

THE GIRL CHILD MARRIAGE PRACTICE IN MADAGASCAR: A CRITICAL ANALYSIS

**Submitted in partial fulfillment of the requirements of the degree LLM
(Human Rights and Democratisation in Africa)**

By

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31 October 2013

DECLARATION

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DEDICATION

To Malagasy girls

ACKNOWLEDGMENT

I would like to thank the Centre for Human Rights and all its staff for this opportunity.

I thank all the tutors for their kind guidance and especially Remember Miamingi, a fellow passionate of children's rights.

I thank my supervisor, Dr. Maria Nassali, for her insightful comments and her experience as an academician and a practitioner.

I deeply thank my family and friends for their valuable support. I am most grateful to my close friend Régine Gachoud for her moral and academic support through the year.

I appreciate the time and assistance of Jacques, my research assistant in Madagascar, Busingye Kabumba for his insightful 'cultural' comments, Madame Laurette from the Ministry of Justice, Tovo, my former OHCHR colleague, Tolotra and Hasina, gender specialists, Anita Ingabire from UNICEF, Madame Noro, from Focus Development, Amélie and Abel from Fiantso NGO for their work in the South, Monsieur Andry Rasamoely, former expert in the African children's Committee in the and children's rights activist.

I thank the BC team for a great Ugandan adventure and Linette, Precious and Prisca for their spiritual guidance.

I finally thank the 2013 LLM class for showing the great diversity of the African continent and the meaning of *ubuntu*.

ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CISCO	Scholar districts (<i>circonscription scolaire</i>)
COBs	Concluding Observations
CRC	Convention on the Rights of the Child
GBV	Gender-Based Violence
HRC	Human Rights Council
MINJUS	Ministry of Justice (Madagascar)
NGO	Non Governmental Organisation
WHO	World Health Organisation
UNCRC	United Nations Convention on the Rights of the Child
UNFPA	United Nations Population Fund
UNICEF	United Nations Children's Fund
UN	United Nations

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The girl child marriage practice in Madagascar: A critical analysis

CHAPTER ONE: INTRODUCTION

1.1 Background of the study

Harmful practices, including child marriages, are currently under international scrutiny. Over 67 million women aged 20 to 24 years were married before 18 in 2010,¹ including about 13 million African women.

On 11 October 2012, the first celebration of the International Day of the Girl Child focused on child marriages, which heightened global awareness on the issue. The Human Rights Council (HRC) adopted a draft Resolution to strengthen efforts to prevent and eliminate child, early and forced marriages². The Secretary General called for the end of the practice in its latest annual report on the Millennium Development Goals (MDGs).³ Recently, the UN Special Representative of the Secretary General on violence against children addressed the plague of child marriages in a study on harmful practices and plurality of legal systems.⁴ Similarly, the UN Special Rapporteur on contemporary forms of slavery also dedicated her last thematic report on servile marriages⁵. The Committees on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and on the Convention on the Rights of the Child⁶ (CRC)⁷ are currently drafting a joint General Comment/General Recommendation on harmful practices, which includes child marriages. In this regard, a large number of members of the civil society provided the Committees with comprehensive case studies and other relevant documentation on the issue.⁸ The African regional human rights framework is equally involved.

¹ UNFPA, *Marrying too young* (2012); this study will focus on the girl child marriage as she is disproportionately more affected than the boy in Madagascar.

² Human Rights Council, A/HRC/24/L.34 (2013).

³ General Assembly, A/68/202 (2013) para 85.

⁴ UN Special Representative of the Secretary General on Violence against children 'Protecting children from harmful practices in plural legal systems', 2012.

⁵ HRC, A/HRC/21/41 (2012); See also Anti-Slavery International, 'Out of the shadow: child marriage and slavery' (2013).

⁶ UN Convention on the Rights of the Child G.A res. 44/25, annex, 44 U.N. GAOR Supp (No 49) at 167, U.N. Doc. A/44/49 (1989), entered into force 2 September 1990.

⁷ OHCHR is also currently preparing a report on early and forced marriages.

⁸ OHCHR, Call for submissions, <http://www2.ohchr.org/english/bodies/cedaw/JointCEDAW-CRC-GeneralRecommendation.htm> (accessed 5 August 2013).

The African Union (AU) published a study on harmful practices⁹ and the celebration of the Day of the African Child 2013 centred around the theme, 'our collective responsibility to end harmful social and cultural practices.' Similarly, the East African Conference on child marriage called upon the African Committee of Experts on the Rights and Welfare of the Child to draft a general comment on child marriage.¹⁰ Moreover, stemming from an initiative of the Elders, led by Archbishop Desmond Tutu and Mary Robinson, a global partnership to end child marriage by 2030 known as 'Girls not Bride'¹¹ was created. Following a resolution of the Pan-African Parliament on the legislation against child marriage, the Inter-Parliamentary Union is currently conducting a study on the laws on early and forced marriages in Africa.¹² These interventions demonstrate a powerful momentum emphasising the global need to eradicate child marriage as a harmful practice. The international human rights legal framework and the international community as a whole are concerned about the destructive impact of the practice of child marriage on the child as an individual rights holder. Research has demonstrated that the practice of child marriage most of the times violates the girl child's rights such as the right to consent to marriage, the right to non-discrimination, the right to health, the right to education, or the right to be protected from harmful traditional practices.¹³ Moreover, in some instance, the child is considered as a commodity and child marriage can therefore amount to slavery, 'sale of children' or trafficking.¹⁴ Child marriages may also negatively affect the realisation of the Millennium Development Goals (MDGs).¹⁵ Culture and traditions are reportedly key drivers in the perpetuation of the practice. Consequently, it is crucial to understand the underlying root causes that underpin child marriages in order to put an end to them.

Madagascar has one of the highest child marriage prevalence rates in the world with 49% of women aged 20 to 24 married before 18¹⁶. In 2010, 447,000 women aged 20 to 24 were married before 18.¹⁷ This means that one out of two girls will be married before their 18th

⁹ African Union 'Harmful traditional practices towards women and girls in Africa' (2012).

¹⁰ www.forwarduk.org.uk/download/313/ (accessed 4 September 2013).

¹¹ www.girlsnotbride.org; Regrouping more than 250 NGOs in 38 countries, excluding Madagascar. Intense lobbying led the 'International Protecting Girls by Preventing Child Marriage Act' (S.414) passed by the US Senate in May 2012. Child marriage became one of the key development goals of the US.

¹² See terms of reference www.ipu.org/finance-e/early_marriage.pdf (accessed on 4 July 2013).

¹³ R Mutyaba, 'Early marriage: A violation of girls' fundamental human rights in Africa' (2011) 19 *International Journal of Children's Rights* 339.

¹⁴ E Warner, 'Behind the wedding veil: child marriage as a form of trafficking in girls' (2004) 12 *Journal of Gender, Social Policy and the Law* 233.

¹⁵ Child marriage hinders the achievement of 6 of the 8 MDGs: ending poverty and hunger, universal education, gender equality, child health, maternal health and combat HIV/AIDS.

¹⁶ UNFPA (n 1 above) 1.

¹⁷ As above 69.

birthday.¹⁸ At the time of writing, Madagascar has suffered from a protracted four years political crisis that led to major social and economic chaos and has resulted into 92% of the population living below the poverty line in 2013. The political stalemate reduced the sustainability of existing development plans of action and programmes and thwarted the development of new ones. The practice of child marriage is far from homogenous and is manifested throughout the country under various forms such as the *moletry* or *valyfofo*.¹⁹ Most of the girls are poor, less-educated and from rural areas²⁰, which heightens their vulnerability to abuse. In 2007, Madagascar enacted the Marriage and Matrimonial Property Act prohibiting marriages before the age of 18, yet allowing for some exceptions.²¹ The practice remains pervasive. The UN Special Rapporteur on contemporary forms of slavery field mission report to Madagascar made specific recommendations to address the prejudicial forms of forced marriages in the country.²²

The implementation of international human rights law in the domestic framework is an international commitment and obligation, which calls for proactive efforts by the state to respect, protect, promote and fulfil the rights of the child. This requires a critical analysis of Malagasy law, policy and practice in order to provide an adequate response. Child marriages can be reduced in Madagascar if adequate measures are put in place to respect commitments and to respect the national traditional context so as to ensure the holistic protection of the best interests of the child.

1.2 Manifestations of the girl child marriage in Madagascar²³

1.2.1 The *Moletry* of the North-West

Among the *Tsimihety* community, in the North Western districts of Mampikony, Antsohihy, Bealanana, North Befandriana and Mandritsara, the child marriage is the responsibility of the boy's parents who would search for a young bride - as young as twelve, negotiate for the bride price (*moletry*) and organise the marriage. The celebration is subject to traditional rites, including the *moletry* in the form of a donation of oxen (*zébus*) and money to the parents of the

¹⁸ As above 1.

¹⁹ Forms of practice involving a bride price, see para 1.2.

²⁰ UNFPA (n 1 above) 1.

²¹ The Marriage and Matrimonial Property Act of 2007.

²² HRC, Report of the Special Rapporteur on contemporary forms of slavery, Mission to Madagascar (Report of the SR) A/HRC/24/43/Add.2 (2013).

²³ It is worth mentioning the *tsehan'ampela* (girls market) whereby every week a girls' market takes place parallel to the cattle market in the Southern region. Although the Special Rapporteur described the practice as a form of servile marriage (see n 22 above paras 141 et seq), it has degenerated into a form of prostitution and sexual trafficking where the girls have sexual relations in the premises of the market.

bride. If those rites (*fomba*) are not respected, the marriage is not recognised by the community and the couple is socially excluded.²⁴ The respect for traditional rites is mainly a way of safeguarding the honour of the family and the girl. In this culture, the elder of the family, regardless of the sex, is the guardian of traditions and is referred to as the *Sojabe*. The *Sojabe* has the power of speech and conducts traditional rituals. The spouses sign a commitment contract (*fehim-panambadiana*) valid for one year (*volambita*) under the following form:

'I undersigned M.X accept to marry Ms. Y. I accept to donate 100,000 Ariary, with one ox. The donation in cash has been transferred but the ox has not been given yet. The deadline for the handing of the ox is set for December 2007. In case of failure to comply with the deadline, I commit to give two more oxen. Ms. Z acts as a guarantor. Pursuant to this traditional contract, the one who faults shall be dismissed.'²⁵

In some instances, the girl did not consent and has to endure the union for one probationary year, even if she is exposed to domestic violence. The practice has been set up to thwart the complications of divorce proceedings in the formal civil system. Indeed, after a year, the girl can leave the man and the *moletry* can be retained by the parents. In case of adultery by the girl or she refuses to engage in sexual relations (*mitisival-pandry*), the parents have to return the *moletry*. If the man commits adultery, the girl can leave the man and the parents retain the *moletry*.²⁶ The girls may prefer to marry under the *moletry* to support her family or for lack of better opportunity.²⁷

The perversion of the practice²⁸ lies in the young age of the bride and in the 'commoditisation' of the girl who is 'transferred' into marriage on an annual contractual basis, sometimes as much as three years in a row.²⁹ Girls are married to older men, as young men cannot afford the *moletry*. Tsimihety consider that 'children living in their parent's home are not independent human beings but the 'property' of the parents (*Tsy tompon'ny tenany fa ny raiamandreniny no tompony*). The practice therefore remains mostly unchallenged although some young girls do not follow it today.

²⁴ Focus Development Association '*Etude sur les coutumes discriminatoires à l'égard des femmes dans le Nord Ouest de Madagascar*' (Study on discriminatory customs towards women in the North West of Madagascar) (2007) 9.

²⁵ Ministry of Justice 'Report on the workshop of the project support for the promotion and protection of human rights' *unreported* (2009) 10.

²⁶ Focus Development (n 24 above).

²⁷ MINJUS (n 25 above).

²⁸ It is noteworthy that the practice is explained in Malagasy on the website of the Ministry of Culture and Heritage. It does not mention the misuse of the practice, see <http://www.mcp.gov.mg/fanambadiana-tsimihety/>.

²⁹ MINJUS (n 25 above) 10; see also '*Mariées*', '*Remariées*', '*Vendues*', '*Revendues*' (Married, Remarried, Sold, Resold) *Syfia Madagascar* 25 April 2004 <http://www.syfia.info/index.php5?view=articles&action=voir&idArticle=3763> (accessed 5 August 2013).

Moreover, child marriage is also a way to avoid the stigma of pre-marital sex, which is not traditionally accepted. Consequently, the perversion of the practice leads to the deprivation of girls from their right to education, health and sexual and reproductive health and may also amount to trafficking as the *moletry* involves the transfer of the girl child in exchange of money for exploitation.

1.2.2 The *Valyfofo* of the South East

In the *Bara* community, in the Southern region of Ihorombe, an infant girl or a newborn is immediately betrothed to a relative - or sometimes an elderly already married or a rich man - and the parents receive oxen. The marriage is organised when the girl is between ten and twelve years old.³⁰ This practice is called *valyfofo*.³¹ Girls are removed from school to enter such marriages.³² Pregnancies occur at a very tender age - as young as twelve. However, on becoming a widow, the teenager wife is often ostracised by the first wife and the community to such an extent that she may not be entitled to her late husband's possession.³³ Most of the girl brides suffer from obstetric fistula and therefore become abandoned by their husbands.³⁴ The community practises a caste-system. Girls are not allowed to marry anyone from the slave caste in order to protect land property.³⁵ Inter-marriages between cousins is practiced to reinforce parental ties and to maintain family wealth (*lova tsy mifindra*).

