South African Constitution further strengthens the standard of this principle and contrasts with that of Nigeria.

In addition, Children’s Acts in both jurisdictions clearly define a child and set attainment of maturity at 18 years. With regard to expressly prohibiting child marriage, Article 21 of Nigeria’s Child’s Right Act clearly prohibits child marriage and states the minimum age of marriage. Although section 12(2) of South Africa’s Children’s Act provides that: “a child below the minimum age set by law for valid marriage may not be given out in marriage”, this provision makes no express mention of child marriage or setting 18 years as the minimum age for valid marriage. This provision is thus problematic as it is unclear in its definitions.\textsuperscript{1422}

Section 3 of Nigeria’s Child’s Right Act recognises the application of the fundamental principles of human rights contained in Chapter IV of the 1999 Constitution as they were stated in the Act. Sections 8 and 15 of South Africa’s Children’s Act equally recognises the application and enforcement of rights contained in the Bill of Rights

\textsuperscript{1419} Ibid; UNICEF “Reforming Child Law in South Africa: Budgeting and Implementation Planning” 3-4.

\textsuperscript{1420} Mezmur 2008 SAPR/PL 16.

\textsuperscript{1421} Ibid., p. 18.

\textsuperscript{1422} This is discussed in section 5.2.5. See SALRC “Discussion Paper 132 on the Practice of Ukuthwala” 40; Mwambene and Sloth-Nielsen (2011) AHRLJ 16.
and clearly states that the rights of the child in terms of the Children’s Act supplement the rights of the child in terms of the Bill of Rights. These provisions clearly show the importance of the core principles of human rights, and for South Africa, the recognition of children’s rights in two legislations, further reinforce the rights of the girl-child.

According to Sloth-Nielsen, the era of constitutional democracy in Africa has shown the significance of children’s rights.\(^\text{1423}\) No doubt this significance of promoting and protecting children’s rights has become apparent in Nigeria and South Africa’s constitutional democracies. The Constitution of each country plays a significant role, although South Africa’s Constitution is more progressive in advancing the rights of children and affirming the core principles of human rights predominantly when addressing the conflict between rights and culture. In addition, the inclusion of section 28 sets a constitutional standard and signifies the country’s commitment to broadening and strengthening the rights of children in order to address their peculiar needs.\(^\text{1424}\)

This contrasts with the Nigerian 1999 Constitution which, lacks a definition of the child, and does not feature any child specific rights.\(^\text{1425}\) However, Iyoha and Nwabueze argue that the omission of specific child rights in the constitution does not bar the court’s creative interpretation of other rights in the Constitution.\(^\text{1426}\) Mezmur equally states that Nigeria’s Child Right’s Act rectifies the lack of definition of a child in the Constitution by setting the age of a child at 18 years.\(^\text{1427}\) However, as stated above, domestication of the Child Rights in the 12 States where child marriage is mainly practiced is a major challenge.\(^\text{1428}\) Therefore, in order to broaden and strengthen the rights of children and in particular the rights of the girl-child in Nigeria, there is need

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\(^{1423}\) Sloth-Nielsen *Children’s Rights in Africa: A Legal Perspective* 53.


\(^{1425}\) Ukwuoma 10-11; Iyoha and Nwabueze 168.

\(^{1426}\) *Ibid*.

\(^{1427}\) Mezmur 2008 *SAPR/PL* 16.

for reform of the Nigerian Constitution to reflect child specific rights. This is also necessary to confirm that the era of constitutional democracy in Nigeria is enacted.\textsuperscript{1429}

