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**EARLY CHILD MARRIAGES: RECENT LAW REFORM AND JURISPRUDENCE IN AFRICA  
TOWARDS BANNING THE PRACTICE**

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## **ABSTRACT**

Many young girls in the developing countries, mainly in Africa, are subjected to early marriages. The majority of such girls cannot choose their marriage age or the person they marry. In this dissertation, the literature on early child marriages in Africa as well as recent legislative reforms towards curbing the practice are reviewed. Most of the findings from empirical studies indicate that the incidence of early marriages is high in Africa and that those young girls who marry early tend to possess fewer years of schooling and start childbearing prematurely. Malawi, Nigeria, Zimbabwe, South Africa and Ghana have experienced increases in early child marriages and the integration of international and regional legislation has been, at times, in conflict with customary laws. Moreover, empirical evidence suggests the existence of disparities in the minimum age of marriage for girls and boys in Malawi, Zimbabwe and South Africa with age differences under separate laws such as under customary laws and other marriage laws. Studies also indicate that within Africa as well as other regions of the world, longstanding risk influences such as poverty and male-dominated social values work together to weaken the effect of interventions to curb early child marriages. The most documented successes against early child marriage in Africa have been credited to the propagation of schooling opportunities for young girls as well as women economic empowerment policy interventions. The literature reviewed suggests a high prevalence of child marriages not only in Africa, but across the world. Cases of early child marriages were found to be enabled by a plethora of socio-economic and cultural factors such as poverty prevalence, weak legislation, deep-rooted stereotypes about gender roles and cultural and religious practices supporting early child marriages.

**Keywords:** Early marriages, legislative reforms, customary law, policy interventions

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### **List of Abbreviations and Acronyms**

ACRWC	African Charter on the Rights and Welfare of the Child
CEDAW	Convention on the Elimination of Discrimination Against Women
CGE	Commission for Gender Equality
COGTA	Department of Cooperative Governance and Traditional Affairs
CONTRALESA	Congress of Traditional Leaders of South Africa
CYPA	Children and Young People's Act
HIV	Human Immunodeficiency Virus
KZN	KwaZulu-Natal
MDFR Act	Marriage, Divorce and Family Relations Act
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
SADC	Southern African Development Community
SADC-PF	Southern African Development Community Parliamentary Forum
SALRC	South African Law Reform Commission
SAPS	South African Police Service
SSA	Sub-Saharan Africa
UDHR	Universal Declaration of Human Rights
UNICEF	United Nations Children's Fund
UNCRC	United Nations Convention on the Rights of the Child
UNFPA	United Nations Population Fund

## CHAPTER 1

### INTRODUCTION

#### 1.1. Context and outline of the research problem

The effects of child marriages on children and their families are devastating and far reaching. Despite widespread awareness and condemnation, this cultural practice persists.<sup>1</sup> A misconception exists that it is only female children who fall victim to early child marriage. While it is true that female children are the common victims of this practice, it must also be noted that the male child can and does fall victim to early child marriage.<sup>2</sup> The impact of early child marriage is devastating for the child affected. A girl who gets pregnant and gives birth to a child out of wedlock is generally viewed by society as having brought shame upon herself and upon her family. Therefore, in order to “protect” her from shame, the girl may fall victim to early child marriage. Due to gender inequality, girls in Africa are often not able to reject unsafe intercourse with their spouses, despite the high incidence of HIV infections.<sup>3</sup>

On the African continent, a number of law reform and jurisprudential strides have been made recently, and these form the focus of this research, particularly in South Africa and Nigeria. Case examples will be taken from other countries such as Zimbabwe, Malawi and Ghana. These countries have high levels of child marriages.<sup>4</sup> With regard to South Africa, this research will not only analyse the cultural practice of *ukuthwala* (which exists in South Africa) but will also consider child marriages in South Africa through a study of the relevant legislation, socio-economic and cultural influences.

##### 1.1.1. South Africa

The Constitution of the Republic of South Africa, 1996 (hereinafter referred to as “the Constitution”) protects the right of every South African to enjoy their culture and to practice their religion.<sup>5</sup> The concern arises where the religion or culture practiced is harmful and/or inconsistent with the Bill of Rights. The Constitution provides that these cultures and religions may not be practised in a manner inconsistent with the Bill of Rights.<sup>6</sup> Furthermore, these rights can be limited.<sup>7</sup> A balancing exercise

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<sup>1</sup> A Jorda ‘Child Brides in Africa could more than double to 310 million by 2050’ UNICEF available at <http://wunrn.com/2015/12/child-marriage-unicef-report-at-african-union-girls-summit-myths-about-child-marriage/>, accessed on 24 March 2017.

<sup>2</sup> For example, in Ghana, male children are trafficked for the purpose of child labour, however, some of them, in addition to being forced to work as fishermen, are sold for as little as \$13 to marry. I Khaledzi ‘Trafficked boys in Ghana are forced into early marriage’ available at <http://www.dw.com/en/trafficked-boys-in-ghana-are-forced-into-early-marriage/a-19229198>, accessed 4 February 2017.

<sup>3</sup> UNICEF, 2001:12-13 as cited by N Johansson *Child Marriage: The Underlying reasons and possible solutions* (unpublished bachelor’s Thesis, Linnaeus University, 2015) pp 23.

<sup>4</sup> S Rembe, O Chabaya, N Wadesango & P Muhuro ‘Child and forced marriage as violation of women’s rights, and responses by member states in Southern African Development Community’ (2011) 25:1 *Agenda* pp 65-74.

<sup>5</sup> Section 31 (1)(a) of the Constitution of the Republic of South Africa, 1996.

<sup>6</sup> Section 31(2) of the Constitution.

<sup>7</sup> Section 36 of the Constitution.

occurs where some rights ostensibly conflict, and children's rights, in particular, may trump other rights.<sup>8</sup>

One such contentious cultural practice in South Africa is called *ukuthwala*. The motives for this practice have over time changed to become criminal in some instances. It is therefore necessary to distinguish between the original practice of *ukuthwala* and the distorted practice which children are protected from under the Bill of Rights. Bekker and Koyana explain the practice and its original purpose.<sup>9</sup> They argue that the practice in its original form was often done with the girl's consent. The groom would take the girl away to his home while she would put up an act of resistance for onlookers. The girl did this in order to preserve her maidenly dignity, however, she was usually a willing party.<sup>10</sup>

Customary law advances both regular and irregular ways to enter into a customary marriage. Arguably, the regular way to enter a customary marriage is for the intending spouses to agree to the pending marriage, thereafter *lobola* is paid to the bride's family. However, *ukuthwala* poses an irregular method which would, if the principles of the custom were correctly followed, with *bona fide* intentions, eventually lead to the conclusion of a valid customary marriage.<sup>11</sup> *Ukuthwala* can be explained as an irregular method for willing intending spouses to initiate marriage negotiations by the respective families. It was usually the viable option where there was some form of conflict surrounding the intended marriage. The idea is to avoid the anticipated resistance to the proposed marriage such as extreme or unreasonable parental authority. In some cases, it was due to the lack of affordability of *lobola* by the man and, in other cases, it was done as an act of rebellion where the woman disapproves of an arranged marriage and would rather marry a lover of her choice.<sup>12</sup>

Unfortunately, the practice of *ukuthwala* has caught the attention of criminal opportunists who use the practice to satisfy their own *mala fide* intentions. Where the practice is carried out without the consent of the girl and in disagreement with her parents, this will be tantamount to kidnapping.<sup>13</sup>

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<sup>8</sup> R Songca 'Evaluation of children's rights in South African Law: the dawn of an emerging approach to children's rights?' (2011) 44:3 *The comparative and International Law Journal of Southern Africa* pp 340 – 359.

<sup>9</sup> D Koyana. and J Bekker, 'The Indomitable *Ukuthwala* Custom' (2007) 1 *De Jure* p 139.

<sup>10</sup> Ibid on page 1.

<sup>11</sup> D Mabasa '*Ukuthwala* is it all culturally relative?' (2015) *De Rebus* p 28 available at <http://www.derebus.org.za/ukuthwala-culturally-relative/> accessed on 26 October 2020.

<sup>12</sup> Ibid.

<sup>13</sup> "Kidnapping consists of unlawfully or intentionally depriving a person of their liberty of movement or, in the case of a minor, depriving a parent or recognised guardian of their control over the child." C Snyman *Criminal Law* 6<sup>th</sup> ed (2014) p 479. Other writers state that "kidnapping consists in unlawfully and intentionally depriving a person of liberty of movement and/or his or her custodians of control" – J Burchell *Criminal Law* 4<sup>th</sup> ed (2014) p 758; J Milton, P Hunt and E Burchell *Common Law Crimes* (1996) pp 470 – 541.

Having sex with a minor following her kidnapping and abduction constitutes rape which is in violation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, also referred to as the Sexual Offences Act.<sup>14</sup>

On 17 April 2009, the Herald newspaper reported that, in the Eastern Cape, more than 20 school girls every month fell victim to the practice of *ukuthwala* and, as a result, could not continue school.<sup>15</sup> Minor girls from as young as 12 years, involuntarily entered into marriages with men who were old enough to be their fathers.<sup>16</sup> Courts have previously held that “*ukuthwala* should not be used as a cloak for forcing unwelcome attentions on a patently unwilling girl.”<sup>17</sup> Courts have also made it clear that “abduction by way of *ukuthwala* is unlawful.”<sup>18</sup> Contrarily, courts have suggested that “if there is a belief by the abductor that the custom is lawful and that the parents or guardians consented to the taking, it would not be abduction because abduction is a crime against parental authority.”<sup>19</sup>

The new distorted form of the practice of *ukuthwala* violates the female child’s Constitutional rights to dignity,<sup>20</sup> freedom and security of the person,<sup>21</sup> and is in conflict with a number of domestic laws. In terms of South African legislation, the following four statutes make it clear that early child marriage is prohibited: the Marriage Act,<sup>22</sup> the Recognition of Customary Marriage Act,<sup>23</sup> the Civil Union Act<sup>24</sup> and the Children’s Act.<sup>25</sup>

The sections of the legislation mentioned above will be critically analysed by this paper. It is of great concern that the minimum age of marriage for girls differs from that of boys. In this regard, section 9 of the Constitution is of relevance, as discrimination on the basis of sex, gender and marriage is prohibited.

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<sup>14</sup> Section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; also referred to as the Sexual Offences Act.

<sup>15</sup> L Mwambene and J Sloth-Nielsen ‘Benign accommodation, *ukuthwala*, ‘forced marriage’ and the South African Children’s Rights Act’ (2011) 11 *African Human Rights Law Journal* p 12.

<sup>16</sup> Ibid.

<sup>17</sup> *Nkupeni v Numunguny* 1938 NAC (C&O) 77.

<sup>18</sup> *R v Swartbooi* 1916 EDL 170; *R v Sita* 1954 (4) SA 20 (E), as cited by D McQuoid-Mason “The practice of *ukuthwala*: The Constitution and the Criminal Offences and Related Matters Act” (2009) 30(3) *Obiter* 716-723.

<sup>19</sup> *R v Sita* (5 above). “In the Constitutional era, however, the common law crime of abduction might be unconstitutionally suspect, in that it focuses on a violation of parental authority and ignores the views and wishes of the child.”

<sup>20</sup> Section 10 of the Constitution of the Republic of South Africa, 1996.

<sup>21</sup> Ibid at section 12.

<sup>22</sup> Act 21 of 1961.

<sup>23</sup> Act 120 of 1998.

<sup>24</sup> Act 17 of 2006.

<sup>25</sup> Act 38 of 2005.

There has been an effort to address the prevalence of *ukuthwala* by institutions supporting Constitutional democracy such as the Commission for Gender Equality (CGE) and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Rights Commission). In 2012, the CGE embarked on a consultative dialogue on the issue in KwaZulu-Natal. The commission is mandated by section 187 of the Constitution to promote respect for, and the protection, development and attainment of, gender equality.<sup>26</sup> In its report, the CGE made a number of recommendations aimed at stakeholders such as traditional leaders, the national prosecuting authority, the police and the provincial legislature, amongst others, to pursue a multi-sectoral approach to eradicating *ukuthwala*.<sup>27</sup>

The CGE urged the following government departments to develop guidelines and procedures to effectively deal with cases of *ukuthwala*:<sup>28</sup>

- the Department of Health which stated that it does not collect data on *ukuthwala*,<sup>29</sup>
- the Department of Cooperative Governance and Traditional Affairs (COGTA) which declared that it is not in a position to provide a statistical report on the practice, and further did not see the practice as an issue requiring their intervention, as well as
- the Department of Social Development which indicated that it does not have specific guidelines for dealing with *ukuthwala*.

The reluctance of all these departments to deal effectively with the issue of *ukuthwala* is counter-productive to the vision of eradicating harmful traditional practices against children as promoted by our Constitution. The need for formulating a multi-sectoral approach to the eradication of this harmful practice should be considered, in this study, by government departments, the South African Police Service (SAPS), the National Prosecuting Authority (NPA) and various other community stakeholders.

*Ukuthwala* and other practices that are dehumanising young female children are regarded as unfair discrimination. This is specifically set out in section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act<sup>30</sup> (PEPUDA). Section 8 of PEPUDA provides that the following constitute unfair discrimination:

- “Section 8(a) gender-based violence,
- Section 8(b) female genital mutilation, and

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<sup>26</sup> CGE Press release on *Ukuthwala* investigation in KwaZulu-Natal available at <http://www.gov.za/press-release-ukuthwala-investigation-kwazulu-natal-kzn> accessed on 9 April 2017.

<sup>27</sup> CGE *Ukuthwala in KwaZulu-Natal: An investigation into state prevention and response* (2015) 24.

<sup>28</sup> Ibid.

<sup>29</sup> op Cit note 23 at 25.

<sup>30</sup> Act 4 of 2000.



- Section 8(d) any practice, including traditional, customary or religious, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and wellbeing of the female child.”

Essentially, this means that PEPUDA regards practices that dehumanise young girls as unfair discrimination. These practices include female genital mutilation, *ukuthwala* and others. The rights found in PEPUDA can be upheld by the courts and there are specific courts called *Equality Courts*, where it is possible to report the infringements of these rights.<sup>31</sup> The South African Law Reform Commission (SALRC) has embarked on drafting a bill following a process that initially provided a number of law reform options. In 2014, the SALRC’s discussion paper<sup>32</sup> mooted possibilities such as the enactment of legislation that creates a criminal offence or amendment of existing legislation such as the Recognition of Customary Marriage Act<sup>33</sup> and the Children’s Act<sup>34</sup> (which was seen as providing unsatisfactory protection).<sup>35</sup>

By October 2015, following public consultations, the SALRC’s discussion paper was revised<sup>36</sup> to include a draft bill, the *Prohibition of Forced Marriages and Child Marriages Bill* [B2015], which is aimed at introducing an expanded crime of forced marriage, the prohibition of child marriages, the provision for competent verdicts in relation to forced marriages, criminalisation of an attempt, conspiracy or incitement to commit an offence relating to forced marriages and the provision for civil remedies.<sup>37</sup>

### 1.1.2. Zimbabwe

South Africa’s law reform efforts must be seen in light of the strides made on the African continent to prohibit child marriage, such as the efforts in Zimbabwe and Malawi. The decision of the Constitutional Court of Zimbabwe – *Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & Two Others* – is significant.<sup>38</sup> Sloth-Nielsen & Hove have remarked that the *Mudzuru* judgment makes important jurisprudential contributions.<sup>39</sup> The three noteworthy jurisprudential strides made by the judgment are as follows: firstly, with respect to *locus standi* to institute a challenge under the Zimbabwean Constitution; secondly, with regard to the use of foreign and international jurisprudence;

<sup>31</sup> J Maluleke ‘*Ukuthwala*: Let’s protect our children’ (2009) 5 *Justice Today Department of Justice and Constitutional Development*.

<sup>32</sup> SALRC The Practice of *Ukuthwala* (2014) Discussion paper 132 Project 138.

<sup>33</sup> Act 120 of 1998.

<sup>34</sup> Act 38 of 2005.

<sup>35</sup> *op Cit* note 28 at 47-48.

<sup>36</sup> SALRC The Practice of *Ukuthwala* (2015) Revised Discussion paper 132 Project 138.

<sup>37</sup> The draft Prohibition of forced marriages and child marriages Bill in the SALRC (2015) p. 57.

<sup>38</sup> CCZ 12/2015 <http://www.lrfzim.com/wp-content/uploads/2016/01/Landmarkruling-on-child-marriages.pdf> accessed on 08 August 2018.

<sup>39</sup> J Sloth-Nielsen, & K Hove ‘Recent developments *Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & two others*: A review’ (2015) 15 *African Human Rights Journal* pp 554-568.

and thirdly, in the purposive manner in which it interpreted the applicable constitutional provisions on child marriage. The willingness of the court to comply with commonly held social expectations about sexual maturity and the necessary protection of pregnant girls which is imperative in the context of seemingly wide spread support for legislative provisions enabling child marriage.<sup>40</sup>

### 1.1.3. Ghana

Anarfi asserts that sexual conduct in Ghana illustrates a culture in transition due to the fact that many restraints against sexuality are no longer being stringently applied. He argues that several traditional standards that used to control societal conduct do not have the capability or are declining in their effectiveness. The results of this is a society filled with influences emanating from western and modern cultures.<sup>41</sup> The Ghanaian Parliament acknowledges that delayed first marriage and the abolition of early child marriages are still hypothetically important associations in increasing the age at which child bearing occurs.<sup>42</sup>

### 1.1.4. Malawi

Malawi records some of the highest numbers of child marriages in the world.<sup>43</sup> The government of Malawi amended its Constitution to remove a provision that allowed children between 15 and 18 to marry with parental consent.<sup>44</sup> The Constitution of Malawi is now in line with the country's Marriage, Divorce and Family Relations Act,<sup>45</sup> (MDFR Act) which sets the minimum age for marriage at 18 years. The MDFR Act was enacted in 2015 after lobbying from activists.<sup>46</sup> A female chief has been lauded for annulling child marriages in her community (reported to be over 850 such marriages) through customary law.<sup>47</sup>

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<sup>40</sup> Ibid at page 568.

<sup>41</sup> J Anarfi 'Sexuality, migration and AIDS in Ghana - a socio-behavioural study Health Transition Review' (1993) 3 available at <http://www.jstor.org/stable/40652061>, accessed on 25 May 2017.

<sup>42</sup> S Gyima 'A cohort analysis of the timing of first birth and fertility in Ghana' (2003) 22 *Population Research and Policy Review* 22 pp 251–266 available at <https://doi.org/10.1023/A:1026008912138>, accessed on 27 April 2017.

<sup>43</sup> Girls not brides 'Child marriages around the world: Malawi' available at <http://www.girlsnotbrides.org/child-marriage/malawi/>, accessed on 27 April 2017.

<sup>44</sup> Plan International 'Malawi changes law to end child marriage' available at <https://plan-international.org/news/2017-02-14-malawi-changes-law-end-child-marriage>, accessed on 27 April 2017.

<sup>45</sup> Marriage, Divorce and Family Relations Act of 2015.

<sup>46</sup> D Dunning & J Mkandawire 'How girl activists helped to ban child marriage in Malawi' *The Guardian* 26 February 2015 available at <https://www.theguardian.com/global-development-professionals-network/2015/feb/26/girl-activists-child-marriage-malawi-let-girls-lead>, accessed on 27 April 2017.

<sup>47</sup> I Khoo 'Malawi chief Therese Kachindamoto annuls 850 child marriages' *The Huffington Post Canada* 18 October 2016 available at [https://www.huffingtonpost.ca/2016/10/18/malawi-chief-theresa-kachindamoto\\_n\\_12539208.html](https://www.huffingtonpost.ca/2016/10/18/malawi-chief-theresa-kachindamoto_n_12539208.html), accessed on 27 April 2017.

### 1.1.5. Nigeria

In Nigeria, 43 per cent of girls are forced to marry before attaining majority status. Seventeen percent are forced to marry before they turn 15.<sup>48</sup> The Nigerian Constitution does not stipulate a minimum age of marriage. Nigeria operates under a federal system of government and is influenced by numerous legal systems across its 36 states. In addition to the Constitution, the Children and Young People's Act (hereinafter referred to as CYPA) 1943, which has been enacted in the Eastern, Western and Northern parts of Nigeria,<sup>49</sup> as well as the Child Rights Act, which was enacted in 2003 and has been adopted by 23 states,<sup>50</sup> are two important pieces of legislation regarding children in Nigeria.

The CYPA defines a child as a person under the age of 14 years, while a "young person" means a person between 14 years and 17 years.<sup>51</sup> The Child Rights Act sets the minimum age of marriage as 18 years. Kanyip states that under customary law, the definition of a child is dependent on who is providing the definition, as it varies from one ethnic group to another. According to some cultural groups, the age of majority may be dependent on initiation into adulthood or the ability to financially contribute to the development of the community. While in others, childhood terminates at puberty.<sup>52</sup>

"Nigeria is governed by a combination of federal law, state law and pre-independence English law. State law can be further subdivided into statutory legislation, customary law and Sharia law."<sup>53</sup> The different laws and the federal nature of Nigerian law make the applicability of these laws and the protection of children's rights in Nigeria a very difficult task. For example, when a person marries a child in Northern Nigeria under Islamic Law and is thus in contravention of the Child Rights Act, that person cannot be prosecuted because the federal government cannot interfere with a marriage that is instituted under Islamic Law.<sup>54</sup>

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<sup>48</sup> Girls not brides 'Child Marriages around the world: Nigeria' available at <http://www.girlsnotbrides.org/child-marriage/nigeria/>, accessed on 22 April 2017.

<sup>49</sup> E Alemika I, Chukwuma, D Lafrata, D Messereli and J Souckova 'Rights of the Child in Nigeria: A report on the Implementation of the convention of the rights of the child by Nigeria' (2005) *World Organisation against Torture* pp 32-38 available at <https://www.refworld.org/docid/46c190d50.html>, accessed on 21 March 2020

<sup>50</sup> UNICEF '23 States pass the Child Rights Act in Nigeria' available at <https://www.today.ng/news/nigeria/124161/23-states-pass-child-rights-nigeria-unicef>, accessed on 27 April 2017.

<sup>51</sup> Section 2 of CYPA.

<sup>52</sup> Child Rights Act 38 of 2005.

<sup>53</sup> BB Kanyip 'Rights of the Nigerian Child' available at <http://www.nicn.gov.ng/k10.php>, accessed on 27 April 2017.

<sup>54</sup> E Nwauche 'Child Marriage in Nigeria: (II) legal and (un) Constitutional?' (2015) 15:2 *African Human Rights Law Journal* pp 421/432.

### 1.1.6. International and regional law

At the international law level, two of the most broadly endorsed treaties have prohibited this practice: the United Nations (UN) Convention on the Rights of the Child<sup>55</sup> (hereinafter referred to as “CRC”) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Although child marriage is not directly referred to in the CRC, article 24(3) of the convention calls for the abolishment of traditional practices that are prejudicial to the health of children. It must also be noted that child marriage is connected to other children’s rights, such as the right to freedom of expression, the right to protection from all forms of abuse, and the right to be protected from harmful traditional practices.

The CRC prohibits states’ parties from permitting or giving validity to a marriage between persons who have not attained their majority.<sup>56</sup> In the context of the CRC “a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.”<sup>57</sup> Some of the other international agreements related to child marriage are the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 1964, the African Charter on the Rights and Welfare of the Child 1990 and the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (the Maputo Protocol) 2003. Child marriage was also identified by the Pan-African Forum against the Sexual Exploitation of Children as a type of commercial sexual exploitation of children.<sup>58</sup> The application of these conventions to the countries in this research will be dealt with in chapter 4.

In June 2016, the Southern African Development Community Parliamentary Forum (SADC-PF) implemented the Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage.<sup>59</sup> The intention of the model law is to prompt a reform of policies and encourage the development of substantive laws in member states of SADC. The model is aimed at serving as a template for legislators in the SADC region to effectively tackle all the relevant areas in need of legislative reform without removing the authority of national legislatures to decide the substance, scope, style, and type of their national laws.<sup>60</sup>

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<sup>55</sup> UN General Assembly *Convention on the Rights of the Child*, 20 November 1989 United Nations Treaty Series vol 1577 p 3.

<sup>56</sup> UN Convention on the Rights of the Child, 1989.

<sup>57</sup> Article 16(2) of the Convention on the Rights of the Child, 1989.

<sup>58</sup> UNICEF, 2005.

<sup>59</sup> Southern African Development Community Parliamentary Forum (SADC-PF) ‘Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage’ available at <http://www.girlsnotbrides.org/wp-content/uploads/2016/10/MODEL-LAW-ON-ERADICATING-CHILD-MARRIAGE-AND-PROTECTING-CHILDREN-ALREADY-IN-MARRIAGE.pdf> accessed on 24 April 2017.

<sup>60</sup> Explanatory notes on ‘the Model Law on Eradicating child marriage and protecting children already in marriage’ available at <http://www.veritaszim.net/node/1868> accessed on 24 April 2017.

### **1.1.7. Background summary and conclusion**

As seen above, law reform and jurisprudential changes in the selected countries are taking place, but there remain a number of challenges which include, amongst others, the lack of uniformity on the minimum age for marriage as well as the age of majority. The extent of child marriages differs considerably among African countries, with the most child marriages being found in Malawi and Nigeria. Domestic and global communities are progressively identifying child marriage as a severe problem, both as an abuse of the human rights of girls as well as a deterrent to fundamental child growth outcomes. Early child marriage prohibition laws have certainly become widespread in number and reach over the last decades. There are promising signs that these efforts will combine to exterminate premature child marriages.