1.3 Statement of the problem

Child marriage is generally considered a harmful practice and as such is prohibited in international human rights law. States parties, including Madagascar, ratified human rights instruments on children's rights as a public commitment to their people and to the international community as a whole. Ratifying the Convention on the Rights of the Child and the African Children's Charter implies fulfilling the child's right to dignity and full development. Nonetheless, it is often an empty promise.

³⁰ Report of the SR (n 22 above) paras 129-133.

³¹ Literally 'to get used to the smell of the spouse'; Report of the SR (n 22 above) ; See also 'Valifofo and Rights violated in the South of Madagascar' (2012) www.youtube.com/watch?v=OZ60V5Mlv0Q (accessed 25 October 2013); Report of the SR (n 22 above) paras 129-133.

³² n 159 above.

³³ Report of the SR (n 22 above) para 132.

³⁴ '*Des femmes malgaches blessées par le mariage précoce et ses conséquences*' (Malagasy women hurt by early marriage and its consequences) *UNFPA Madagascar* 15 October 2012. http://madagascar.unfpa.org/Article_10_2012.htm

³⁵ UNICEF, '*Le Sud: cimetière de projets?*' (The South: cemetery of projects?) (2011).

Undeniably, States parties face this recurring challenge: despite the plethora of laws and policies, there is lack of effective implementation resulting in the disconnection between the law and the reality on the ground. In relation to child marriage, Madagascar partly harmonised its legislation with international standards by prohibiting marriage under 18 years in 2007. However, the law allows parental consent as an exception upon the Court's authorisation for 'serious reasons'. In parallel, child marriage, under customary celebrations as described above, remain unregistered in the formal system and therefore the practice continues unabated. In this regard, future projections establish that, if the present trends continue, 767 000 of the young girls born between 2005 and 2010 will be married before age 18 by 2030.³⁶ Accordingly, there is a need to explore and understand why child marriage continues to manifest in Madagascar and how the government is addressing the issue in order to underline the challenges and gaps. It is important to address Madagascar's response within an international and regional normative framework and the cultural context in order to recommend effective strategies against child marriages.

1.4 Objective of the study

The main objective of this study is to provide an analysis of the Malagasy legal and policy framework on child marriages and to assess the extent to which it meets or violates international human rights standards in order to inform policy recommendations.

Using Madagascar as a case study, this dissertation also aims at assessing the tension between the legal framework and existing traditional practices in the context of child marriages with a view to recommending holistic and context-specific strategies to end such practices in Madagascar.

1.5 Research questions

This study seeks to answer the following questions:

- What is the international and regional legal framework regulating the protection of the girl child from child marriages?
- To what extent does the Malagasy legal and policy framework comply with international and regional standards on child marriage and what are the existing implementation measures?

³⁶ UNFPA (n 1 above) 69.

- Why do child marriages manifest within ethnic communities and how can Madagascar respond to the broader social, economic and cultural context within which the practice manifests?
- What legal, policy and implementation measures should be put in place to effectively prevent and protect the girl child from child marriage in Madagascar?

1.6 Literature review

Child marriage is among the harmful practices that have recently been at the centre of the debate and has been extensively addressed by scholars, NGOs and international organisations. The literature predominantly ascertains for the negative impact of the practice on the child through an analysis of the various rights violated. In general terms, Gaffney-Rhys looked at international human rights law as an instrument to combat child marriages. He rightly concludes that international law by itself cannot be effective without adequate implementation.³⁷ Similarly, a study on the responses among Southern African Development Community members³⁸ demonstrated that legislation and policies do not work if not accompanied by the establishment of structures that would implement and monitor them. With regard to education, it is acknowledged that measuring the direct link between child marriage and education attainment or dropouts rates is not an easy task. In this regard, Brown has contented that access to education is a key driver to delay child marriage.³⁹ Nguyen and Wodon supported this view in a major study revealing the direct link of delaying child marriage and education attainment and literacy with statistics figures.⁴⁰ Another study complements these findings by highlighting the impact of the mother's literacy on school attendance of the girl child and delay of marriage.⁴¹ Other publications focused on the violation of the right to health. Scholars have demonstrated the causal link between child marriage and the occurrence of obstetric fistulas caused by early pregnancies, sexual transmitted diseases and HIV as well as the impact on maternal and infant mortality rates.⁴² Some scholars underlined the fact that child marriage leads the child into

³⁷ R Gaffney-Rhys, 'International law as an instrument to combat child marriage' (2011) 15(3) *The International Journal of Human Rights*, (2011) 359.

³⁸ S Rembe et al 'Child and forced marriage as violation of women's rights, and responses by members states in Southern African Development Community' (2011) 25 *Empowering women for gender equity* 65.

³⁹ G Brown, 'Out of wedlock, into school: combating child marriage through education' (2012).

⁴⁰ NC Nguyen & Q Wodon 'Child marriage and education: A major challenge' World Bank www.ungei.org/files/Child_Marriage_Edu_Note.pdf (accessed 26 October 2013); see also references.

⁴¹ CA Smith et al 'A model of women's educational factors related to delaying girls' marriage' *International Review of Education* 58 (2012) 533.

⁴² A Raj & U Bohemer 'Girl child marriage and its association with national rates of HIV, Maternal Health, and Infant Mortality across 97 countries' *Violence against Women* 22 (2013) 1; NM Nour 'Child marriage: a silent health and

having sexual relations and increases its vulnerability to sexual abuse. It may also involve the exchange of money for exploitation. Child marriage has therefore been equated to sexual exploitation,⁴³ child prostitution⁴⁴ and child trafficking.⁴⁵ Undeniably, child marriage has also been tackled through a gender lens to condemn the violation of women's rights.⁴⁶ These articles are more focused on the aspect of discrimination and violence suffered by women and girls. Otoo-Oyortey and Pobi have argued that child marriage contributes to the feminisation of poverty and have discussed the factors relating both concepts.⁴⁷ Jensen and Thornton have contended that policy interventions should target both the supply and demand factors.⁴⁸ In other words, they should not only address parents marrying off their young daughters but also the reasons why older men prefer young brides. An interesting mapping of the issue in West African countries presented best practices in terms of legal and extra-legal measures.⁴⁹ On the global level, UNFPA provided for some global policy guidelines.⁵⁰ In 'Child marriage and the Law',⁵¹ UNICEF offers useful guidance on the elements to consider in legislative and policy reform and suggests that this issue should be viewed in the context of gender inequality. A plethora of reports was published by NGOs all of them presenting the rights violated and the dire consequences of the practice or case studies.⁵² With regard to African case studies, scholars have highlighted the crucial need to address the issue within the local cultural context. Bunting addressed the necessity to go beyond legislation with regard to child marriage in Nigeria.⁵³ This idea has been buttressed by Boyden et al in their research on Ethiopia.⁵⁴ In this regard,

human rights issue' *Reviews of obstetrics and gynecology* 2 (2009); A Raj 'When the mother is a child: the impact of child marriage on the health and human rights of girls' *Arch Dis Child* 95 (2010) 931;

⁴³ SLB Mikhail 'Child marriage and child prostitution: Two forms of sexual exploitation' (2002) 10 *Gender & Development* 43.

⁴⁴ As above.

⁴⁵ E Warner, 'Behind the wedding veil: child marriage as a form of trafficking in girls' *Journal of Gender, Social Policy and the Law* 12 (2004) 233.

⁴⁶ S Rembe et al (n 25 above); N Wadesango et al 'Violation of women's rights by harmful traditional practices' *Anthropologist* 13(2) (2011) 121; Y Rafferty 'International dimensions of discrimination and violence against girls: A Human Rights Perspective' *Journal of International Women's Studies* 14 (2013) 1.

⁴⁷ N Otoo-Oyortey & S Pobi 'Early marriages and poverty: exploring links and key policy issues' *Gender and Development* 11 (2010) 42.

⁴⁸ R Jensen & R Thornton 'Early female marriage in the developing world' *Gender and Development* 11 (2010) 9.

⁴⁹ JA Walker 'Mapping early marriage in West Africa: a scan of trends' for the Ford foundation (2013) <http://wharc-online.org/wp/wp-content/uploads/2013/09/Early-Marriage-West-Africa-Report-2013.pdf> (accessed 20 October 2013).

⁵⁰ UNFPA 'Ending child marriage: a guide for global policy action' (2006).

⁵¹ UNICEF 'Child marriage and the Law' (2008); see checklist, 58.

⁵² Human Rights Watch 'This old man can feed us, you will marry him: child and forced marriage in South Sudan' (2013); Plan International 'Breaking vows: early and forced marriage and Girls' Education' (2011); Centre for Reproductive Health 'Child Marriage in South Asia' (2013).

⁵³ A Bunting 'Stages of Development: Marriage of Girls and Teens as an International Human Rights Issue' *Social and Legal Studies* 14 (2005) 17.

⁵⁴ J Boyden et al 'Child protection and harmful traditional practices: female early marriage and genital modification in Ethiopia' *Development in Practice* 22 (2012) 510.

acknowledging the fact that different societies have different understandings of childhood, T Khaime astutely discusses the need for cultural legitimacy in order to meaningfully fulfil the rights of the African child.⁵⁵ The present study will discuss these concerns in the specific context of Madagascar.

Related to Madagascar, Gastineau has written extensively on related issues such as sexual and reproductive rights, early pregnancies and maternal mortality.⁵⁶ She discussed on marriage, fertility and autonomy of adolescents girls but her research was limited to Antananarivo, a urbanised capital.⁵⁷ Glick has linked the issue with education and revealed that an additional year of schooling will delay marriage by 1.6 year.⁵⁸ The recent UN Special Rapporteur mission report has addressed servile and forced marriages of women⁵⁹ and shed light on the issue. However, it was merely descriptive and provided recommendations in very general terms thus requiring for further research and analysis.

The literature review reveals that a great number of scholars from different disciplines have written on the issue of child marriages further illustrating its complexity. The present study will draw from these approaches and analyse the issue from a Malagasy perspective. There are indeed no comprehensive studies on the situation of the girl child marriage in Madagascar, assessing the practice from a legal and social perspective. This is the added value and contribution of this work.

1.7 Significance of the study⁶⁰

Given the fact that child marriage is currently under the international spotlight, it is timely for Madagascar to explore legal and policy strategies to end child marriages. The election of a new President⁶¹ and the promise to restore constitutional order make this study timely as national development plans of action are to be drafted.

⁵⁵ T Khaime *The African Charter on the Rights and Welfare of the Child, a socio-legal perspective* (2009).

⁵⁶ See for instance, B Gastineau 'Grossesses précoces et conséquences à Madagascar' (Early pregnancies and consequences in Madagascar) in C Gourbin (ed) *Santé de la Reproduction au Nord et au Sud: de la connaissance à l'action* (2009) 65-67.

⁵⁷ C Binet & B Gastineau 'Mariage, fertilité et autonomie conjugale à Madagascar' (Marriage, fertility and matrimonial autonomy in Madagascar) *Autrepart* 47 (2008) 43.

⁵⁸ PJ Glick 'Schooling, Marriage and childbearing in Madagascar' *Cornell Food and Nutrition Policy Program Working Paper* 241 (2012) available http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2016385 (accessed 5 August 2013).

⁵⁹ Report of the SR (n 22 above).

⁶⁰ To be fully significant, this research will be translated into French.

⁶¹ The second round of the presidential elections is scheduled on 20 December 2013.

Furthermore, Madagascar's participation in the global empirical knowledge production is limited. Being isolated from the African continent and compounded by language limitation of French, this study will contribute to the knowledge building by a Malagasy national who is familiar with the intricate details of the country and can highlight sensitive issues.

This dissertation can also be part of the tools to be used in order to respect Madagascar's international commitments. It can be used to inform policy makers, NGOs and development partners. Reference is especially made to the 2012 CRC Committee recommendations calling for the effective implementation of the prohibition of child marriages in Madagascar.⁶² Finally, Madagascar is currently drafting its national report to the CEDAW Committee and may draw from this study, as may do the Committee in its consideration of the country and assessment of the situation.

1.8 Conceptual framework

This study critically assesses the issue of child marriage through a child-rights based approach highlighting the vulnerabilities of the child as an individual right-holder and as a 'girl' child. A rights-based approach intends to promote 'justice, equality and freedom' and tackles the power issue that lie at the root of poverty and exploitation.⁶³ This approach is all the more important with reference to the girl child, given the intersections of vulnerabilities that she faces.⁶⁴ A child-rights based approach is centred on empowering children rights-holders to claim their rights and on strengthening the accountability of duty bearers to fulfil their obligations. The principle of the best interests of the child lies in the heart of children's rights. This study addresses child marriages through the lens of this principle, embedded in the Convention on the Rights of the Child⁶⁵ and the African Charter on the Rights and Welfare of the Child.⁶⁶ The best interests of the child is a 'dynamic concept' encompassing various issues continuously evolving. In its General Comment N°14, the CRC Committee states that the concept of the child's best interests is threefold as a 'substantive right', a 'fundamental, interpretative legal principle' and a 'rule of procedure',⁶⁷ 'aimed at ensuring both the full and effective enjoyment of all the rights

⁶² CRC, Concluding Observations Madagascar, CRC/C/MDG/CO/3-4, paras 53-54.

⁶³ J Theis 'Promoting rights based approach' Save the Children (2004) 2.

⁶⁴ See N Taefi 'The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Gild' *International Journal of Children's Rights* 17 (2009) 345.