South Africa has been praised for making huge strides in creating and building equality jurisprudence through a number of landmark Constitutional Court cases, some of which have been identified above. However, the implementation of laws, including laws that relate to gender equality, non-discrimination and child marriage have been recognised as a challenge in South Africa.\textsuperscript{1430} Although Nigeria’s commitment to various human rights instruments and bodies has also been recognised, the problem of implementation of these laws, especially with regard to gender equality, non-discrimination and child marriage, also remain a major challenge.\textsuperscript{1431} For child marriage cases, the challenges with the implementation of laws also relates to the federal government’s failure to prosecute perpetrators of child marriage in order to set examples to violators and prevent contravention of laws.\textsuperscript{1432}

5.5 Summary

This chapter provided a comparative analysis of the current legal framework and culture of child marriage in South Africa and Nigeria. This chapter takes into cognizance the question: to what extent have the national legislation for both jurisdictions been effective in transforming the rights of the girl-child, especially in relation to gender equality, non-discrimination and child marriage in a patriarchal society? The critical analysis provided reveals the different challenges that exist in both jurisdictions with regard to the practice and prevalence of child marriage, and the level of the significance of the national laws in promoting and protecting the rights of girls in both jurisdictions. No doubt urgent attention is needed in both South Africa and Nigeria to address the identified shortcomings discussed above. Recommendations


and suggestions to addressing these shortcomings will be considered in the next concluding chapter.
CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

6.1 General Conclusions

The majority of African countries are faced with the challenging complexities of child marriage as well as the prevalence of such marriages, hence the need to accelerate concerted efforts aimed at addressing the different interrelated causes of this phenomenon across Africa.1433 This study set out to examine the cultural practice of child marriage as a challenge to the realisation of the human rights of the girl-child in Africa with a comparative study of the legal and cultural situation in South African and Nigeria. Although the findings from the analysis provided in this thesis are chapter specific, the general conclusion that runs through the overall thesis is that irrespective of the significant role of culture, tradition and religious belief in a community, harmful practices such as child marriage are a serious violation of the fundamental rights of the girl-child and pose major challenges for African States.

Chapter Two analysed the connection between culture, child marriage and the girl-child through a conceptual framework on childhood, the significance of childhood, legal definitions of a child, the context of culture and forms of child marriage. This chapter argued regarding the importance of childhood and the significance of attaining a predetermined age as a factor for the transition of a girl-child from childhood to adulthood, even though cultural traditions and religious beliefs that promote child marriage do not support this argument.1434 An evaluation of different factors responsible for the persistence of the practice of child marriage include, amongst others, cultural and religious factors, poverty and gender inequality.1435 The implications of child marriage on the health, education and development of the girl-child were equally analysed to determine the extent of the problem of child marriage in Africa.1436 The recognition of these contributory factors as interrelated and having

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1433 UNFPA “Africa Launches Historic Campaign to end Child Marriage” 9 June 2014 1.
1434 See sections 2.2 to 2.3 of Chapter Two
1435 Ibid; section 2.8.
1436 Ibid., section 2.9.
grave impacts on the girl-child, and on efforts at protecting the rights of the girl-child in Africa has overwhelmingly shown that there is indeed an urgent need to eliminate this practice.

Chapter Three considered the question of how culture and human rights can co-exist especially with regards to harmful cultural practices such as child marriage, and if not, what alternative solutions should be applicable? This question was prompted by the contradictions that exist in the practical application of the rights of the girl-child and African traditional customs and religious beliefs that prevent efforts aimed at the full realisation of her fundamental rights. This is the case particularly with regard to the minimum legal age of the child, the right to consent, and the legal traditions of most African States.

The discourse on the practical application of human rights standards and the promotion of customs and traditional practices often leads to the debate on the conflict between universality of human rights and cultural relativism. Therefore, as a foundation for further discussion on human rights and culture in this thesis, Chapter Three investigated and provided an understanding into this contentious debate, through a conceptual, theoretical and philosophical approach. The analysis focused on the arguments in defence and those opposed to universality and relativism. While scholars and advocates of human rights argue on the universality of human rights for all, advocates of relativism mainly argue on the validity and applicability of universal human rights due to their historical development.