### **1.2. Rationale for the study**

This study was motivated by the observation that abnormal behaviour cases, such as those of *ukuthwala*, have been increasing on the continent and this has prompted the researcher to investigate their causes as well as possible remedies to the crisis. The study is justifiable since, although there is research on the causes and implications of early child marriages in Africa, there is limited research on the legal aspects of early childhood marriage, particularly as this relates to law reform, jurisprudence and advocacy initiatives.

This paper is guided by different theories; for example social exchange theory which emerges as the driving force in promoting *ukuthwala* in communities which uphold tradition where the girls who come from poverty stricken households are by far the victims of forced marriages. The paper will also discuss theories related to culture, patriarchy, masculinity and feminism. The study focuses on the theory of the protection of children's rights.

The most essential theoretical inferences of the study relate to the development of a framework for solving the early child marriage crisis among the communities on the African continent. The study findings will be of assistance to national and provincial government departments in attaining the objectives of ending forced early child marriages in the country. The investigation will also establish a foundation for further analysis into the factors that influence child marriages.

### **1.3. Research aims and objectives**

The primary objective of this study is to critically examine law reform, jurisprudence and advocacy initiatives that have been taking place in selected countries on the African continent with respect to early child marriages, and to determine what the impetus has been in each instance to bring about much needed change, including the roles of the stakeholders involved.

The specific objectives of the study are as follows:

- To evaluate the early marriage customs practised in each selected country, in order to determine drivers and the basis for legitimisation;
- To assess international and regional law protection mechanisms that exist to prohibit the practice of early child marriage in each country under review;
- To examine the legislative framework, law reforms and jurisprudential gains that prevent the practice in each country under study; and
- To highlight the fundamental lessons and best practices of successful early marriage prohibition initiatives.

#### **1.4. Research questions**

The study will respond to the following questions:

- What is the early child marriage ‘custom’ practised in each country, what are the reasons that motivate child marriage and on what basis has it been legitimated?
- What is the international law and regional law protection that exists to prohibit the practice of early child marriage in each country under review?
- What is the legal framework in each country (including customary law, legislation and Constitutional law) that provided for early child marriage and what are the law reforms or lobbying and advocacy or jurisprudential gains that now prohibit the practice? What was the role of the stakeholders involved in the legal reform process?
- What lessons and best practices can be learnt from the initiatives used to prohibit the practice in the selected countries?

#### **1.5. Research methodology**

This investigation will employ a qualitative descriptive methodology to answer the research questions. The study is desktop-based and gathered data from primary sources such as international law instruments, Constitutions and legislation of the relevant countries, as well as case law. Secondary literature such as books, chapters in books and journal articles, as well as internet sources and dissertations are also used. A qualitative methodology was selected because not many qualitative studies have explicitly focused on early marriage customs in Africa. Moreover, a qualitative methodology is descriptive and experimental in nature and has a greater probability of producing richer data (Mouton, 2001). In essence, the study is socio-legal in nature, as it starts with the premise that child marriage has

dire social, health, economic and educational consequences for children and that states have obligations, through their laws and other measures, to ban the practice and protect female children from harm.<sup>61</sup>

### **1.6. Significance of the study**

In order for South Africa to effectively deal with the issue of early child marriages of both the male and female children, understanding the roles played by cultural practices, society and legislation in the prevention and protection of these vulnerable groups is of utmost importance.

This study will make a contribution to this field of research and will also attempt to provide a possible solution in balancing the needs of society such as the need for social justice and the need for protection from the law and access to justice. The research findings could further support the global campaigns to abolish child marriage by the United Nations (UN) and the United Nations Population Fund (UNFPA).<sup>62</sup>

### **1.7. Structure of the dissertation**

This dissertation is made up of six major chapters.

**Chapter 1** sets out the introduction, background of the problem, rationale for the study, research questions, research methodology and chapter outline.

**In Chapter 2** the review of the existing literature will be used to collect the findings of existing studies' investigations on the topic. The theory around early child marriage customs practiced in each country, and the factors that influence forced early child marriage will be considered. The basis on which the practice has been legitimated (such as customary law) will also be considered in each instance.

**Chapter 3** critically analyses the legal framework in South Africa (including customary law, legislation and Constitutional law) which relates to early child marriage. It proceeds to determine the initiatives undertaken to bring about law reform and jurisprudential gains that now prohibit the practice. The role of the stakeholders involved in the legal reform process will be considered.

**Chapter 4** critically analyses the legal framework in Nigeria (including customary law, legislation and Constitutional law) which relates to early child marriage. It proceeds to determine the initiatives undertaken to bring about law reform or lobbying and advocacy or jurisprudential gains that now

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<sup>61</sup>D Thomas 'Some Aspects of Socio-Legal Research at Yale' *American Journal of Sociology* (1931) 37:2 pp 213-223.

<sup>62</sup> T Deen 'UN Launches global campaign to abolish child marriages' available at <http://www.ipsnews.net/2012/10/u-n-launches-global-campaign-to-abolish-child-marriages/> accessed on 29 April 2017.

prohibit the practice. The role of the stakeholders involved in the legal reform process will be considered.

**Chapter 5** provides the lessons and best practices from other African countries.

**Chapter 6** presents the overall conclusions for the study, and makes recommendations.



## **CHAPTER 2**

### **LITERATURE REVIEW**

#### **2.1. Introduction**

This chapter discusses and evaluates the existing literature on early child marriages in Africa and other parts of the world. The section provides a contextual examination of the different risk factors for early child marriages in Nigeria and South Africa. The aim of this chapter is to show previous and extant debates on the issue of child marriage around the world and in Africa, in particular. In addition to looking at contemporary African debates on the practice of child marriages, the chapter also explores the evolution of different legislation in South Africa and Nigeria that has been promulgated to directly address the issue of child marriages. This section is also important in two ways: firstly, for clarifying the findings of previous studies on the research topic, and secondly, for understanding the nature of the methods that are used to collect and analyse data for a study such as this one as well as their sequential stages of analysis.

The following section offers a brief review and context to child marriage practices using local and international evidence as established in an array of literature. As a caveat, the aim of this chapter is not to provide an in-depth exploration of the different legislation in place to prohibit child marriage in South Africa and Nigeria. It is rather a broad review of literature and legislation on child marriage around the world and in the countries under focus, so as to provide insight into the different factors that contribute to the proliferation of this practice.

#### **2.2. Global evidence on the causes and detrimental effects of early child marriage on child welfare**

Msuya submits that “child marriage is deeply embedded in African societies. Marriage is viewed as a way to protect young girls from pre-marital sex and pregnancy. The latter are seen as undermining family honour and may decrease the amount of lobola a family may receive.”<sup>63</sup> The culture of lobola payment by the groom to the bride’s family may act as a mitigating factor for many families to marry off their daughters, thereby making girls vulnerable to early child marriage.

CEDAW and the CRC have stressed that detrimental customs are entrenched in social mindsets according to which young girls and women are considered as lesser to boys and men based on stereotypes. In addition, they also illustrate the gender element of domestic violence and specify that gender-based stereotypes, power disparities, inequities and discrimination propagate the extensive

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<sup>63</sup> Msuya Norah Hashim ‘Tradition and Culture in Africa: Practices that Facilitate Trafficking of Women and Children, Dignity’ (2017) 2:1 Article 3 *A Journal on Sexual Exploitation and Violence*.

actuality of customs that frequently encompass violence.<sup>64</sup> Moreover, they also argue that discrimination on gender and sex is intertwined with other issues that affect young girls and women, specifically those who are seen to come from underprivileged groups, and who are consequently at a greater risk of becoming prey to detrimental practices. The nature and pervasiveness of these practices differ by culture and region, the most widespread and well-recorded of these being female genital mutilation, forced child or child marriages.<sup>65</sup>

In East Africa, for instance, a population-based analysis was executed in seven of Ethiopia's nine bigger regions in 2009 and 2010 amongst a sample of 10,080 male and female young people aged 12 to 24. Erulkar found that by age 15, one in six young Ethiopian women had married. Young girls who married at very young ages were found to be unaware of the marriage or to have accepted or consented to it in advance. The lack of consent or prior knowledge puts these girls at risk of physical abuse, including forced first marriage sexual intercourse. Another important finding from the study was that before these young girls had started menstruating, the majority of them had first practiced matrimonial sex. In addition, young girls who had married early appeared to live in rural areas, highlighting the need to geographically address early child marriages initiatives.<sup>66</sup> The results of this study are in complete accordance with those of other conclusions that describe clandestine spousal violence in the background of early marriages.

In a similar study conducted in India, Santhya et al surveyed a total sample of 42,852 young married and unmarried women between the ages of 15 and 24, unmarried men between the ages of 15 and 24 and married men aged 15 to 29 between 2007 and 2008. The results of the study highlight that early child marriage remains highly widespread in India and is linked to an extensive array of marital and reproductive consequences.<sup>67</sup>

A similar result is submitted in a study carried out by Raj, which indicates that rural, underprivileged, less educated girls are most susceptible to early child marriage practices. She suggests that these practices are related to high inferior fertility outcomes such as undesirable pregnancies and repeated

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<sup>64</sup> Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child *Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices*, CEDAW/C/GC/31-CRC/C/GC/18 para 6.

<sup>65</sup> CEDAW general recommendation No. 31, para 7.

<sup>66</sup> A Erulkar 'Early Marriage, Marital Relations and Intimate Partner Violence in Ethiopia' (2013) 39:1 *International Perspectives on Sexual and Reproductive Health* pp 6-13 available at <http://www.jstor.org/stable/23408822> accessed on 10 May 2017.

<sup>67</sup> K.G. Santhya, U. Ram, R. Acharya, S.J. Jejeebhoy, F. Ram and A. Singh 'Associations between Early Marriage and Young Women's Marital and Reproductive Health Outcomes: Evidence from India' (2010) 36:3 *International Perspectives on Sexual and Reproductive Health* pp 132-139 available at <http://www.jstor.org/stable/20775350> accessed on 10 May 2017.

childbirths. The analysis shows that in India child marriage impacts not only youngsters aged 16 to 17 years, but likewise huge quantities of pubescent girls aged 14 to 15 years. Similar to the African situation, it came to the fore that girls who had married early were unaware of the arrangement, they did not consent and they were not at the age of consent during the marriage. Consistent with empirical evidence, the study also shows that girls who marry prematurely have a higher risk of being subjected to sexual and physical abuse within the marriage.<sup>68</sup>

Both the works of Raj et al and Santhya et al indicate that economic emancipation and women empowerment policies to curb child marriage and support child welfare, have not been effectual in lessening the pervasiveness of child marriages in India as well as a large number of other emerging nations such as those in Africa.<sup>69</sup>

Blackburn and Bessell explore the detrimental outcomes of early child marriages among Indonesian girls. The study uses the case of the early marriage of a young woman to a husband twenty years older than her. The girl child in question was found to have given birth to an infant who died and was struggling with serious health complications herself. The research findings, importantly, draw a close association between premature child marriage and early entrance to the Indonesian labour force, observing that, together, these circumstances deprive young women of their rights. Like most studies, Blackburn and Bessells' work also underscores poverty as a factor that made women submissive and subservient to men. Drawing from evidence, Blackburn and Bessell aver that the practice of early child marriage in Indonesia also disregards the right and welfare of children.<sup>70</sup> The foregoing factors are analogous to those identified in most child marriage literature in most African countries.

Nour reports that marital unions involving children younger than 18 years is a global phenomenon. The practice is, however, more widespread and common in South Asia, Latin America and Africa. In addition, Nour expresses that early child marriage is a human rights infringement which openly affects the health, psychological welfare and education of a female child as well as the well-being of her progenies. Nour's findings also demonstrate that child marriage customs are driven by poverty and are propagated to guarantee the financial prospects of young girls and to strengthen social relations. A

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<sup>68</sup> A. Raj, 'When the mother is a child: the impact of child marriage on the health and human rights of girls' (2010) *Global Child Health* pp 931-935.

<sup>69</sup> A. Raj, N. Saggurti, D. Balaiah & J. Silverman 'Prevalence of child marriage and its effect on fertility and fertility-control outcomes of young women in India: a cross-sectional, observational study' (2009) 373 *US National Institute of Health and the Indian Council of Medical Research* pp. 1883-1889 available at [www.thelancet.com](http://www.thelancet.com) accessed on 12 June 2017.

<sup>70</sup> S. Blackburn & S. Bessell 'Marriageable Age: Political Debates on Early Marriage in Twentieth-Century Indonesia' (1997) 63 *Indonesia* pp. 107-141 available at <http://www.jstor.org/stable/3351513> accessed on 10 May 2017.

significant finding of the study is the revelation that in nations where poverty has diminished, such as Taiwan, South Korea and Thailand, the prevalence of child marriages has also deteriorated.<sup>71</sup>

In summary, the practice of early child marriage in the selected countries discussed above has been considered by authors to constitute gender-based violence, enslavement and sexual abuse. The consequences of these practices are harmful to the welfare of a female child and they are found to be propagated by some level of lawlessness, the collapse of social security and controls and domestic socio-cultural, economic and legal practices.

### **2.3. Poverty, customs and the transactional nature and effects of child marriages in Southern Africa**

Child marriage, described as the matrimony of a child younger than 18 years of age, is a static and yet pervasive tradition in several parts of the world. According to Nour, in excess of 60 million marriages consist of girls younger than the age of 18 years (almost 6.6 million in Latin America and the Caribbean, 14 million in sub-Saharan Africa, and 31 million in South Asia).<sup>72</sup> Several studies have made efforts to deal with the issue of child marriages due to the complexity of the subject, however, the practice remains a widespread problem.<sup>73</sup> United Nations Children's Fund ('UNICEF') specifically defines a child marriage as involving one or both spouses under the age of 18.<sup>74</sup> For the purposes of this research, the definition of a child will be limited to a person under the age of 18 as defined by the Children's Act of South Africa.<sup>75</sup>

To emplace the arguments of this chapter *in situ*, it is pertinent to explore the practice or custom of child marriage and some of the debates around it in contemporary South Africa and other parts of the world. In a South African study conducted by Monyane, it was examined whether the practice of *ukuthwala* qualifies as a forced marriage. The study discovers that *ukuthwala* happens in diverse ways and some of its negative outcomes include interrupting the rights of children which contributes to the predominant problem of domestic violence in rural areas and in the country at large.<sup>76</sup> In addition, the study's findings

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<sup>71</sup> N.M Nour 'Child Marriage: A Silent Health and Human Rights Issue' (2009) 2:1 *Reviews in Obstetrics & Gynecology* pp 51-56.

<sup>72</sup> N.M Nour 'Child Marriage: A Silent Health and Human Rights Issue' (2009) 2:1 *Reviews in Obstetrics & Gynecology* pp 51-56.

<sup>73</sup> UNICEF 'Early Marriage, Child Spouse' (2001) *Innocenti Digest* available at <https://www.unicef-irc.org/publications/pdf/digest7e.pdf> accessed on 1 March 2017; L. Mwambene 'Recent Law Responses to Child Marriage in Southern Africa: The case of Zimbabwe, South Africa and Malawi' (2018) 18:2 *African Human Rights Journal* pp 527-550; J. Walker 'Early Marriage in Africa-the trends, harmful effects and interventions' (2012) 16:2 *African Journal of Reproductive Health* pp 231-240.

<sup>74</sup> Ibid p 9.

<sup>75</sup> Act 38 of 2005.

<sup>76</sup> C. Monyane 'Is *Ukuthwala* Another Form of 'Forced Marriage'?' (2013) 44:3 *South African Review of Sociology* 64-82.

reveal that *ukuthwala* further propagates the cycle of gender disparity and is similar to forced marriage, despite occurring in diverse forms.

Similar to Moyane, Rice also looks at the practice of *ukuthwala* in some rural communities in the Eastern Cape and proceeds to label it as 'abduction marriage' or 'forced marriage'. More so, the study also finds a tense association between gender power, gender rights and gerontocratic authority. Evidence from the study suggests that older women overstepped their gerontocratic authority by playing a part in the process of *ukuthwala*. In addition, it was revealed that children elect to remain in *ukuthwala* marriages and choose to adhere to their parents' decisions notwithstanding the great sexual and physical exploitation which they may experience. The outcomes of the study indicate that young men did not categorically condemn marriages initiated through *ukuthwala*, as young girls and many older women appeared to do. It also appeared that gerontocratic authority in the framework of *ukuthwala* marriages places young girls at a bigger risk of HIV infections.<sup>77</sup>

Wadesango, Rembe and Chabaya argue that customary practices such as child marriages, polygamy, and the disbursement of bride price or *lobola* are all tantamount to gender-based violence, as they diminish women to inferior human assets owned by men.<sup>78</sup> Their review suggests that child marriage, a custom which is prevalent in practically all countries in the SADC region, is an infringement of human rights, whether it occurs to a female or male child, and possibly denotes the most widespread method of sexual exploitation and abuse of girls.<sup>79</sup> Moreover, their assessment shows that detrimental traditional cultural customs have demoralising psychological and physical outcomes on young women and this can be further intensified by the presence of ignorance, poverty and illiteracy amongst them.

The above argument is consistent with Stormorken, Vincent and Santisteban's assertion that child marriage is capable of leading to violence against the target, her enslavement and sexual abuse.<sup>80</sup> The study was based in Zimbabwe and its findings suggest that men who demonstrate better prospects of economic prosperity are targeted by the parents of young girls to offer their daughters to them. Moreover, in certain parts of Zimbabwe, South Africa and Malawi, the man is offered a young niece or sister of his wife to pocket as a bonus bride after the niece or young sister has been lured by her parents

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<sup>77</sup> Kate Rice 'Ukuthwala in Rural South Africa: Abduction Marriage as a Site of negotiation about gender, rights and generational authority among the Xhosa' (2014) 40:2 *Journal of Southern African Studies* 40:2 381-399.

<sup>78</sup> N. Wadesango, S. Rembe & O. Chabaya (2011) 'Violation of Women's Rights by Harmful Traditional Practices' (2011) 13:2 *The Anthropologist* 121-129.

<sup>79</sup> Malawian Human Rights Commission, 2005.

<sup>80</sup> S Stormorken, K. Vincent & R Santisteban 'No More Excuses: Ending all Harmful Traditional Practices against Girls and Young Women.' (2007) available at <http://db.amazone.be/3/515204.pdf> accessed on 8 November 2018.

and other family members to move into that union. In certain cases, family obligations and debts are settled by marrying young girls early.<sup>81</sup>

The transactional motivation for the practice of child marriage is further documented by the Malawian Human Rights Commission. The Commission documents the prevalence of a custom in which destitute families characteristically obtain assistance from other families on a provision that the family getting help pledges to offer a female child to the other family. In this respect, young girls are offered in a form of debt servitude irrespective of the age of the husbands they marry.<sup>82</sup> A number of them end up reaching sexual maturity while residing with their husbands. These young girls do not have other choices since their parents, family and other tribe members choose whom they should wed.<sup>83</sup> UNICEF declared that the adversity of dealing with parenting tasks as well as a bigamous marriage are frequently outside the capability of a young wife. This is because the young wife was abused by older wives who allocate her many difficult tasks.<sup>84</sup> Moreover, bearing children at a very young age or before the age of 18 years places their survival at risk of problems such as protracted or congested labour due to the immature pelvis.<sup>85</sup>

#### **2.4. Challenges facing extant legislation on the prevention of early child marriages: evidence from Nigeria**

In spite of the increasing cognisance of the damage related to early child marriages, measures taken to fight this system of exploitation have often recorded little success.<sup>86</sup> Ouattara and Thomson, in condemning the practice and custom of child marriages, suggest that the practice must be understood as putting girls in mortal danger and further exposing them to rape and physical and mental abuse.<sup>87</sup> In Nigeria, for instance, the prevalence of and the continuous practise of child marriage is as a result of a vague legal system that operates simultaneously at three spheres; civil, customary and Islamic. As a consequence of this tripartite operation of law in relation to marriage, the federal government has no control over customary and Islamic marriages.<sup>88</sup> The heavy influence of Islam in Northern Nigeria still remains a vital stimulating factor for forced early child marriages.

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<sup>81</sup> Malawi Human Rights Commission (2005). Cultural Practices and their Impact on the Enjoyment of Human Rights, Particularly the Rights of Women and Children in Malawi. Lilongwe, Malawi: Malawi Human Rights Commission. [http://www.mwfountainoflife.org/files/4413/9395/3331/cultural\\_practices\\_report.pdf](http://www.mwfountainoflife.org/files/4413/9395/3331/cultural_practices_report.pdf) accessed on 08 November 2018.

<sup>82</sup> Ibid p 70

<sup>83</sup> Op.cit note 17 at p 77

<sup>84</sup> UNICEF (2003:12).

<sup>85</sup> N. Wadesango, S. Rembe and O.Chabaya 'Violation of Women's Rights by Harmful Traditional Practices' *The Anthropologist* 13:2 pp 121-129.

<sup>86</sup> S. Louis & B. Mikhail 'Child marriage and child prostitution: Two forms of sexual exploitation, *Gender & Development*' (2002) pp 43-49.

<sup>87</sup> M. Ouattara, P. Sen & M. Thomson 'Forced marriage, forced sex: The perils of childhood for girls, *Gender & Development*' (1998) pp 27-33.

<sup>88</sup> Op.cit note 59 at pp 485.

A case in point on the negative effect of the tripartite operation of the Nigerian legal system is that of Senator Ahmad Yerima. The Nigerian senator married a young girl which is in contravention of the Child Rights Act.<sup>89</sup> At the time of the marriage (2010), the Nigerian Senator was 50 years old while his bride was only 13 years old. According to Tardzer (2012), while Ahmad Yerima's conduct seemed unacceptable, no one could do anything about his marriage to the child.<sup>90</sup> This is because his marriage to this girl was in terms of Sharia Law.<sup>91</sup> In 2010, in an interview with Aljazeera, Senator Yerima was questioned about his marriage to a child. He defended himself by saying that the marriage was permitted by the laws of Islam.<sup>92</sup>

Nkosi and Buthelezi share the view that bride abduction constitutes the misuse of the traditional practice of *ukuthwala* which is alleged by most people to have vanished during the post-apartheid democratic dispensation, but is still widespread in specific deep rural areas of South Africa.<sup>93</sup> This assertion is coherent with Kheswa and Hoho whose results indicate that some abductions of girls for the purposes of *ukuthwala* are said to follow an organised pattern and are consensual. Evidence suggests the contrary, as it is reported that involuntary and forced marriages as a result *ukuthwala* still exist which leads to the rape and emotional abuse of young girls.<sup>94</sup>

In a study conducted by Maphalala on the different mechanisms and initiatives put in place to prohibit the practice of *ukuthwala* due to its conceived negative effects on the female child in the eMangwaneni clan in KwaZulu-Natal, South Africa; the study found that *ukuthwala* is harmful to the welfare of a child and recommends a necessity for a synergistic methodology where all the interested parties should stand up to guarantee that the rights and interests of young girls are secured.<sup>95</sup> Maphalala's study also found that no concrete measures existed in the community to curtail the plague of increasing forced child marriages. In addition, the study's results indicate that while organisations such as The Congress on Traditional Leaders in South Africa (hereinafter referred to as CONTRALESA), the CGE and the Department of Women, Children and People with Disabilities have made pronouncements against the *ukuthwala* practice, the practice has not experienced any significant change in some rural KZN

<sup>89</sup> Section 21 of this Act states "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."

<sup>90</sup> CSK Tardzer (2012) *My odyssey, My Country* (Indiana, U.S.A, Xlibris Corporation).

<sup>91</sup> Prophet Muhammad married Aisha at the age of nine. Therefore, any Muslim who marries a girl of nine years and above is following the teaching and practices of prophet Muhammad.

<sup>92</sup> Aljazeera, Nigerian Senator marries 13 year old girl

<http://www.aljazeera.com/news/africa/2010/05/2010518858453672.html> accessed on 29 April 2017.

<sup>93</sup> Nkosi and Buthelezi (2013) *The Nature and Causes of Bride Abduction Cases in KwaZulu-Natal, South Africa. Stud Tribes Tribals*, pp 161-178.

<sup>94</sup> J.G. Kheswa, V.N. Hoho 'Ukuthwala' The Sexual- Cultural Practice with Negative Effects on the Personality of Adolescent Females in Africa' (2014) 5:20 *Mediterranean Journal of Social Sciences* pp 2039-2117.

<sup>95</sup> M.C. Maphalala 'The Impact of *Ukuthwala* on the Schooling and Livelihood of a Girl Child: A Case of the eMangwaneni Tribe in Bergville, KwaZulu-Natal' (2016) *J Sociology Soc Anth* pp 149-159.

communities. In a similar vein, Nkosi, in his study, explores exactly how abduction affects schoolgirls and claims that *ukuthwala* represents a gendered custom that works for the wellbeing of men. According to Nkosi, despite the notion that the practice of *ukuthwala* has disappeared due to social transformation, the custom is, however, affirmed to still be strongly embedded in some rural Zulu communities in the KwaZulu-Natal province.

The Nguni people of South Africa acknowledge the practice and perceive that *ukuthwala* is “a condoned although abnormal path to marriage targeted at certain girls or women of marriageable age”.<sup>96</sup> Essentially, *ukuthwala* is practised extensively in South Africa amongst isiZulu and isiXhosa speaking groups, and demands the seizure of a young woman as an initiator to marriage.