⁶⁵ Article 3 CRC.

⁶⁶ Article 2 of ACRWC.

⁶⁷ CRC, General Comment No 14, CRC/C/GC/14 (2013) para 6.

recognised in the Convention and the holistic development of the child'.⁶⁸ The concept means that every decision concerning the child should be child-centred and aims at recognising the child as a right holder. This principle should be applied in all implementation measures. That means that states are required to review and amend their domestic legislation, uphold the principle in the coordination and implementation of policies, establish mechanisms and procedures for complaints, remedies or redress and allocate appropriate national resources for programmes and measures aimed at implementing children's rights.⁶⁹ While making decisions, 'a best-interests assessments' consists of evaluating and balancing all the elements necessary to make a decision in a specific situation for a specific child. In the context of child marriages, although legislation should absolutely prohibit marriage under 18 years, when marriage is allowed by a judge's decision, we consider that the judge should always apply the best interests of the child principle.

Secondly, this study also addresses the issue through a gendered lens. It is important to explore the issue bearing in mind the social construction of the girl child, her submissive role and the quest to control women's sexuality and fertility⁷⁰ in a patriarchal society such as Madagascar. The protection and recognition of the rights of the girl child should be placed at the heart of implementation measures by the Malagasy government to effectively respond to the harmful practice of child marriage. Finally, this study will also carefully consider the Malagasy value system underpinning cultural and traditional practices, including child marriage. It is indeed essential to adopt an objective approach balancing views and exploring common grounds of the Malagasy culture and children's rights.⁷¹ Consequently, it is argued that a child-rights based approach centred on the bests interests of the child, sensitive to gender and culture will contribute to the eradication of the practice of child marriage.

1.9 Methodology

This research is based on desk research including the analysis of existing publications, review of secondary data such as books, journals, articles, UN and NGOs' reports on child marriage. It also analyses Madagascar's legislation and policies.

⁶⁸ As above, para 4.

⁶⁹ As above, para 15.

⁷⁰ S Tamale 'Researching and theorising sexualities in Africa' in S Tamale (ed) *African Sexualities: A Reader* (2011)

16.

⁷¹ see especially chapter 4.

For the content of the case study, I especially use the documentation gathered during my collaboration with the Office of the High Commissioner for Human Rights (OHCHR) in Madagascar. Reference is also made to the findings of the UN Special Rapporteur on contemporary forms of slavery, including its causes and consequences, during her field visit mission in December 2012, which gave impetus to the present research.

1.10 Limitations of the study

Advocating for a child-rights based approach to legislation, policy and programming, this research mainly lacks participation and testimonies of girls. This study would have benefited from further in-depth field research and direct interviews in targeted rural areas of Madagascar where the practice is particularly pervasive but the researcher is not on site and is limited by time constraints. In addition, Madagascar is composed of 18 ethnic communities among 22 regions and this study does not purport to exhaustively address all the different forms and manifestations of the practice but will focus on the *Tsimihety* community of the North West and the *Bara* community of the South.

1.11 Overview of chapters

This dissertation is structured into five chapters.

Chapter one consists of the proposal which gives the background, a general introduction to the study and describes the manifestations of the girl child marriage practice in Madagascar.

Chapter two discusses the international and regional legal framework of the protection against child marriage. It lays down the international and regional normative foundation for Madagascar's response.

Chapter three analyses the legal and policy framework in Madagascar and the extent to which it complies with international standards. It will discuss how Madagascar responds to this issue and what challenges and gaps it faces.

Chapter four identifies the underlying values, root causes and exacerbating factors of the practice of the girl child marriage in Madagascar. It explores extra-legal strategies, which take into account the broader cultural and socio-economic context.

Chapter five concludes the study and makes recommendations for future action to ensure the effective prevention and protection of the girl child from child marriage.

CHAPTER TWO: International and regional legal framework of the protection of the girl child against child marriage

2.1 Introduction

This chapter analyses the human rights standards on child marriage as enshrined in the international and regional human rights conventions and further developed by soft law. Madagascar has ratified most of the instruments relating to child marriages and therefore undertook to be legally bound by their normative content.⁷² This part highlights the issue of child marriage as a violation of the girl child's rights, which adversely impacts on her right to health, education and to be free and protected from violence and harmful practices.

2.2 International human rights instruments relating to child marriage

2.2.1 The United Nations Bill of Rights

The 1948 Universal Declaration of Human Rights (Universal Declaration) is the first universally endorsed human rights document. In this regard, Article 16(1) Universal Declaration provides that persons of 'full age' can marry and that 'marriage should be entered into only with free and full consent of the intending parties'. In the same vein, Article 23(2) of the International Covenant on Civil and Political Rights⁷³ (ICCPR) provides for the 'free and full' consent of both spouses as does Article 12 of the International Covenant on Economic, Social and Cultural Rights⁷⁴ (CESCR). Collectively, the above provisions lay out the foundation for a right to consent to marriage.

However, these instruments do not define the concept of 'free and full consent' and do not take into consideration the specific vulnerability of the girl child, as a child and as a girl. Subsequently, the Human Rights Committee highlighted that marriage should be entered into at an age where the individuals are 'able to give their free and full personal consent' without further specifying it.⁷⁵ International standards define adult as an individual of 18 years and recognise that a child cannot give consent to marriage.⁷⁶ A marriage without consent is tantamount to a forced marriage thus implying that a child marriage would be automatically a forced marriage.

⁷² Article 26 of the Vienna Convention of the Law of Treaties, 1969.

⁷³ Ratified by Madagascar in 1971.

⁷⁴ Ratified by Madagascar in 1971.

⁷⁵ HRC, General Comment No. 19, HRI/GEN/1/Rev1 (1994) para 4.

⁷⁶ Report of the SR (n 22 above) para 14.

Furthermore, in General Comment 28, the Human Rights Committee does not recognise the legality of customary or statutory law that allow for a third party to consent to marriage thereby denying girls their right to exercise their free will.⁷⁷ Beyond the issue of consent, in some cases, a child in a marriage amounts to slavery as outlined below.

2.2.2 The 1957 United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (The Supplementary Slavery Convention)

Madagascar ratified the Supplementary Slavery Convention in 1972. This instrument does not expressly prohibits child marriage but requires States parties to 'take all practicable and necessary legislative and other measures to bring about 'the complete abolition of any institution or practice whereby a woman without the right to refuse is promised or given in marriage in payment of consideration in money or in kind to her parents, guardian, family or other person or group'⁷⁸ and 'whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view of exploitation of the child or young person of his labour'⁷⁹.

These provisions read in conjunction are applicable to child marriage where there is a payment in the form of a bride price. Even if it does not particularly consider the girl child's vulnerability, both articles need to be interpreted purposively as referring to a prohibition of child marriage. Moreover, States Parties are required to prescribe a 'suitable minimum age of marriage'.⁸⁰ Although the absence of guidance of what is a 'suitable minimum age' may constitute a loophole, it should be read in light of Article 1(d) prescribing a minimum of 18 years.

The UN Special Rapporteur further elaborated on this issue in a thematic report on servile marriages.⁸¹ She stressed the adversarial impact on the girl child forced into marriage who may face domestic servitude, sexual slavery and violation of her right to health and education.

Significantly, in the landmark decision of *Hadijatou Mani Koroua v Niger*⁸², the ECOWAS Court of Justice referred to the Supplementary Slavery Convention⁸³ and recognised marriage (in the

⁷⁷ HRC, CCPR/C/21/Rev.1/Add.10 (2000) para 23.

⁷⁸ Article 1(c).

⁷⁹ Article 1(d).

⁸⁰ Article 2.

⁸¹ HRC (n 5 above).

⁸² *Mme Hadijatou Mani Koroua v The Republic of Niger*, 27 October 2008, ECW/CCJ/JUD/06/08.

⁸³ As above, para 72 et seq.

instant case, a child marriage as Hadijatou was under 18) as amounting to slavery. The Court held that slavery qualifies ‘not only when there is ownership in the legal sense, but also when a ‘certain level of control exists by one individual over another’.⁸⁴ The above standards have considered child marriage as a practice similar to slavery further emphasising the gravity of the issue and the urgent need to eradicate the practice.

2.2.3 The 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (The Marriage Convention)

Madagascar ratified the Marriage Convention in 1964. Article 1 focuses on the issue of consent and equality by stating that:

‘no marriage should be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person as prescribed by law’.

As Warner rightly points out, those conventions do not recognise ‘the special vulnerabilities of children, whose ‘consent’ can be easily coerced or unduly influenced by adults.’⁸⁵ The Convention however introduces the notion of compulsory registration of marriages.⁸⁶ The registration of marriages is an important tool to ascertain the legal age and the fulfilment of required conditions, such as consanguinity. It is also important for data collection as it accounts for the number of violations and can be used to assess the scope of the practice.

The Marriage Convention has been described as an aspirational instrument and merely an empty shell as there is no further explanation as to its content and no monitoring mechanisms.⁸⁷ This instrument is a welcomed first step but needs to be read in conjunction with the CEDAW and the CRC to enhance its meaning.

2.2.4 The 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Madagascar ratified CEDAW Convention in 1989 without any reservations.⁸⁸ CEDAW was the first universal instrument taking into account the specific needs of women and clearly tackled ‘discrimination against women’. CEDAW firstly reiterates the ‘free and full consent’

⁸⁴ See H Duffy ‘*Hadijatou Mani Koroua v Niger*: slavery unveiled by the ECOWAS Court’ *Human Rights Law Review* (2008) 10.

⁸⁵ Warner (n 46 above) 247.

⁸⁶ Article 3.

⁸⁷ Warner (n 45 above).

⁸⁸ CEDAW is today the convention registering the highest number of reservations, mainly on article 2 (non-discrimination) and 16 (marriage).

requirement⁸⁹ and more importantly expressly prohibits child marriage. According to Article 16(2):

'The betrothal and the marriage of a child shall have *no legal effect*, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.'(emphasis added)

The expression 'no legal effect' implies that a child marriage should be declared void *ab initio*.⁹⁰ The definition of what is 'child' is not provided and there was no discussion of a minimum age during the *travaux préparatoires*.⁹¹ Similarly, CEDAW does not address the particular vulnerabilities of the 'girl child'. However, the Committee further elaborated the concept of child marriage in subsequent General Recommendations thus bridging the initial gap. In this regard, General Recommendation 21 on equality in marriage and family relations states that the minimum age for marriage should be 18 and further prohibits the betrothal or consent on marriage given by a family member.⁹² The Committee emphasises that when men and women marry, they assume important responsibilities.⁹³ Consequently, marriage should not be permitted before they have attained full maturity and capacity to act.⁹⁴ In turn, General Recommendation 19 fills the silence of the Convention on violence against women.⁹⁵ It specifies that early marriages are a form of gender-based violence, impairing the enjoyment of their rights by girls.

Madagascar has the obligation to respect, protect and fulfil women's rights. That means it has to refrain from enacting laws undermining the equality between women and men in the family, to protect women from discriminatory practices by third parties, including addressing child marriages. Furthermore, for the first time in a legal instrument, CEDAW acknowledges the potential adversarial impact of culture and traditions in protracting women discrimination. In this regard, in accordance with Article 5, Madagascar was required to:

'take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other

⁸⁹ Article 16(1).

⁹⁰ MA Freeman 'Article 16' in MA Freeman et al (ed) *The Convention on the elimination of all forms of discrimination against women: a commentary* (2011) 437.

⁹¹ As above.

⁹² CEDAW UN Doc A/49/38 (1994) paras 36-39.

⁹³ As above.

⁹⁴ UNICEF (n above).

⁹⁵ CEDAW UN Doc A/47/38 (1993).

practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women’.

For instance, the State has to invest in eliminating the view that ‘marriage is required to complete women’s lives and that women’s primary value lies in their reproductive roles’.⁹⁶

Moreover, the Committee’s concluding observations (COBs) are also an important tool to assess the implementation of the Convention and set minimum standards on the issue. In its last concluding observations on Madagascar,⁹⁷ the CEDAW Committee has consistently repeated the need to eradicate early marriages in a holistic approach. It firstly addressed the need to eliminate harmful practices that perpetuates discrimination against women such as the bride price practice.⁹⁸ Early marriage was also linked to the violation of the right to education⁹⁹ as well as early pregnancies.¹⁰⁰ Moreover, CEDAW calls for the provision of a comprehensive legal framework for women’s equal enjoyment of their rights within the family structure.¹⁰¹

As access to justice is equally important to end this practice, it is finally worth mentioning that Madagascar has also signed the Optional Protocol to the CEDAW on a communication procedure in 2000 but has not yet ratified it.

Overall, the normative environment created by CEDAW and its soft law calls for a domestic legal framework that prohibits child marriages. However, the practice of the Committee is not uniform with regard to the validity of exceptions. Having regard to context, the Committee sometimes allows for ‘parental consent’ upon decision of a competent judicial authority.¹⁰²

2.2.5 The 1989 UN Convention on the Rights of the Child (CRC)

Madagascar ratified CRC in 1991. The CRC does not include an explicit provision prohibiting child marriages. Moreover, the Convention uses gender-neutral language thus failing to address the specific vulnerabilities of the girl child.¹⁰³ However, in its subsequent General Recommendations, the CRC Committee takes a clear stance against marriage under 18

⁹⁶ Freeman (n 91 above) 440.

⁹⁷ CEDAW/C/MDG/5 (2008).

⁹⁸ As above, para 17.

⁹⁹ As above, para 26.