This relativist argument is a shared consensus among and within African traditional societies because of the diversity of cultures that exist around the world, as well as the entrenched communal and patriarchal systems in African traditional societies. It was demonstrated in this Chapter that the defence raised by relativists, when considered in the context of child marriage, contributes to a violation and abuse of the human rights of the girl-child, and often prevents efforts aimed at resolving the conflicts that arise between human rights and culture in the context of child marriage.

1437 Ibid., section 3.2.
1438 Discussed in sections 3.4 to 3.5 of Chapter Three.
1439 Ibid., section 3.5.
findings in this Chapter have also shown that the relevance of the universality of human rights to the protection of the girl-child from child marriage cannot be overemphasised.\textsuperscript{1440}

In order to address this conflict, this Chapter evaluated the significance of striking a balance between rights and culture.\textsuperscript{1441} It has been argued that the cultural legitimacy of human rights and the use of strategies such as “internal cultural discourse” and “cross-cultural dialogue” can establish an alternative approach or provide an interpretation to the practice in question.\textsuperscript{1442} The conclusion drawn from the analysis of cultural legitimacy of human rights is that the practical application of human rights alone cannot resolve the conflict between human rights and culture, especially within African societies. Secondly, human rights having a cultural vantage point will allow for a better realisation of children’s rights,\textsuperscript{1443} as well as reduce criticisms of western values having dominance over African values.\textsuperscript{1444}

With regard to internal cultural discourse, this study also considered the possibility of codifying the outcomes of internal cultural discourse as written laws,\textsuperscript{1445} as the concern that the overall outcome of internal cultural discourse on a conflict or harmful practice arises from contributions, ideas and interpretations of a custom and practice, and if such is not converted to written laws or policies, it could lead to future monopoly and manipulation.

This Chapter concluded with the realisation that the protection of the universally-affirmed human rights of the girl-child in Africa does not involve a one-way solution. Although human rights or children’s rights framework is an imperative, alternative supporting strategies to these legal frameworks such as education, dialogue and awareness rising, are the most important in addressing the conflict between human

\textsuperscript{1440} Ibid., section 3.3.2.
\textsuperscript{1441} Ibid., section 3.5.2.
\textsuperscript{1442} Ibid., section 3.5.2. See also An-Na’im Human Rights in Africa Cross-Cultural Perspective 21.
\textsuperscript{1443} Ibhawan 2000 HRQ 841.
\textsuperscript{1444} Kaime 2005 AHRLJ 223.
\textsuperscript{1445} Discussed in section 3.5.2 of Chapter Three.
Cultural traditions and religious beliefs have proven quite challenging because of the perceived ingrained perceptions, orientations and cultural attitudes of people and their communities. As stated above, there is a gradual cultural change by traditional and religious leaders; an example is in the district of Dedza in Malawi where a senior traditional leader annulled 330 child marriages. In addition the Emir of Kano, in Nigeria, Alhaji Muhammad Sanusi II, recently openly condemned child marriage during a conference of Northern religious leaders on primary health care, this, no doubt, is a welcome development. However, this gradual change is not enough to address the challenges that lie ahead in terms of the prevalence and consequences of child marriage. Therefore, more concerted efforts need to be made in terms of non-legal measures to address child marriage.

In Chapter Four, the thesis examined the human rights frameworks, special mechanisms and initiatives relative to child marriage in Africa. The analysis provided in this Chapter demonstrated that the rights and obligations enshrined in the CRC, ACRWC and the AWP play a vital role in providing a comprehensive protection for every girl-child in Africa. The extent of the role, relevance and involvement of human rights bodies and specialised agencies involved in protecting children’s rights are also examined along with recent AU initiatives for ending child marriage in Africa.