Kaschula, Huisamen, Mostert and Nosilela aimed to discover the likely social costs as well as the observations towards the convention of *ukuthwala* from inside the amaXhosa culture as well as on the outside, by the breaking down of a small story which builds upon this custom. The results showed that *ukuthwala* is historically a marriage standard within the amaXhosa culture, which permits a ‘legitimate abduction’ of a wife-to-be. In addition, the findings recommended that customs such as ‘legal abduction’ in South Africa carry on under the guise of cultural rights. These manipulated customs challenge the rights of people as entrenched in the South African Constitution. The study concludes that *ukuthwala* is a cultural aspect that has its place, although one that lies in direct deviance to the modern-day support for human rights.<sup>97</sup>

Smit and Notermans similarly illustrate why *ukuthwala* transpires as the consequence of domestic socio-cultural, economic and legal practices in South Africa. Their findings suggest that despite *ukuthwala* being strongly opposed by many women, many others still embrace it, displaying that its recurrence is a multifaceted interaction of culture and gender politics, and is not just a biased patriarchal enterprise performed by men.<sup>98</sup> Employing the theories of Afromodernity and Policulturalism, the results of the ethnographic exploration discovered that indigenous communities are instituting new independent identities, fixed contrary to the Constitution’s model of human rights, via the revitalisation and modification of ordinary practices.<sup>99</sup> Moreover, these authors argued that these invigorated practices are then used as survival stratagems to fight novel economic challenges as well as the HIV

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<sup>96</sup> Ddr ‘*Ukuthwala*’ an ancient practice’ *Dispatch Live* 27 November 2015 available at <https://www.dispatchlive.co.za/news/2015-11-27-ukuthwala-an-ancient-practice/> accessed on 03 May 2020.

<sup>97</sup> R.H Kaschula, T. Huisamen, A Mostert & B. Nosilela ‘The amaXhosa *ukuthwala* marriage custom in fact and fiction: A contemporary critique’ (2013) 33:2 *South African Journal of African Languages* pp 143-152.

<sup>98</sup> W.J. Smit & C. Notermans ‘Surviving change by changing violently: *ukuthwala* in South Africa’s Eastern Cape Province’ (2015) 38:1-2 *Anthropology Southern Africa* pp 29-46.

<sup>99</sup> Constitution of the Republic of South Africa, 1996.



pandemic. Further, these survival tactics simultaneously effect the approach in which *ukuthwala* is exercised, re-enunciating an ancient custom within modernity.<sup>100</sup>

Louis and Mikhail similarly concur with the above line of argument and report that poverty remains the chief instrumental factor to the vulnerability of young children to sexual manipulation or exploitation.<sup>101</sup> It is also said that women from war ravaged communities are also likely to fall into transactional sexual arrangements like early child marriage. In Northern Nigeria, for instance, the upsurge of transactional sexual arrangements and the vulnerability of women have been as a result of the activities of Boko Haram terrorists.

Mwambene and Sloth-Nielsen discuss the issue of child marriages in relation to the Children's Act in South Africa and note that although *ukuthwala* is not specifically mentioned in the Children's Act, this does not mean that *ukuthwala* is absolved from legal scrutiny.<sup>102</sup> This omission indicates an ambiguity and it can be deduced that the legislature was aware of the custom. The fact that there is evidence that the custom is widespread in some parts of Southern Africa is a further affirmation of the legislature's standpoint. By electing to disregard and not mention or denounce *ukuthwala*, the Children's Act can be interpreted as indicating that the practice *as was* did not require regulation. These authors adopted the view that the practice did not have Constitutional ramifications and did not require any legislative intervention.

Mtshali contributes to the literature on child marriages in South Africa by studying the practice of *ukuganisela* which he describes as a sub-culture of forced marriages where a female child's parents open negotiations with a male's parents, usually done by parents of affluent social (or otherwise) status. An important finding of the study shows that while *ukuganisela* is a form of forced child marriage and an infringement of the girls' rights, it is not treated strictly by the courts. For example, in a matter heard before the Magistrates Court in KwaMaphumulo where a 13 year old girl was forced into a child marriage with a 41 year old man, the court held that the girl's family must return the *lobola* received. There was no further action recommended against the girl's parents.<sup>103</sup>

The challenge to the implementation of legislation that prohibits child marriage is that the African continent bears an enduring and heavy influence by cultural practices and religious beliefs. In Nigeria,

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<sup>100</sup> *op Cit* note 93.

<sup>101</sup> S. Louis, B. Mikhail 'Child marriage and child prostitution: Two forms of sexual exploitation' (2002) 10:1 *Gender & Development Journal* pp 43-49.

<sup>102</sup> L Mwambene and, J Sloth-Nielsen 'Benign accommodation, *ukuthwala*, "forced marriage" and the South African Children's Rights Act' (2011) 11 *AHRLJ* pp 1-22.

<sup>103</sup> V Mtshali, 'Forced marriage practiced under the pretext of customary marriage in South Africa' (2014) 51 *Child abuse: A South African Journal* p 52.

the challenge is further exacerbated by the tripartite operation of the law in relation to marriage. Pluralistic systems have their drawbacks when there is conflict in a particular area of law. Governments must provide transparent and effective laws setting down 18 years as the minimum age required in order to enter into a marriage. Furthermore, legislation needs to clearly set out its stance on the prohibition of child marriages. For example, the legislators in the Children's Act are silent on the practice of *ukuthwala*.

## **2.5. Promoting sound preventive measures and legislation against child marriage: examples from Tanzania and Malawi**

Writing about some positive news recorded with regard to ending child marriages in Africa, Wang comments on the enactment of the Malawian Marriage Act of 2015 which prohibits child marriages in Malawi. According to his findings, the enactment of this legislation is a remarkable effort on the part of the Malawian legislature in ending the high rate of child marriages in Malawi. He further indicates that the provision that has attracted the most domestic and international attention stipulates that the minimum age to enter a marriage is 18 and makes formal government registration of all marriages compulsory.<sup>104</sup> According to his findings, the problem with child marriage in Malawi is due to the fact that the Malawian Constitution in section 22(6) allows for the marriages of girls between the ages of 15 to 18. This particularly presents a hurdle, as it stands in stark contradiction of the new Marriage Act. There is the argument that most legislation to end child marriages in African countries is faced with a plethora of challenges. As a consequence of the above contradiction in legislation, Wang suggests that in order for child marriages to be effectively abolished, amendments need to be made in the Constitution that stipulate and establish 18 years as the minimum age of marriage.

It is of great importance to ensure that there is a Constitutional stipulation for a minimum age for marriage. Among other factors, the necessity of such legislation is because there is a plethora of negative outcomes associated with child marriages. Most of these negative outcomes complicate the life of a female child, as they have deep physical and psychological impacts. Some of the psychological challenges faced by female children that marry at an early age include chronic or mild forms of anxiety disorders. It is said that such disorders in their worst manifestation are capable of leading to death by suicide. The physical trauma comes in the form of death as a result of complications from childbearing. In less fatal cases, the female child could suffer from some or all of the negative consequences of early pregnancies.<sup>105</sup>

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<sup>104</sup> V Wang 'Ending Child Marriages – new laws bring progress but hurdles remain' (2016) issue 4 *CMI insight* p 3 available at <https://www.cmi.no/publications/file/5802-ending-child-marriages-new-laws-progress-malawi.pdf> accessed on 3 May 2020.

<sup>105</sup> Y Kakande 'Uganda tackles child marriage' *IOL News* 2016 available at <http://www.iol.co.za/news/africa/uganda-tackles-child-marriage-2000577> accessed on 29 April 2017.

Of equal importance is the assertion by Mukenge that strategies and prevention programmes aimed at curbing child marriages must take into consideration cultures that place marriage as a higher priority than the education of girls.<sup>106</sup> He points out that a further factor that is common in communities where child marriage is prevalent is women's economic dependence on men. Moreover, he suggests that ending child marriages requires donor support for economic growth initiatives that benefit African communities and enable job creation that will particularly benefit women.<sup>107</sup>

In Tanzania, the High Court handed down a landmark judgment in 2016 in the case of *Rebecca Z. Gyumi v Attorney General*.<sup>108</sup> In this case, Rebecca Gyumi, who is the founder and director of a children's rights organisation, brought an application before the High Court of Tanzania. This application challenged the Constitutionality of sections 13 and 17 of the Law of Marriage Act of Tanzania (Cap. 29 R.E. 2002). This Act sets the minimum marriage age for girls at 15 years old with parental consent and 14 years old with the consent of a court.<sup>109</sup> Whereas, the minimum age for boys to enter into a marriage is 18 years old. Gyumi's application sought concession from the court that these provisions contravened the rights of girls to equality and non-discrimination and further compromises their access to education.

The High Court of Tanzania held that sections 13 and 17 of the Law of Marriage Act were unconstitutional in the manner in which they breached articles 12(1) and 13(1) and (2) of the Constitution of Tanzania, which is enacted to protect against discrimination based on gender and guarantees equality for all before the law.<sup>110</sup>

The Court further held that the provision's differential treatment of girls and boys, which authorised girls to enter into a marriage before they reach the age of majority with the consent of a third party, but only permitted boys to marry upon reaching age 18, was discriminatory and contravened the right to equality.<sup>111</sup>

The judgment is important in that the Court ruled that the impugned provisions are unconstitutional and ordered the government to review the law. Msuya comments that "apart from the clear instructions on

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<sup>106</sup> M Mukenge 'Dreams of my Mother: Good news on ending Early Child Marriage' in A Bunting, BN Lawrence and RL Roberts *Marriages by force? Contestation over consent and coercion in Africa* (2016) pp 269-274.

<sup>107</sup> Op Cit note 59 p 289.

<sup>108</sup> *Case No 5 of 2016 HC Dar es Salaam* on July 8, 2016 available at <https://uniteforreproprights.org/wp-content/uploads/2018/01/rebeca.pdf> accessed on 3 May 2020.

<sup>109</sup> S13 (1) of the of the Tanzania Marriage Act CAP R.E. 2002.

<sup>110</sup> op Cit note 107 pp 25.

<sup>111</sup> Msuya 'The analysis of child marriage and third-party consent to child marriage in the case of *Rebeca Z. Gyumi v Attorney General Miscellaneous Civil Case no 5 of 2016* Tanzania High Court at Dar es Salaam' (2019) *De Jure Law Journal* p 305 available at <http://dx.doi.org/10.17159/2225-7160/2019/v52a18> accessed on 3 May 2020.

the legal position regarding the minimum legal age of marriage, this judgment has contributed to the country's effort of advocating for legal reforms to ensure that existing domestic laws and policies are human rights sensitive, conforming to international human rights standards as embedded in human rights instruments ratified by Tanzania."<sup>112</sup>

## **2.6. The effectiveness of child rights, child protection and early child marriage policy interventions in restricting early child marriages in selected African Countries**

In recent years, the well-being of the female child within the domestic environment and the responsibility of the government towards the child have developed into a subject of increasing concern.<sup>113</sup> Efforts have been made by legislators, scholars and policymakers to concentrate on significant problems impacting the welfare of young children in Africa and to design practical policies or interventions for safeguarding the rights of children as well as guaranteeing the sustainable growth of the continent as a whole.<sup>114</sup> Among other things, some of the intervention methods that this section underscores hinge on empowering the female child and women generally through education, economic empowerment and human capital development.

Raj and Boehmer argue that there exists an increasing body of literature which connects early child life endeavours with later events.<sup>115</sup> In most social studies, poverty is considered to influence a range of phenomena, including early child marriage practices and the effectiveness of interventions aimed at curbing this practice in the African continent.<sup>116</sup> A number of explanations have been specified as to why early marriage is as a result of the poor educational and socio-economic status of women in most developing societies.

It can be affirmed that interventions to eliminate early child marriages have gained ground since 1995.<sup>117</sup> Legislative reforms to create and increase the permissible minimum age for marriage to 18 for young girls have gained momentum across many countries over the last decades.<sup>118</sup> Moreover, interventions

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<sup>112</sup> Ibid at p 308.

<sup>113</sup> Gyimah S 'Polygamous marital structure and child survivorship in Sub-Saharan Africa: Some Empirical Evidence from Ghana' (2009) 68 *Journal of Social Science and Medicine* 68 pp 334-342 available at [www.elsevier.com](http://www.elsevier.com) accessed on 7 November 2017.

<sup>114</sup> Gupta N and Mahy M 'Adolescent childbearing in sub-Saharan Africa: Can increased schooling alone raise ages at first birth?' (2003) 8 *Journal of Demographic Research* 8 pp 93-106.

<sup>115</sup> Raj A and Boehmer U 'Girl Child Marriage and Its Association with National Rates of HIV, Maternal Health, and Infant Mortality Across 97 Countries' (2013) 19:4 *Violence Against Women Journal* pp 536-551.

<sup>116</sup> Ibid.

<sup>117</sup> 'The State of the World's Children' UNICEF (2007) pp 1-148 available at [https://www.unicef.org/publications/files/The\\_State\\_of\\_the\\_Worlds\\_Children\\_2007\\_e.pdf](https://www.unicef.org/publications/files/The_State_of_the_Worlds_Children_2007_e.pdf) accessed on 3 May 2020.

<sup>118</sup> Santhya K, Jejeebhoy S, Ram U, Acharya R, Singh A & Ram F 'Associations between early marriage and young women's marital and reproductive health outcomes: evidence from India' (2010) 36:3 *International Perspectives on Sexual and Reproductive Health* pp 132-139.

to resolve the detrimental traditional customs violating the rights of women have been mainly reinforced by the United Nations and supported by child rights activists.<sup>119</sup> Article 16(1) of the Universal Declaration of Human Rights stipulates that “all males and females of full age shall have the right to enter into a matrimonial union and establish a family and are allowed equal rights pre-marriage, throughout the marriage and at its termination”.<sup>120</sup> In a subsequent article, states’ parties are to ensure that each marriage shall be registered with free and complete consensus of the proposing partners.<sup>121</sup> Declarations such as the one above offer young girls the prospects of acquiring education and skills. Such intervention efforts have resulted in a change in perceptions, behaviour and knowledge linked to child marriage within a few years of implementation.<sup>122</sup> Several prevention initiatives work directly with communities and individual families to try to alter the fundamental social customs that propagate early child marriage practices.<sup>123</sup> Most other interventions also present the parents with financial enticements to prevent child marriage, encourage education and prevent unsafe sexual behaviour.<sup>124</sup> Most of the literature suggests that educational attainment strongly relates to late marriage.<sup>125</sup> Despite the interconnectedness of this association being contested, uneducated girls are more likely to marry early when contrasted with girls with a certain level of education.<sup>126</sup> Rembe et al conclude that although schooling is the best programmatic intervention to curb early child marriage, it is not utilised sufficiently as a strategy to prevent child marriages.<sup>127</sup>

An example of a unique initiative put in place to empower women so as to break the cycle of poverty and concomitantly prevent the occurrences of transactional child marriages, is the Malawian Cash Transfer policy initiative. The initiative that was instituted in the Zomba district provides empirical evidence and insight into the impact of cash transfer initiatives on altering educational, marriage, and sexual behaviours amongst young girls.<sup>128</sup> According to the findings, girls who were recipients of cash transfers and were not attending school at the commencement of the initiative were 40 percent less

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<sup>119</sup> Kyari G and Ayodele J ‘The Socio-Economic Effect of Early Marriage in North Western Nigeria’ (2014) 5:14 *Mediterranean Journal of Social Sciences* pp 582-590.

<sup>120</sup> Article 16(1) of the Universal Declaration of Human Rights (UDHR).

<sup>121</sup> Article 16 (2) of the Universal Declaration of Human Rights (UDHR).

<sup>122</sup> Garima J, Vikram B, Singh S & Piyush J ‘Early Marriage of Girls as a Barrier to Their Education’ (2012) 11:3 *International Journal of Advanced Engineering Technology* pp 193-198.

<sup>123</sup> Clark S ‘Early Marriage and HIV Risk in Sub-Saharan Africa’ (2004) 35:3 *Journal of Family Planning Studies* pp 149-160.

<sup>124</sup> Bayisenge J ‘Early Marriage as a Barrier to Girl’s Education: A Developmental Challenge in Africa’ (2012) 12:6 *Social Psychology* pp 23-48.

<sup>125</sup> Le Fevre J, Murphy E and Quiroga R ‘Future Options Foreclosed: Girls Who Marry Early’ *UNICEF report on Early Marriage, Child Spouses* 2004.

<sup>126</sup> Bongaarts, J. ‘Late Marriage and the HIV Epidemic in sub-Saharan Africa’ (2007) 61:1 *Population Council* pp 73-83.

<sup>127</sup> Rembe S, Chabaya O, Wadesango N & Muhuro P ‘Child and forced marriage as violation of women's rights, and responses by member states in Southern African Development Community’ (2011) 25:1 *Agenda* pp 65-74.

<sup>128</sup> Palamuleni E ‘Socio-economic determinants of age at marriage in Malawi’ (2011) 3:7 *International Journal of Sociology and Anthropology* pp 224-235.

expected to marry after a period of a year compared to other girls.<sup>129</sup> This finding indicates that education or some form of financial security does have a shielding impact for young girls who are at a greater risk of premature marriage and sexual exploitation.

In his assessment of child marriages in Africa, Walker concludes that intervention efforts that seek to prohibit the practice of child marriage are not at all times pronounced in countries affected with the highest cases of child marriage practices.<sup>130</sup> In addition, due to the fact that most intervention efforts in these countries do not form part of government policies or socio-economic transformation agendas, they are, as a result thereof, not implemented or viable in the long-term.<sup>131</sup> In Malawi, child marriage prevention interventions have been implemented but the data to assess the results of these interventions is presently not collected.<sup>132</sup>

The African Charter on the Rights and Welfare of the Child (ACRWC) was also instituted to eradicate gender biased customs and forbids all forms of prejudices against children.<sup>133</sup> Countries that are parties to the charter have a duty to implement the required jurisdictional procedures to execute its specifications.<sup>134</sup> Jain and Kurz observe that African countries and international agencies involved in initiatives aimed at protecting girls' rights, curbing poverty and empowering women have the capacity to eradicate early child marriage but their interventions are not formulated with proper objectives in mind.<sup>135</sup>

According to Otoo-Oyortey and Pobi, the effectiveness of such interventions is also complicated by factors such as poverty and the shortage of sustainable income-generating opportunities for young girls. These factors have been identified as significantly contributing to the elevated number of child marriage incidents.<sup>136</sup> Nevertheless, programmes are starting to increasingly tackle the financial incentive for

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<sup>129</sup> A. Malhotra, A. Warner, A. McGonagle & S. Lee-Rife 'Solutions to End Child Marriage' (2011) *International Centre for Research on Women* available at <https://www.icrw.org/wp-content/uploads/2016/10/Solutions-to-End-Child-Marriage.pdf> accessed on 3 May 2020.

<sup>130</sup> Walker J. 'Early Marriage in Africa - Trends, Harmful Effects and Interventions' (2012) 16:2 *African Journal of Reproductive Health* pp 231-240.

<sup>131</sup> Nour N. 'Child Marriage: A Silent Health and Human Rights Issue' (2009) 2:1 *Reviews in Obstetrics & Gynecology* pp 51-56.

<sup>132</sup> USAID 'Preventing Child Marriage: Protecting Girls' (2009) Health Issues Brief available at <http://www.khubmarriage18.org/sites/default/files/36.pdf> accessed on 3 May 2020.

<sup>133</sup> Article 1(1) of the Charter.

<sup>134</sup> Palermo T and Peterman A. 'Are Female Orphans at Risk for Early Marriage, Early Sexual Debut, and Teen Pregnancy? Evidence from Sub-Saharan Africa' (2009) 40:2 *Studies in Family Planning* pp 101-112.

<sup>135</sup> Jain S and Kurz K. 'New Insights on Preventing Child Marriage. A Global Analysis of Factors and Programs' (2007) *International Centre for Research on Women (ICRW)* pp 1-60 available at <https://n2r4h9b5.stackpathcdn.com/wp-content/uploads/2016/10/New-Insights-on-Preventing-Child-Marriage.pdf> accessed on 3 May 2020.

<sup>136</sup> Otoo-Oyortey N & Pobi S 'Early marriage and poverty: Exploring links and key policy issues' (2003) 11:2 *Gender & Development* pp 42-51.

parents to consent to the early marriage of their young girls.<sup>137</sup> Malhotra et al reveal that the Berhane Hewan initiative in Ethiopia enticed households with a goat, which was conditional upon their daughter not getting married during the course of the initiative.<sup>138</sup> The effectiveness of this initiative in Ethiopia resulted in its piloting in most East African countries for use on both the short- and long-run.

In most countries confronted by high levels of early child marriages, regulations restraining the practice and policy interventions to reinforce such regulations have been introduced.<sup>139</sup> Nevertheless, most legislative and programmatic interventions have exhibited strong assessment setbacks, due to the complexity of distinguishing secular tendencies from those prompted by legislative or programmatic change.<sup>140</sup>

In summary, there has been an increasing level of policy initiatives guaranteeing their resources and commitment towards eradicating early child marriages. The results from previous studies illustrates a range of interventions aimed at policy amendments, better schooling, girl child empowerment, financial enticements to have enhanced the perceptions and knowledge associated with curbing early child marriage.

## **2.7. Conclusion**

It is clear from the sources reviewed in this chapter that early child marriages and the affiliated custom of *ukuthwala* infringes on the African Charter on the Rights of the Child, something which most African countries are signatories to and hence obliged to defend. The right to agree to a matrimonial union cannot be raised or accomplished if neither of the partners are mature enough to consider such matrimony.

It is unambiguous that all African countries and the international community are duty-bound to take mandatory steps to guarantee that they resolve these unjustifiable child right violations. In this analysis, it is noteworthy that there are inspiring signs of a growing number of interventions utilising schooling and financial incentives as instruments to defer early child marriage. The subsequent chapters will focus on answering key research questions.

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<sup>137</sup> International Planned Parenthood Federation and the Forum on Marriage and the Rights of Women and Girls 'Ending child marriage: A guide for global policy action' available at <https://www.unfpa.org/sites/default/files/pub-pdf/endchildmarriage.pdf> accessed on 27 June 2020.

<sup>138</sup> op Cit note p 124.

<sup>139</sup> M. Ndulo 'African Customary Law, Customs, and Women's Rights' (2011) *Cornell Law Faculty Publications* p 187 Available at <http://scholarship.law.cornell.edu/facpub/187> accessed on 20 April 2017.

<sup>140</sup> op Cit note p 130

## CHAPTER 3

### CHILD MARRIAGE PREVENTION MEASURES AND LAW REFORM IN SOUTH AFRICA

#### 3.1 Introduction

The present chapter identifies the preventive measures, law reform and the legal framework in South Africa which provides for early child marriages (including customary law, legislation and Constitutional law), with emphasis on South Africa. It also seeks to unpack the role of the stakeholders involved in the legal reform process.

#### 3.2 Early child marriage cases in South Africa

In South Africa, the trend in early child marriages is generally similar to other countries in Sub-Saharan Africa and the continent at large, although studies on the subject are scarce in South Africa.<sup>141</sup> According to the organisation 'Girls not Brides' (2018), the most recent data on child marriages in South Africa was collected by UNICEF in 2003, and shows that up to one per cent of girls in the country get married off at 15 years while up to six per cent are married by 18 years of age. Considering there are millions of girls in South Africa, such a statistic shows a high incidence of child marriage, and an obvious problem in need of redress.

Most child marriage cases in South Africa are blamed on the practice of *ukuthwala*, a cultural practice most prevalent in the Western Cape, Eastern Cape and KwaZulu-Natal provinces.<sup>142</sup> A hotspot identified in the Eastern Cape is Lusikisiki.<sup>143</sup>

Statistics SA conducted a community survey, which was aimed at providing nuptiality patterns and levels provided by Census 2011 and Census 2016.<sup>144</sup> The survey shows that in 2016, more than 91000 girls between the ages of 12 and 17 were married, divorced, separated, widowed or cohabiting. KwaZulu-Natal had the highest number of abduction cases, with more than 25205 "victims" while more than 10000 young girls who got married in the same year were from the Eastern Cape.<sup>145</sup> Gauteng had 15929 similar cases.<sup>146</sup>

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<sup>141</sup> 'What's the child marriage rate? How big of an issue is child marriage?' (2018) *Girlsnotbrides.org* available at <https://www.girlsnotbrides.org/child-marriage/south-africa/> accessed on 20 August 2019.

<sup>142</sup> GirlsnotBrides.org 'What's the child marriage rate? How big of an issue is child marriage?' (2018) available at <https://www.girlsnotbrides.org/child-marriage/south-africa/> accessed on 20 August 2019.

<sup>143</sup> Z, George 'Eastern Cape's shame over *ukuthwala*' *Dispatch live* 12 July 2018 available at <https://www.dispatchlive.co.za/news/2018-07-12-e-capes-shame-over-ukuthwala/> accessed on 26 April 2020.

<sup>144</sup> 'Community Survey 2016 An exploration of nuptiality statistics and implied measures in South Africa' StatsSA p 9 available at <http://www.statssa.gov.za/publications/03-01-25/03-01-252016.pdf> accessed on 3 May 2020.

<sup>145</sup> Ibid at p 24.

<sup>146</sup> Ibid at p 31.



Meanwhile, Mtshali argues that such customary practices are clear actions of criminal conduct.<sup>147</sup> Mtshali is corroborated by section 3 of the Recognition of Customary Marriage Act 120 of 1998 (RCMA) which provides for the requirements of a valid customary marriage. The RCMA states that both spouses must be above the age of 18 years. Furthermore, section 1(1)(a) of the Criminal Law (Sexual Offences and Related Matters) Act defines a child as any person below the age of 18 years, and consent to sexual intercourse as a voluntary, uncoerced agreement. Since children are unable to give valid consent, the marriage of any person below 18 years is a crime according to South African law.