¹⁰⁰ As above, para 30.

¹⁰¹ Freeman (n 92 above) 425.

¹⁰² See for instance CEDAW, COBs Columbia.

¹⁰³ L Askari ‘The Convention on the Rights of the Child: the necessity of adding a provision to ban child marriages’ *International Journal of International and Comparative Law* 23 (1998).

years.¹⁰⁴ It further prohibits absolutely parental consent whether authorised by a competent judicial authority or not.

In this regard, under Article 4 CRC, Madagascar undertook to take ‘all appropriate legislative,¹⁰⁵ administrative and other measures for the implementation of the rights in the Convention.’ In other words, Madagascar has the obligation to respect, promote, protect and fulfil the realisation of children’s rights.

In relation to child marriage, the obligation to respect requires the State not to interfere with the enjoyments of the rights. The national legal framework should unequivocally prohibit child marriage. For instance, a civil servant should be sanctioned when conducting a marriage whereby the spouse is under 18 years. Moreover, recognising constitutional status to the rights of the child gives political legitimacy to the children’s rights discourse and enhances visibility of children.¹⁰⁶ Further, The obligation to protect requires the state to prevent the violations of rights by third parties, such as the parents, guardian or the husband of the child. Finally, the obligation to fulfil enjoins the state to take positive steps to protect the girl child from child marriage, not only in terms of protection from violence but also on access to education, better health services. Effective implementation implies adequate budget allocation.¹⁰⁷ In this regard, a child-rights based approach to budget allocation would better safeguard the rights of the girl child.¹⁰⁸

The four general principles governing the CRC, namely the principle of non-discrimination, the best interests of the child, participation and survival and development, have a direct implication on the protection of girls against child marriages.

Firstly, the principle of non-discrimination requires that girls and boys be treated in an equal manner regarding the minimum age for marriage. Gender inequality and imbalanced power dynamics between sexes are often underlying the practice and consideration must be given to equality.

¹⁰⁴ See for instance CRC, General Comment No 4, CRC/GC/2003/4 (2003) para 20.

¹⁰⁵ For best practices in legislative implementation, see the Protection Project and International Centre for Missing & Exploited Children ‘The Model Law on child protection’ (2013).

¹⁰⁶ See for instance Section 28 of the South African Constitution; Section 34(6) of the Ethiopian Constitution and Section 28 of the Ghanaian Constitution; The recent outcry in Nigeria illustrates the importance of the government’s public stance against child marriages. Nigeria’s 1999 constitution left open a possibility for the legality of girl child marriage: Section 29(4) provides that age of maturity is age 18. However, Section 29(4)(b) includes an exception for girl children and proclaims that girl children reach maturity when they marry, regardless of the age of marriage. It raises the question of the impact of culture and traditions and the potential disconnect between law and society. It will further be explored in chapter 4.

¹⁰⁷ CRC, General Comment No 5, CRC/GC/2003/5, para 51.

¹⁰⁸ As above.

The second core principle of the CRC is the best interests of the child¹⁰⁹, which also provides for the conceptual framework of the present study. As earlier explained earlier, the best interests of the child principle stands firstly as a rule of procedure. Applied to the issue of child marriage, we argue that the decision of the judge must consider the possible impact (positive or negative) on the child and must give due importance to these impacts when considering the different interests involved. Priority must be given to the best interests of the child as opposed to the parents' for instance. Secondly, the best interests of the child is 'the foundation for a substantive right'. In other words, States parties are required to establish a mechanism necessary to adequately consider the best interests of the child, through a legal obligation for decision-makers such as judges for instance. Finally, the best interests of the child is a 'fundamental, interpretative legal principle' to assess a particular situation. Practices that are in conflict with the child's dignity and physical integrity cannot be justified by 'cultural relativist' considerations. This principle is interpreted to include 'all actions', including in the domestic sphere such as actions of parents or guardians. In this regard, Article 18(1) recalls that the best interests of the child should be the parents' 'basic concern'. The interpretation of a child's best interests must be 'consistent with the whole Convention' implying that the global spirit of the Convention should always be borne in mind. It is contented that this principle should be at the centre of all actions, measures and strategies against the practice of child marriage. To avoid any legal manipulation, it is important for Madagascar to have a clear understanding of the definition of this principle. The Ugandan Children Act¹¹⁰ for instance comprehensively defines the criteria applicable to assess the 'best interests of the child' as the following:

- (a) the ascertainable wishes and feelings depending on age and understanding;
- (b) the child's physical, emotional and educational needs;
- (c) the likely effects of any changes in the child's circumstances;
- (d) age, sex, background and circumstances
- (e) any harm that the child has suffered or is at the risk of suffering;
- (f) capacity of the child's parents, guardians or to meet the needs.'

Furthermore, the principle of participation or the right of the child to be heard¹¹¹ is important, particularly in terms of consent to marriage. Drawing from the CRC legal interpretations, a girl child cannot give consent to marriage by the mere fact that she is a child because of the lack of sufficient maturity of the girl child. Conversely, according to the participation principle, the girl child is supposed to give her opinion on matters that concern her wellbeing or development,

¹⁰⁹ Article 3.

¹¹⁰ Article 3, First schedule of the Children Act (Cap 59) of 1 August 1997.

¹¹¹ Article 12.

thus leading to an inconsistency in the application of the law. Moreover, article 14 includes the right to sexual and reproductive health. It begs the question of the right to consent and the age of discretion in the cases of girl adolescents aged 16 to 18 or girl child-headed households. At what age a girl is actually 'capable of exercising choice'?¹¹² Moreover, how does the right to have sexual intercourse as an adolescent girl can be reconciled with the legal age at marriage? The answers can partially be drawn from General comment 14 according to which both principles of participation and the best interests of the child should be weighed and complement each other. Furthermore, the consideration of the evolving capacity, age and maturity of the child that may demand some leeway in response to the age debate. The legislation on marriage should further not impinge on the right to sexual and reproductive health of adolescents nor stigmatise the girls who have sexual intercourse before 18. Interestingly, a recent study revealed that countries with strict prohibition of child marriage in law experienced the most 'dramatic decline in adolescent fertility'¹¹³ further buttressing the stance of the CRC.

Lastly, child marriage has a prejudicial impact on the principle of survival and development.¹¹⁴ As defined in General Comment No 5, the principle of survival and development must be interpreted broadly and holistically as encompassing the physical, mental, spiritual, moral, psychological and social development.¹¹⁵ States parties should ensure the girl child's right to life¹¹⁶ and to the enjoyment of the highest attainable standard of health,¹¹⁷ which was broadly defined by the CRC Committee in General Comment No 4¹¹⁸ and General Comment No 15¹¹⁹ as the right of the child to develop to its full potential. Furthermore, Article 24(3) addresses particularly the impact of traditional practices on the right to health. Beyond female genital cutting, this provision also refers to child marriages as further outlined in the 1994 UN seminar and subsequent Plan of action for the elimination of harmful traditional practices affecting the health of women and children.¹²⁰ Article 24(3) also includes violence against women. In line with the Committee's views, Tobin stressed the fact that the concept of health in this regard goes

¹¹² P Gupta 'Child Marriage and the Law, Contemporary Concerns' *Economic & Political Weekly* (47) 49 54.

¹¹³ M Kim et al 'When do law matters: national minimum age of marriage law, child rights and adolescent fertility 1989-2007' *Law & Society Review* 47 (2013) 589.

¹¹⁴ Article 6(2).

¹¹⁵ CRC (n 109 above) para 12.

¹¹⁶ Article 6(1).

¹¹⁷ Article 24.

¹¹⁸ CRC (n 105 above).

¹¹⁹ CRC/C/GC/15 (2013).

¹²⁰ Explicitly listing 'early marriages' Available at

beyond the 'bio-medical' assessment to include the psychosocial impact of the practice.¹²¹ Accordingly, extensive research and evidence have shown that child marriage is typically accompanied by early and frequent pregnancies and childbirth resulting in higher than average maternal morbidity and mortality rates.¹²² Physiologically, the body of a young girl is not fully mature for childbirth - the uterus not being developed enough - causing obstetric fistulas and other complications.¹²³ Moreover, a married girl child is more prone to depression, sexually transmitted disease and HIV/Aids.¹²⁴ A recent study has shown that 'nations with higher rates of girl child marriage are significantly more likely to contend with higher rates of maternal and infant mortality and non utilisation of maternal health services.'¹²⁵ This principle also encompasses the right to an adequate living.¹²⁶ Madagascar undertook to implement effective measures to abolish such practices prejudicial to the health of the girl child.

In addition, child marriage, because of the age difference between the spouses, the lack of decision-making of the girl, the payment of a bride price or the power imbalance, is considered as a factor in increasing the risk of domestic violence against which the girl child has the right to be protected. The CRC Committee expanded the concept in General Comment No 13¹²⁷ spelling out the right of the child to be free from violence, with specific reference to harmful practices, including child marriages. The term 'violence' includes 'all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse'.¹²⁸ It evidently encompasses domestic violence, including marital rape. Article 34 on sexual abuse and sexual exploitation is therefore also applicable. Indeed, in most instances, marriage means engaging into sexual relations and the girl child is often coerced into the act. In this context, related to the right to health, state parties are required to set a minimum age of sexual consent.¹²⁹ This was one of the recommendations of the CRC Committee to Madagascar.¹³⁰

¹²¹ J Tobin, 'The international obligation to abolish traditional practices harmful to Children's health: What does it mean and requires of States?' *Human Rights Law Review* 9 (2009) 373 378.

¹²² See World Health Organisation 'Adolescent pregnancies' MPS Notes 1 (2008).
http://www.who.int/maternal_child_adolescent/documents/note_adolescent_pregnancy/en/index.html (accessed 5 August 2013).

¹²³ As above; NM Nour (n 43 above).

¹²⁴ As above.

¹²⁵ A Raj & U Bohemer (n 43 above) 1.

¹²⁶ Article 27.

¹²⁷ CRC/C/GC/13 (2011).

¹²⁸ Article 19.

¹²⁹ CRC (n 105 above) para 9.

¹³⁰ n 63 above, para 46.

Child marriage is also an impediment to the realisation of the right to education.¹³¹ The correlation between the occurrence of child marriage and the lack of or absence of education has been documented extensively.¹³² The ratio between girls attending primary school and secondary school also shows a dramatic drop out rate in relation to the moment girls enter marriage and start having children. Ensuring the education of the girl child has been consistently invoked as an effective way to delay child marriages.¹³³ Under the CRC, the girl child is entitled to free basic education and the state has the obligation to provide it.

Fighting against child marriages requires the state to be able to ascertain the age of the child. Article 7 obliges States parties to ensure the existence and accessibility of a birth registration system. The CRC Committee further elaborated that this obligation entails effective access to free birth registration, which is crucial to establish the age of a child and thus reduce child marriage.

In light of the above, it can be concluded that a number of rights are violated in cases of child marriage, which support the 'harmful' qualification of the practice. It has been demonstrated that both CRC and CEDAW complement and mutually reinforce each other with regard to the legal protection of the right of the girl child and provide for a sound legal framework against the practice.¹³⁴

2.2.6 The 2000 Optional Protocol on the sale of children, child prostitution and child pornography

Madagascar ratified the Protocol in 2004. Under Article 2(a), the Protocol defines sale of children as 'any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.' The jurisprudence of the CRC Committee considers child marriage as a form of 'sale of children'.¹³⁵ The Protocol is therefore applicable to child marriage the girl child considered as a commodity through the payment of a bride price.

¹³¹ Articles 27 and 28.

¹³² A Melchior & E Atkins 'At what age are school-children employed, marry and taking to court' Right to Education Project (2011); Brown (n 40 above).

¹³³ Brown (n 39 above).

¹³⁴ It is important to mention the subsequent instruments protecting the girl child such as the Beijing Declaration and Platform of Action and the International Conference on Population and Development Programme of Action (ICPD) both adopted in 1995.

¹³⁵ See for instance CRC COBs Burkina Faso, CRC/C/OPSC/BFA/CO/1 paras 20-21; Madagascar has not yet submitted its initial report.

It is finally worth mentioning that Madagascar signed the new Optional Protocol on a Communications Procedure in 2012. The procedure provides a mechanism for complaints, remedies and redress for the girl child victim of a child marriage.

2.2.7 The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (The Palermo Protocol)

Madagascar ratified the Palermo Protocol in 2005. The Protocol provides that the ‘recruitment, transfer, or receipt of a child for the purposes of exploitation’ is considered trafficking ‘whether force or coercion is used, money exchanged or consent given.’¹³⁶ A child is defined as below the age of 18 years.¹³⁷ As Warner rightly states, ‘the marriage of a girl child inevitably results in her ‘transfer’ from her birth family to that of her husband.’¹³⁸ As demonstrated above, the girl child marriage may amount to a form of exploitation, in terms of sexual exploitation or slavery like practices. The Palermo Protocol therefore falls into the ambit of the legal protection against child marriages. Some countries, such as Uganda, specifically added forced marriage in the national legislation against trafficking in persons.¹³⁹

2.3 The African Regional legal framework

2.3.1 The African Charter on the Rights and Welfare of the Child¹⁴⁰ (ACRWC)

Madagascar ratified the African Children’s Charter in 2005. This instrument was adopted to complement the CRC in order to address the peculiarities affecting the African child.¹⁴¹ In this regard, the African Children’s Charter provides for protection affecting the welfare, dignity, normal growth and development, prejudicial to the health or life, discriminatory to the child on the ground of sex and explicitly prohibits child marriage. Pursuant to Article 21(2), under the protection from harmful social and cultural practices, the Charter states:

¹³⁶ Article 3(a) & 3(d).