The conclusions drawn from the analysis provided in this Chapter was that the various instruments in the human rights frameworks each play a complementary role to one another in the advancement of children’s rights and in strengthening efforts aimed at the prevention of violations and abuses, despite the identified shortcomings of each human rights instrument relative to the protection of the girl-child in the context of child

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1446 Discussed in section 3.7 of Chapter Three. See also Viljoen 2009 WASH & LEE J.C.R & SOC. JUST 11 31.


1448 SRSG, Santos Pais “Welcomes the Decision by Senior Traditional Leader to Annual 330 Child Marriages in Malawi”, 2 September, 2015.


1450 Discussed in Chapter Four.
marriage. An example is the CRC which has no express provision prohibiting child marriage and the African Women’s Protocol which lacks the recognition of African values in its provisions but these shortcomings are clearly provided for in the African Children’s Charter. In addition, the recent works of the specialised mechanisms and AU initiatives have shown more regional recognition and focus on the promotion and protection of women and children’s rights as well as ending child marriage in Africa.

Chapter Five examined the legal nature of national human rights laws and policies relative to the protection of a girl-child in the context of child marriage in South Africa and Nigeria. The analysis ascertained the current legal protection available for the protection of a girl-child, as well as the shortcomings of each national legal instrument in relation to child marriage.\textsuperscript{1451} The legal framework in both jurisdictions confirms the debate between universality of human rights and cultural relativism. The focus of the Constitution of both jurisdictions is founded on the principles of universality which encompass human dignity, equality, non-discrimination,\textsuperscript{1452} and the protection of cultural rights. This confirms an awareness that cultural relativism is very much part of South Africa and Nigeria.\textsuperscript{1453} However, the conclusions drawn from this chapter have also shown that the South African Constitution, as well as its equality jurisprudence, has offered more progressive protection for the girl-child with limited shortcomings, when compared to the Nigerian Constitution.

With regard to the cultural practice of child marriage, the extent of the practice differs between the two jurisdictions, with Nigeria having a higher prevalence in the practice of child marriage, when compared to South Africa. In addition, the analysis showed that although both jurisdictions have similar factors responsible for the practice of child marriage, such as poverty and the preservation of virginity,\textsuperscript{1454} the nature of cultural traditions and religious beliefs that promote child marriage in both jurisdictions differs.\textsuperscript{1455}

\begin{itemize}
  \item \textsuperscript{1451} Discussed in Chapter Five of this thesis.
  \item \textsuperscript{1452} Chapter 2 of the South African Constitution and Chapter IV of the Nigerian Constitution.
  \item \textsuperscript{1453} Section 30 and 31 of the South African Constitution and section 38 of the Nigerian Constitution.
  \item \textsuperscript{1454} Discussed in Chapter Five of this thesis.
  \item \textsuperscript{1455} Discussed in section 5.2.2 and section 5.3.2 of Chapter Five.
\end{itemize}
In conclusion, the analysis provided in this thesis recognises the challenge of child marriage, and identified shortcomings at the international, regional and national levels. Therefore, recommendations and suggestions to address these shortcomings in order to advance the protection of the rights of the girl-child will be considered further below.

6.2 Recommendations

6.2.1 Recommendations on the human rights framework and specialised mechanisms

The CRC, African Children's Charter and African Women’s Protocol address the different contemporary challenges that affect children in Africa and each instrument complements each other in their areas of inadequacies. Therefore, in order to achieve a recognisable advancement in the promotion, implementation and enforcement of human rights frameworks there is need for continuous enlightenment and awareness rising, suited to each legal challenge, in this case child marriage, and to the different classes of people within society.

The CRC is the first internationally recognised and widely accepted children’s right instrument. At the regional level, the African Children’s Charter and the African Women’s Protocol are yet to receive ratification by some African States. This is a major factor limiting the effectiveness of advancing the rights of the girl-child in Africa. As stated above, reports have shown that States yet to ratify the African Children’s Charter and African Women’s Protocol are 7 and 18 respectively. This number includes Niger and Chad which are reported to be amongst the States with the highest prevalence of child marriage in Africa. The ACERWC and ACHPR have made commendable efforts in addressing this challenge, through advocacy and lobbying visits but there is need for consistent follow up in order to achieve full ratification and implementation of children’s rights instruments.