A closer exploration of the practice of *ukuthwala* shows conditions that are possibly as serious as forced marriage itself, which is the practice of kidnapping.<sup>148</sup> In a wide-reaching study exploring child marriages on the African continent, the Centre for Human Rights<sup>149</sup> notes that under-age girls are often kidnapped by men and their peers, thus compelling the girl's family to consent to marriage negotiations. While some cases involve a girl and boy who are of similar age with the girl being 'abducted' since they might have failed to secure marriage consent by normal means, several other cases are genuine abductions of unsuspecting girls.

While child marriage cases are already abundant in South Africa as reported by studies, it is also possible that the status of the country as an immigration hub for most African countries helps perpetuate a high rate of child marriages.<sup>150</sup> Since migrants bring their cultural beliefs and practices into their destination country, it is imperative for legislative and other interventions in South Africa to protect all children below marriage age from early marriages. Accordingly, the South African Prevention and Combating of Trafficking Act<sup>151</sup> designates "any person who (a) adopts a child legally or illegally for the purposes of exploitation of that child or (b) concludes a forced marriage with another person within or across the borders of South Africa to be an offender." This Act's provision shows that the South African legal system fully understands the extent of possible forced marriages resulting from imported cultures, thus its move to criminalise such through legislative means.

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147 Mtshali, V 'Forced child marriages under the pretext of Customary Marriage in South Africa. Child Abuse Research' (2014) 15:2 *A South African Journal* pp 51-61.

148 Department of Justice and Constitutional Development 'Ukuthwala: Let's protect our children' (2009) available at [http://www.justice.gov.za/docs/articles/2009\\_ukuthwala-kidnapping-girls.html](http://www.justice.gov.za/docs/articles/2009_ukuthwala-kidnapping-girls.html) accessed on 3 May 2020.

149 Centre for Human Rights 'A Report on Child Marriages in Africa' (2018) pp 1-80 available at [https://www.chr.up.ac.za/images/publications/centrepublishments/documents/child\\_marriage\\_report.pdf](https://www.chr.up.ac.za/images/publications/centrepublishments/documents/child_marriage_report.pdf) accessed on 3 May 2020.

150 Dahl, G. B 'Early Teen Marriage and Future Poverty' (2010) 47:3 *Demography* pp 689-718 available at <https://doi.org/10.1353/dem.0.0120> accessed on 4 May 2020.

151 Section 4(2) of the Prevention and Combating of Trafficking in Persons Act 7 of 2013.

Empirical studies conducted in South Africa are evidence that child marriage cases are still prevalent.<sup>152</sup> However, given that South Africa is a dualist country (international law incorporated in legislation) and pluralist (customary law & common law are both subject to the Constitution), the supremacy of the Constitution in all legal matters will likely make it easier to institute law reform. This can be done through the process of ensuring that all laws, whether international or customary laws, conform to the Constitutional provisions. In the next subsection, the discussion of the prevention measures implemented in South Africa to eliminate child marriages follows. The discussion also involves other measures that could be implemented to achieve the same goal.

### 3.3 The legal framework relating to child marriages in South Africa

The Constitution of South Africa is the supreme law of the land and it therefore plays an important role in the regulation of whether a cultural practice is unlawful. In deciding whether a practice is unlawful, it must be weighed up against society's perception of justice and the legal convictions of society. In South Africa, customary law is afforded the same status as other laws. Customary law derives its force from the Constitution and because the Constitution is the supreme law of the land, the validity of its rules must be determined, not with reference to the common law, but to the Constitution.<sup>153</sup>

The South African Law Reform Commission notes that South Africa practises legal pluralism in that customary law is recognised as a system of law, provided that it operates within the values of the Constitution. In light of the fact that the best interests of the child principle in section 28 is key, the right of a child outweighs that of a cultural or religious group.<sup>154</sup>

The legal framework relating to child marriages in South Africa presents some inconsistencies regarding the permissible age of marriage under different circumstances. Section 9 of the Constitution guarantees the "right to equality before the law and equal protection and benefits." It also prohibits "discrimination on the grounds of, *inter alia*, gender, sex and marital status."<sup>155</sup> Section 10 of the Constitution enshrines the "right to dignity" and the right to have dignity protected while section 12 of the Constitution further affords the "right to be free from all forms of violence, not to be punished or treated in a cruel, degrading or inhumane way." Moreover, the Constitution expressly provides for the protection of the right of the child under section 28.

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<sup>152</sup> Selby, D and Singer, C 'Child Marriage: What You Need To Know And How You Can Help End It' *Global Citizen* 27 August 2019 available at <https://www.globalcitizen.org/en/content/child-marriage-brides-india-niger-syria/> accessed on 21 May 2020.

<sup>153</sup> *Bhe and other v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC) para 148.

<sup>154</sup> The South African Law Reform Commission 'The practice of *ukuthwala* discussion paper available at <https://www.justice.gov.za/salrc/dpapers/dp132-UkuthwalaRevised.pdf> accessed on 27 August 2019.

<sup>155</sup> Section 9(3).

In South Africa, in the context of child marriages, these rights are violated by having legislation that leaves room for children below the age of 18 to enter into valid marriages. The legislative framework of South Africa is not consistent with the protection provided for by its Constitution.

The following four statutes form the basic framework in relation to early child marriages in South Africa:

- 3.3.1. The Marriage Act<sup>156</sup> regulates heterosexual monogamous marriages in South Africa. It provides “that no marriage officer may solemnise a marriage where either one or both parties are minors unless the necessary consent has been obtained.”<sup>157</sup>

The gender inequality that exists in the Marriage Act is glaring under section 26 in that it sets the minimum age to be able to consent differently for girls as opposed to boys. Under this Act, girls aged 15 years are able to consent whereas the minimum age for consent for boys is 18 years.

Both the Marriage Act and the RCMA allow for ministerial consent or parental consent for a child to be married where at least one of the spouses is a minor. The Marriage Act allows for a Commissioner of Child Welfare and a judge of the High Court to consent to the marriage in the event of the parent refusing consent.<sup>158</sup>

The inconsistency in the minimum age for consent to marriage is problematic in that it creates a loophole and reinforces a form of gender inequality. It is important that children (both girls and boys) are recognised as children under the law and are afforded equal protection by the law. Furthermore, adequate safeguards need to be in place to ensure that ministerial and parental consent is not used to force children into marriage.

- 3.3.2. The Recognition of Customary Marriages Act<sup>159</sup> requires that intending spouses must be over the age of 18 and both must consent to the marriage. The Act goes further to say in section 3 (a)(ii) that the intended spouses must both consent to be married to each other under customary law.

The Act provides for a situation where either one of the intended spouses is a minor. An exception to the requirement of consent is provided for by giving parents/guardians the authority to consent to the marriage where one/both parties is a minor.<sup>160</sup> Like the Marriage Act, the

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<sup>156</sup> Act 25 of 1961.

<sup>157</sup> Section 24 of Act 25 of 1961.

<sup>158</sup> Section 26.

<sup>159</sup> Act 120 of 1998.

<sup>160</sup> Section 3(3).

RCMA allows for a Commissioner of Child Welfare or a court to grant consent to a minor intending to enter into a marriage in the event that the parent refuses. The RCMA goes a step further by granting authority to the Minister of Home Affairs to give consent where minors intend on marrying each other.<sup>161</sup>

Arguably, the Marriage Act and the RCMA may be adding to the challenge of ending child marriages in South Africa. In the context of customary marriages, *lobola* may play a huge role in increasing the vulnerability of girls. Parents may be quick to grant parental consent in exchange for financial gain.<sup>162</sup> Alternatively, parents may consent to their minor child getting married in an effort to evade the humiliation of their daughter having a child born out of wedlock or because they simply cannot afford to feed one more mouth as a result of poverty.

Therefore, parental consent is not always in the best interest of the child. The RCMA read together with the Marriage Act, send contradictory messages about attempts to end child marriages that are rooted in customary practices.

3.3.3. Section 12(2) of the Children's Act 38 of 2005 provides the following regarding the minimum age for a valid marriage:

"A child below the age set by law for a valid marriage may not be given out in marriage or engagement, and above that minimum age may not be given out in marriage or engagement without his or her consent." In all matters concerning the child, the best interest of the child standard must be applied. This principle is referred to explicitly in section 7 and throughout the Children's Act.<sup>163</sup> Unlike the RCMA and Marriage Act discussed above, the Children's Act, under section 12, provides a much clearer stance on the protection of children from early marriages. The Children's Act does this by stating that a child below the minimum age set by law for a valid marriage may not be given out in marriage or engagement and goes further to say that even above that age, the consent of the child is necessary. A parent's consent to such marriage and acceptance of *lobola* payment in such instance is a further violation of the Children's Act.<sup>164</sup> Section 305 (1)(a), (6) and (7) of the Children's Act makes provision for criminal liability where there has been non-compliance with section 12(2). This is in contrast to section 12(1), which is problematic in that while it makes it clear that children should not be subjected to social, cultural and religious practices which are detrimental to their well-being,<sup>165</sup> it does not provide for criminal liability in the event of non-compliance with this provision.

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<sup>161</sup> Section 3(4)(a) and (c).

<sup>162</sup> The practice of *lobola* is not being critiqued here, the comment is made in the the context of child marriages.

<sup>163</sup> Act 38 of 2005.

<sup>164</sup> Section 12 (2)(a) of the Children's Act.

<sup>165</sup> Section 12 (1) of the Children's Act

Furthermore, with regard to section 12(2), a child who has been subjected to *ukuthwala* is not (in the conventional sense of the word) “given out” to marriage.

3.3.4. In 2006, Parliament promulgated the Civil Union Act 17 of 2006 which sets the minimum age at 18 years without any exceptions for the marriages of children. This is the only legislation that complies with regional and international obligations. The Civil Union Act<sup>166</sup> provides for the solemnisation of same sex civil unions so that they may enjoy the same status, benefits and responsibilities that marriage accords to opposite sex couples. The Act provides that parties may only conclude a civil union under this Act if their union would not be prohibited by law had they not been of the same sex. The Act goes further to state that the prospective civil union must not have been, save for their sex, prohibited by the Marriage Act<sup>167</sup> or RCMA.

### 3.4. Law reform and jurisprudential strides taken in relation to early child marriages

The most recent case on *ukuthwala* is *Jezile v S & Others*<sup>168</sup> decided in March 2015, where the court held that the facts of this case were a deviant type of *ukuthwala* in that the victim was a minor (14 years old) and she did not at any point consent to the marriage.<sup>169</sup> The victim was taken from her home in the Eastern Cape to the defendant’s home where she was raped. She escaped from his home, however, with the “help” of her uncle, she was returned to the defendant’s home. She was thereafter trafficked to Cape Town where she was again raped and assaulted.

The Court cited a number of international conventions and domestic laws in its finding that the criminal acts of the defendant (in the court a quo) cannot find protection under the law.<sup>170</sup> This case is an illustration of how courts are not tolerant of offenders who commit criminal acts such as trafficking and rape and disguise these under the umbrella of *ukuthwala*. Any form of child abuse or exploitation, the courts have made clear, will not be tolerated in our Constitutional dispensation.

The *Jezile* case rejected the manipulated customary practice of *ukuthwala*, but noted and accepted the following with regard to the traditional form of *ukuthwala*:

1. “Both parties must be of marriageable age;<sup>171</sup>
2. Both parties must consent to initiate the marriage through the use of *ukuthwala* and if the woman does not agree, the process fails, and her father may institute a civil action against the

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<sup>166</sup> Act 17 of 2006.

<sup>167</sup> Section 8 (6) of the Civil Union Act.

<sup>168</sup> 2015 (2) SACR 452 (WCC).

<sup>169</sup> Ibid at para 92.

<sup>170</sup> Ibid at para 95.

<sup>171</sup> Ibid at para 72.1

man's guardian;<sup>172</sup>

3. The mock abduction of the bride would be arranged by the intending couple and would be done in order to preserve her modesty. The court noted that the bride would be aware of and agree to the abduction beforehand;<sup>173</sup>
4. Once abducted, the intending bride would be placed in the safe custody of the women in the man's homestead in order to preserve her reputation;<sup>174</sup>
5. Sexual intercourse is strictly prohibited during this time;<sup>175</sup>
6. The intending groom's family would then send an invitation to the bride's family, either on the day of the mock abduction or the following morning."<sup>176</sup>

The court heard and accepted that in the case of *Jezile*, the practice of *ukuthwala* was not properly applied. The complainant was a minor, she had not consented, she had been raped and *lobola* had been negotiated and paid for before the *ukuthwala* had occurred.<sup>177</sup>

The court in the *Jezile* case intended to illustrate that both the Marriage Act and the RCMA are indirectly contributing to the challenge of early childhood marriages and the rape, assault and trafficking of women. The judgment marks a significant jurisprudential stride by asserting that gender violence disguised behind cultural rationales cannot be justified and will receive no protection from the law.

The South African Law Reform Commission (SALRC) published its "Revised Discussion Paper on Project 138: The Practice of *ukuthwala*." The revised paper includes a draft Bill, tentatively the "Prohibition of Forced Marriages and Child Marriages Bill."<sup>178</sup>

The Prohibition of Forced Marriages and Child Marriages Bill aims to criminalise child marriages in South Africa. This Bill is set to contain provisions on the conviction and sentencing for those who force children into marriage. Through the use of preventive measures and punishment, the Bill focuses on tackling the continued child marriages in South Africa.

For instance, section 7 of the Bill introduces a "forced marriage protection order" which will empower the courts to issue a prohibition order for any person (even the victim's parents) committing or aiding the committing of a child marriage. The challenge in relying on a protection order is that offenders often

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<sup>172</sup> Ibid at para 72.2

<sup>173</sup> Ibid at para 72.3.

<sup>174</sup> Ibid at para 72.4.

<sup>175</sup> Ibid at para 72.5.

<sup>176</sup> Ibid at para 72.6.

<sup>177</sup> Ibid at para 75.

<sup>178</sup> South African Law Reform Commission 'Revised Discussion Paper on Project 138: The Practice of *ukuthwala*' available at: <http://www.justice.gov.za/salrc/dpapers/dp132-UkuthwalaRevised.pdf> accessed on 8 April 2020.

ignore the terms and conditions attached to it. In domestic violence cases where offenders do not attach any meaning to the order, the order becomes a mere piece of paper that carries little to no effect. This is the plight of many domestic violence victims who die with their protection orders in hand.

One such case, with regard to a woman killed by the man against whom she had a protection order, is that of Belinda Legobye.<sup>179</sup> Legobye, like many victims of domestic violence, had successfully applied for a protection order against her ex-boyfriend, Elias Modiselle. Modiselle had been abusing her and threatening to kill her. However, a month after the protection order was granted, Modiselle went to Legobye's house and stabbed her to death. Artz, in a study into domestic violence protection orders, found that the victims would sometimes withdraw from the process after obtaining a protection order because they are scared of relying on the criminal justice system, which they perceive as unreliable.<sup>180</sup> Mistrust in the South African criminal justice system is not irrational.

The most important law reform role that the Bill plays is that once it becomes a law, it will be the first time that child marriages will be a criminal offence. Offenders may be liable to imprisonment for periods in line with offenses such as assault, abduction, kidnapping, rape and human trafficking or a fine or both such imprisonment and fine.<sup>181</sup> Unfortunately, the Bill fails to repeal provisions that allow children to get married.

However, as previously discussed on various legislative measures, most such are evidently ineffectual unless effected with a host of other interventions. For instance, the existence of the Bill will not help unless communities practising child marriages, the police force and local courts fully comprehend its implications.<sup>182</sup> It is therefore crucial for the Bill to be introduced together with widespread community education and the empowerment of girls to better result in the reduction/elimination of child marriages.

### **3.5 Stakeholders' role in combating child marriages in South Africa**

A number of stakeholders have assumed the role of ensuring the prevention of early child marriages and the promotion of the best interests of the child in all matters related to the child. Relevant

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<sup>179</sup> Mabuza, E. 'Man Jailed for stabbing ex-girlfriend 24 times, despite her having a protection order against him' *Times Live* 2019 available at <https://www.google.com/amp/s/www.timeslive.co.za/amp/news/south-africa/2019-09-30-man-jailed-for-stabbing-ex-girlfriend-24-times-despite-her-having-a-protection-order-against-him-/> accessed on 1 April 2020.

<sup>180</sup> L Artz 'Fear or failure? Why victims of domestic violence retract from the criminal justice process' (2011) 37:1-10 *SA Crime Quarterly* p 9.

<sup>181</sup> Section 6 of the Bill.

<sup>182</sup> Mgidlana R. H 'Should South Africa criminalise *ukuthwala* leading to forced and child marriages?' (2017) available at <http://www.cssr.uct.ac.za/news/should-south-africa-criminalise-ukuthwala-leading-forced-and-child-marriages> accessed on 5 September 2019.

government departments, non-governmental organisations and other international bodies all play different roles in fighting child marriage.

### **3.5.1 The African Commission on Human & Peoples' Rights (ACHPR), the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the Committee on the Rights of the Child**

The ACHPR, the ACERWC and the Committee on the Rights of the Child believe that the incidence of early child marriages is a violation of human rights. According to the ACHPR website,<sup>183</sup> the commission is mandated with the promotion and protection of human rights which includes children's rights. Through the power emanating from the African Union Charter, the ACHPR has jurisdiction across all AU member states where it spearheads initiatives and advocates for human rights. Meanwhile, the ACERWC<sup>184</sup> formulates principles, cooperates with governments across AU member states and monitors the implementation of the AU charter principles on maintaining the rights and welfare of the child. The CRC is the entity of 18 independent experts who are responsible for monitoring the execution of the Convention on the Rights of the Child.<sup>185</sup>

In a joint general comment report,<sup>186</sup> the ACHPR and the ACERWC focused on elaborating provisions of pieces of legislation by the AU which outlaw child marriage. Through four underlying principles of the joint comment, the commissions advocate for: (i) putting the best interests of the child first; (ii) ensuring freedom from discrimination; (iii) protecting the right to survival and development; and (iv) the participation of affected children in matters affecting them. Consequently, the ACHPR and ACERWC joint comment obligates governments to abolish marriage of children under 18 years without exception, to ensure personal and full consent to marry is given and to undertake Constitutional reforms where necessary.

In relation to early child marriages, the CRC monitors the implementation article 24(3) of the Convention on the Rights of the Child which calls for the abolishment of traditional practices that are prejudicial to the health of children.

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<sup>183</sup> African Commission on Human and Peoples' Rights 'Mandate of the Commission' available at <https://www.achpr.org/mandateofthecommission> accessed on 29 June 2020.

<sup>184</sup> African Committee of Experts on the Rights and Welfare of the Child 'Mandate of the Committee' available at <https://www.acerwc.africa/mandate/> accessed on 29 June 2020.

<sup>185</sup> United Nations Human Rights Office of the High Commissioner (1996-2020) *The Committee on the Rights of the Child*. available at <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx> accessed on 5 April 2020.

<sup>186</sup> The African Commission on Human & Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) (2017) *Joint General Comment on Ending Child Marriage*.



### 3.5.2 COGTA and traditional leadership

The Honourable Dr Zweli Mkhize, who was at the time the Minister of Cooperative Governance and Traditional Affairs of South Africa, addressed a Public Dialogue on The Protection of Human Rights within Traditional Leadership Structures and Communities in Limpopo on 29 March 2019. In his address, Dr Mkhize encouraged traditional leaders to work hand in hand with the government to take a stand against cultural practices that are harmful to women and children. The theme for Human Rights month, March 2019, was “Not in my culture.” Dr Zweli Mkhize emphasised this in his address for all relevant stakeholders.<sup>187</sup> Practices such as *ukuthwala* are called “culture” but they constitute serious violations of human rights. Traditional leaders, the community and government need to be a safety net for all vulnerable groups.

The 2018/2019 annual performance plan for COGTA<sup>188</sup> included a call for the continued transformation of culture. COGTA, in its plan, committed itself to the “promotion of a cultural and customary way of life which conforms to the Bill of Rights and Constitutional and democratic principles.” However, COGTA recognised that some of the customs and practices are obsolete and that they need to be updated in order to adhere to the Bill of Rights.

Chapter 11 of the Constitution states that “the institution, status and roles of traditional leadership, according to customary law, are recognised. South Africa has provincial houses of traditional leaders in the following six provinces: Eastern Cape, Free State, KwaZulu-Natal, Limpopo, Mpumalanga and North West. National and provincial houses of traditional leaders enhance the cooperative relationships within national and provincial government. Local houses of traditional leaders deepen and cement the relationship between municipalities and traditional leaders on customary law and development initiatives.”

The Traditional Leadership and Governance Framework Act 41 of 2003 outlines the roles and functions of traditional leadership. Yet, the extent to which traditional leadership has fulfilled the legislative requirements outlined in that Act is not yet clear.

Policing the abduction of children for marriage, especially in rural communities that are under the chieftainship of traditional leaders, is difficult. The police are often not permitted to perform their duty of investigating crime in rural areas due to the fact that there are cultural/traditional protocols that need to be followed. People who live in rural areas are loyal to the institution of traditional leadership, as

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<sup>187</sup> Address by Minister Mkhize during the Public Dialogue on the Protection of Human Rights within Traditional Leadership Structures and Communities available at <http://www.cogta.gov.za/?p=6497> accessed on 13 April 2019.

<sup>188</sup> COGTA 2018/2019 Annual performance Plan; with Deputy Ministers available at <https://pmg.org.za/committee-meeting/26450/> accessed on 13 April 2019.

they believe that traditional leadership is essential in making sure that their areas develop. This belief dates back to the period before 1994 when traditional leadership was at the core of the development of rural communities.<sup>189</sup> This hinders efforts of human rights institutions and other stakeholders that are involved in the law reform process to end child marriages.

### 3.5.3 Commission on Gender Equality

The Commission on Gender Equality which is established under section 187 of the Constitution labels *ukuthwala* as an unlawful practice disguised as a custom.<sup>190</sup> The CGE has worked with several religious and traditional rural communities in rural areas in South Africa. The CGE as well as the House of Traditional Leaders of the Eastern Cape drew up a memorandum of understanding (MOU) in May 2014. The objective of the MOU is to promote cooperation between the two parties and to uphold the equality agenda. The MOU outlines the need to eradicate cultural practices that are harmful and adopt the ones that uphold gender equality.

The CGE has been in the forefront of the fight against forced marriages. In addition to supporting and contributing to the discussion paper on the Prohibition of Forced Marriages and Child Marriages Bill, the CGE also participates in public engagements, public hearings as well as policy dialogues that address the issue of *ukuthwala*.<sup>191</sup>

The CGE has intervened in many gender-based litigation matters.<sup>192</sup> One such case is the landmark judgment in the *Jezile case* which is discussed above. The CGE was admitted as amicus curiae in this matter. The CGE presented before the Court the comprehensive work that it has done within the customary arena with a specific focus on the work done within the practice of *ukuthwala*.<sup>193</sup> The CGE noted that the original form of *ukuthwala* was now distorted and used as a disguise for human trafficking. In addition to this, it was submitted that forced child marriage violated a variety of international and regional laws which South Africa was party to.<sup>194</sup>

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<sup>189</sup> Ntsebeza L. *Rural governance in post-1994 South Africa: Has the question of citizenship for Rural inhabitants been settled 10 years in South Africa's democracy?* (University of Cape Town, 2003).

<sup>190</sup> Parliamentary Monitoring Group Commission for Gender Equality on its Annual Report for 2012/13 available at <https://pmg.org.za/committee-meeting/16623/> accessed 10 September 2019.

<sup>191</sup> Maema, K. The Commission on Gender Equality 2015-2016 Annual Report (2016) available at <http://www.cge.org.za/wp-content/uploads/2014/09/2015-2016-CGE-Annual-Report.pdf> accessed on 6 April 2020.

<sup>192</sup> For example see the following cases *Bhe and others v Magistrate, Khayelitsha and Others (Commissioner for Gender Equality as Amicus Curiae)* 2005 (1) SA 580 CC; *Raedani v Mufunwa Inwi* case no 1/2016 Thohoyandou Magistrates Court (Equality Court); *Sb Mahlangu v Minister of labour and others* Case no: 79180/15; *M v S Mbombela* Magistrates Court (Equality Court); *Women Legal Trust Centre v President of the Republic and others*. Case number 22481/2014 Western Cape High Court.

<sup>193</sup> *Jezille v S & Others* (2) SACR 452 (WCC) at para 79

<sup>194</sup> *Ibid* at para 70

### 3.5.4 The Commission on Religious, Cultural and Linguistic Communities (CRL)

The Commission on the Protection of Rights of Cultural, Religious and Linguistic Communities, which is established under section 187 of the Constitution, is aimed at ensuring the continuation of cultural and religious practices in South Africa which would likely be under threat from the changing socio-cultural environments over the world.<sup>195</sup> Its work in terms of the CRL Rights Commission Act 19 of 2002 includes the handling of cultural, religious and linguistic complaints.