¹³⁷ Article 3(e).

¹³⁸ Warner (n 46 above) 262.

¹³⁹ Article 2(d) of the Prevention of trafficking in persons Act of 2009 includes ‘child marriage’ in the definition of ‘exploitation’.

¹⁴⁰ OAU Doc.CAB/LEG/24.9/49 in Heyns & Killander (eds) *Compendium of Key Human Rights Documents of the African Union* (2010) 77.

¹⁴¹ F Viljoen *International human rights law in Africa* (2012) 392.

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

The prohibition is unequivocal and in line with Article 2 which defines a child as a person under 18 years old without any possible exception. Some countries have enacted a law against such harmful practices in general.¹⁴² Section 14(1) of the Ghanaian Act refers directly to child marriage and provides that 'no person should force a child to be betrothed, to be the subject of a dowry transaction or to be married.'

Similar to the CRC, the African Children's Charter provides for various rights linked to child marriages. Under the Charter, the best interests of the child should be 'the' primary consideration.¹⁴³ The right to life and survival and development¹⁴⁴ is equally protected. Article 20 recalls the application of this principle as a parental responsibility. The right to education under Article 11(6) addresses the particular needs of children who become pregnant before completing their education and obliges States parties to ensure that the child be given an opportunity to continue her education. Article 14 provides for the right to health. Article 1(3) calls for the 'discouragement' of any custom, tradition, cultural or religious practice that is inconsistent with the rights of the Charter. In this regard, some Constitutions, such as in South Africa, have expressly recognised customary law as long as it does not contravene the Bill of rights.¹⁴⁵

The monitoring body of the African Children's Charter, namely the African Committee of Experts on the Rights and Welfare of the Child is slowly generating jurisprudence on the Charter's provisions. It is hoped that the Committee will answer to the call for a general comment on child marriage. The African continent will certainly benefit from a clear and unified normative response on the issue by an authoritative African body.

¹⁴² See for instance, section 7 of the Ugandan Children's act; section 12(1) of the South African Children's act.

¹⁴³ Article 4; It has been further developed that this provision should be interpreted holistically with respect to other rights and principles of the CRC and should be read as being 'a' primary consideration on a case by case basis.

¹⁴⁴ Article 5.

¹⁴⁵ Section 39(4) of the South African Constitution.

2.3.2 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa¹⁴⁶ (The Maputo Protocol)

Madagascar signed the Maputo Protocol in 2004 but has not ratified it yet. Madagascar is nonetheless bound by the spirit of the treaty and must act in accordance to its content. The Maputo Protocol also aspired to enlarge women's legal protection offered by the CEDAW in order to take into consideration the 'African women specificities'.

The Maputo Protocol is also clear on the prohibition of child marriages and does not allow any loopholes. Article 6(b) states that 'the minimum age of marriage for women shall be 18 years'. The wording 'women' in this provision suggests that the drafters did not intend for marriages to be entered into before 18 by girls. The Protocol also requires that every marriage should be recorded in writing and duly registered in order to be recognised legally.¹⁴⁷

Article 5 tackles the issue of the elimination of harmful practices, defined 'as all behaviour, attitudes and/or practices, which negatively affect the fundamental rights of women and girls.'¹⁴⁸

The Maputo Protocol expressly addresses violence against women which is defined as 'all acts perpetrated against women which cause or could cause them physical, sexual, psychological and economic harm.'¹⁴⁹ Article 4 directs the State parties to 'enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or in public.' Article 14(c) is equally important as it provides for the protection of the sexual and reproductive rights of the girl child by and requires States to authorise 'medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.'

It is also worth mentioning that the AU adopted the Declaration on Gender Equality in 2004 buttressing the provisions of the Protocol. Although not legally binding, it represents a political commitment of States Parties, including Madagascar, to fight against gender-based violence.¹⁵⁰

¹⁴⁶ CAB/LEG/66.6 (entered into force in 2005).

¹⁴⁷ Article 6(d).

¹⁴⁸ Article 1(g).

¹⁴⁹ Article 1(j).

¹⁵⁰ Paras 6 & 7.

2.3.3 The African Youth Charter

Although rarely referred to and not yet ratified nor signed by Madagascar, the African Youth Charter is nonetheless an important instrument adopted in the view of advancing youth empowerment. It is particularly important as child marriage mostly involves adolescent girls. The African Youth Charter defines young people from 15 to 35¹⁵¹. Article 8 states that ‘young men and women of full age’ shall marry based on their ‘free consent’. It therefore raises the concern expressed earlier on the particular age group of 15 to 18 adolescent girls with regard to child marriage. It is contended that the African Youth Charter attempted to take in consideration the particular context in which girls develop in most African countries. This grey area calls for a balance reflection and an analysis of the facts of each case, the risk of coercion of the parents and the situation of the girl.

2.4 The sub regional legal framework

2.4.1 The Southern African Development Community Protocol on Gender and Development (The SADC Gender Protocol)

Madagascar adhered to the SADC Gender Protocol in 2008. Although Regional Economic Communities (RECs) have not been set up primarily to foster human rights, economic integration is linked to the realisation of socio-economic rights and cannot strive without the respect for human rights in general, including gender equality¹⁵². Sub regional instruments are therefore additional legal tools that can further elaborate on girls’ rights.

In this regard, the SADC adopted a Protocol to address common sub regional gender discrimination issues. Pursuant to Article 8, ‘no person under the age of 18 shall marry, unless otherwise specified by law, which takes into account the best interests and welfare of the child’. Although probably drafted with regard to the age debate, we argue that the clawback clause should be clarified in order to avoid manipulation by States parties. The SADC barometer baseline survey¹⁵³ on Madagascar further demonstrates that in practice, gender inequality is pervasive in Madagascar and hinders the girl child from the enjoyment of her rights.

¹⁵¹ Preamble.

¹⁵² Viljoen (n 144 above) 483-487.

¹⁵³ SADC Gender Protocol Barometer Baseline Study (2012) <http://www.genderlinks.org.za/article/baromtre-de-la-sadc-sur-le-genre-et-le-dveloppement-madagascar-2013-04-11> (accessed 25 September 2013).

2.5 Legal enforcement

The CRC Committee has stressed the importance of States parties' obligations to protect child victims from human rights violations, to investigate and to punish those responsible and to provide access to redress to put an end to impunity.¹⁵⁴ Rights are indeed empty shells if access to justice is denied to the child victims.

The best interests of the child should always be a primary consideration. In this regard, the imprisonment of the parents or the family is unlikely to be an appropriate sanction¹⁵⁵ and should only be considered as an ultimate resort, depending on the circumstances of the case. Careful consideration should also be given to potential short and long term impacts on the child of the dissolution of the child marriage. Negative impacts such as social and familial exclusion, economic deprivation, claims for repayment of dowry and other potential consequences should be thoroughly considered. Annulment of marriage should not be subjected to return of dowry.¹⁵⁶ In a study in Ethiopia, girls in Tigray explained that having been beaten by their parents when they reported them to officials for trying to marry them off.¹⁵⁷ The rights of the victims should therefore always be upheld. Penal sanctions, when applicable, should be coupled with protection measures and services for victims. The importance of establishing an age for sexual consent is reiterated. Prosecution under the offence of defilement has sometimes been used astutely to put an end to child marriage.¹⁵⁸ Alternative dispute resolutions and other informal justice mechanisms, when compliant with human rights, may also be put in place to address the adversarial consequences on the child. It would ensure the enforcement of the law at the local level and reinforce the sense of ownership of the process.¹⁵⁹ Successful examples of the creation of local courts in Uganda¹⁶⁰ and Lesotho have proved that dispute resolution based on reconciliation and non-confrontation may be a more suitable mechanism.¹⁶¹

¹⁵⁴ CRC, General Comment No 13 (n 129 above) para 5.

¹⁵⁵ Gupta (n 114 above) 54.

¹⁵⁶ The Protection project (n 107 above).

¹⁵⁷ Boyden (n 54 above) 515.

¹⁵⁸ 'Zambia-Legal case highlights child marriage rights violation' *Women News Network* 5 August 2011 http://www.wunrn.com/news/2011/08_11/08_15/081511_zambia.htm

¹⁵⁹ J Sloth-Nielsen et al 'Child friendly laws in Africa' *The African Child Policy Forum* (2009) 14-15.

¹⁶⁰ Section 92(4) of the Ugandan Children Act.

¹⁶¹ Sloth-Nielsen et al (n 164 above) 15.

2.7 Conclusion

It is contended that the international legal framework, although initially unclear and at times inconsistent, has been gradually and adequately developed by soft law and regional instruments. It provides a sound legal basis for Madagascar's action against child marriage, if implemented holistically.

In concrete terms, the Malagasy government has the legal obligation to respect, promote, protect and fulfil the right of the girl child to be protected from child marriage. This implies the adoption of a series of appropriate and effective measures safeguarding the protection of the girl child's right to health, education, to be free from all forms of violence, from harmful traditional practices, the right not to be separated from her parents, to survival and development, to participation and to access to birth registration.

This part also highlighted the complexity stemming from the 'full and free consent' and the age requirement. CRC considers a child not sufficiently informed and mature to give consent. CEDAW is not consistent in its practice. This aspect is subject to debate and needs to be considered thoroughly in the Malagasy context. In addition to the requirement of the enactment of a minimum age at 18, the government must ensure legal enforcement of the prohibition by taking punitive or alternative restorative measures against the perpetrators and protection measures for the girl child victim.

It is upon the basis of the discussion of the international normative framework that Madagascar's response to child marriage will be assessed in the next chapter.

CHAPTER THREE: Reviewing the Malagasy legal and policy framework

3.1 Introduction

Having discussed the scope of the rights of the girl child to be protected against child marriages provided for under international and regional human rights law binding on Madagascar, this section examines the extent to which Madagascar's laws and policies comply with the above standards. From the outset, it should be noted that although Madagascar has a monist legal system, international conventions are domesticated in the national legal system.¹⁶² This part analyses if the law comprehensively addresses child marriage and aims at identifying gaps, inconsistencies and challenges of the national legal and policy framework.

3.2 The legal framework regulating the protection of the girl child

It is only in recent years that Madagascar has started to develop a human rights based approach to programming across ministries with the assistance of international development partners. However, a child rights based approach has not yet been mainstreamed. Furthermore, human rights litigation is still inexistent and the Executive branch has disproportionate power over the judiciary.¹⁶³

3.2.1 The 2010 Malagasy Constitution¹⁶⁴

The Constitution was adopted in December 2010 by referendum to mark the transition to the fourth Republic. The Constitution provides for a bill of rights that applies equally to adults and children. Accordingly, the right to dignity, integrity, full development as well as the right to health are provided for everyone. The Constitution however does not include a specific provision on the protection of children nor a definition of a child. It is equally mute on the prohibition of harmful practices, including child marriages. The only reference to a specific protection of the child is the provision of a free and compulsory basic education.¹⁶⁵

Moreover, Article 6 provides for non-discrimination on the ground of sex but it still a general provision with many prohibitive grounds, which does not enhance women's protection through an explicit provision for equality between men and women. Furthermore, Article 21 directss the

¹⁶² Preamble and Article 116 Constitution; in practice however, international instruments are domesticated by an act of parliament and are not justiciable.

¹⁶³ Article 110 of the Constitution states that 'the President is the guarantor of the independence of the judiciary'.

¹⁶⁴ Decree 2010-994 promulgating the Constitution of the IV Republic.

¹⁶⁵ Articles 23 & 24.

state to ensure the protection of the family, the mother and the child for their full development. Instead of a clear delineation of the rights of the child or the woman as an individual right-holder, the woman is perceived as a 'reproductive being' suggesting the premise of gender inequality ingrained in the culture and highlighting the patriarchal patterns of the Malagasy society. Another major gap is the absence of a clear provision on the status of customary law in the legal system.

Presenting major lacunae, the supreme law does not provide for a proper framework of protection of the girl child against child marriage. It is therefore important that the protection is entrenched in the supreme law.

3.2.2 The Marriage and Matrimonial Property Act of 2007¹⁶⁶

It was observed that international human rights law requires the enactment of the prohibition of child marriage. The first Malagasy legislation on Marriage provided for the matrimonial age of female at 14 and for male at 17.¹⁶⁷ It was clearly violating the principle of non-discrimination on the ground of sex as enshrined in CEDAW, CRC and also contravening ACRWC prohibiting marriage under 18. It was therefore not compliant with international standards on child marriage and needed to be reviewed. The Marriage and Matrimonial Act, expressly prohibiting child marriage, was therefore adopted in 2007. Pursuant to Article 3,

'The matrimonial age is 18 years.

However, before this age and for serious reasons, without prejudice to criminal offences regarding offences of indecency, the President of the Court of First Instance may authorise the marriage, at the request of the father and the mother or the child's guardian and with their consent and that of the latter. Consent must be given before the President of the Court of First Instance and established by the judiciary decision authorising the marriage.'

The law provides exceptions to child marriage. Although marriage under 18 is prohibited, parental consent is permitted under judicial authorisation for 'serious reasons'. The review of the authorisation cases of the Court of first instance of Antananarivo reveals that most of the girls are pregnant and between 15 and 18 years. This legal exception may be a response to the debate on age and agency of adolescent girls. It may in turn constitute a loophole as parents are often the ones forcing to marry and effective judicial oversight is difficult to ensure in the context of the family. Family is indeed viewed as a highly valued social unit and the government

¹⁶⁶ Act 2007-022 of 20 August 2007.