1456 Discussed in section 4.6.1 of Chapter Four.
1457 Discussed in section 4.4 and section 4.6.1.
1459 Mezmur 2006 AHRLJ 565.
In order to strengthen efforts aimed at advocacy and lobbying, it is suggested that the ACHPR and the ACERWC together with the Special Rapporteur on the Rights of Women and the Special Rapporteur on ending child marriage, should focus on a realistic timeline (i.e. yearly or two-yearly plan) to work with relevant agencies or NGOs on providing periodic data generation in those communities with high prevalence’s of child marriage, in the States that are yet to ratify key instruments. Providing more specific statistical information and trend analysis on the prevalence of child marriage, as well as statistics on the various risk factors of child marriage such as sexual and reproductive health and educational i.e. number of girls who are school dropouts, will help support and strengthen the justification for ratification and implementation of the rights of the girl-child.

Child marriage is a fast growing and re-occurring practice. Therefore, the success of the 2015 DAC focused on child marriage in Africa and by virtue of the mandate of the ACHPR, it is suggested that a yearly regional forum such as a seminar, symposium or conference be organised in order to further establish continuous awareness and education on the different international and regional human rights instruments. Such a forum will provide information on the current situation relating to child marriage in each State, measures or strategies taken to address the practice, as well as build continuous momentum towards ending child marriage. The forum could also address such challenges as State party reporting and ineffective implementation of the concluding observations of the ACERWC.

Budgetary constraints and unavailability of basic facilities are challenges that the ACERWC and ACHPR face which limit the full success of their mandate. There is need for this challenge to be addressed in order to have a wider coverage in the implementation of the objectives of the mandate. This is especially true with regard to the promotional mandate of the ACERWC and the ACHPR and those activities which have been recognised as successful in addressing the plight of children in Africa.

1460 Article 45 (1) (a) of the African Charter.
1461 Discussed in section 4.5.
1463 Viljoen International Human Rights Law in Africa 398.
There is growing urgency in the region to end child marriage and this promotional mandate is of great relevance to creating more awareness on the relevant children’s right instruments, the challenges of child marriage, and possible strategies to bring an end to the practice. Therefore, it is suggested that more funding be sourced from state parties as well as the private and business sectors in order to realise progress in the fight to end child marriage in the region.

6.2.2 Recommendations at the national level aimed at South Africa and Nigeria

More than ever before, every African State has the ultimate responsibility of addressing child marriage by recognising the practice as a serious abuse of the girl-child, and then developing and implementing practical child protection measures that will address the different factors that reinforce child marriage. Different States have taken up the challenge of launching the national AU campaign to end child marriage in Africa with Ghana being the most recent State to launch the campaign on 10 February 2016. At present, South Africa and Nigeria are yet to launch their national campaigns. It is therefore recommended that they make efforts to launch this AU campaign to end child marriage, and provide sustainable measures or strategies at a national level that will address the unique challenges of child marriage in their respective jurisdictions. It is also recommended that this campaign should actively involve local traditional and religious leaders, families and communities with a focus on praising the positive aspects of culture and religious beliefs in those societies, whilst at the same time uncovering the importance of the human rights framework. The harmful practice of child marriage and the risks involved in the practice should also be condemned in the strictest terms.