Reports have indicated that there is often conflict in the standpoints between the CGE and CRL Rights Commission. According to a report to parliament,<sup>196</sup> the desire to push for greater equality between genders is often challenged by a lack of cooperation from stakeholders who still believe in the inferiority of women. For instance, in 2014, Thoko Mkhwanazi-Xaluva, head of the CRL Rights Commission, publicly stated that their commission supports the conduct of *ukuthwala* while some members of the CGE have likened the practice to organised crime.<sup>197</sup> The CRL's support of *ukuthwala* is despite the CGE's view that the practice is often used as a tool of promoting the deprivation of education to young girls, sexual assault, rape and unwanted pregnancies.<sup>198</sup> In light of these disagreements, it is notable that the practice of early child marriage may be far from over as long as a consensus has not yet been reached by conflicting parties on the way forward. Hence, there is need for more open dialogue on how to ensure that the practice of cultural practices does not end up infringing on human rights enshrined in the Constitution.

### 3.5.5 The role of government bodies

Government bodies such as the Departments of Cooperative Governance and Traditional Affairs (COGTA), Social Development, Education and Justice and the South African Police Service (SAPS) all have a role to play in promoting the rights of the child. The Cooperative Governance and Traditional Affairs department must be focused on promoting equality and equal opportunities at all levels of society. While the practice of tradition is important, this should not result in the gross violation of human rights. The Department of Social Development has a similar role of ensuring greater cohesion and care for vulnerable members of society, such as the female child, whilst promoting a culture of respect of all

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<sup>195</sup> Parliamentary Monitoring Group (2012). Commission on Protection of Rights of Cultural Religious & Linguistic Communities; Strategic Plan. (2012) available at <https://pmg.org.za/committee-meeting/14069/> accessed on 10 September 2019.

<sup>196</sup> Parliamentary Monitoring Group Eastern Cape & KwaZulu Natal provincial offices of Commission of Gender Equality on progress made to their work to date. (2010) available at <https://pmg.org.za/committee-meeting/11814/> accessed 9 August 2019.

<sup>197</sup> SAPA 'Opinions divided over *ukuthwala*' IOL 4 December 2014 available at <https://www.iol.co.za/news/opinions-divided-over-ukuthwala-1791001> accessed 18 September 2019.

<sup>198</sup> ENCA 'Rights Commission faces opposition in promotion of *ukuthwala*' (2014) Available at <https://www.enca.com/south-africa/rights-commission-faces-opposition-its-promotion-ukuthwala> accessed 10 September 2019.

individuals living in the country.<sup>199</sup> Meanwhile, the Departments of Education and Justice have a role in ensuring greater access to education for the female child and greater exposure to comprehension of children's rights, respectively.

Such interventions are usually key in producing a society of empowered girls who know their rights. The SAPS also has a role to play in educating local communities about the rights of children, especially the female child, and the possible punishments for perpetrators as well as the arrest of perpetrators to likely act as a deterrent measure to would-be offenders. Training of SAPS members in the unlawfulness of *ukuthwala* is necessary, so that the police do not send victims home to keep the matter 'in the family'. Raising awareness about successful prosecutions such as the *Jezile* case should be the responsibility of the National Prosecuting Authority and the Department of Justice.

### 3.5.6 Conclusion

It is submitted that in order to ensure that harmful cultural practices such as *ukuthwala* are eradicated, stakeholders should work hand in hand and have a clear understanding of their roles. This will ensure that all parties are able to reach the objectives of the partnership. However, despite there being several international laws and provisions such as laws by the African Union, such 'soft laws' are often challenging to enforce since the African Union and enforcing international bodies have no resources to monitor the entire continent in detail. Worse still, political will to implement necessary measures, particularly those requiring domestication, lacks in various areas where religious and cultural impediments to law reform are not removed.

### 3.6 Chapter summary

While South Africa has legislation that appears to address the objectionable aspects of *ukuthwala*, it is arguable as to whether these laws actually effectively address the abuses associated with modern day *ukuthwala*. There is no sign yet of much progress on the Prohibition of Forced Marriages and Child Marriages Bill which is aimed at protecting girls from being trapped in forced marriages. Despite the high numbers of child marriages that exist in the country, the Bill appears to still be a long way from becoming enacted as legislation.<sup>200</sup> The judiciary, however, has made strides in articulating the abhorrence and the criminality in *ukuthwala* cases in the *Jezile* judgment.

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<sup>199</sup> Department of Social Development media release 'Social Development hosts Lusikisiki community outreach programme' 22 Aug 2019' available at <https://www.gov.za/speeches/social-development-hosts-lusikisiki-community-outreach-programme-22-aug-21-aug-2019-0000> accessed on 5 May 2020.

<sup>200</sup> *Alicestine October*, REGULAR: Where is Child Marriages Bill? Available at <https://www.notesfromthehouse.co.za/opinion/item/149-regular-parly-questions-where-is-child-marriages-bill> accessed on 13 April 2019.

Law reform to end child marriage associated with cultural practices is considered a difficult task because of the manner in which it poses potential conflict between children's rights and cultural rights. The process that leads to law reform indicates that many of the children's experiences in areas where child marriage is rife have not been adequately addressed. One such crucial experience that must be taken into account is poverty. The Girls Not Brides organisation proposes that communities need to be made a part of the solution and, most importantly, empowering girls.<sup>201</sup>

The next chapter will follow from this discussion. It will critically analyse the legal framework in Nigeria (including customary law, legislation and Constitutional law) that relates to early child marriage and proceed to determine initiatives undertaken to bring about law reform or lobbying and advocacy or jurisprudential gains that now prohibit the practice. The role of the stakeholders involved in the legal reform process will be considered.

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<sup>201</sup> What is Theory of Change? Available at <https://www.girlsnotbrides.org/child-marriage-theory-of-change/> accessed on 13 April 2019.

### NIGERIAN LEGISLATIVE FRAMEWORK, PREVENTION MEASURES AND LAW REFORM

#### 4.1. Introduction

This chapter is intended to critically analyse the legal framework in Nigeria (including customary law, legislation and Constitutional law) that relates to early child marriage. It will proceed to determine initiatives undertaken to bring about law reform and jurisprudential gains that aim to prohibit the practice and the challenges arising therefrom. The role of the stakeholders involved in the legal reform process is also discussed, and the results are compared with other African case studies on child marriages.

#### 4.2. Legal framework relating to early child marriages in Nigeria

The frequency of early child marriages is well-detailed and most widespread in a group of adjacent countries traversing Mali in West Africa towards Cameroon located in Central Africa as well as the Central North of Nigeria.<sup>202</sup> The above countries are similar with respect to their bionetworks, high prevalence of poverty, insecurity, culture and religion.<sup>203</sup> The implication of these assertions is that the existence of early child marriages in this region necessitates a regional policy to decrease poverty, remove social inequities and address widespread gender disparities.<sup>204</sup> In Nigeria, a recent study has established that the range between which girls marry in Nigeria is 14 to 19, which is within the girls' adolescence age.<sup>205</sup> Another recent study confirmed that child marriages are mostly prevalent in the North East and North West regions of Nigeria, and lower in the South East and South West regions.<sup>206</sup> These marriages were found to result from extreme poverty and families' need for survival, socio-cultural and religious values as well as strengthening family relationships. However, these child marriages were found to cause numerous psychological health problems for victims such as feelings of isolation, being confined at the home with household duties, trauma from premature sex and childbearing and low self-esteem arising from a lack of prospects for development.<sup>207</sup>

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<sup>202</sup> Nour, M 'Health Consequences of Child Marriage in Africa' (2016) 12:11 *Emerging Infectious Diseases*.

<sup>203</sup> Eno-Obong Akpan 'Early marriage in eastern Nigeria and the health consequences of vesicovaginal fistulae (VVF) among young mothers' (2003) 11:2 *Gender & Development* pp 70-76.

<sup>204</sup> *op Cit* note 125.

<sup>205</sup> Aye, E. N., Robinson, A., Eze, C. O., Eze, E. N., & Oforka, T. O. 'Impact of Child Marriage on Health of Adolescent Girls in Kaduna State, Nigeria' *International Journal of Applied Engineering Research* 13(23) pp. 16152-16161

<sup>206</sup> Adebowale, S. A. 'Dynamics of child marriage and marital timing in Nigeria: A retrogression or progression?' (2013) 39:9 *Health Care for Women International* pp. 975-993

<sup>207</sup> *op Cit* note 4

The Federal Republic of Nigeria (FRN) is a Constitutional republic. At independence, Nigeria consisted of three regions, namely, the Northern Region, the Eastern Region and the Western Region. Nigeria is constituted of 36 states.<sup>208</sup> Nigeria is governed by a combination of federal law, state law and pre-independence English law. The Nigerian legal system is complex due to the legal pluralism which exists. This means that customary law, in particular Sharia law, exists side by side with English Law. The complexity of its legal system presents a challenge in the protection of children's rights in relation to early child marriage.

The reason why Sharia law presents a challenge in the protection of children's rights is that no age limits have been fixed by Islam for marriage,<sup>209</sup> therefore, leaving a possibility for a Muslim to marry at any age. The distinction between a girl's right to marriage and consent is dependent on the age she reaches puberty. For example, the Hanafi and Ithna Ashari schools believe that the age of majority is attained at 15 years at which stage they can enter into a marriage and girls younger than the age of 9 are minors.<sup>210</sup> The Shafi'i and Hanbali schools subscribe to this belief. Whereas the Maliki school believes that the age of majority is attained at 18 years.<sup>211</sup>

Age is interpreted differently under Sharia law than it is interpreted under international conventions such as the UNCRC. Sexual maturity is the determinant of age of majority, rather than the number of years an individual has since birth.<sup>212</sup> This is why Muslim girls aged 9 and below are classified as minors. Girls aged 15 and above are considered to be women. The classification for a girl aged between 9 to 15 is dependent on when she reaches puberty. All the schools subscribe to this view except for the Maliki school, which considers a female to have reached the age of majority only at the age of eighteen.<sup>213</sup> As a result, Muslim girls are 'married off' young.

The current Constitution of the Federal Republic of Nigeria is the 1999 Constitution. It came into operation on the 29th of May 1999. The Nigerian Constitution is supreme. Constitutional supremacy relates to the supremacy of authority of the Constitution over other laws. Section 1(1) provides that "this Constitution and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria". In addition to this, Section 1(3) provides 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."

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<sup>208</sup> Lokulo-Sodipe, J., Akintola, O. & Adebamowo, C. 'Legal basis for Research Ethics governance in Nigeria' (2014) available at <https://elearning.trree.org/mod/page/view.php?id=142> accessed on 20 April 2019.

<sup>209</sup> Levy, R. 'The Social Structure of Islam' (2000. First published 1957) p 106.

<sup>210</sup> Lau M and Hinchcliffe D *Introduction to Islamic law* (2010) p 53.

<sup>211</sup> Abiad N and Mansoor FZ 'Criminal Law and the Rights of the Child in Muslim States: A Comparative and Analytical Perspective' (2010) BIICL pp 57-58.

<sup>212</sup> Ibid at pp 58

<sup>213</sup> Hussain NS 'Islamic Law on Child Marriage' (2018) 1 NILS UK Law Review pp 164 – 174.

Section 10 of the Constitution states that “the Government of a Federation or of a State shall not adopt any religion as State religion.” While, section 275 allows for the “creation of the state Sharia Court of Appeals”, the Constitution has arguably reserved discretion to the states to create their own Sharia courts to act as courts of first instance. The creation of the Sharia Courts of Appeal is a derogation of section 10. This contradiction presents a challenge in the protection of children from early child marriages.

The confusion of the legal age to conclude a valid child marriage is further found within section 23 of the Constitution. This section states that “a person under the age of 18 is incapable of contracting a valid marriage. If such a marriage does take place, it should be declared null and void and of no effect.” Contradictorily, approval for child marriages can be found under section 29(4b) of the same Constitution which provides the following: “This is by its provision that any woman who is married shall be deemed to be of full age.”

The Constitution in section 29 (4b) allows a Nigerian citizen to renounce his/her citizenship as long as such a person is above eighteen years of age. However, for a woman who is married, whether or not up to the age of eighteen, such a person is deemed of full age for the purpose of renunciation of citizenship.<sup>214</sup> This section came under scrutiny regarding its Constitutionality in July 2013,<sup>215</sup> however, the Senate voted in favour of its retention. Senator Ahmed Sani Yerima<sup>216</sup> argued that removing this section will go against the religion of Islam. This is problematic in that the Constitution is thereby legalising child marriage.

In addition to the Constitution, the Children and Young Peoples Act 1943 (CYPA), which has been enacted in the Eastern, Western and Northern parts of Nigeria,<sup>217</sup> as well as the Child Rights Act, which was enacted in 2003 and has been adopted by 23 states,<sup>218</sup> are two important pieces of legislation regarding children in Nigeria. The CYPA defines a child as a person under the age of 14 years, while a “young person” means a person between 14 and 17 years.<sup>219</sup> The Child Rights Act sets the minimum age of marriage as 18 years. Kanyip states that under customary law, the definition of a child is dependent on who is providing the definition, as it varies from one ethnic group to another. Some ethnic

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<sup>214</sup> Ndidi Section 29 (4) (b) of the Constitution of the Federal Republic of Nigeria, *Much Deeper Than Child Marriage, Citizenship, Discrimination and Gender* (LLM thesis, University of Lagos, 2013).

<sup>215</sup> Ibid.

<sup>216</sup> Earlier in 1999, Senator Yerima as Governor of Zamfara State legislated beyond the Constitutionally allowed limit the entire corpus of the sharia Law to form part of the material or formal source of law in the state. In 2010 in violation of the Childs Rights Act, he married a 13-year-old Egyptian child.

<sup>217</sup> EEO Alemika, I Chukwuma, D Lafrata, D Messereli and J Souckova, ‘Rights of the Child in Nigeria’ (2005) A report on the Implementation of the convention of the rights of the child by Nigeria.

<sup>218</sup> UNICEF: 23 States pass the Child Rights Act in Nigeria available at <https://www.today.ng/news/nigeria/124161/23-states-pass-child-rights-nigeria-unicf> accessed on 27 April 2017.

<sup>219</sup> Section 2 of CYPA.



groups have a practice of initiation into adulthood and until the child passes through the initiation, he/she will remain a child or, alternatively, until he/she is old enough to contribute financially to community development. While in others, childhood terminates at puberty.<sup>220</sup>

The Sexual Offences Bill 2015 sets the minimum age of sexual consent at 11 years.<sup>221</sup> This Bill shows a lack of harmonisation with the Child Rights Act.

The different laws and the federal nature of Nigerian law makes the applicability of these laws and the protection of children's rights in Nigeria very difficult tasks. For example, when a person marries a child under Islamic law in Northern Nigeria and as a result contravenes the Child Rights Act,<sup>222</sup> such a person cannot be prosecuted because the federal government would be interfering with an Islamic marriage.

#### **4.3. Role of stakeholders in curbing child marriages in Nigeria**

Similar to South Africa, Nigeria benefits from the role of governmental and non-governmental stakeholders in the curbing of child marriages. Government bodies have the role to ensure social cohesion and the respect of children's rights while the education function focuses on availing more opportunities to young girls. The police services educate communities while arresting offenders.

In 2015, the Nigerian Foreign Ministry<sup>223</sup> launched a strategic plan aimed at ending child marriages in the country by 2021. The plan aims at implementing a multi-faceted approach to ending child marriages which includes interventions such as:

- research to understand the drivers of child marriages;
- researching and drafting a situational analysis;
- the identification of the strategies aimed at addressing the drivers of child marriages and gender inequality; and
- developing a monitoring framework for activities initiated on the ground.

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<sup>220</sup>Child Rights Act 38 of 2005.

<sup>221</sup> Section 7(2) of the Sexual Offences Bill 2015

<sup>222</sup> Child Rights International Network, 'Nigeria: National Laws' (2011).

<sup>223</sup> Girls not brides 'Nigeria National Strategy to end child marriages 2016-2021' available at <https://www.girlsnotbrides.org/resource-centre/national-strategy-end-child-marriage-nigeria-2016-2021/> accessed on 27 April 2017.

The joint comment<sup>224</sup> by the ACHPR and ACERWC also applies to child marriages in Nigeria and seeks to advocate for the adequate prosecution of offenders despite child marriages having been concluded under the provisions of customary or Sharia law.

Religious leaders also have a crucial role to play in the Nigerian society's fight against early child marriages. With the population of Nigeria being made up of about 43 per cent Christians and 50 per cent different Muslim groups<sup>225</sup>, these religions dominate more than 90 per cent of the religious space in the country. Hence, most of the religious interventions for fighting child marriages in Nigeria arise from the Christian and Muslim faith leaders. For instance, between 2013 and 2015, the Ford Foundation funded a project championed on the ground by the Girl Child Concerns (GCC) and the Isa Wali Empowerment Initiative (IWEI) which aimed at eliminating early child marriages, especially in Northern Nigeria.<sup>226</sup> This project targeted Muslim leaders through capacitation workshops aimed at enhancing their understanding of early child marriages, and resulted in the Muslim leaders championing enlightenment through finding scriptures that support girls' education and empowerment.<sup>227</sup> Through exposing religious leadership to the finer details associated with child marriages such as the dangers on reproductive health, leaders are placed in a better position to influence followers under them and encourage young girls to pursue empowerment and education.

Evidence also shows that not only national stakeholders or traditional and religious leaders have a role to play in ending child marriages in Nigeria. In January 2019, Plan International reported the story of a petition gathering momentum in Nigeria,<sup>228</sup> which was started by three girls, Susan, Kudirat and Temitayo, through their non-profit organisation, 'It's Never Your Fault'. After news broke in December 2018 about a man in his 70s who married a 15 year old girl<sup>229</sup>, the subsequent uproar in Nigerian society prompted the three girls to start a non-profit organisation and take raising the marriage age to 18 years as their first fight. Since then, the petition has gained more than 231 000 signatures and appears to be gaining further momentum on Change.org.<sup>230</sup>

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<sup>224</sup> The African Commission on Human & Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) (2017). Joint General Comment on Ending Child Marriage

<sup>225</sup> Wee, R. Y. 'Religious Beliefs In Nigeria' *WorldAtlas 2019* available at <https://www.worldatlas.com/articles/religious-beliefs-in-nigeria.html/> accessed on 27 November 2019.

<sup>226</sup> J.A. Walker 'Engaging Islamic Opinion Leaders on Child Marriage: Preliminary Results from Pilot Projects in Nigeria' (2015) 13:3 *The Review of Faith & International Affairs* pp 48-58 available at <https://DOI:1080/15570274.2015.1075760> accessed on 5 May 2020.

<sup>227</sup> *Ibid.*

<sup>228</sup> Plan International, Nigerian teens launch petition to ban child marriage (2019) available at <https://plan-international.org/news/2019-01-31-nigerian-teens-launch-petition-ban-child-marriage> accessed 22 November 2019.

<sup>229</sup> Salau, T. '#ChildNotBride: 70-year-old man ties the knot with 15-year-old girl' *The Guardian* 14 December 2018 available at <https://guardian.ng/news/childnotbride-70-year-old-man-ties-the-knot-with-15-year-old-girl/> accessed 22 November 2019.

<sup>230</sup> 'Raise the age of consent in Nigeria from 11 to 18' Change.org available at [https://www.change.org/p/it-s-never-your-fault-raise-the-age-of-consent-in-nigeria-from-11-to-18?use\\_react=false](https://www.change.org/p/it-s-never-your-fault-raise-the-age-of-consent-in-nigeria-from-11-to-18?use_react=false) accessed 5 May 2020.

While this paper is not a comparative study between South Africa and Nigeria, it is important to note that in South Africa, stakeholders such as COGTA have come out to directly address the issue of the transformation of culture by making a call to transform culture and bring it in line with the Constitution. In Nigeria, traditional leaders have been more reluctant to join the fight against child marriages due to the deep-rooted culture and acceptance of Sharia law. The case of Senator Ahmed Sani Yerima who married a 13-year-old is an illustration of the lack of political will to end child marriages. While the voice of stakeholders such as political and traditional leaders in Nigeria has not been as loud as that of South Africa, children in Nigeria are taking part in the fight against child marriage. This is commendable and has been absent in South Africa.

These interventions by a number of stakeholders, including children, show that similar to South Africa and other countries, the fight against child marriages in Nigeria has also taken a multi-dimensional approach with several different stakeholder groups, such as governments, international bodies, law enforcement groups, civil society and girls themselves, coming in to make an impact.

#### **4.4. Prosecution of child marriage cases in Nigeria**

In spite of existing law reform in Nigeria, the prosecution of offenders is still challenging as a result of the complexities in the country's legislation concerning marriages. In Nigeria, a dual system exists where Constitution is used concurrently with customary law to outline the rights of individuals.<sup>231</sup> The dual system creates a situation whereby women and children are subjected to detrimental cultural and traditional customs.<sup>232</sup> Due to the existence of dual legal systems, the marriage rights accorded to women and men differ significantly.<sup>233</sup> In South Africa, however, although a plural system exists which recognises both the common law, customary law and legislation, all laws in South Africa are subject to the supremacy of the Constitution. This means that practices which are harmful to children are brought in line with the Constitution.

According to Agege et al (2017),<sup>234</sup> despite Nigeria outlawing child marriages in 2003 through the Child Rights Act (CRA), conflicts still exist with customary and Islamic laws governing marriage, specifically, Sharia law which recognises puberty signs as 'maturity for marriage' signs even if the girls are younger than 18, the federal minimum marriage age. Since the Child Rights Act of 2003 was passed

<sup>231</sup> Toyo N. (2006). Revisiting Equality as a Right: The Minimum Age of Marriage Clause in the Nigerian Child Rights Act, 2003. *Third World Quarterly*, Vol 27(7) pp 1299-1312.

<sup>232</sup> Malhotra A, McGonagle W, and Lee-Rife S (2011). Solutions to End Child Marriage: What the Evidence Shows. International Centre for Research on Women. Washington-DC

<sup>233</sup> Rembe S, Chabaya O, Wadesango N & Muhuro P 'Child and forced marriage as violation of women's rights, and responses by member states in Southern African Development Community' (2011) 25:1 *Agenda* pp 65-74.

<sup>234</sup> Agege, E. A., Nwose, E. U., Odjimogho, S. and Igumbor, E. O. (2017). Legalities of child marriage in Nigeria: Implications on health and strategies of prevention, *Sex Health Issues*, 1(1) pp. 1-4

at a federal level, it can only be effectively implemented in states which have adopted it. However, to date, 11 northern states, which are dominated by the Muslim faith, have not yet adopted the Act, but use Sharia law to govern marriages,<sup>235</sup> and the Nigerian central government cannot control customary and Islamic marriages due to the existing tripartite legal system. As a result, all child marriages conducted in line with Islamic law in Northern Nigeria cannot be prosecuted on the grounds of the CRA. Worse still, the CRA is made useless in all the states of Nigeria due to the supremacy of the Constitution in the country, of which part 1 section 61 of the 1999 Constitution allows for marriages under customary and Islamic law<sup>236</sup>. In cases where some Northern Muslim dominated states such as the Jigawa state have re-enacted the CRA, certain manipulations have been made to the original provisions of the Act<sup>237</sup>. According to Iyabode,<sup>238</sup> Jigawa state's child rights law bans all child marriages, but defines a child as a person who has not yet reached puberty, defined in the law as the age at which a person is physically and psychologically prepared to consummate in marriage.

An example of a challenging case involving a child marriage was Senator Ahmed Sani Yerima's marriage to a 13-year-old Egyptian girl<sup>239</sup> which has been discussed in chapter 2 with reference to the tripartite operation of the Nigerian legal system. While Senator Yerima's marriage was morally wrong, he could not be prosecuted by anyone since his marriage was conducted under Islam law. According to Braimah (2014:486), the senator was quoted as saying:

“Prophet Muhammad (SAW) married Aisha at the age of nine. Therefore, any Muslim who marries a girl of nine years and above is following the teaching and practices of prophet Muhammad (SAW). If there is anybody who will tell me that what you did contradicts Islam, I will say I will submit, and I will do whatever they ask me to do.”

Furthermore, other child marriage related cases, especially in Northern Nigeria, have left some girls on death row.<sup>240</sup> In one case, a girl named Maimuna Abdulmunini was sentenced to death (in 2012 when she was 18 years old) for burning her then 35-year-old husband to death when she was only 13. In a more recent case, Wasila Tasi'u may be sentenced with a death penalty for allegedly murdering her 35-year-old husband, when she was 14. Clarke notes that there are several such cases involving girls

<sup>235</sup> Braimah, T. S., Child marriage in Northern Nigeria: Section 61 of Part I of the 1999 Constitution and the protection of children against child marriage, *African Human Rights Law Journal*, 2(8) pp. 474-488, 481.

<sup>236</sup> Braimah, TS 'Child marriage in Northern Nigeria: Section 61 of Part I of the 1999 Constitution and the protection of children against child marriage' (2014) 14:2 *AHRLJ* pp 474-488.

<sup>237</sup> Musawah, (2017). *Musawah Thematic Report on Article 16 & Muslim Family Law: Nigeria*, 67<sup>th</sup> CEDAW Session, Geneva, Switzerland.

<sup>238</sup> Iyabode, O., (2011). Child Bride and Child Sex: Combating Child Marriages in Nigeria, *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 2(1) pp. 85-96

<sup>239</sup> Clarke, J. S., 'Nigeria: Child brides facing death sentences a decade after child marriage prohibited'. *The Guardian* 11 March 2015 available at <https://www.theguardian.com/global-development-professionals-network/2015/mar/11/the-tragedy-of-nigerias-child-brides> accessed on 20 November 2019.