¹⁶⁷ Ordinance 62-089 of 1 October 1962.

is reluctant to overstep familial boundaries. It calls for an assessment of the best interests of the child on a case by case basis. Addressing this issue undeniably requires innovative and holistic strategies and alternatives for the families that will be explored in chapter four.

In the Marriage Act, consent under duress is a condition for invalidity. Moreover, lack of consent is a ground for absolute nullity, irrespective of the age of the parties and can be initiated by the spouse, the parents and the Prosecutor.¹⁶⁸ However, Article 42 states that the petition of nullity for lack of consent cannot be initiated by the spouse whose consent is lacking, or by his/her spouse. Conversely, Article 43 states that the petition for nullity can only be initiated by one of the spouse. There is a gross inconsistency in the wording of those provisions making it impossible for the girl child to petition for nullity on the ground of lack of consent. In any event, there is no available information on any existing case law in this regard. Article 9 further prohibits between relatives in the direct and the collateral line.

Furthermore, Article 29 formally recognises the practice of customary marriages. The law does not legally recognise a customary marriage that does not respect traditional rites.¹⁶⁹ It states that before the celebration, the chief of the village (*fokontany*) must remind the future spouses that bigamy is prohibited under law. There is no mention of a reminder of the prohibition of child marriage. The acceptance of customary marriages in legislation stems from the intention of the legislator to facilitate access to marriage in rural areas given the difficult access to civil registries. Customary marriages must then be registered with the Civil Registrar. Article 33 states that the chief of the village has to submit the minutes¹⁷⁰ of the customary marriage to the Civil Registrar within 12 days after the celebration, on the pain of article 473 of the Penal Code. Subsection 3 of this article provides for a fine of 500 francs to 25'000 francs¹⁷¹ or imprisonment of maximum 29 days in the case of failing to make mandatory declarations to the civil servant, without valid reason. However, in practice, customary marriages are rarely declared to the Civil Registrar making any enforcement mechanisms sterile.

¹⁶⁸ Article 41.

¹⁶⁹ See Article 28 of the Marriage Act.

¹⁷⁰ It is noteworthy that Article 31 regarding the requirements of the content of the minutes demands for the mention of the nationality of the spouses but not the age.

¹⁷¹ Since 2005, the currency has changed to the *Ariary*. This would be the equivalent of 0.001\$ to 1\$ highlighting how outdated and irrelevant is this provision.

It is also worth noting that Article 54 underlines that ‘the husband is the head of the family’ whilst subsection 2 indicates that ‘the spouses manage together the material and moral affairs of the family and upbringing of the children.’ This article again is contradictory and inconsistent in that while it proclaims the superiority of the husband as head of the household, it puts equal responsibility on both spouses for the maintenance and upbringing of the family. This article shows stereotyped gender roles and the negative role of the State in the perpetuation of practices based on gender inequality,¹⁷² such as child marriage. In the same vein, Article 51 codifies a customary practice called the ‘right to *misintaka*’ whereby a wife who was subjected to violence by her husband has the right to leave the matrimonial home for a period of two months and go to her parents or a shelter for victims of violence. During this time, the husband has to repent himself and may oblige her to come back. The fact that the wife who endured the violence has to leave is again symptomatic of a society based on male domination and deprives the woman of her rights.

Overall, the legislation is partly in line with international jurisprudence establishing a prohibition of child marriage below the age of 18. The parental consent authorised by a judge is questionable and requires further analysis in terms of effectiveness of the judicial oversight. In such case, the judge should carefully assess the situation in accordance with the principle of the best interests of the child. Alternatively, in accordance with the CRC stance, this exception can create a dangerous loophole that should be removed. This prohibition may however further prevent families to register formally.

3.2.3 The Law on the rights and protection of children¹⁷³

In 2005, an intergovernmental Committee was created to conduct the harmonisation process with the CRC. The law on the rights and protection of children was adopted in 2007 and its protection scope relating to child marriage is analysed below.

According to Article 2, a child is defined as ‘every human being under 18 years.’¹⁷⁴ The law provides for the core principles of the CRC. Article 3 outlines non-discrimination on the ground of sex. Article 5 states that the principle of the best interests of the child has to be ‘the’ primary consideration. The right to survival and development as well as the right to be heard are equally

¹⁷² See also UNICEF ‘Gender and Education in Madagascar’ (2011).

¹⁷³ Law 2007-023 of 20 August 2007.

¹⁷⁴ It is noteworthy that the age of civil majority is 21 under Article 14 of the Civil Code thus being inconsistent with the Law on Protection and the Marriage Act.

safeguarded. The child is also protected from neglect, violence or all forms of mistreatment, including sexual violence. All these concepts are regrettably not further elaborated and seemingly remain rights on paper.

Article 14 defines 'parental authority' as the rights and duties given to the parents towards their child until the age of majority or 'emancipation by marriage'. The expression 'emancipation by marriage' is problematic because it allows for the continuation of the practice by elevating it as a positive mechanism of liberation. The law also provides for educational assistance measures in the case of danger to the security, physical or moral integrity, health or education of the child.

Regrettably, this law is more of a broken 'copy paste' of the CRC and presents many gaps. There are no provisions on the protection against harmful practices, including child marriage. Other rights are tackled into fragmented piece of legislation. The right of the child to health, including sexual and reproductive health, is guaranteed in the Law on the Health Code.¹⁷⁵ In this regard, abortion is absolutely prohibited¹⁷⁶ in violation of international standards. The right to education is enacted in the Law on the general orientation of the education system, teaching and training of 2004¹⁷⁷ providing compulsory education from 6 to 14. Birth registration is compulsory under the Law on civil status acts.¹⁷⁸

Although gender-based and domestic violence is a serious concern in Madagascar,¹⁷⁹ it is noteworthy that the penal code only criminalises physical violence¹⁸⁰ but does not address psychological and economic violence, nor sexual violence or marital rape. Equally challenging is the absence of a formally determined age of sexual consent in the Penal Code thus preventing sexual abuse to be prosecuted.¹⁸¹

3.2.5 The Law on Trafficking 2008¹⁸² modifying the Penal Code

Article 333c of the Penal Code introduced by the 2008 Law provides for the criminalisation of the transfer of a child with the purpose of exploitation. Compliant with the international

¹⁷⁵ Articles 265 et seq of the Law 2011-002 of 22 August 2011.

¹⁷⁶ Article 89 of the Law on the Code of Health; Article 317 of the Penal Code.

¹⁷⁷ Law 2004-004 of 26 July 2004.

¹⁷⁸ Law on civil status acts 61-025 of 9 October 1961.

¹⁷⁹ See B Gastineau & L Gathier 'Domestic violence in Antananarivo (Madagascar): a public health concern' *Pan African Medical Journal* 11 (2012) 23.

¹⁸⁰ Law 2000_021 of 22 November 2000 modifying and complementing certain arrangements on penal code related to violence; Article 332 of the Penal Code.

¹⁸¹ The law only provides for the crime of decency against a minor under 14.

¹⁸² Law 2007-038 of 14 January 2008 modifying and completing some provisions of the Penal Code on sexual exploitation and sexual tourism.

legislation on trafficking and the CRC Optional Protocol discussed in the previous chapter, child marriages may also be interpreted as a form of exploitation falling within the ambit of trafficking. The definition of ‘sale of children’ has to be broadened and include child marriage.

Overall, Madagascar has made some efforts to comply with international standards on children’s rights but is still largely falling behind the international and regional standards. The justification for inaction based on the ongoing crisis is not sustainable. The above overview shows that appropriate legal reform should be initiated to address the gaps identified.

3.3 Policies, National Plan of Actions and child protection mechanisms

Although policies and Nation Plan of Actions are not binding instruments, they provide guidance and inform state action. It is therefore important to examine these instruments in order to assess the entire scope of protection of the girl child against child marriage provided by the state. From the outset, it is important to note that Madagascar does not have a current strategic plan or vision for its development.¹⁸³ In September 2013, the government and development partners initiated the preparatory work for the next development strategy. It is also essential to emphasise the importance of the collaboration with intergovernmental organisations, international and national NGOs for the interventions against child marriage.

3.3.1 Relevant policies and National Plan of Actions

Firstly, the draft Plan of implementation of the 2012 CRC¹⁸⁴ envisages the creation of an interministerial Committee in charge of the following-up of the Marriage Act, the following up of activities regarding the molestry in the North West and public consultations with stakeholders to establish the age of sexual consent. With regard to education, the Interim Education For All Plan 2013-2015¹⁸⁵ focuses on infrastructures and quality of education without specific measures targeting the girl child. The 111 scholar districts (CISCO) should enable a supportive environment for girls.

¹⁸³ The Madagascar Action Plan (MAP) was established from 2004-2008. The political crisis thwarted further efforts to set up a development strategy.

¹⁸⁴ See also the Plan of implementation on the UPR recommendations 2012-2014 regarding protection of children and violence against women.

¹⁸⁵ Letter N°2012/051/MEN; There are 111 scholar districts referred to as *CISCO*.

The national policy on adolescent health does not adequately respond to the CRC Committee's concern about the high level of teenage pregnancies and low level of contraceptive use.¹⁸⁶

In this regard, to celebrate the international day of the girl child 2012, the Directorate of Youth Health partnered with UNFPA to create a campaign against early pregnancies and child marriages. The focus was on the negative impact of child marriages on health and early pregnancies related consequences such as obstetric fistulas. The campaign helped raise awareness on the harmful practice of child marriages but must be accompanied by programmatic and practical measures and target in priority the 2534 community health centres (*centre de santé de base*).

Initiated in 2007, the National Programme for Rehabilitating Birth Registration *Ezaka Kopia ho an'ny Ankizy* (EKA) provides for free birth registration. However, it is estimated that the level of birth registration is still low; for example in 2008-2009, 20 per cent of births were not declared in 2008-2009). Regrettably, in 2010, the programme covered only 921 out of 1,549 municipalities.¹⁸⁷ In practice, a birth certificate costs is prohibitive for the vulnerable families thus preventing them from acquiring one.¹⁸⁸

With respect to gender, the National Action Plan for Gender and Development (2004-2008)¹⁸⁹ included a programme on the improvement of the women's economic development. This programme had a component targeting young girls who left school early and aimed at their economic integration. This plan did not address the vulnerability of the girl child and did not provide for a protective framework. The evaluation of the Plan revealed that it was largely ineffective and was not renewed.¹⁹⁰

In order to combat discriminatory practices against women, the Directorate on Human Rights and International Relations, in collaboration with UNDP, initiated a workshop¹⁹¹ on the traditional practice of bride price or *moletry* in the North West in 2009. Madagascar intended to extend the debates with traditional leaders and other stakeholders to the regional and national level in order to formulate a national policy to combat traditional practices incompatible with the

¹⁸⁶ n 62 above, para 51.

¹⁸⁷ As above para 33.

¹⁸⁸ The Report of the SR (n 22 above) para 159.

¹⁸⁹ *Plan d'action national pour le Genre et le Développement* (PANAGED)

<http://genre.francoophonie.org/spip.php?article177> (accessed 26 September 2013)

¹⁹⁰ UNFPA Evaluation Report on the legal centres (2011) *unreported*.

¹⁹¹ MINJUS (n 25 above) 14.

international human rights instruments which Madagascar has ratified.¹⁹² The protracted crisis made the pursuit of these efforts difficult and the identified recommendations were not implemented. The Ministry is therefore encouraged to resume the implementation of the roadmap.

3.3.2 Child protection mechanisms

In view of reaching rural areas and facilitate decentralisation, the Ministry of Population and social affairs, in collaboration with UNICEF, established Child Protection Networks (CPNs) throughout the country. Since 2001, 450 child protection networks have been established at the local level comprising of medical professionals, counsellors and other relevant stakeholders. This venue is adequate to address child marriage at the grass root level and should be strengthened. An interministerial Committee on child protection was recently created to coordinate these CPNs.¹⁹³ It will serve as an important tool to develop integrated policies against child marriage.

The Ministry of justice, in collaboration with UNFPA established legal clinics (*trano aro zo* or *centres d'écoute et de conseil juridique*) to address gender-based violence. Unfortunately, the evaluation of these centres revealed that girls and women are reluctant to report cases of violence because of a prevailing culture of silence.¹⁹⁴ In the future, there is a need to strengthen the capacities of the staff of these mechanisms to appreciate the gendered disempowerment of the girl child. This would among others encourage putting a specific focus on the girl child.

3.4 Enforcement challenges

Madagascar is failing to provide an effective legal protection framework against child marriages. The criminal framework is not existent except for the law of trafficking but there is no information regarding a prosecution on this ground. The State undeniably lacks human, technical and financial resources to comply with international standards.

The law on civil status acts deals with the sanctions of civil servants. Article 6 requires that the Civil Registrar ensure that the legal conditions of marriage, including consent as required by Article 3 of the Marriage Act, are duly met. The civil servant is liable for faults or negligence committed while exercising its duties. Additionally, failure to meet the legal conditions could

¹⁹² MINJUS (n 25 above) 12.

¹⁹³ Decree 2012-858 of 28 December 2012.