To further enhance the impact of the campaign across both countries, it is suggested that the two governments work with international and local NGOs, civil societies and relevant agencies, such as UNFPA, in organising a pre-AU campaign on ending child marriage in their provinces or regions. This is in order to create more inclusive

1465 Discussed in section 4.9 of Chapter Four. See also Daily Graphic “Ghana to Launch ‘Ending Child Marriage’ campaign” 9 February, 2016.
1466 Mwambene and Sloth-Nielsen 2011 AHRLJ 1.
participation across the country as well as create enlightenment, education and awareness at the grassroots or rural levels, which is where child marriage is mostly practiced. This pre-AU campaign will enable many ignorant women and girls to become more aware of their rights and the impact of child marriage. It will also enable dialogue and commitment from local and religious leaders, who are mostly men, as well as enable the government itself to understand other challenges of the community such as poverty and unemployment and how best to address these challenges. It is hoped that the findings from the envisaged pre-AU campaign will enable a strategic and focused AU campaign at a national level. It will also help prevent any criticism against organising AU campaigns at a national level alone, as well as criticisms on the perceived impact of a national campaign at a grassroots level where the practice most often takes place.

Furthermore, at the celebration of the 2015 DAC, the ACERWC urged all member States to convene a national inter-religious and inter-cultural dialogue by religious and traditional authorities on the role of religion and culture in child’s rights, welfare and development.\(^\text{1467}\) This suggestion is vitally important to the unique situation of Nigeria. As stated above, child marriage is common practice in Nigeria, and even more challenging is the cultural/religious practice of child marriage in the Northern region of Nigeria.\(^\text{1468}\) In addition is the recent news reports on the trend in the abduction of girls into forced marriage. An example is the recent abduction of a 14-year-old girl from her home in the Southern Bayelsa State, to Kano State, Northern Nigeria who was subsequently forced into marriage.\(^\text{1469}\)

No doubt an urgent intervention is needed to address this recent development, as well as the existing challenges with regard to child marriage in the Northern region of Nigeria. It is suggested that the Federal and State government representatives in especially the 12 States yet to ratify the CRA,\(^\text{1470}\) together with Islamic

\(^{1467}\) AU, ACERWC “Concept Note of the 25th Day of the African Child 2015”, para 33.

\(^{1468}\) Discussed in section 5.3.2 of Chapter Five.


traditional/religious leaders such as the Emir of Kano, Muhammadu Sanusi II (an influential Islamic and traditional leader in Nigeria), Islamic clerics, Islamic organisations (such as the Muslim Rights Concerns) the Sharia Commission, as well as girl’s rights and human rights specialised agencies such as UNICEF, UNFPA and NGOs, convene a national cultural/religious dialogue in order to arrive at a collective approach to addressing an end to the practice of child marriage. It is hoped that such a forum as this will create an understanding and reach consensus, especially on the legal minimum age of marriage of a girl-child in order create an avenue for government to modify the Constitution in adopting a uniform age for a child. In addition, it is hoped that this dialogue will address cases of abduction and forced marriage as well as how best the rights of the girl-child will be adequately protected.

Nigeria has been encouraged to enact ‘Prohibition of Child Marriage Act’.\textsuperscript{1471} This thesis equally recommends the enactment of an Act with strict prohibitions on child marriage and various related offences, and that provides heavy penalties for contraventions of the provisions of the proposed Act. It is also recommended that strict interpretation be given to the offences related to child marriage cases such as child/forced marriage as well as abduction and sexual exploitation, to mention a few. This will aid in providing clarity and avoid ambiguities when such proposed legislation is in use.

The above proposition for the enactment of the ‘Prohibition of Child Marriage Act’ is also relevant to South Africa. Although South Africa has been commended for its progressive Constitution and equality jurisprudence,\textsuperscript{1472} the recent case of \textit{Jezile v S} has played a significant role in highlighting the distinction between the traditional practice of \textit{ukuthwala} and the wrongful practice of \textit{ukuthwala}. There is no specific mention of \textit{ukuthwala} as a harmful cultural practice in the different legislations or the extent to which the practice could be harmful.\textsuperscript{1473} Therefore, while various efforts such as awareness are still being made to ensure that traditional practices conform to the

\textsuperscript{1471} Braimah 2014 \textit{AHRLJ} 488.