<sup>240</sup> *Ibid.*

married while under the legal age, but these cases are difficult to prosecute due to the slow-moving process of legal reform, and the responsiveness of local court systems.<sup>241</sup>

Nevertheless, despite the challenges with legal reform, scholars believe there are ways to ensure the protection of children under the marriage age through the use of other legislation related to child protection. For instance, Nwauche<sup>242</sup> points to the ‘best interests of the child’ legislation in the CRA that can be applicable in prosecuting child marriage cases. While pointing to cases such as *Williams v Williams*<sup>243</sup> and *Odogwu v Odogwu*<sup>244</sup> in which the Nigerian Supreme Court took into account a child’s happiness and psychological development when making a determination in custody determination suits, Nwauche notes that prosecutors can argue that child marriages do not serve the best interests of the child, hence they are not legal<sup>245</sup>.

#### 4.5. Problems with Nigeria’s handling of child marriages

As noted in recent empirical studies, Nigeria’s legal systems on handling child marriages are limited, especially in applicability, implementation and prosecution.<sup>246</sup> In addition to the empirical findings on the challenges with Nigeria’s child marriage laws, treaty monitoring bodies, such as the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), have also raised concerns on the legislative loopholes in Nigeria’s child marriage laws such as the conflicts between the CRA and Constitutional provisions as well as customary and Islamic law.<sup>247</sup> In the ACERWC’s concluding observations on the initial and periodic reports for Nigeria,<sup>248</sup> the following concerns on Nigeria’s child marriage law were raised.

- Due to the Nigerian governance three-tiered framework with National, State and Local levels, the CRA has only been re-enacted in 19 out of the 36 states. This meant that, at the time, 17 states had not re-enacted the Act, and still had a minimum age for marriage lower than the

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<sup>241</sup> Clarke, J. S., ‘Nigeria: Child brides facing death sentences a decade after child marriage prohibited’. *The Guardian* 11 March 2015 available at <https://www.theguardian.com/global-development-professionals-network/2015/mar/11/the-tragedy-of-nigerias-child-brides> accessed on 20 November 2019.

<sup>242</sup> Nwauche, E. S. ‘Child marriage in Nigeria: (Il)legal and (un)Constitutional?’ (2015) 15:2 African Human Rights Law Journal pp. 421-432.

<sup>243</sup> (1987) 7 NWLR (Pt 252) 187

<sup>244</sup> (1992) 2 NWLR (Pt 252) 539

<sup>245</sup> Nwauche ES ‘Affiliation to a new customary law in post-apartheid South Africa’ (2015) 18:3 Potchefstroom Electronic Law Journal pp 1-25 available at [https:// DOI: 10.4314/pelj.v18i3.04](https://doi.org/10.4314/pelj.v18i3.04) accessed on 6 May 2020.

<sup>246</sup> Musawah, (2017). Musawah Thematic Report on Article 16 & Muslim Family Law: Nigeria, 67<sup>th</sup> CEDAW Session, Geneva, Switzerland.

<sup>247</sup> Human Rights Council, ‘Preventing and eliminating child, early and forced marriage’ (2014) Report of the Office of the United Nations High Commissioner for Human Rights 15.

<sup>248</sup> ACERWC, Concluding recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Nigeria report on the status of implementation of the African charter on the rights and welfare of the child, African Union (2005).

federal age of 18. However, according to recent data, the number of states still to re-enact the CRA has dropped to 11, and the states left out are mostly in the Northern region.<sup>249</sup>

- Contradictions and inconsistencies exist in applying statute law, policy and customary practices. While the CRA and the Constitution clearly stipulate the children's rights and set the minimum marriage age as 18, several areas, especially rural areas, use customary law and Sharia law to justify the marriage of children below 18.

In addition, other similar concerns were also raised by the Convention on the Rights of the Child (CRC)<sup>250</sup> on Nigeria's child marriage laws. For instance, the CRC notes that as evidenced by the second periodic report, Nigeria has only partially implemented the recommendations put forward to combat child marriages. These interventions include mainstreaming customary law with regional and local legislation, the prosecuting of cases of harmful traditional practices against children and enhancing the awareness of children's rights.

Legislation and law reform in South Africa are clearer on the position of child marriages than that of Nigeria. The existence of a variety of conflicting laws with regard to the age of majority in Nigeria results in complications with the adjudication of child marriages in courts. Nigeria requires an amendment of its Constitution. Furthermore, Nigeria requires the enactment of new laws that will bring the age of majority to 18. South Africa's law reform has shown to be more progressive, however, government is required to fast-track the enactment of the Prohibition of Forced Marriages Bill. The judiciary in South Africa has ruled against child marriages as was seen in the *Jezile* case unlike in Nigeria where the legislative loopholes make the prosecution of child marriages difficult.

#### **4.6. Other interventions adopted for combating child marriages in Nigeria**

A number of preventative measures have been taken by Nigeria in an effort to prevent early child marriage. Some of these preventative measures taken are as follows:

- In 2016, the Ministry of Women Affairs and Social Development launched a National Strategy to End Child Marriage. The strategy's vision is to reduce child marriage by 40 per cent by 2020 and end the practice entirely by 2030.<sup>251</sup>
- In 2015, Commonwealth countries (including Nigeria) adopted the Kigali Declaration<sup>252</sup>, which sets out a framework for action by National Human Rights Institutions on child marriage. In

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<sup>249</sup> Op Cit note 236

<sup>250</sup> Convention on the Rights of the Child (2005). Concluding observations: Nigeria, United Nations

<sup>251</sup> The National strategy to end child marriage and teenage pregnancy 2015/2015-2019/2020: A Society free from child marriage and teenage pregnancy available at [https://www.girlsnotbrides.org/wp-content/uploads/2017/04/Strategy-to-end-child-marriage\\_for-printing\\_08-03-2017.pdf](https://www.girlsnotbrides.org/wp-content/uploads/2017/04/Strategy-to-end-child-marriage_for-printing_08-03-2017.pdf) accessed on 2 April 2019.

<sup>252</sup> Commonwealth 'Kigali Declaration: Moving from aspiration to action to prevent and eliminate child, early and forced marriage in the Commonwealth' (2015) available at

the declaration, Commonwealth nations pledge to, among other interventions, foster international and national collaborations for fighting child marriages, strengthen the monitoring of the enforcement laws, advocate for law reforms to align the marriage age with international standards and encourage dialogue and promote partnerships and collaborations with traditional leaders in the prevention of early and forced child marriages.

- At the Conference on the Social Protection of the Girl Child organised by Action Aid Nigeria, the Emir of Kano announced that he would bring in renowned Islamic Clerics from all over the world to discuss this issue at an international conference and dialogue with them on the possible interventions for ending child marriages in their regions.
- Male and Wodon<sup>253</sup> also argue that the lack of access to empowerment facilities, such as education, is a contributor to early child marriages. As a result, educational attainment should be made a priority in countries where the prevalence of child marriages is high, to empower girls to pursue careers.

Notwithstanding the current legislation, there are other initiatives that could be implemented in an effort to curb early child marriages and prevent its precarious outcomes. For example, the scope of the existing child-marriage prevention programmes that are targeted at unmarried girls should be widened to include the education of parents and, especially, the men who might pursue young girls for marriage as well as the provision of interventions for women already married as children.<sup>254</sup> According to Braimah, other efforts to prevent early child marriages could include social change programmes to provide education and employment opportunities for girls in underdeveloped areas since education provides an occupation that girls can concentrate more on, and not fall into early marriages.<sup>255</sup>

#### **4.7. Chapter summary**

From the findings of this review, it is clear that the use of a tripartite legal system in Nigeria must be considered when balancing the rights of females as compared to those afforded to men. In addition, more awareness and a change of practice and, in some cases, legislation/policy are needed for the protection of children's rights in Nigeria.

The law in Nigeria is aimed at nullifying any cultural practice that is harmful to the child. However, the implementation of these laws is problematic. Evidence of the ineffectiveness of the law in some parts

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<https://thecommonwealth.org/sites/default/files/inline/Kigali%20Declaration.pdf> accessed on 20 November 2019.

<sup>253</sup> Male, C. & Wodon, Q. 'Girls' Education and Child Marriage in West and Central Africa: Trends, Impacts, Costs, and Solutions' (2018) 47:2 *Forum for Social Economics* pp 262-274.

<sup>254</sup> Op Cit note 236

<sup>255</sup> Op Cit note 236

of Nigeria is that perpetrators of child marriages have not been arrested.<sup>256</sup> The country is bound by federal laws, but a statutory law cannot be applied to marriages contracted under Customary or Islamic laws.<sup>257</sup> Sharia laws need to be brought into line with laws' statutory provisions that protect the rights of the child in order to curtail child marriages.

The above analysis also indicates that governments in Africa have embarked on various actions to prohibit the cultural customs, which infringe on the rights of women and children. Current legislation and policy implements are functioning and commendable in many instances, despite failing to produce the anticipated changes. The findings indicate that, in spite of the localisation and ratification of appropriate legislation, implementation and prosecution continue to remain an obstacle.

The subsequent chapter will identify the lessons and best practices that can be gleaned from the initiatives by other African countries hoping to prohibit the practice.

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<sup>256</sup> Fayokun KO 'Legality of child marriage in Nigeria and Inhibitions against Realisation of Education Rights; (2015) 12:812 *US-China Law Rev.*

<sup>257</sup> Chindah T 'Nigeria's Child Rights Act: Ratification, implementation and domestication' (2017) 1:1 *Open Access Text Sexual Health Issues* available at <https://www.oatext.com/pdf/SHI-1-105.pdf> pp 1-4 accessed on 27 April 2019.



## **CHAPTER 5**

### **BRIEF OVERVIEW ON THE LESSONS AND BEST PRACTICES FROM OTHER AFRICAN COUNTRIES**

#### **5.1. Introduction**

This chapter is intended to clarify the lessons and best practices that can be learnt from the initiatives used to prohibit the practice of early child marriages in other African countries. A consolidation of the findings on law reform, grassroots actions in countries and other interventions for ending child marriages will be presented before the recommendations based on the best practices and other lessons learnt are presented.

#### **5.2. Strategies and interventions for ending early child marriages in Africa**

Chapters 3 and 4 presented a comprehensive review of the practices in two African countries with a few mentions of other relevant jurisdictions aimed at ending child marriages on the continent. These practices can narrowly be grouped into (i) proactive/prevention measures (i.e. measures for empowering young girls), and (ii) legislative measures/law reform.

Chapters 3 and 4 also provided an in-depth discussion of the challenges facing governments in the curbing of early child marriages, especially with regard to legislative interventions. Empirical studies suggest that legislative interventions are often ineffective on their own in ending early child marriages due to the difficulty in the enforcement of laws in the victims' communities. This subsection consolidates the discussion of the interventions by exploring both the preventive and reactive measures being implemented by African countries in the curbing of early child marriages.

##### **5.2.1. Preventive strategies**

Most preventive measures become effective when implemented at the grassroots level where both the victims and perpetrators can be found. Preventive strategies are often initiated and implemented with the involvement of key stakeholders such as the influencers in communities and community leaders.

In Malawi, there are reports of chiefs intervening in their local communities to save girls married before the legal age from their marriages, and return them to school.<sup>258</sup> In addition, some chiefs in Malawi have been using a combination of decrees against child marriages in their communities and encouraging

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<sup>258</sup> A Brown 'Almost half of all girls in Malawi are married before the age of 18' *UNICEF* 27 April 2018 available at <https://www.unicef.org/stories/malawi-local-chief-leads-effort-end-child-marriage-community> accessed on 6 May 2020.

young girls to pursue education and other empowerment opportunities.<sup>259</sup> Moreover, the recently initiated cash transfer initiative in a Malawian district has shown empirical evidence that shielding girls from poverty likely reduces their chances of being married off early by 40 per cent.<sup>260</sup> In Nigeria, efforts to educate Islamic leadership are ongoing, especially in the Northern states which are yet to re-enact the Child Rights Act which outlaws child marriages.<sup>261</sup> The target is to ensure that if religious leaders are more knowledgeable about the dangers of child marriages, they are likely to spearhead fights against it through religious interventions.

Throughout the African continent, there is evidence of increasingly louder calls for the ending of child marriages, now currently being driven by the desire to meet the Millennium Development Goal of ending child marriages. Heads of states are receiving constant pressure from other governments, human rights watchdogs and civil society groups. This has prompted numerous campaigns and responses from across the continent. For instance, in Ethiopia,<sup>262</sup> a continent-wide campaign against early child marriages was launched on 29 May 2014, according to the Human Rights Watch. Together with the appointment of the new AU special rapporteur and goodwill ambassador for the AU on child marriage from Ethiopia, the campaign targets empowering victims to become self-sustaining and not view marriage as a solution to their socio-economic challenges.<sup>263</sup>

While multiple blueprints and solutions might be produced and systems appear to be set up in place, Human Rights Watch points out that without coordination among key players, good ideas are likely to go unimplemented, or partly implemented. For instance, the Malawian system for preventing early child marriages is articulate in assigning roles to multiple government departments and agencies, but on the ground, there is little to no communication among them to ensure that cases are identified and subsequently prosecuted. Coordination among the Ministry of Gender, Children and Community Development, Ministry of Justice and Ministry of Interior has proven to be challenging in Malawi, thus leading to multiple cases of child marriage going unprosecuted.

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<sup>259</sup> M Werft 'Meet the Southern Malawi Chief who Stopped 850 Child Marriages: They call her the "Marriage Terminator."' Global Citizen 7 April 2016.

<sup>260</sup> B Schubert and M Huijbregts 'The Malawi Social Cash Transfer Pilot Scheme, Preliminary lessons learned' Paper presented at the Conference on "*Social Protection Initiatives for Children, Women and Families: An Analysis of Recent Experiences*" New York 30-31 October 2006.

<sup>261</sup> J Walker 'Engaging Islamic Opinion Leaders on child Marriage: Preliminary results from pilot' (2015) 13:3 *The Review of Faith & International Affairs Journal* pp 48-58

<sup>262</sup> Human Rights Watch 'Ending Child Marriage in Africa: Opening the Door for Girls' Education, Health, and Freedom from Violence' (2015) available at [hrw.org: https://www.hrw.org/news/2015/12/09/ending-child-marriage-africa](https://www.hrw.org/news/2015/12/09/ending-child-marriage-africa) accessed on 14 October 2019.

<sup>263</sup> World watch Report 2015 available at [https://www.hrw.org/sites/default/files/wr2015\\_web.pdf](https://www.hrw.org/sites/default/files/wr2015_web.pdf) accessed on 6 May 2020.

Educating young girls is the fundamental reason for the international agreements around current educational reforms being executed in many African countries.<sup>264</sup> Many studies indicate that the less education young girls receive, the more likely they will marry early.<sup>265</sup> A number of programmes, such as the Millennium Development Goals, Global Basic Education Reforms and Early Childhood Development Programmes facilitated by the United Nations, are all aimed at achieving targets for registering and absorbing more young girls into the schooling systems.<sup>266</sup> The UN has recommended absorbing more young girls into the schooling system as a strategy for prohibiting the high prevalence of early child marriages in African countries.<sup>267</sup>

Education is frequently labelled as a symbol for women empowerment.<sup>268</sup> According to Tilson and Larsen, the association between women education and divorce is revealed to be positive.<sup>269</sup> This is partially consistent with other settings in Africa where fewer divorce cases are detected amongst unschooled women, and higher amongst educated women.

Ueyama and Yamauchi conclude that premature child marriage suggests reduced schooling amongst young girls, which may further diminish their negotiating influence in the family and accordingly have damaging outcomes on children.<sup>270</sup> Accordingly, Sawyer et al. argue that the investment in child education has strong benefits to them and their well-being, and is a strategy for increasing work opportunities, human rights, public wealth and shared resources.<sup>271</sup> The unfavourable consequences of early child marriage and premature pregnancy on the welfare and human rights of young girls are well recognised. Also undeniable is the disrupting impact of premature pregnancy on schooling and other societal networks which challenge their current and future wellbeing as well as that of their children.<sup>272</sup>

Pressure groups have also been at the forefront of spearheading anti-child marriages campaigns in Africa. In Nigeria, for instance, a number of schoolgirls have taken the initiative to pressure their government into implementing Constitutional reforms to protect the victims of early child marriages,

<sup>264</sup> Lloyd C and Mensch B. 'Marriage and childbirth as factors in dropping out from school: An analysis of DHS data from sub-Saharan Africa' (2008) 62:1 *Population Studies* pp1-13.

<sup>265</sup> Svanemyr J, Chandra-Moulli V, Christiansen S, Mbizvo M 'Preventing Child Marriages: First International day of the girl Child "my life, my right, end child marriage"' (2012) 9:1 *Reproductive Health* pp 31

<sup>266</sup> Uecker J and Stokes C 'Early Marriage in the United States' (2008) 70 *Journal of Marriage and Family* pp 835-846

<sup>267</sup> S Rembe, O Chabaya, N Wadesango & P Muhuro 'Child and forced marriage as violation of women's rights, and responses by member states in Southern African Development Community' (2011) 25:1 *Agenda* pp 65-74.

<sup>268</sup> Op Cit note 124.

<sup>269</sup> Tilson D and Larsen U 'Divorce in Ethiopia: The Impact of Early Marriage and Childlessness' (2000) 32 *Journal of Biosocial Science* pp 355-372.

<sup>270</sup> M Ueyama and F Yamauchi 'Marriage Behaviour Response to Prime-Age Adult Mortality: Evidence from Malawi' (2009) 46:1 *Demography* pp 43-63 available at <https://doi.org/10.1353/dem.0.0039> accessed on 7 May 2020

<sup>271</sup> Sawyer S, Afifi R, Bearinger L, Blakemore S, Dick B, Ekeh A & Patton G. (2012). Adolescence: a foundation for future health; *Adolescent Health1*, Vol 379: pp 1630-1640

<sup>272</sup> Ibid

according to CNN (2019).<sup>273</sup> Through the use of online petitions and media appearances, these girls hope to gather momentum for their campaign and attract the attention of their government. According to UNICEF, grassroots campaigns are key in the fight against early child marriages since they educate people on the dangers of early child marriages. Hence, instead of relying on policy and legislative interventions made from above, grassroots campaigns are directly targeted at the affected communities, and their effect can be intensified where members of the grassroots are part of the campaigns.

Walker highlights that the most effective strategy for curbing early marriages is targeting girls within their families.<sup>274</sup> According to Walker's assertions, this can be accomplished through schooling interventions, career guidance programmes, sensitisation and knowledge sharing programmes also aimed at altering the conduct and attitudes of traditional opinion leaders as a central requirement for the collective mobilisation against harmful practices. Walker further argues that governments have a catalytic responsibility to create more work opportunities for young girls and boys, as well as offer a legal and policy framework for execution. Moreover, cooperation and alliance across the variety of participants dedicated to decreasing early child marriages in the entire continent of Africa are a compulsory requirement for prolonging transformation.<sup>275</sup>

### **5.2.2. Gender empowerment programmes**

Preventative measures are often more effective when the vulnerable group is empowered. Empowering young girls through the implementation of gender empowerment programmes as a preventative measure in curbing child marriage has been adopted in several African countries such as Tanzania, South Africa and Uganda.<sup>276</sup> These gender empowerment programmes equip girls with critical resources such as skills, information and social support. Since 2001, UNICEF and the Division for the Advancement of Women (DAW) within the UNDP have supported international programmes towards enforcing child rights as a tool for stimulating governmental leadership and the submission to international norms and conventions.<sup>277</sup> Member states of the African Union illustrated their support of gender empowerment programmes in July 2004 by adopting the Solemn Declaration on Gender Equality in Africa.<sup>278</sup>

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<sup>273</sup> 'These schoolgirls want an end to child marriage. So they're fighting to change their country's Constitution' CNN 2019 available at <https://edition.cnn.com/2019/05/25/africa/nigerian-girls-child-marriage-campaign-intl/index.html> accessed on 10 October 2019.

<sup>274</sup> Walker 'Early Marriage in Africa' (2012) 16:2 *African Journal of Reproductive Health* (Special Edition) pp 231-240

<sup>275</sup> *ibid*

<sup>276</sup> Palermo T and Peterman A. 'Are female orphans at risk for early marriage, sexual debut and teen pregnancy? Evidence from Sub-Saharan Africa' (2009) *Studies in Family Planning*, 40(2) 101-112.

Some examples of these gender empowerment programmes can be found in countries such as Tanzania, Uganda and South Africa.<sup>279</sup> Tanzania is particularly concerned with addressing the economic situation of rural women.<sup>280</sup> In 2014, Uganda signed up for the Global UNDP Gender Equality Seal (GES) programme and developed a Gender Equality Strategy (2014-2017) and an action plan for gender equality within the country.<sup>281</sup> One of the many ways in which South Africa has endorsed gender empowerment programmes is through the development of the National Policy Framework for Women Empowerment and Gender Equality. Moreover, important areas of concern such as poverty, education, the high prevalence of HIV/AIDS, gender inequality and economic emancipation have also been recognised as possible barriers which must be taken into consideration when efforts are made for the promotion and development of gender empowerment programmes.<sup>282</sup>

Research conducted on the execution of global and regional norms and principles for curbing gender inequalities indicates that some African countries have charters that unequivocally prohibit gender discrimination.<sup>283</sup>

In Africa, establishments such as women empowerment ministries and support structures are amongst the developments created by many countries, especially in Southern Africa, to execute the strategies devised to improve gender equity and the emancipation of women.<sup>284</sup> Additionally, several pieces of legislation and policies have been formulated and executed in order to promote gender equity and improve and localise the impacts of these establishments.<sup>285</sup>

In addition, national human rights commissions have been created by countries, such as Zimbabwe, South Africa, Tanzania and Malawi, with their responsibility involving the studying and monitoring of the rights of women.<sup>286</sup> In Malawi, the Human Rights Commission investigated the detrimental cultural customs which infringe upon the rights of women and children and devised strategy plans to prohibit these customs.<sup>287</sup>

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<sup>279</sup> Op Cit note 261.

<sup>280</sup> FAO, 2014. Tanzania Mainland country profile: gender inequalities in rural employment in Tanzania Mainland, an overview. Rome.

<sup>281</sup> UNDP Uganda, "The Gender equality seal" available at [http://www.ug.undp.org/content/uganda/en/home/ourwork/womenempowerment/in\\_depth.html](http://www.ug.undp.org/content/uganda/en/home/ourwork/womenempowerment/in_depth.html) accessed on 26 January 2018.

<sup>282</sup> Otoo-Oyortey N. and Pobi S. (2003) Early Marriage and Poverty: Exploring Links and Key Policy Issues. *Gender and Development* 11(2), 42-51.

<sup>283</sup> Lloyd C & Mensch B (2008) Marriage and childbirth as factors in dropping out from school: An analysis of DHS data from sub-Saharan Africa, *Population Studies*, Vol 62:1, pp 1-13,

<sup>284</sup> The African Child Policy Forum (2007). Realising Rights for Children: Harmonisation of Laws on Children Eastern and Southern Africa. Research Report, Addis Ababa, Ethiopia.

<sup>285</sup> UNICEF. (2005). Early Marriage: A Harmful Traditional Practice. A Statistical Exploration. New York

<sup>286</sup> Jensen R & Thornton R. (2003). Early female marriage in the developing world, *Gender & Development*, 11:2, pp 9-19,

<sup>287</sup> Malawi Human Rights Commission (2010). The status of the Human Rights of Women and Girls in Malawi.

Nevertheless, studies have concluded that some structures which deal with the rights of women and children are ineffectively skilled and not well resourced. Hence, they continue to be somewhat weak and incapable of reasonably executing gender policy interventions and campaigns.<sup>288</sup> According to the African Policy Forum, one major factor that militates the implementation of legislation aimed at tackling detrimental cultural customs and practices in many African countries hinges on the reality that magistrates and judges in courts are predominantly male, and most of these male magistrates and judges still hold firm patriarchal views which effectually opposes change.<sup>289</sup> In Nigeria, early child marriage is driven by gender inequality.

### 5.2.3. Law reform

The reforming of laws is perhaps the most widely implemented measure to fight early child marriages in Africa and the world. It has also been discussed in the previous chapters that law reform in isolation without grassroots-targeting initiatives is insufficient as a preventive measure. Regardless of this argument, various legislative interventions across the continent are notable, and demonstrate the states' commitment to fighting early child marriages.

An example is the Malawian Marriage Act of 2015 which raised the minimum age for marriage to 18 years and classified violators of such a law in Malawi. This provision, according to Wang, received widespread domestic and international attention due to its setting of the minimum marriage age and the demands for the formal government registration of all marriages.<sup>290</sup> However, it appears that child marriages in Malawi were condoned by section 22(6) of the Malawian Constitution of 1994 which set the minimum marriage age to be between the ages of 15 to 18. The contradiction between the Constitution (which is the supreme law) and the Marriage Act thus created loopholes that perpetrators could easily manipulate. Consequently, Wang advocated that Constitutional amendments needed to be made to stipulate and establish 18 years as the minimum age of marriage. South Africa faces a similar challenge, but in a different dimension.<sup>291</sup> In 2016, a Bill for the Amendment of the Constitution was drafted by the Ministry of Justice. The Constitutional Amendment Bill No.36 was passed unanimously with 131 votes. This ensures there is harmonisation between the Constitution and the Marriage Act and

<sup>288</sup> Boyden J, Pankhurst A & Tafere Y.(2012). Child protection and harmful traditional practices: Female early marriage and genital modification in Ethiopia, *Development in Practice*, 22:4, pp 510-522

<sup>289</sup> The African Child Policy Forum (2007).Realizing Rights for Children: Harmonization of Laws on Children Eastern and Southern Africa. Research Report, Addis Ababa, Ethiopia

<sup>290</sup> V Wang 'Ending Child Marriages – new laws bring progress but hurdles remain' (2016) 4 *CMI insight* p3.