¹⁹⁴ UNFPA Madagascar 'Report on the evaluation of the *centres d'écoute et de conseil juridique*' unreported (2012).

incur his criminal liability under article 193 of the Penal Code on conviction of a fine of 25'000 to 75'000 francs¹⁹⁵ or imprisonment from six months to one year in case he did not ensure that parental consent was authorised by the judge. As mentioned above, sanctions are also possible for the chief of the village if he fails to declare the customary marriage to the Civil Registrar within 12 days. Nonetheless, in practice, customary marriages are rarely registered and it is unlikely that any sanctions will ever be issued.¹⁹⁶

In view of the above, there is no information about a case ever brought in respect of child marriage in spite of the presence of children's judges. Insufficient training of the judiciary, civil servants, police officers and social workers further compound the lack of legal protection.

The law creating the Independent National Human Rights Commission has not yet been promulgated.¹⁹⁷ Madagascar has a legal obligation to provide for an independent monitoring mechanism for the implementation of the rights enshrined in the CRC.

In addition, girls are reluctant to report abuses and file complaints due to lack of legal awareness and the prevailing culture of impunity. In this regard, an alternative dispute resolutions mechanism may be explored in the form of the *dina*. *Dinas* are local institutions composed of the traditional leaders and chief of the villages in charge of controlling that the rules of the village are respected. Careful consideration must however be given on the possible abuse of the system. *Dina* may be a powerful community tool but the required homologation by the state is often ignored. In addition, members are usually male and gender biased perceptions may thwart the fair assessment of the cases of child marriage presented.

3.5 Conclusion

This chapter reveals that lack of enforcement hampers the implementation of an effective national protective legal framework. In spite of the 2007 legislative reform formally prohibiting marriage before 18 years, the child marriage practice continues unabated in every region of Madagascar, mostly because of 'parental consent' and of customary marriages being still prevalent and unregistered. Furthermore, there is an effort to develop sectoral policies and national plans of action but they remain largely unimplemented and fragmented across

¹⁹⁵ The equivalent is 1\$.

¹⁹⁶ There is no available information in this regard.

¹⁹⁷ E-mail from T Razakamanana on 24 September 2013, Human Rights Officer, OHCHR, Madagascar; the law has been pending within the Ministers of Council for over a year demonstrating a lack of political will.

ministries, instead of being part of an integrated comprehensive and coordinated child protection strategy.¹⁹⁸ More importantly, the child-rights based approach is inexistent and laws are underpinned by patriarchal interests and values. The national legal and policy framework is therefore not adequately responsive to the challenges faced by a girl child in relation with child marriages.

Besides superficially copy pasting international and regional provisions, it is timely to entirely recast the legal framework relating to child marriage and focus on the best interests of the girl child to ensure the full enjoyment of her rights. Breaking from a pattern of child rights protection as a charitable venture towards a discourse of rights and entitlements will allow the beneficiaries to participate in the legislative process and strengthen the government's capacities to deliver adequate protection.

It is further contended that the response to child marriage has to be located in a broader social, economic, cultural and structural context. Understanding these dynamics is necessary to reframe the legislation and policies effectively in accordance with the practice on the ground.

¹⁹⁸ CRC (n 62 above) para 12.

CHAPTER FOUR: Unpacking the girl child marriage practice in Madagascar

4.1 Introduction

Within the country, the forms and manifestations of child marriages are diverse and vary according to the ethnic community and the region.¹⁹⁹ Irrespective of the forms, the prejudicial consequences of the practice on the girl child are the same.²⁰⁰ This chapter addresses the underpinning values, root causes and exacerbating factors of the practice. It finally makes a case for a holistic approach to implementation and explores extra-legal measures responsive to the broader cultural and structural context.

4.2 Addressing the underlying values, root causes and exacerbating factors of child marriage

4.2.1 Entrenched cultural and traditional practices

It is crucial to establish the distinction between ‘cultural and traditional ‘practices’ and the cultural ‘values’ underlying them.’²⁰¹ This allows for a modification of the practice without undermining culture and tradition.

As observed above, throughout Madagascar, the girl child is traditionally married by the chief of the village during a celebration involving a bride price under different forms such as the *moletry*, the *valyfofo* or the *vody ondry*²⁰². It is the first step in the formation of the family and a cultural requirement for the establishment of every family. Customary marriages do not provide an age limit and by implication condone child marriages.

Across all ethnic communities, an underlying common value emerged in the form of the ‘cult of ancestors’ (*culte des ancêtres*) embedded through the life of the Malagasy. Malagasy believe in the sanctity of the dead and in life after death and therefore greatly value their ancestors and

¹⁹⁹ UNFPA (n 1 above) 69; Madagascar has 18 ethnic communities within 6 provinces (*faritany*), 22 regions, 116 districts, 1540 communes and around 17 500 villages (*fokontany*). The Southern region of Toliara presents the highest prevalence of child marriage, recording 69% of women aged 20 to 24 married before 18. It is then followed by Mahajanga in the North West with 59%, Antsiranana in the North with 58% and Fianarantsoa in the East with 41%.¹⁹⁹ The central highlands region of Antananarivo, which is also the capital, records the lowest percentage of 35%.

²⁰⁰ See ‘*Jeunes malgaches, prisonnières du mariage précoce*’ (Young Malagasy girls, prisoners of early marriages) Afrika all 5 January 2013 <http://www.afrik.com/jeunes-malgaches-prisonnieres-du-mariage-precoce> (accessed 6 September 2013).

²⁰¹ J Amoha ‘The World on her shoulder: the rights of the girl-child in the context of culture and identity’ *Essex Human Rights Review* 4 (2007) 1 3.

²⁰² Practiced in the Merina community.

traditions, guarded by traditional leaders in the community (*fokolona*). The Malagasy culture is based upon a large number of forbidden behaviours and actions (*fady*). It is believed that breaching these forbidden actions contravene traditions and disrespect the ancestors. Being buried in the familial tomb following traditional rites ensures the passage to the sacred status of ancestors.

Against this background, progeny is considered the most valuable gift (*harena ny zaza*) to ensure continuation of the hereditary line and the conduct of funeral rites hence the finality of marriage is bluntly childbearing (*ny hanambadian-kiterahana*). As a result, the cultural value of the girl child is measured by her ability to be a wife and more importantly, a mother.

The first sexual experiences are linked with marriage. On puberty, a girl is perceived as 'ready to marry' and more importantly child bearing. Pregnancies out of a marriage are traditionally not accepted. Girls are self-conscious not to become pregnant out of wedlock for fear of stigma and dishonour.²⁰³ In some instances, the girl herself may want to marry in order to respect those traditions and to have a protected marriage.²⁰⁴ In other instances, she is forced to marry by the family under the threat of being banned of the family tomb.²⁰⁵ Marriage is perceived as a way to protect the girl from being ostracised from the community. In the same vein, the underlying rationale for the withdrawal from school is often the fear that the girl may become sexually active.

When interviewed about the sanctions on the practice by the UN Special Rapporteur, a judge replied with resignation that 'the practice existed since time immemorial and nothing could be done to change it.'²⁰⁶ The only cases in court relate to litigation on the payment or amount of the bride price or breach of the *moletry* contract.²⁰⁷ It is popularly agreed that going against the practice would 'lead to social exclusion, stigma and ostracism from the community.'²⁰⁸

One of the root causes of the perpetuation of the practice lays in the unequal traditional gender roles deeply embedded in the communities. Similarly, conserving strong intergenerational ties and respect for elders, traditions and protection of family resources is as important as providing social and physical protection to the girl child. Child marriage under the *moletry* guarantees the

²⁰³ Gastineau (n 44 above) 65-67.

²⁰⁴ (n 24 above) 11; 33% of the girls interviewed want their parents to arrange their marriage.

²⁰⁵ That may be invoked as a cause for invalidity for consent under duress.

²⁰⁶ Telephone communication with Justice of the Court of first instance of the district of Mampikony on 18 December 2012.

²⁰⁷ As above; Report of the SR (n 22 above).

²⁰⁸ n 170 above.

ongoing support of the elders. These underlying values are to be taken into consideration into the assessment of child marriage. Girls themselves, particularly at 16 or 17 years old, may have the agency to decide what is in their best interests, especially within a context of lack of resources.

4.2.2 'Children or cattle':²⁰⁹ the challenge of poverty

The links between child marriage and poverty are manifold and complex and reinforce each other.²¹⁰ Madagascar is undeniably facing a social and economic crisis with 92% of its population living below the poverty line. Regular drought and infertile soil in the South as well as frequent cyclones add to the plight of the Malagasy.

Girls who marry young are mostly poor, uneducated and comes from rural areas.²¹¹ Families and girls themselves are motivated by the survival instinct and marriage may often be the only remedy to support the family. In this context, parents tend to 'commoditise' the girl child - through the bride price, *moletry*, or to offer the girl in markets, in order to provide a livelihood to the family. Moreover, the absence of access to health care and contraceptives perpetuates the vicious circle of early pregnancies. Furthermore, the ratio between urbanised and rural girls who have a propensity to marry at earlier age is an illustration of the impact of poverty. In this context, considering the girls' social and economic circumstances is crucial to eliminate the practice. In light of the above, the lack of service delivery and poverty begs the question of the best interests of the child in the lens of survival and development. Strategies to delay marriage have to tackle structural challenges and 'must be coupled with strategies to address girls' education, health and poverty.'²¹²

4.3 Beyond the law: applying the concept of 'cultural legitimacy'

The CEDAW Committee has constantly emphasised that culture is a 'dynamic aspect of the country's life and social fabric and are subject, therefore, to change'.²¹³ Culture indeed responds to shifting socio-economic and political conditions.

²⁰⁹ Expression used by B Rwezaura 'The concept of the child's best interests in the changing context economic and social context of Sub-Saharan Africa' *International Journal of Law and the Family* 8 (1994) 82 98.

²¹⁰ Otoo-Oyortey & Pobi (n 48 above).

²¹¹ UNFPA (n 1 above) 2.

²¹² Bunting (n 54 above) 34.

²¹³ CEDAW (n 98 above) para 17; Interview with A Cassam (an elder) on 19 July 2013, Antsiranana. According to him, the practice of the moletry among the Bara existed among the Antakarana of the North and disappeared over time due to globalisation and other factors.

Different strategies, taking into consideration cultural legitimacy, such as the empowerment of girls or engaging with the communities are to be considered.

The key questions are ‘which criteria do we use to judge what is harmful and what is protective of children?’²¹⁴ Who decides what is in the best interests of the child? Should we focus on the girl child as an individual right-holder (as underlined by the Conventions), or as a member of the community or both? These questions call for a nuanced answer. We would like to think of children’s rights as ‘living practices’ shaped by the girl child’s concerns. It is important to emphasise on the fluidity of culture and refuse this antagonistic view of culture and rights.²¹⁵ ‘Every culture has human rights norms.’²¹⁶

It is contended that the actual harm and negative impact of child marriage on her development leads to focus on the protection of the girl child as an individual right holder without depriving her from her cultural and social status. It is paramount to address the particular vulnerabilities of the girl child while being sensitive to the local context of her environment and underpinning values of her community. Agreeing with Tamale, we should be wary of ‘black and white’ or ‘either or’ approaches that deny the complexity of this social issue²¹⁷ and re-examine the practice in the context of changes in time and social context.²¹⁸ Translating children’s rights into practice is never solely either ‘a top-down or bottom-up activity’ and to bypass the binary of the global and the local, we have to engage in a dialogue within an ‘in-between space.’²¹⁹ Freeman accordingly advocates for a ‘common sense’ and suggests to find it in the of the girl child to participate and give her views.²²⁰ The child’s voice must indeed be heard in all cultural practices in which they are a part of.²²¹

In this regard, Khaime advocates for the approach of ‘cultural legitimacy’ whereby the change of behaviour is internalised by the community and therefore the elimination of the practice is

²¹⁴ Boyden (n 55 above) 519.

²¹⁵ The preamble of ACRWC itself takes into consideration the values of the African civilisation as an inspiration of the rights and welfare of the child.

²¹⁶ See AM Nassali ‘Non-governmental Organisations (NGOs), governance and human rights in Kenya, Uganda and South Africa’ unpublished PhD thesis, University of Pretoria, 2009 87 and references.

²¹⁷ S Tamale ‘The Right to culture and the culture of rights: A critical perspective on women’s sexual rights in Africa’ *Feminist Legal Studies* (2008) 51.

²¹⁸ Amoha (n 207 above) 11.

²¹⁹ K Hanson & O Nieuwenhuys ‘Living ights, social justice, translations’ in K Hanson and O Nieuwenhuys (eds) *Reconceptualizing children’s rights in International Development, living rights, social justice, translations* (2013) 19.

²²⁰ M Freeman ‘Culture, Childhood and Rights’ *The Family in law* 5 (2011) 15 28.

²²¹ T Boezaart ‘Building bridges: African customary family law and children’s rights’ *International Journal of Private law* .

legitimised and change is sustainable.²²² Likewise, Tamale refers to ‘cultural transformation’ by locating common ground to develop new strategies and using cultural positive values to induce social transformation. To respond to the fear of being stigmatised by the community, the behaviour change should stem from a *critical mass*.²²³ Khaime further calls for the cultural appropriation of the norm at stake through dissemination, collaboration, participation and innovation.²²⁴ Without the sense of strong ‘ownership’ at the grassroots level, the rights in the Conventions are likely to remain unenforceable.²²⁵

This approach was successfully used by the NGO *Tostan* for the mitigation of female genital cutting²²⁶ and, in a lower extent, to early marriages in Senegal.²²⁷ *Tostan* empowers communities to lead their own development through a series of educational techniques leading to behavioural change. It is argued that the fundamental belief behind child marriage is to do what is the best for the girl child or to be a ‘good parent.’²²⁸ The reasons for child marriages outlined by *Tostan* are applicable to the Malagasy context, namely to provide protection for girls, prevent premarital pregnancy and lower the economic burden of the family.²²⁹ Providing accurate information and clear message about the negative impact of the harmful practice is important but not sufficient. Alternative solutions that would address the underlying reasons of the practice should be created. A promising study conducted in the South of Madagascar revealed that girls were able to challenge the kinship context and pursue higher education while retaining the strong internal value of the preservation of family.²³⁰ The girl child should be the main participant in this transformative process. Strategies need to be tailored to suit the dynamics of the context under consideration.