\textsuperscript{1472} Discussed in Chapter Five.

\textsuperscript{1473} This point was noted in section 5.7 of Chapter Five.
legal age of marriage of a child as attainment of maturity for marriage, it is recommended that South Africa enact the ‘Prohibition of Child Marriage Act’ with the wrongful practice of *ukuthwala* clearly indicated. It is hoped that if this Act is enacted, it will further complement existing laws, reduce incidences of child marriage, and strengthen prosecution in both jurisdictions.

The analysis provided in Chapter Five relating to Nigeria has shown the need for an amendment to be made to the Constitution to provide for the inclusion of a provision specific to the rights of children such as section 28 of the South African Constitution. This suggestion may not be easy to realise though, and is likely to meet objections and opposition especially from cultural/religious groups, on setting 18 years as the minimum age of marriage, as has been the case with the history of the Child Right’s Act, 2003. For this amendment to be realised, a lot of appeal, lobbying and dialogue has to be made. It is hoped that if a resolution can be made for an amendment then this will help to resolve conflicting laws with regard to the age of a child. Such amendments will recognise child marriage as an unconstitutional practice; it will advance the protection of the rights of the girl-child; it will strengthen prosecution cases relating to child marriage, as well as reduce the high prevalence of child marriage in Nigeria.

Lastly, as stated above, both South Africa and Nigeria are recognised as pivotal States in the region, therefore both countries need to work together with other African States, especially in Southern and Western Africa, to end the practice of child marriage. For instance, the Southern African Development Community Parliamentary Forum (SADC-PF) adopted a “Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage” on 3rd of June 2016. The Model law brings together 14 SADC States and aims “to provide guidance to parliamentarians, ministries of justice, policymakers and other state holders in SADC countries as they develop their

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1474 According to Akinwumi, the drafting of the Child Right’s Bill took about 10 years before it was passed into law by the National Assembly in July 2003. Akinwumi 2009 International Journal of Legal Information 386.

national laws.” No doubt this is a welcomed development for Southern Africa and such a model should be an example for States in Western Africa with higher prevalence in the practice of child marriage. This is also an indication that African States need to work together to end the practice of child marriage.

6.2.3 Recommendations to supporting strategies to the human rights framework

A number of factors such as poverty, unemployment, and economic hardship are responsible for the persistent practice of child marriage and are inseparable from cultural and traditional practices and beliefs. Various international, regional and national laws and policies on the rights and welfare of the girl-child play a significant standard setting role, thus preventing the continuous harmful practice of child marriage and obligating all State parties to conform to the standards provided. However, different sustainable strategies are needed in order to support existing legislations to end the practice of child marriage.

Poverty, unemployment and economic hardship are major challenges across Africa, and thus account for the persistent practice of child marriage in both South Africa and Nigeria. More effort is therefore needed in the two jurisdictions to improve the situation of people, particularly in rural areas and underdeveloped communities where child marriage is mostly practiced. It is suggested that realistic poverty eradication programmes and plans such as financial incentives or feeding schemes be considered as a strategy for addressing the challenge of child marriage. In addition, the creation of unskilled and semi-skilled job opportunities and labour for those in rural areas where child marriage is mostly practiced is equally important.

Lack of education is one of the major risk factors of child marriage. Therefore, education is critical in ending child marriage as it is a right in itself and an essential

1476 Ibid.
1477 Causes of child marriage discussed in Chapter Two.
1478 Lane “Stealing Innocence” 2011 4.
1479 Discussed in section 2.8.3 of Chapter Two.
1480 Discussed in section 2.9.1 of Chapter Two.
means to achieving other human rights. Different reports and studies have emphasised and restated suggestions and recommendations relating to the improvement of education for the girl-child, the family and the community. This thesis equally confirms that education and training is critical to ending child marriage in South Africa and Nigeria. Therefore, more conscious efforts need to be made with realistic developmental plans, programmes and activities on advancing the education of girls in this region. Among others, there should be in place adequate programmes that encourage equality of access to education and training in order to achieve an educational or skills qualification that will provide sustainable development for the girl-child. Programmes such as scholarships and bursaries as well as provision of such facilities such as transport, food, school uniforms and security for girls going to school are essential, as well as other means to reduce the cost of education for parents.