<sup>291</sup> H Wang et al 'Resource use in growing China: Past trends, influence factors and future demand' (2012) 16:4 *Industrial Ecology* pp 481-492 available at <https://doi.org/10.1111/j.1530-9290.2012.00484.x> accessed on 7 May 2020

marked a historic day for girls in Malawi. The Constitutional Amendment Act No.36 was passed on February 14, 2017.<sup>292</sup>

While the South African Constitution is clear that the minimum age of consent for marriage is 18, customary laws and common laws suggest that in tradition, marriage can be allowed where one party is below the age of 18. However, the pluralist status of South Africa means that courts can simply follow the dictates of the Constitution as the supreme law of the land and effectively outlaw all child marriages. Similar to South Africa, Nigeria's legal system also recognises customary and Sharia laws in addition to the Constitution. This has created challenges in the enactment of the Child Rights Act (CRA) of 2003 which was only passed at a federal level, and nationwide implementation depended on its adoption by each of the 36 states.<sup>293</sup> With 11 states still yet to ratify the CRA, the minimum age of marriage prescribed by the Nigerian federal government is yet to take countrywide effect. This is worsened by the conflict between Sharia law, which does not set a minimum age for marriage (puberty is used as a measure of marriage readiness), and the CRA. This conflict has created loopholes exploited by perpetrators. For instance, Senator Ahmed Sani Yerima's marriage to a 13-year-old Egyptian girl, who could not be prosecuted using the CRA since the marriage was enacted through Sharia law.

Legislative interventions become most effective when set to apply to all individuals living in a specific country, even if they come from other countries. Legislation can therefore be made to outlaw all exploitative customs ending in child marriages even if these customs originate from, or are being practised by, non-citizens. In this regard, the success story can be seen from the South African Prevention of Trafficking Act<sup>294</sup> which designates any person who (a) adopts a child legally or illegally for the purposes of exploitation of that child or (b) concludes a forced marriage with another person within or across the borders of South Africa as an offender. Other African countries, especially those receiving high numbers of migrants from their neighbours, should therefore take cognisance of the possible imported cultures which promote child marriages, and institute relevant legislations to protect everyone living within their borders.

Another case study of legislative intervention is Zimbabwe through the outlawing of child marriages in 2015.<sup>295</sup> The landmark 'Mudzuru' case resulted in the Constitutional Court setting aside sections of the Customary Law Act and the Marriage Act which did not specify the marriage age. The implementation of these laws, however, is subject to coordination among various government departments and agencies,

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<sup>292</sup> Girls Not Brides 'Malawi's Constitutional Change: a step forward towards ending child marriage' available at <https://www.girlsnotbrides.org/wp-content/uploads/2017/12/Malawi-case-study-template-19.12-FINAL.pdf> accessed on 28 October 2020.

<sup>293</sup> Op Cit note 229

<sup>294</sup> Chapter 2, Section 4(2)

<sup>295</sup> L Mwambene 'Recent Law Responses to Child Marriage in Southern Africa: The case of Zimbabwe, South Africa and Malawi' (2018) 18:2 *African Human Rights Journal* pp 527-550.

as well as the willingness of grassroots leaders to spearhead anti-child marriages in their local communities. For instance, in South Africa, the Gender Directorate has called for an alignment of the country's religious and cultural values to the Constitution, with the cooperation of community leaders.

As discussed in this chapter, efforts to eliminate child marriages across the continent have been anchored on the provision of legislation as a starting point. Empirical studies, such as that of Svanemyr et al.<sup>296</sup>, argue that the availability of legislation on ending child marriages has a limited contribution in ending child marriages. Rather, the decline in early child marriages was attributable to initiatives such as the increased education for girls and community outreach activities. Consequently, the need to follow up legislation by community outreach activities meant to spread awareness on the rights of the child cannot be ignored. In the end, the laws act only as 'enablers' to a culture of ending child marriages.

#### **5.2.4. The need to curb poverty and improve the standard of living in rural areas**

This study has revealed that poverty is one of the substantial contributors to the prevalence of child marriages in Africa. Therefore, there is a need to improve the standard of living in rural communities in order to lessen the numbers of families who accept lobola for their minor daughter as a means to an end. Governments in Nigeria and South Africa should implement the provision of credit facilities and micro-financing opportunities for people living in rural areas who depend on farming. Governments should focus on making needed agricultural inputs available to and affordable for the farmers.<sup>297</sup>

Land in the rural arrears is administered by traditional leaders. Governments should provide title deeds to people living in rural areas. People living in rural areas are unable to submit successful applications for home loans and, as a result, do not have basic housing and cannot benefit from economic opportunities that are only available to title deed holders.<sup>298</sup>

Job creation is at the epicentre of curbing poverty. Job opportunities should be created and maintained in rural areas. Youths have often been the target group of governments in the area of skills development and job creation. In addition to the youth empowerment initiatives, governments should also focus on the creation of jobs for women in rural areas. In most cases, it is the man who ventures out into urban

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<sup>296</sup> Svanemyr, J., Amin, A., Robles, O., and Greene, M. 'Creating an Enabling Environment for Adolescent Sexual and Reproductive Health: A Framework and Promising Approaches' *Journal of Adolescent Health* (2015) 56 available at <https://core.ac.uk/reader/82356834> accessed on 29 June 2020.

<sup>297</sup> PM Nkosi *"Ingcwaba Lentombi Lisemzini": A Socio-Cultural and gendered construction of Ukuthwala among the Zulu people in selected rural areas of Kwazulu-Natal* (Doctor of philosophy thesis, University of KwaZulu-Natal, 2011) available at <https://pdfs.semanticscholar.org/e889/ae0495fc292a67e94790508e7b8a36c331c7.pdf> accessed on 7 May 2020.

<sup>298</sup> L Matsila 'Villagers must get title deeds' *City Press* 10 October 2018 available at <https://citypress.news24.com/Voices/villagers-must-get-title-deeds-20181011> accessed on 7 May 2020.



areas to find gainful employment, leaving the woman at home to look after the children and home. There is a need to create employment within rural communities, so that women who cannot leave their homes as a result of the responsibility to look after the home, can benefit from this job creation.

The subsequent chapter will present the overall conclusions for the study as well as recommendations. It will explore the literature that highlights the schools of thought intended to identify solutions to the harmful practices against children.

## CHAPTER 6

### CONCLUSIONS AND RECOMMENDATIONS

#### 6.1. Introduction

This study focused on reviewing the prevalence of early child marriages across the African continent as found in literature, the interventions currently in place against early child marriages and the challenges stakeholders are facing in the attempt to implement these interventions. In chapter 2 (literature review), it was noted that child marriages are not only an African phenomenon but a global one with countries such as Bangladesh, India and Thailand ranking very high on the prevalence of child marriages levels in the world. Chapter 3 discussed in-depth the prevalence of early child marriages in South Africa as well as the interventions for curbing this as influenced by various stakeholders. Chapter 4 reviewed legislative reforms with more specific focus on Nigeria and explored the processes that have been undertaken to end child marriages in Nigeria. This section synthesises the findings from all these chapters for the drawing of overall conclusions on child marriages in Africa.

#### 6.2. Prevalence of early child marriages in Africa

A review of empirical studies suggests that the prevalence of child marriages cannot be viewed in isolation, but that perspectives should be drawn after establishing the root causes of the phenomenon. By identifying the causes, players will be better equipped to determine where interventions are mostly needed, and which interventions are likely to neutralise the challenge as opposed to a one-dimensional view of the problem in isolation. Treaty monitoring bodies, such as the Committee on Elimination of Discrimination against Women and the Committee on the Rights of the Child, believe that child marriages are perpetuated by deeply entrenched views that girls are of lesser value than boys. Thus, girls may not require that much advancement in society, and derive their value from getting married.<sup>299</sup>

Studies have also shown that people in vulnerable societies, such as the poorest, are mostly prone to child marriages, as they often marry off their children to search for better livelihoods through lobola payment and benefits from extended families.<sup>300</sup> This is true in numerous circumstances, and, at times, families get to marry off their daughters, hoping that their husbands would provide for them, thus reducing the burden on the family. This is corroborated by Erulkar who notes that, in Ethiopia, multiple girls who were victims of early child marriages were not given any opportunity to avail their consent

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<sup>299</sup> 'Women's rights are human rights' UNICEF (2014) available at

<https://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf> accessed on 22 May 2020

<sup>300</sup> 'Poverty' *Girls not Brides* available at <https://www.girlsnotbrides.org/themes/poverty/> accessed on 7 May 2020.

(even though their consent would have been invalid anyway) or informed prior to being sent off for marriage. Evidence also showed direct links between early marriage and the likelihood of the victim being in a rural area,<sup>301</sup> with other cases showing girls being married off before even fully reaching puberty.

Another key enabler of early child marriage is the cultural practices passed on over time which are still being practised in communities today. This practice was seen to be true in several African countries, including South Africa (*ukuthwala*) and Malawi (*kupimbira*). These practices are often supported by legislation which recognises customary practices, although recent advances in these countries have seen the prioritisation of the Constitution as the supreme law of the land. The discussion on ending child marriages promoted by cultural practices does not only end with the passing of legislation. Evidence from South African experiences has shown that without buy-in from traditional leaders in the cultures practising early child marriages, the passing of legislation may not change any such practices in these communities, hence the need for stakeholder commitment.

Overall, evidence shows that early child marriages are prevalent throughout the continent of Africa even though accurate and recent statistics are currently scarce. What is agreed upon by multiple stakeholders, such as international bodies, states and civil society, is that early child marriages should be eliminated, and that the victims need to be empowered in their societies. The convergence of legislation and outreach activities being initiated gives a chance to victims, punishes perpetrators and aims to transform community mindsets on the role of girls in society and the need to eradicate early child marriages.

### **6.3. Challenges facing stakeholders in implementing preventive measures**

From resource constraints to political complications facing various nations, the literature reviewed shows that parties are facing numerous challenges in their attempt to eradicate early child marriages. To begin with, intervention efforts seeking to prohibit the practice of child marriage are not at all times pronounced in the countries affected with the highest cases of child marriage practices.<sup>302</sup> Also, since most intervention efforts in these countries do not form part of government policies or socio-economic transformation agendas, they are not implementable in the long-term. Jain and Kurz corroborate this in their assertion that African countries and international agencies involved in the initiatives aimed at protecting girls' rights, curbing poverty and empowering women, have the capacity to eradicate early

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<sup>301</sup>A. Erulkar 'Early Marriage, Marital Relations and Intimate Partner Violence in Ethiopia' (2013) 39:1 *International Perspectives on Sexual and Reproductive Health* pp 6-13 available at <http://www.jstor.org/stable/23408822> accessed on 10 May 2017.

<sup>302</sup> op Cit note 125.

child marriage, but their interventions are not formulated with proper objectives in mind.<sup>303</sup> This shows that policies and ideas alone are not fully effective until they are implemented, especially with the commitment and cooperation of all the parties involved.

Studies also show that as long as the deep poverty affecting communities has not been addressed, it is virtually impossible to eradicate child marriages since parents will continue to marry off their daughters for lobola. Otoo-Oyortey and Pobi (2003) note that the effectiveness of such interventions is hampered by poverty and a shortage of sustainable income-generating opportunities for young girls, thus leading to an elevated number of child marriage incidents.<sup>304</sup>

In South Africa, the implementation of legislative reforms has been in a constant fight against laws which recognise traditional practices. Disagreements between the Commission on Gender Equality (CGE) and the Commission on the Protection of Rights of Cultural, Religious and Linguistic Communities on *ukuthwala* has meant that harmful traditional practices continue in a country where child marriages are specifically outlawed by the Constitution. It is the tentative Prohibition of Forced Marriages and Child Marriages Bill and the supremacy of the Constitution which will likely enhance the prosecution of child marriage perpetrators in South Africa. The proposed Bill attempts to “ensure that cases of child marriages are prosecuted to the extent of prosecuting even those who aid and abet such marriages and prosecuting perpetrators even if the marriage ended up not taking place.” This Bill would be a welcome development in the South African legislative interventions against child marriages since it will re-affirm the supremacy of the Constitution over customary laws. However, its effectiveness will depend largely on the adequate training and implementation of its provisions by the police and prosecuting authority, as well as the knowledge by stakeholders such as social workers and educators. Nigeria also faces similar challenges wherein cases of child marriages are difficult to prosecute due to the Constitutional recognition of customary practises that result in child marriages.

Furthermore, the integration of international and regional legislation at times resulted in conflict with customary laws in countries such as Malawi, Nigeria, Zimbabwe, South Africa and Ghana. In these instances, advocates for customary law have repeatedly pushed back against initiatives specifically targeting their customary practices. This has resulted in the continuation of early child marriages despite the existence of explicit national laws prohibiting the practice. This challenge is further exacerbated in instances where victims and their families are ignorant of national laws, thus curbing the potential channel for reporting. The pervasiveness of deep-rooted stereotypes and the continuation of fixed

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<sup>303</sup> Jain S & Kurz K ‘New Insights on Preventing Child Marriage. A Global Analysis of Factors and Programmes’ (2007) *International Center for Research on Women (ICRW)* available <https://n2r4h9b5.stackpathcdn.com/wp-content/uploads/2016/10/New-Insights-on-Preventing-Child-Marriage.pdf> accessed on 7 May 2020.

<sup>304</sup> Otoo-Oyortey N & Pobi S ‘Early marriage and poverty: Exploring links and key policy issues’ (2003) 11:2 *Gender & Development* pp 42-51.

traditional values, customs and cultures are thus key impediments to the success of transformative measures.

#### **6.4. Conclusion**

The study focused on exploring the recent law reform and other interventions aimed at ending early child marriages in Africa. The literature reviewed suggests a high prevalence of child marriages, not only in Africa, but across the world. Cases of early child marriages were found to be enabled by a plethora of socio-economic and cultural factors such as poverty prevalence, weak legislation, deep-rooted stereotypes about gender roles and cultural and religious practices supporting early child marriages. In response to the incidences, governments in Africa have been making progress in implementing law reforms, integrating international laws against child marriages into their laws and partnering with civil society in spearheading grassroots interventions.

However, studies have also shown that government bureaucratic systems have made it challenging for any legislative reforms to work, and institutions, in some instances, have been almost totally incapacitated to drive any impact. Worse still, push back from the supporters of customary laws practising early child marriages and the overall lack of stakeholder buy-in have slowed the successes of implementation measures across the continent. Nevertheless, recorded successes involve cases of full legal reform implementation and the influence of non-governmental organisations. It has been empirically proven, in some of the literature surveyed, that empowering women, for instance through education, is a significant step towards reducing early child marriages. Hence, stakeholders are investing more in such initiatives at grassroots levels.

#### **6.5. Recommendations**

In light of the findings and conclusion, it is recommended that:

- The Prohibition of Forced Marriages and Child Marriages Bill be enacted into law in South Africa as a matter of urgency. This Bill represents positive strides toward outlawing child marriages even if they are condoned by customary laws. Through its prosecution of accessories to the crime as well as those who attempt to force a child into marriage, the Bill will likely act as a strong preventive measure. However, there should be amendments to the Bill which provide for the education of all the stakeholders involved. This ensures greater knowledge of the legal position by everyone, including law enforcement bodies, child rights groups and the

local communities. The Bill must also be amended to impose sanctions against stakeholders, such as traditional leaders, under whose guard a forced marriage occurs.

- Court outcomes arising from the prosecution of child marriage offenders such as in the case of *Jezile v the State*, showed that *ukuthwala* practices are no excuse for the trafficking of women and underage brides. Court conclusions on this case should hence be publicised through multiple media outlets to create sufficient precedence for future cases and foster community awareness.
- The Nigerian federal government needs to re-affirm Constitutional supremacy over Sharia laws and customary laws in the country. States which are yet to re-enact the CRA need to be issued with an ultimatum to do so, as a matter of human rights protection. In conjunction with this, dialogue needs to continue with religious leaders, especially in the northern states, on the dangers of child marriages. Moreover, the Nigerian National Assembly needs to enact legislation reaffirming the supremacy of the Constitution and provisions such as the CRA over Sharia law.
- The inability of all departments in South Africa to effectively deal with the issue of *ukuthwala* is counter to the vision of eradicating harmful traditional practices against children as promoted by our Constitution. Government departments, SAPS, NPA and various other community stakeholders have a role to ensure a multi-sectoral approach to the eradication of this harmful practice.
- There should be provisions for all girls in rural and urban areas to access sexual reproductive health information and healthcare. This can be achieved through partnerships with civil society and the increase in national budgets for health and education.
- Local police need constant training to ensure that they are up-to date with the recent law reforms banning child marriages in their localities. Law enforcement officials need to understand where the line is drawn between harmless cultural practices and human rights abuses.
- Nationwide campaigns targeting parents, guardians and community leaders on the harmful effects of child marriage and the value of girls in society should be implemented. These campaigns should emphasise, for instance, the health risks of early pregnancy, the benefits of educating girls and the punishments for breaking national laws against child marriages.
- Together with such campaigns, governments should implement nationwide empowerment initiatives for girls. These will include skills training, career guidance and support networks as well as overall educational advancement.

## **6.6. Suggestions for further research**

The literature reviewed in this research paper as well as other studies affirm that the association of the domestic laws that forbid early child marriage with the pervasiveness of child marriages is not properly understood. Moreover, it also suggests that a further investigation is required to study the association between domestic regulations that set the minimum age for marriage for young girls at younger than 18 years or older and the incidence of premature child marriages and adolescent childbirth in the selected countries as well as in Africa as a whole.

## **BIBLIOGRAPHY**

### **Constitutions**

Constitution of Nigeria, 1999

Constitution of the Republic of South Africa, 1996

### **Legislation**

#### ***South Africa***

Children's Act 38 of 2005

Promotion of Equality and Prohibition of Unfair Discrimination Act 4 of 2000

Marriage Act 25 of 1961

Recognition of Customary Marriage Act 120 of 1998

Civil Union Act 17 of 2006

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

Prevention and Combating of Trafficking in Persons Act 7 of 2013

#### ***Nigeria***

Child's Rights Act 26 of 2003

Sexual Offences Bill of 2015

Children and Young People Act of 1943

#### ***Malawi***

Marriage, Divorce and Family Relations Act of 2015

#### ***Tanzania***

Tanzania Marriage Act CAP R.E. of 2002

### **Case Law (*South Africa*)**

*Jezile v S & Others* 2015 (2) SACR 452 (WCC)

*R v Swartbooi* 1916 EDL 170

*R v Sita* 1954 (4) SA 20 (E)

*Nkupeni v Numunguny* 1938 NAC (C&O) 77

*Bhe and Other v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC)

### **Case Law (*Nigeria*)**

*Odogwu v Odogwu* 1992 (2) NWLR (Pt 252) 539

*Williams v Williams* 1987 (7) NWLR (Pt 252) 187



### **Case Law (Zimbabwe)**

*Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others* 2015 CCZ

### **Case Law (Tanzania)**

*Rebecca Z. Gyumi v Attorney General*. 2016 Case No. 5

### **International and Regional Law**

The African Commission on Human & Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) (2017) *Joint General Comment on Ending Child Marriage*.

Organisation of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

Organisation of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

UN General Assembly, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 7 November 1962.

Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child *Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices*, CEDAW/C/GC/31-CRC/C/GC/1.

African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003 (the Maputo Protocol).

UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

CRC General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child of the Committee on the Rights of the Child 1 July 2003 CRC/GC/2003/4.  
CRC and CEDAW Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices 14 November 2014 CEDAW/C/GC/31/CRC/C/GC/18.  
Southern African Development Community Parliamentary Forum (SADC-PF) Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage.

### **Books and Chapters in Books**

Connell Raewyn *Gender and Power* (1987) Polity Press, Cambridge, UK.

John W Creswell *Research design: qualitative, quantitative and mixed-methods approaches* 3 ed (2009).

M Lau & D Hinchcliffe *Introduction to Islamic law* (2010).

R Levy ‘*The Social Structure of Islam*’ (2000) (First published 1957) p 106.

A Malhotra A, W McGonagle & S Lee-Rife *Solutions to End Child Marriage: What the Evidence Shows* (2011).

J Milton, J, P Hunt & E and Burchell *Common Law Crimes* (1996) pp 470-541.

E Thornberry “*Ukuthwala, forced marriage and the idea of custom in South Africa’s Eastern Cape*” (2016).

J Mouton *How to succeed in your Master’s and Doctoral Studies* (2001).

M Mukenge ‘Dreams of my Mother: Good news on ending Early Child Marriage’ in A Bunting, BN Lawrence and RL Roberts *Marriages by force? Contestation over consent and coercion in Africa* (2016) pp 269-274.

B Schubert & M Huijbregts ‘The Malawi Social Cash Transfer Pilot Scheme, Preliminary lessons learned’ Paper presented at the Conference on “*Social Protection Initiatives for Children, Women and Families: An Analysis of Recent Experiences*” (2006).

C S K Tardzer *My odyssey, My Country* (2012).

## Journal Articles

N Abiad & F Z Mansoor 'Criminal Law and the Rights of the Child in Muslim States: A Comparative and Analytical Perspective' (2010) *British Institute of International Comparative Law* pp 57-58.

S A Adebawale 'Dynamics of child marriage and marital timing in Nigeria: A retrogression or progression?' (2013) 39:9 *Health Care for Women International* pp 975-993

A Adebawale & E Martins 'Cox-proportional hazard model of gender differentials in determinants of early marriage: evidence from 2010 in Malawi.' (2013) 11(9) *Gender and Behaviour* pp 5421-5438.

E A Agege, E U Nwose, S Odjimogho & E O Igumbor 'Legalities of child marriage in Nigeria: Implications on health and strategies of prevention, Sex Health Issues' (2017) 1(1) pp 1-4.

J K Anarfi 'Sexuality, migration and AIDS in Ghana: a socio-behavioural study' (1993) 3 *Health Transition Review (Sexual networking and HIV/AIDS in West Africa)* pp 45-68.

L Artz 'Fear or failure? Why victims of domestic violence retract from the criminal justice process' (2011) 37:1-10 *SA Crime Quarterly* p 9.

E N Aye, A Robinson, C O Eze, E N Eze & T O Oforka 'Impact of Child Marriage on Health of Adolescent Girls in Kaduna State, Nigeria' [YEAR] 13(23) *International Journal of Applied Engineering Research* pp 16152-16161

O Azubike & O Adeniyi. 'Sexual abuse and child marriage: promise and pathos of international human rights treaties in safeguarding the rights of the girl child in Nigeria' (2015) 16(2) *Child Abuse Research* pp 78-87.

J Bayisenge 'Early Marriage as a Barrier to Girl's Education: A Developmental Challenge in Africa' (2012) 12(6) *Social Psychology* pp 23-48.

J Boyden, A Pankhurst & Y Tafere 'Child protection and harmful traditional practices: Female early marriage and genital modification in Ethiopia' (2012) 22(4) *Development in Practice* pp 510-522.

T Bramiah 'Child marriage in Northern Nigeria.' (2014) 14(2) *African Human Rights Law Journal* pp. 474-488.

S Blackburn & S Bessell 'Marriageable Age: Political Debates on Early Marriage in Twentieth-Century Indonesia' (1997) 63 *Indonesia* pp. 107-141 available at <http://www.jstor.org/stable/3351513> accessed on 10 May 2017.

J Bongaarts 'Late Marriage and the HIV Epidemic in sub-Saharan Africa' (2007) 61(1) *Population Council* pp 73-83.

M Sommer, C Sutherland & V Chandra-Mouli. 'Putting menarche and girls into the global population health agenda.' (2015) *Reprod Health* available at: <https://doi:10.1186/s12978-015-0009-8> accessed on 27 April 2019.

T Chindah 'Nigeria's Child Rights Act: Ratification, implementation and domestication' (2017) 1:1 *Open Access Text Sexual Health Issues* pp 1-4 available at <https://www.oatext.com/pdf/SHI-1-105.pdf> accessed on 27 April 2019.

S Clark 'Early Marriage and HIV Risk in Sub-Saharan Africa' (2004) 35:3 *Journal of Family Planning Studies* pp 149-160.

G B Dahl 'Early Teen Marriage and Future Poverty' (2010) 47:3 *Demography* pp 689–718 available at <https://doi:10.1353/dem.0.0120> accessed on 4 May 2020.

A Eno-Obong 'Early marriage in eastern Nigeria and the health consequences of vesicovaginal fistulae (VVF) among young mothers' (2003) 11(2) *Gender & Development* pp 70-76.

A Erulkar 'Early Marriage, Marital Relations and Intimate Partner Violence in Ethiopia' (2013) 39:1 *International Perspectives on Sexual and Reproductive Health* pp 6-13 available at <http://www.jstor.org/stable/23408822> accessed on 10 May 2017.

K O Fayokun 'Legality of child marriage in Nigeria and Inhibitions against Realisation of Education Rights (2015) 12(812) *US-China Law Rev.*

J Garima, B Vikram, S Singh & J Piyush 'Early Marriage of Girls as a Barrier to Their Education' (2012) 11(3) *International Journal of Advanced Engineering Technology* pp 193-198.

S Gyimah 'Polygamous marital structure and child survivorship in Sub-Saharan Africa: Some Empirical Evidence from Ghana' (2009) 68 *Journal of Social Science and Medicine* pp 334-342.