²²² Khaime (n 56 above) 26-27; He defines cultural legitimacy as ‘the quality of being in conformity with the accepted principles or rules and standards of a particular culture’ such as the authority and reverence derives from internal validity.’

²²³ See J Shih ‘Learning from the community lead abandonment of femal genital cutting: cultural transformation, *Tostan*, and implications for the abandonment of early child marriage’ Unpublished thesis, University of Washington 2013 18-19.

²²⁴ Khaime (n 56 above) 177-184.

²²⁵ S Harris-Short ‘International human rights law: imperialist, inept and ineffective? Cultural relativism and the UN Convention on the Rights of the Child’ *Human Rights Quarterly* 25 (2003) 130 172.

²²⁶ Traditionnally known as Female Genital Mutilation (FGM) but as it created a negative biased of the practice, it Female Genital Cutting (FGC) is preferred.

²²⁷ <http://www.tostan.org/tostan-model>.

²²⁸ Khaime (n 56 above) 131.

²²⁹ Shih (n 229 above) 47 et seq, quoting *Tostan Kobi 2: Facilitator guide* (2011).

²³⁰ M Skjortnes & HH Zachariassen ‘Even with higher education you remain a woman: a gender perspective on higher education and social change in the Toliara region of Madagascar’ *Gender and Education* 22 (2009) 193.

4.4 Conclusion

This chapter analysed how the practice of child marriage is compounded by underlying values specific to the *Tsimihety* or the *Bara* communities. As rightly stated by Khaime, the children's rights discourse is ultimately about constructing a culture that ensures the dignity and the enjoyment of the rights of the girl child'.²³¹ Although practices differ, African values are equally concerned about the dignity and the integrity of the child.²³² This part therefore advocates for a dialogue with the communities in order to reach an 'in-between space, where the exchange of [...] equally legitimate set of values and norms takes place [and allows for] new social practices [to] emerge'.²³³ This empowering approach - rather than protective- encompasses the concept of cultural legitimacy. This approach successfully implemented by the NGO *Tostan* may be replicated in Madagascar by the Malagasy themselves.

This part also demonstrated how an entrenched culture of gender inequality and socio-economic conditions exacerbate child marriage. Locating 'culture' in the broader equality framework and questioning the role of the State in perpetuating patriarchal patterns may also be more effective in addressing child marriage. The challenge of poverty leads families to marry off their daughter in order to receive the bride wealth or to relieve themselves of the economic burden. Limited real life options for securing livelihood may entice girls themselves to marry early. Addressing structural issues such as providing education, including sex education, access to health care and family planning and problematising the cultural contexts is paramount in order to holistically address child marriages.

The next chapter will conclude the study and provide recommendations for a holistic implementation of culturally tailored legal and extra-legal measures to effectively mitigate the child marriage prevalence.

²³¹ T Kaime (n 56 above) 37.

²³² W Ncube 'Prospects and Challenges in Eastern and Southern Africa: The Interplay between International Human Rights Norms, and Domestic Law, Tradition and Culture' in *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* (1998) 8-9.

²³³ K Hanson & O Nieuwenhuys (n 228 above) 20.

CHAPTER FIVE: The way forward: implementing legal and extra-legal measures

5.1 General conclusion

Child marriage is a human rights violation which erodes, as detailed above, the right to be protected from violence, the right to education and the rights to health. The analysis of the legal, social and cultural context of child marriages in Madagascar has revealed that the practice is interwoven in human rights law, socio-economic factors and traditional and cultural practices. The international and regional framework of the protection of the girl child against child marriage lays the foundation from which Madagascar must draw in order to develop an adequate and comprehensive legal, institutional and social response, commensurate to the prevalence of the practice in the country. However, the analysis has shown that the Malagasy legal and policy framework is not adequately responsive to the situation of the girl child forced into marriage and is not in line with international and regional standards in many respects. Notably, a large number of laws need to be either amended or enacted. Further, existing laws are clearly insufficiently implemented and enforced. It is therefore crucial that the government mainstreams gender-sensitivity and a child-rights based approach across its numerous policies and strategies. These also need to be coordinated and adequately budgeted for.

As mentioned, legislative reform is important as it 'gives legitimacy and status to our rights, assist civil society in its rights-based campaigns, and serve as a yardstick and barometer for government conduct.'²³⁴ However, it remains only one component of a multidisciplinary approach²³⁵ and has to be implemented in a holistic framework. Indeed, the context of the manifestations of the practice on the ground is too complex to be tackled by legislation alone.

Inadequate standard of living and lack of employment opportunities are clearly factors exacerbating the practice. This economic hurdle underlies the practice and fosters its perpetuation. It is paramount that the state takes action for the full realisation of the socio-economic rights of families and to further develop educational and economic opportunities for its youth, targeting teenage girls.

Gender inequality and stereotypical attitudes have to be addressed through social change. It is recalled that cultural and traditional practices such as the *moletry* or the *valifofo* are internalised as legitimate practices based on positive values. This should be fully taken into consideration

²³⁴ F Viljoen, *Beyond the law: Multidisciplinary perspectives on Human Rights* (2012) xv.

²³⁵ As above.

when developing policies addressing child marriage in Madagascar. In this regard, rather than imposing a view of what is 'right', the rights discourse has to find legitimacy within the communities it addresses, from the traditional leaders, the parents to the girl child herself. Finding a space of dialogue and exchange where the girl child would be able to voice what she actually needs may be the way to transcend cultural dichotomies and develop new common grounds. The concepts of rights, as culture, are ever changing and adapt to new situations and new needs. It is only within this broader transformative process aiming ultimately at the achievement of the integrity and dignity of the child, that laws and policy will be implemented effectively.

5.2 Recommendations

A large number of programmes worldwide have been implemented to tackle the discrepancy between law and society in delaying the age of marriage.²³⁶ It is however important to be wary of *cliché* answers to 'educate the backwards' and rather engage in a constructive dialogue with the communities in order to develop unbiased new practices respectful of the dignity and integrity of the girl child.

The large number of recommendations below is reflective of the multidisciplinary dimension of the issue at stake and targets both the State and non-state actors.

5.2.1 Fostering an enabling legal and policy framework

5.2.1.1 Constitutional and legislative reform

First, the government of Madagascar should engage in a constitutional review process in order to introduce specific provisions on the protection of children, including protection against harmful practices, in particular child marriage. The recognition of children's rights as at constitutional level will enhance their protection. Moreover, the state should specify that civil law take precedence over customary law in case of violation of human rights. Given the prevalence of customary law, this is essential in order to avoid any ambiguity.

Second, the government should review the Law on Marriage and Matrimonial Act in order to bring it in line with international human rights standards. The prohibition of marriage under 18 should clearly encompass 'betrothal'. Further, the exception regarding parental consent under

²³⁶ S Lee-Rife et al 'What works to prevent child marriage: a review of the evidence' *Studies in Family Planning* (43) 287.

the authorisation of the judge, as provided for in Article 3, should be removed so that the minimum age of marriage is 18 years old in all cases, in line with the CRC jurisprudence. Should the state retain such exception in the Marriage and Matrimonial Act, it would be necessary (1) that the law identifies the serious reasons that would trigger the exception; (2) that the law clearly establishes that the age cannot be reduced below 16 and (3) that the judge duly takes into consideration the best interests of the child. The government is further encouraged to amend the Law on Protection and Rights of Children so as to include a specific prohibition of child marriage and betrothal and the practice of the bride price in a child marriage. The concept of 'emancipation by marriage' should be removed from Article 4. The Law on civil status acts should be harmonised with the Marriage and Matrimonial Property Act of 2007.

The Penal Review Commission is currently discussing the revision of some provisions of the Penal Code. The Law on trafficking modifying the Penal Code should be amended so as to include a provision defining 'sale of children' which would encompass child marriage, in accordance with the CRC OPSC. A formal age of sexual consent should be established by enacting the offence of defilement in order to respond to sexual abuse and exploitation. The fines under the provisions relating to the civil servant's offences should be updated in *ariary* and increased so as to effectively serve as a deterrent. Abortion should be decriminalised and Article of the Penal Code and Article of the Law on the Health Code should be amended to include legal abortion. In turn, in line with human rights standards, a law providing access to legal abortion should be enacted to address the high prevalence of early pregnancies, which often lead to early marriages.

A law prohibiting harmful practices, addressing specifically child marriage and sanctions thereof should be enacted. Given the high prevalence of domestic violence, it is also necessary to enact a specific law on domestic violence and provide criminal sanctions for physical, psychological and mental violence, sexual abuse and marital rape.

In order to establish an independent monitoring mechanism for children's rights, the government is encouraged to speedily enact the existing bill on the creation of the National Human Rights Institution.

Furthermore, the government should ratify the Maputo Protocol, the African Youth Charter and the Third Optional Protocol to the Convention on the Rights of the Child on a Communication Procedure. The government should submit regular and comprehensive national reports to

regional treaty bodies, in particular to the African Committee of Experts on the Rights and Welfare of the Child, given that it has never submitted its initial report.²³⁷

Finally, all legal reform processes should be inclusive through consultations with various stakeholders such as members of the community, traditional leaders, parents, children and/or relevant professionals in order to reflect practical concerns and ensure implementation. The government should facilitate access to information by disseminating the legislation and translating it into the local language as well as simplified in child-friendly language.

5.2.1.2 Institutional recommendations

The issues involving the girl child, including adolescent girls are currently divided and fragmented between gender, youth and child- serving initiatives, hence the necessity for a uniform action plan. A comprehensive national children protection policy should be developed by the inter-ministerial Committee on child protection in order to harmonize policy and coordinate the government response for child marriage. A child-rights based approach should be mainstreamed across ministries through the inter-ministerial Committee.

The government should continue to promote and strengthen universal birth registration in order to ensure that all children, including in rural areas and villages (*fokontany*) are registered.

Existing child protection networks should be strengthened and specifically address cases of child victims of marriages by providing assistance to such victims and encourage them to report offences. These networks can also serve as a monitoring group to feed information about successes and failures. The government should improve data collection and management by developing strong and accurate databases. It is encouraged to gather data based on marriage registries and disaggregated data by the types of marriage, customary or civil in order to assess the scope of the practice and the impact of future actions.

It is paramount that the government undertake to build and develop capacities of civil servants, police officers and judges in terms of training in the application of the Marriage Act, sensitisation on the best interests of the child and the definition of gender-based violence. In order to

²³⁷ See list of submissions http://www.africanchildinfo.net/clr/vol2/madagascar_en.html.

prioritise interventions, it is important to identify areas with highest concentrations of girls at risk, such as those where the *moletry* or the *vallyfofo* are widely practised.

Finally, enhancing international and regional cooperation with development partners and the collaboration with non-state actors is crucial for coordination efforts and effectiveness.²³⁸

5.2.2 Addressing the social, economic and cultural context

Child marriages are symptomatic of a low socio-economic development of the State. In order to tackle the root causes of child marriage, the State should also focus on delivery services by providing free access to education and ensuring access to health care services, including sexual and reproductive health services and family planning information. Sexual and reproductive health education should be included in school curricula. In this endeavour, allocation of budget to social protection is essential. In response to economic challenges, the state should increase cash transfers or microfinance schemes available to women to unburden the family economically. Fostering the economic empowerment of teenage girls is equally important. Given the fact that the most vulnerable girls live in remote rural areas, it is paramount that the state coordinates and harmonises its policies and services at all levels of the government, national, regions, districts and villages (*fokontany*).

The root causes of the practice should also be tackled by appropriate educational and awareness-raising measures. Empowering girls with information, skills and support networks²³⁹ is essential to build social and health assets. Female traditional leaders (*sojabe*) and teachers may act as role models. Likewise, enhancing the accessibility of formal schooling and collaborating with schools to support girls' access to secondary education, including training and curriculum support in preventing child marriage and in children's rights is equally vital. Creative and inclusive platforms such as theatre, songs, role-playing are recommended to allow girls to express their concerns.

The participation and involvement of the communities is important through sensitively tailored approaches based on cultural legitimacy. In this regard, it is encouraged to focus on reciprocal and open community dialogues and identify agents of change. Sharing experiences by

²³⁸ In this regard, it is encouraged to organise a mapping of all the NGOs and interventions relating to child marriage in the country.

²³⁹ Adolescent Girls Vulnerability Index: guiding strategic investment in Uganda (2013) 110.

testimonies among girls and women victims is also important. It is finally important to encourage the involvement of men in all advocacy activities.

5.2.3 Specific recommendations to non-state actors

Non-state actors such as NGOs, and especially grassroots NGOs and the media have an important role to play in the eradication of the practice. The role of advocacy should be enhanced in order to raise visibility of the issue. NGOs active in the protection of girls against child marriage should establish national networks and coalitions and be part of the global movement against child marriage 'girls not bride' in order to broaden the scope of their advocacy.

Word count: 19 811

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