Teachers and educators also have a vital role to play with regard to school children dropouts. Governments need to ensure teachers and school authorities provide statistics on school dropouts with reports on the reason(s) for dropping out too. More investigative efforts by the teachers or school administrators should be made to ascertain the reason for leaving school, as often times girls are taken from schools in order to prepare them for marriage. In addition, intervention efforts should also be made by the school by contacting relevant authorities for further investigation. It is hoped that such reports will assist in preventing an impending child marriage or assist the relevant authorities to intervene in child marriage cases in order to retain more girls in school.

Many practical sustainable strategies are needed to address child marriage. Social media awareness has become a very popular and significant medium in

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1483 Ibid.

1484 Discussed in chapter three. See also Beijing Declaration and Platform of Action/Beijing +5 Political Declaration and Outcome 1995 47.
communication and information sharing. It is a medium where individuals, government agencies, human rights activists, agencies and NGOs share first-hand information or news, as well as means to mobilise advocacy and awareness. This is not new for child marriage cases as a lot of information is shared over different social media platforms such as Facebook, Twitter, YouTube, and Google. Similarly, different newspaper websites, and websites of bloggers who post news and information for the public are utilised in the child marriage battle. An example is Punch newspaper, in Nigeria that launched the campaign to free an abducted girl. This created a lot of awareness and engaged discussions across the internet (via different social media channels) and radio and television channels across the country resulting in the release of the girl to her parents.

Therefore, there is need for individuals, government agencies such as Human Rights Commissions, human rights activists, International and National UN agencies such as UN, NGOs, media and newspaper companies in South Africa and Nigeria to use these platforms to raise awareness on different socio-cultural issues affecting women and girls such as child marriage, gender equality and non-discrimination. The debates and discussions that will be generated will increase knowledge and advocacy for change.

More awareness and advocacy should also be encouraged on traditional media in both South Africa and Nigeria. Radio and television stations and newspaper companies/columnists should be encouraged to work together with governments, as well as human rights agencies, to develop informative programming on documented present day challenges of women and girls in relation to gender equality and non-discrimination, in order to shape cultural attitudes and perceptions. There is a need to create engaging discussions via the radio, especially local radio stations which are accessible to people in communities in order to increase knowledge, generate discussions and increase enlightenment around these issues. There is also a need to use the entertainment industry as well as programmes on the television in different

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local languages to draw the attention of the public to the significance of preventing harmful cultural practices in the community.\textsuperscript{1487} The movie titled “Dry” written and produced by a Nigerian actress, Stephanie Linus, which is based on child marriage and the health implications of the practice, provides an example of the role and relevance of the entertainment industry, in particular movie writers, actors/actresses and producers.\textsuperscript{1488}

As a final point and as stated above, the era of constitutional democracy in Africa has shown the significance of children’s rights and the need to address the critical situation of most African children and the challenges they face. For South Africa and Nigeria, child marriage is a unique challenge facing a girl-child and efforts are needed to end this abusive practice in these two jurisdictions. A platform of consensus has to be built on the importance of gender equality and non-discrimination in traditional communities still ingrained with patriarchal ideologies. No doubt this is quite formidable and challenging, but it should not create a setback in the struggle for an end to child marriage.

\textsuperscript{1487} Food and Agriculture Organisation of the UN (FAO) “Voices for Change: Rural Women and Communication” 1999 Economic and Social Development Department. Available at: http://www.fao.org/docrep/x2550e/x2550e04.htm (accessed 16-03-2016).

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