S Gyima 'A cohort analysis of the timing of first birth and fertility in Ghana' (2003) 22 *Population Research and Policy Review* 22 pp 251-266 available at <https://doi.org/10.1023/A:1026008912138>, accessed on 27 April 2017.

N Gupta & M Mahy 'Adolescent childbearing in sub-Saharan Africa: Can increased schooling alone raise ages at first birth?' (2003) 8 *Journal of Demographic Research* pp 93-106.

N S Hussain 'Islamic Law on Child Marriage' (2018) 1 *Network for International Law Students UK Law Review* pp 164-174.

G Kyari & J Ayodele 'The Socio-Economic Effect of Early Marriage in North Western Nigeria' (2014) 5:14 *Mediterranean Journal of Social Sciences* pp 582-590.

J G Kheswa & V N Hoho 'Ukuthwala' The Sexual- Cultural Practice with Negative Effects on the Personality of Adolescent Females in Africa' (2014) 5(20) *Mediterranean Journal of Social Sciences* pp 2039-2117.

D S Koyana & Bekker J 'The Indomitable Ukuthwala Custom' (2007) 40 *In De Jure* pp 139-144.

R H Kaschula, T Huisamen, A Mostert & B Nosilela 'The amaXhosa ukuthwala marriage custom in fact and fiction: A contemporary critique' (2013) 33:2 *South African Journal of African Languages* pp 143-152.

S Louis & B Mikhail 'Child marriage and child prostitution: Two forms of sexual exploitation (2002) 4(4) *Gender & Development*' pp 43-49.

C Lloyd & B Mensch 'Marriage and childbirth as factors in dropping out from school: An analysis of DHS data from sub-Saharan Africa' (2008) 62:1 *Population Studies* p 1.

M J Maluleka 'Culture, Tradition, Custom, Law and Gender Equality' (2012) 15(1) *Potchefstroom Electronic Law Journal* available at <http://dx.doi.org/10.4314/pelj.v15i1.1> accessed on 27 June 2020.

J Maluleke 'Ukuthwala: Let's protect our children' (2009) 5 *Justice Today Department of Justice and Constitutional Development*.

D Mabasa 'Ukuthwala is it all culturally relative?' (2015) *De Rebus* p 28.

C Male & Q Wodon 'Girls' Education and Child Marriage in West and Central Africa: Trends, Impacts, Costs, and Solutions' (2018) 47:2 *Forum for Social Economics* pp 262-274.

M C Maphalala 'The Impact of *Ukuthwala* on the Schooling and Livelihood of a Girl Child: A Case of the eMangwaneni Tribe in Bergville, KwaZulu-Natal' (2016) *J Sociology Soc Anth* pp 149-159.

C Monyane 'Is *Ukuthwala* Another Form of 'Forced Marriage'?' (2013) 44(3) *South African Review of Sociology* pp 64-82.

Msuya Norah Hashim 'Tradition and Culture in Africa: Practices that Facilitate Trafficking of Women and Children, Dignity' (2017) 2(1) Article 3 *A Journal on Sexual Exploitation and Violence*.

Msuya 'The analysis of child marriage and third-party consent to child marriage in the case of Rebeca Z. Gyumi v Attorney General Miscellaneous Civil Case no 5 of 2016 Tanzania High Court at Dar es Salaam' (2019) *De Jure Law Journal* p 305.

D McQuoid-Mason 'The practice of *ukuthwalwa*: The Constitution and the Criminal Offences and Related Matters Act' (2009) 30(3) *Obiter* pp 716-723.

V. Mtshali 'Forced child marriage practised under the pretext of customary marriage in South Africa' (2014) 15(2) *Child Abuse Research in South Africa* pp 51-61.

L Mwambene 'Marriage under African customary law in the face of the Bill of Rights and international human rights standards in Malawi' (2010) 10(1) *African Human Rights Law Journal* pp 78-104.

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

L Mwambene 'Reconciling African customary law with women's rights in Malawi: the proposed marriage, divorce and family relations bill: notes and comments' (2007) 1(1) *Malawi Law Journal* pp 113-122.

L Mwambene 'Recent Law Responses to Child Marriage in Southern Africa: The case of Zimbabwe, South Africa and Malawi' (2018) 18:2 *African Human Rights Journal* pp 527-550.

M Nkosi & T Buthelezi T 'The Nature and Causes of Bride Abduction Cases in KwaZulu-Natal, South Africa.' (2013) 11(2) *Stud Tribes Tribals* pp 161-178.

E S Nwauche 'Child Marriage in Nigeria. (2015) 15(2) *African Human Rights Law Journal* pp 421-432.

E S Nwauche ES 'Affiliation to a new customary law in post-apartheid South Africa' (2015) 18(3) *Potchefstroom Electronic Law Journal* pp 1-25 available at [https:// DOI: 10.4314/pelj.v18i3.04](https://doi.org/10.4314/pelj.v18i3.04) accessed on 6 May 2020.

N M Nour 'Health consequences of child marriage in Africa' (2006) 12(11) *Emerging Infectious Diseases* pp 1644-1649.

N M Nour 'Child Marriage: A Silent Health and Human Rights Issue' (2009) 2(1) *Reviews in Obstetrics & Gynecology* pp 51-56.

N M Nour 'Child Marriage: A Silent Health and Human Rights Issue' (2009) 2(1) *Reviews in Obstetrics & Gynecology* pp 51-56.

N Otoo-Oyortey & S Pobi 'Early Marriage and Poverty: Exploring Links and Key Policy Issues.' (2003) 11(2) *Gender and Development* pp 42-51.

M Ouattara, P Sen & M Thomson, M. 'Forced marriage, forced sex: The perils of childhood for girls.' (1998) *Gender & Development*.

E Palamuleni 'Socio-economic determinants of age at marriage in Malawi' (2011) 3(7) *International Journal of Sociology and Anthropology* pp 224-235.

A Raj, N Saggurti, D Balaiah & J Silverman 'Prevalence of child marriage and its effect on fertility and fertility-control outcomes of young women in India: a cross-sectional, observational study' (2009) 373 *US National Institute of Health and the Indian Council of Medical Research* pp 1883-1889 available at [www.thelancet.com](http://www.thelancet.com) accessed on 12 June 2017.

A Raj & U Boehmer 'Girl Child Marriage and Its Association with National Rates of HIV, Maternal Health, and Infant Mortality Across 97 Countries' (2013) 19(4) *Violence Against Women Journal* pp 536-551.

S Rembe, O Chabaya, N Wadesango & P Muhuro 'Child and forced marriage as violation of women's rights, and responses by member states in Southern African Development Community' (2011) 25(1) *Agenda* pp 65-74.

K Rice 'Ukuthwala in Rural South Africa: Abduction Marriage as a Site of negotiation about gender, rights and generational authority among the Xhosa' (2014) 40(2) *Journal of Southern African Studies* pp 381-399.

L K Saidy 'Reflections on the day of an African Child.' (2010) *MICS*.

K G Santhya, U Ram, R Acharya, S J Jejeebhoy, F Ram & A Singh 'Associations between Early Marriage and Young Women's Marital and Reproductive Health Outcomes: Evidence from India' (2010) 36(3) *International Perspectives on Sexual and Reproductive Health* pp 132-139 available at <http://www.jstor.org/stable/20775350> accessed on 10 May 2017.

K Santhya, S Jejeebhoy, U Ram, R Acharya, A Singh & F Ram 'Associations between early marriage and young women's marital and reproductive health outcomes: evidence from India' (2010) 36(3) *International Perspectives on Sexual and Reproductive Health* pp 132-139.

S Sawyer, R Afifi, L Bearinger, S Blakemore, B Dick, A Ezeh & G Patton. 'Adolescence: a foundation for future health' (2012) 379 *Adolescent Health* pp 1630-1640.

R Songca 'Evaluation of children's rights in South African Law: the dawn of an emerging approach to children's rights?' (2011) 44(3) *The comparative and International Law Journal of Southern Africa* pp 340-359.

J Sloth-Nielsen & K Hove 'Recent developments Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 others: A review' (2015) 15 *African Human Rights Journal* pp 554-568.

W J Smit & C Notermans C 'Surviving change by changing violently: ukuthwala in South Africa's Eastern Cape Province' (2015) 38(1-2) *Anthropology Southern Africa* pp 29-46.

J Svanemyr, V Chandra-Moulli, S Christiansen & M Mbizvo 'Preventing Child Marriages: First International day of the girl Child "my life, my right, end child marriage"' (2012) 9:1 *Reproductive Health* p 31.



N Toyo 'Revisiting Equality as a Right: The Minimum Age of Marriage Clause in the Nigerian Child Rights Act, 2003.' (2006) 27(7) *Third World Quarterly* pp 1299-1312.

D Thomas 'Some Aspects of Socio-Legal Research at Yale' (1931) 37(2) *American Journal of Sociology* pp 213-223.

D Tilson & U Larsen 'Divorce in Ethiopia: The Impact of Early Marriage and Childlessness' (2000) 32 *Journal of Biosocial Science* pp 355-372.

J Uecker & C Stokes 'Early Marriage in the United States' (2008) 70 *Journal of Marriage and Family* pp 835-846.

M Ueyama & F Yamauchi 'Marriage Behaviour Response to Prime-Age Adult Mortality: Evidence from Malawi' (2009) 46(1) *Demography* pp 43-63 available at <https://doi:10.1353/dem.0.0039.org> accessed on 7 May 2020.

M Van der Walt & M Ovens 'Contextualising the practice of *Ukuthwala* within South Africa' (2012) 13(1) *Child Abuse Research in South Africa* pp. 11-26.

H Wang, Seji Hashimoto, Yuichi Moriguchi, Qiang Yue, Zhongwu Lu 'Resource use in growing China: Past trends, influence factors and future demand' (2012) 16:4 *Industrial Ecology* pp 481-492 available at <https://doi.org/10.1111/j.1530-9290.2012.00484.x> accessed on 7 May 2020.

N Wadesango, S Rembe & O Chabaya 'Violation of Women's Rights by Harmful Traditional Practices' (2011) 13(2) *The Anthropologist* pp 121-129.

J Walker 'Early marriage in Africa - trends, harmful effects and interventions: Review article' (2012) 16(2) *African Journal of Reproductive Health* pp 231-236.

J A Walker 'Engaging Islamic Opinion Leaders on Child Marriage: Preliminary Results from Pilot Projects in Nigeria' (2015) 13(3) *The Review of Faith & International Affairs* pp 48-58 available at <https://DOI:1080/15570274.2015.1075760> accessed on 5 May 2020.

J Walker 'Engaging Islamic Opinion Leaders on child Marriage: Preliminary results from pilot' (2015) 13(3) *The Review of Faith & International Affairs Journal* pp 48-58.

## Electronic Sources

Alicestine October 'REGULAR: Where is Child Marriages Bill?' available at <https://www.notesfromthehouse.co.za/opinion/item/149-regular-parly-questions-where-is-child-marriages-bill> accessed on 13 April 2019.

E E OAlemika, I Chukwuma, D Lafrata, D Messereli & J Souckova 'Rights of the Child in Nigeria. A report on the Implementation of the convention of the rights of the child by Nigeria' available at: accessed on.

S Ayaz & Yuksel 'Child Marriage- The underlying reasons and possible solutions.' available at: [//www.diva-portal.org/smash](http://www.diva-portal.org/smash) accessed on 6 March 2017.

A C Jorda 'Child Brides in Africa could more than double to 310 million by 2050' *UNICEF*, available at <http://wunrn.com> accessed on 24 March 2017.

Aljazeera 'Nigerian Senator marries 13 year old girl' available at <http://www.aljazeera.com/news/africa> accessed on 29 April 2017.

E Alemika, I Chukwuma, D Lafrata, D Messereli & J Souckova 'Rights of the Child in Nigeria: A report on the Implementation of the convention of the rights of the child by Nigeria' *World Organisation against Torture* pp 32-38 available at <https://www.refworld.org/docid/46c190d50.html> accessed on 21 March 2020.

A Brown 'Almost half of all girls in Malawi are married before the age of 18' *UNICEF 27 April 2018* available at <https://www.unicef.org/stories/malawi-local-chief-leads-effort-end-child-marriage-community> accessed on 6 May 2020.

Commonwealth 'Kigali Declaration: Moving from aspiration to action to prevent and eliminate child, early and forced marriage in the Commonwealth' available at <https://thecommonwealth.org/sites/default/files/inline/Kigali%20Declaration.pdf> accessed on 20 November 2019.

Commission for Gender Equality. 'Ukuthwala in KwaZulu-Natal: An investigation into state prevention and response' available at <https://www.pmg.org.za/files/13032ukuthwala.pdf> accessed on.

COGTA 2018/2019 'Annual performance Plan with Deputy Ministers' available at <https://pmg.org.za/committee-meeting/26450/> accessed on 13 April 2019.

Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others CCZ 12/2015. Available at <http://www.lrfzim.com/wp-content/uploads/2016/01/Landmarkruling-on-child-marriages.pdf> accessed on 8 August 2018.

Child Rights International Network 'Nigeria: National Laws' p 18 Available at <https://www.crin.org> accessed on 5 May 2017.

Centre for Human Rights 'A Report on Child Marriages in Africa' pp 1-80 available at [https://www.chr.up.ac.za/images/publications/centrepublishations/documents/child\\_marriage\\_report.pdf](https://www.chr.up.ac.za/images/publications/centrepublishations/documents/child_marriage_report.pdf) accessed on 3 May 2020.

Change.org 'Raise the age of consent in Nigeria from 11 to 18' available at [https://www.change.org/p/it-s-never-your-fault-raise-the-age-of-consent-in-nigeria-from-11-to-18?use\\_react=false](https://www.change.org/p/it-s-never-your-fault-raise-the-age-of-consent-in-nigeria-from-11-to-18?use_react=false) accessed 5 May 2020.

Child Rights International Network, 'Nigeria: National Laws' available at <https://archive.crin.org/en/library/publications/nigeria-national-laws.html> accessed on 27 June 2018.

Ddr "'*Ukuthwala*' an ancient practice" *Dispatch Live* 27 November 2015 available at <https://www.dispatchlive.co.za/news/2015-11-27-ukuthwala-an-ancient-practice/> accessed on 3 May 2020.

Department of Justice and Constitutional Development 'Ukuthwala: Let's protect our children' available at [http://www.justice.gov.za/docs/articles/2009\\_ukuthwala-kidnapping-girls.html](http://www.justice.gov.za/docs/articles/2009_ukuthwala-kidnapping-girls.html) accessed on 3 May 2020.

T Deen 'UN Launches global campaign to abolish child marriages' available at <http://www.ipsnews.net/2012/10/u-n-launches-global-campaign-to-abolish-child-marriages/> accessed on 29 April 2017.

Department of Social Development media release 'Social Development hosts Lusikisiki community outreach programme' 22 Aug 2019' available at <https://www.gov.za/speeches/social-development-hosts-lusikisiki-community-outreach-programme-22-aug-21-aug-2019-0000> accessed on 5 May 2020.

D Dunning & J Mkandawire 'How girl activists helped to ban child marriage in Malawi' *The Guardian* 26 February 2015 available at <https://www.theguardian.com/global-development->

professionals-network/2015/feb/26/girl-activists-child-marriage-malawi-let-girls-lead accessed on 27 April 2017

Z George 'Eastern Cape's shame over *ukuthwala*' Dispatch live 12 July 2018 available at <https://www.dispatchlive.co.za/news/2018-07-12-e-cafes-shame-over-ukuthwala/> accessed on.

Girls not brides 'What's the child marriage rate? How big of an issue is child marriage?' available at *Girlsnotbrides.org* available at <https://www.girlsnotbrides.org/child-marriage/south-africa/> accessed on 20 August 2019.

Girls not Brides 'What is Theory of Change?' available at <https://www.girlsnotbrides.org/child-marriage-theory-of-change/> accessed on 13 April 2019.

Girls not brides 'The Model Law on Eradicating child marriage and protecting children already in marriage' available at <http://www.veritaszim.net/node/1868> accessed on 24 April 2017.

Girls not brides 'Poverty' available at <https://www.girlsnotbrides.org/themes/poverty/> accessed on 7 May 2020.

Girls not brides 'Child marriages around the world: Malawi' available at <http://www.girlsnotbrides.org/child-marriage/malawi/> accessed on 27 April 2017.

Girls not Brides 'National strategy to end child marriages in Nigeria (2016-2021)' available at: <https://www.girlsnotbrides.org/resource-centre/national-strategy-end-child-marriage-nigeria-2016-2021/> accessed on 27 April 2017.

Girls Not Brides 'Malawi's Constitutional Change: a step forward towards ending child marriage' available at <https://www.girlsnotbrides.org/wp-content/uploads/2017/12/Malawi-case-study-template-19.12-FINAL.pdf> accessed on 28 October 2020.

Human Rights Watch. 'Ending Child Marriage in Africa: Opening the door for girls' education, health and freedom from violence.' available at: <https://www.hrw.org/sites/default/> accessed on.

ICRW (International Centre for Research on Women) 'New Insights on Preventing Child Marriage' available at <http://www.icrw.org/publications/new-insightspreventing-child-marriage> accessed on 29 January 2017.

B B Kanyip 'Rights of the Nigerian Child' available at <http://www.nicn.gov.ng/k10.php> accessed on 27 April 2017.

I Khoo 'Malawi chief Therese Kachindamoto annuls 850 child marriages' *The Huffington Post Canada* 18 October 2016 available at [https://www.huffingtonpost.ca/2016/10/18/malawi-chief-theresa-kachindamoto\\_n\\_12539208.html](https://www.huffingtonpost.ca/2016/10/18/malawi-chief-theresa-kachindamoto_n_12539208.html) accessed on 27 April 2017.

Y Kakande 'Uganda tackles child marriage' *IOL News* 2016 available at <http://www.iol.co.za/news/africa/uganda-tackles-child-marriage-2000577> accessed on 29 April 2017.

J Lokulo-Sodipe 'Legal basis for Research Ethics governance in Nigeria' available at <https://elearning.tree.org/mod/page/view.php?id=142> accessed on 20 April 2019.

E Mabuza 'Man Jailed for stabbing ex-girlfriend 24 times, despite her having a protection order against him' *Times Live* 2019 available at <https://www.google.com/amp/s/www.timeslive.co.za/amp/news/south-africa/2019-09-30-man-jailed-for-stabbing-ex-girlfriend-24-times-despite-her-having-a-protection-order-against-him-/> accessed on 1 April 2020.

K Maema 'The Commission on Gender Equality 2015-2016 Annual Report (2016)' available at <http://www.cge.org.za/wp-content/uploads/2014/09/2015-2016-CGE-Annual-Report.pdf> accessed on 3 May 2020.

A Malhotra, A Warner, A McGonagle & S Lee-Rife 'Solutions to End Child Marriage' *International Centre for Research on Women* available at <https://www.icrw.org/wp-content/uploads/2016/10/Solutions-to-End-Child-Marriage.pdf> accessed on 3 May 2020.

L Matsila 'Villagers must get title deeds' *City Press* 10 October 2018 available at <https://citypress.news24.com/Voices/villagers-must-get-title-deeds-20181011> accessed on 7 May 2020.

R H Mgidlana 'Should South Africa criminalise *ukuthwala* leading to forced and child marriages?' available at <http://www.cssr.uct.ac.za/news/should-south-africa-criminalise-ukuthwala-leading-forced-and-child-marriages> accessed on 5 September 2019.

Musawah 'Musawah Thematic Report on Article 16 & Muslim Family Law: Nigeria, 67<sup>th</sup> CEDAW Session, Geneva, Switzerland' available at [https://www.ecoi.net/en/file/local/2025411/INT\\_CEDAW\\_CSS\\_PAK\\_41111\\_E.docx](https://www.ecoi.net/en/file/local/2025411/INT_CEDAW_CSS_PAK_41111_E.docx) 7 May 2020.

M Ndulo 'African Customary Law, Customs, and Women's Rights' *Cornell Law Faculty Publications* p 187 available at <http://scholarship.law.cornell.edu/facpub/187> accessed on 20 April 2017.

Government of South Africa 'Press release on *Ukuthwala* investigation in KwaZulu-Natal' 14 November 2012 available at <http://www.gov.za/press-release-ukuthwala-investigation> accessed on 9 April 2017.

Plan International 'Malawi changes law to end child marriage' available at <https://plan-international.org/news/2017> accessed on 27 April 2017.

Parliamentary Monitoring Group Commission for Gender Equality 'Annual Report for 2012/13' available at <https://pmg.org.za/committee-meeting/16623/> accessed on 10 September 2019.

Plan International 'Nigerian teens launch petition to ban child marriage (2019)' available at <https://plan-international.org/news/2019-01-31-nigerian-teens-launch-petition-ban-child-marriage> accessed on 22 November 2019.

SALRC 'The Practice of *Ukuthwala*' Discussion paper 132, Project 138 available at <http://salawreform.justice.gov.za> accessed on.

S Stormorken, K Vincent & R Santisteban 'No More Excuses: Ending all Harmful Traditional Practices against Girls and Young Women.' available at <http://db.amazone.be/3/515204.pdf> accessed on 8 November 2018.

South African Law Reform Commission 'Revised Discussion Paper on Project 138: The Practice of *ukuthwala*' available at <http://www.justice.gov.za/salrc/dpapers/dp132-UkuthwalaRevised.pdf> accessed on 8 April 2020.

Southern African Development Community Parliamentary Forum (SADC-PF) 'Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage' available at <http://www.girlsnotbrides.org/wp-content/uploads/2016/10/MODEL-LAW-ON-ERADICATING-CHILD-MARRIAGE-AND-PROTECTING-CHILDREN-ALREADY-IN-MARRIAGE.pdf> accessed on 24 April 2017.

T Salau '#ChildNotBride: 70-year-old man ties the knot with 15-year-old girl' *The Guardian* 14 December 2018 available at <https://guardian.ng/news/childnotbride-70-year-old-man-ties-the-knot-with-15-year-old-girl/> accessed 22 November 2019.

Stats SA Community Survey 2016. 'An exploration of nuptiality statistics and implied measures in South Africa' StatsSA p 9 available at <http://www.statssa.gov.za/publications/03-01-25/03-01-252016.pdf> accessed on 3 May 2020.

UNICEF. 'A profile of Child Marriage in Africa.' available at <https://www.unicef.pt/docs> accessed on 5 March 2017.

UNICEF 'Early marriage: A harmful traditional practice.' available at <https://www.unicef.org/publications> accessed 1 March 2017.

UNICEF 'Early Marriage, Child Spouses.' *Innocenti Digest* available at <https://www.unicef-irc.org/publications> accessed 1 March 2017.

UNICEF 2003 'States pass the Child Rights Act in Nigeria.' available at: <https://www.today.ng/news/nigeria> accessed on 27 April 2017.

UNICEF 'Early Marriage, Child Spouse' *Innocenti Digest* available at <https://www.unicef-irc.org/publications/pdf/digest7e.pdf> accessed on 1 March 2017.

UNPFA 'Marrying too Young.' pp 55-58 available at <https://www.unfpa.org> accessed on 20 March 2017.

USAID 'Preventing Child Marriage: Protecting Girls' (2009) *Health Issues Brief* available at <http://www.khubmarriage18.org/sites/default/files/36.pdf> accessed on 3 May 2020.

UNICEF 'The State of the World's Children' pp 1-148 available at [https://www.unicef.org/publications/files/The\\_State\\_of\\_the\\_Worlds\\_Children\\_\\_2007\\_e.pdf](https://www.unicef.org/publications/files/The_State_of_the_Worlds_Children__2007_e.pdf) accessed on 3 May 2020.

M Werft 'Meet the Southern Malawi Chief who Stopped 850 Child Marriages: They call her the "Marriage Terminator."' *Global Citizen* available at accessed on 7 April 2016.

R Y Wee 'Religious Beliefs In Nigeria' *WorldAtlas 2019* available at <https://www.worldatlas.com/articles/religious-beliefs-in-nigeria.html/> accessed on 27 November 2019.

V Wang 'Ending Child Marriages – new laws bring progress, but hurdles remain'. *CMI insight issue 4* available at <https://www.cmi.no/publications/5802-ending-child-marriages-new-laws-progress-malawi> 27 November 2019.

Human Rights Watch 'World watch Report 2015' available at [https://www.hrw.org/sites/default/files/wr2015\\_web.pdf](https://www.hrw.org/sites/default/files/wr2015_web.pdf) accessed on 6 May 2020.

### **Theses**

N Johansson *Child Marriage: the underlying reasons and possible solutions* (Bachelor of Social Sciences dissertation, Linnaeus University, Växjö, Sweden, 2015).

V R Mafhala *Child marriage: a violation of human rights of girls in a free South Africa* (Master of Arts, University of Pretoria, 2016) available at <http://repository.up.ac.za/handle/2263/53428> accessed on 7 May 2020,

Ndidi *Section 29 (4) (b) of the Constitution of the Federal Republic of Nigeria, Much Deeper Than Child Marriage, Citizenship, Discrimination and Gender* (LLM thesis, University of Lagos, 2013).

P M Nkosi "Ingcwaba Lentombi Lisemzini": *A Socio-Cultural and gendered construction of Ukuthwala among the Zulu people in selected rural areas of Kwazulu-Natal* (Doctor of philosophy thesis, University of KwaZulu-Natal, 2011) available at <https://pdfs.semanticscholar.org/e889/ae0495fc292a67e94790508e7b8a36c331c7.pdf> accessed on 7 May 2020.

P Ramnath *Are traditional African practices relating to child marriages in the face of HIV/AIDS in violation to the South African legal framework?* (Master of Philosophy, University of the Western Cape, 2015).