

Annexure R

Student number: 28129289

***Is the difference in minimum legal ages of marriage for girls and boys in South Africa a violation of equality?***

by

**Marthé Kotze**

Submitted in fulfilment of the requirements for the degree  
MPhil Multidisciplinary Human Rights

In the Faculty of Law,  
University of Pretoria

Date 2020 February

Supervisor: Karin van Marle

Annexure N

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250-word summary of mini-dissertation

***Is the difference in minimum legal ages of marriage for girls and boys in South Africa a violation of equality?***

South African law allows minors under the age of 18 to get married, under certain conditions.<sup>1</sup> The minimum age at which a minor may enter into marriage under both civil and customary law is 12-17 for girls, and 14-17 for boys.<sup>2</sup>

The focus of this paper is not the practice of child marriage, nor measures aimed at combating child marriage, and recommends that South Africa set the age of marriage at 18 for both sexes without exceptions.

However, until South Africa changes its laws, boys and girls will continue being treated differently under existing marriage legislation. This mini-dissertation is concerned with whether different minimum ages of marriage for minors contributes to the systemic discrimination that women and girls face in South Africa, and whether this violates the rights of girls to be treated equally to boys. The paper looks at the role of culture and gender stereotypes in the formation of marriage legislation, as well as the societal effects of the current legislation.

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<sup>1</sup> Mahery, P., and P. Proudlock. "Legal guide to age thresholds for children and young people." Children's Institute, University of Cape Town (2011) 22-23

<sup>2</sup> Marriage Act, Section 26(1) (Act No. 25 of 1961) Read together with sections 17 and 18(3)(c)(i) of the Children's Act (n 1 above)

See also Section 12(2) of the Children's Act (n 1 above), read with the common law

\*Note: According to South African common law a child cannot legally be married below the age of puberty, which is defined as age 12 for girls and age 14 for boys (see Mahery & Proudlock n 1 above)

Annexure G

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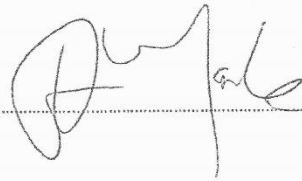
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Mini dissertation for MPhil Multidisciplinary  
Human Rights

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## Introduction

### Research problem

The main research problem that this study aims to address, is *'Is the difference in minimum legal ages of marriage for girls and boys in South Africa a violation of equality?'* Currently, in South Africa, boys and girls are treated differently under existing marriage legislation. This difference relates to the minimum age at which children younger than 18 are permitted to marry. Currently the youngest age a boy may marry is 14 years, while for a girl that age is 12 years. This raises the question of whether setting different minimum legal ages of marriage for minors contributes to the systemic discrimination that women and girls face in South Africa, and whether this violates the rights of girls to be treated equally to boys.

### Research questions

The main research questions to address are:

- 1) What are the reasons for the difference in age between boys and girls to enter marriage?
- 2) What is the social impact of this differentiation?
- 3) Can this differentiation be seen as a violation of equality?

### Motivation for study

A community survey released by Statistics South Africa in 2017 showed that more than 91,000 South African girls between the ages of 12 and 17 were either married, divorced, widowed, separated or cohabiting with a partner.<sup>3</sup> Under South African law the legal age at which a young adult may consent to marriage without requiring the consent of the parents or guardians is 18.<sup>4</sup> This age of consent is in line with international standards, based on international legal treaties such as the African Charter on the Rights and Welfare of the Child<sup>5</sup> (Children's Charter), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa<sup>6</sup> (Maputo Protocol), both of which state that no child should be allowed to marry under the age of 18. Despite this, estimates show that around 6% of South African girls marry before the age of 18.<sup>7</sup>

South African law allows children under the age of 18 to marry based on certain conditions. Girls aged 15 to 17 may marry if they, as well as their parent or guardian, consent to the marriage.<sup>8</sup>

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<sup>3</sup> 'Child marriages: A global and national disgrace' Daily Maverick 31 October 2018  
[https://www.dailymaverick.co.za/article/2017-10-31-child-marriages-are-a-global-and-national-disgrace/#.Ws3M\\_4huZPZ](https://www.dailymaverick.co.za/article/2017-10-31-child-marriages-are-a-global-and-national-disgrace/#.Ws3M_4huZPZ) (accessed 10 April 2018)

<sup>4</sup> The Children's Act 38 of 2005 secs 17

<sup>5</sup> African Charter on the Rights and Welfare of the Child 1990 article 21

<sup>6</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003 article 6

<sup>7</sup> 'South Africa' Girls not Brides, <https://www.girlsnotbrides.org/child-marriage/south-africa/> (accessed 11 April 2018)

<sup>8</sup> Marriage Act 25 of 1961 Section 26(1) Read together with secs 17 and 18(3)(c)(i) of the Children's Act (n 2 above)

See also secs 12(2) of the Children's Act (n 2 above), read with the common law

\*Note: According to South African common law a child cannot legally be married below the age of puberty, that is defined as age 12 for girls and age 14 for boys (see Mahery & Proudlock)

Girls aged 12 to 14 may marry if they, their parent or guardian, as well as an officer authorised by the Minister of Home Affairs, consent to the marriage.<sup>9</sup> Boys aged 14 to 17 wishing to marry need to consent to the marriage, as well as getting the consent of their parent or guardian and an officer authorised by the Minister of Home Affairs.<sup>10</sup> These ages are based on the South African Marriages Act, that allows girls to marry from the age of 15, and boys from the age of 18,<sup>11</sup> and the minimum marriageable ages as defined in common law, which is 12 years for girls and 14 years for boys.<sup>12</sup>

Allowing boys or girls to marry under the age of 18 is a violation of the international treaties that South Africa is party to. Despite recommendations by the United Nations Committee on the Rights of the Child,<sup>13</sup> which states that Government should change all relevant legislation to make the minimum legal age of marriage for both boys and girls 18, Government has to date not made any changes to existing legislation to bring it in line with international standards. At the beginning of August 2019, The South African Law Reform Commission announced that it would be investigating the constitutionality of the South African Marriages Act, as well as common law in terms of marriageable ages.<sup>14</sup>

There are several reasons why this differentiation in age between boys and girls is problematic and justifies in-depth investigation.

Firstly, Section 9 of the South African Constitution states that ‘Everyone is equal before the law and has the right to equal protection and benefit of the law’,<sup>15</sup> while also prohibiting the State from discriminating either directly or indirectly against anyone based on the grounds of gender or sex.<sup>16</sup> The different minimum age of marriage for boys and girls could, therefore, be seen as a violation of Section 9 of the South African Constitution, as girls and boys are not being treated equally before the law based on gender and sex.

Secondly, allowing children to marry from the age of 12 or even 14 is also problematic when the South African legal age of sexual consent is taken into consideration. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007,<sup>17</sup> (Sexual Offences Act) states that no child, either male or female, under the age of 16 may consent to sexual intercourse.<sup>18</sup>

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<sup>9</sup> Mahery P & Proudlock P. ‘Legal guide to age thresholds for children and young people.’ Children’s Institute, University of Cape Town 2011 22-23

<sup>10</sup> Recognition of Customary Marriages Act 120 of 1998 secs 3 Read together with Section 12(2) of the Children’s Act (n 2 above), read with the common law

<sup>11</sup> Marriage Act (n 6 above) secs 26(1)

<sup>12</sup> Mahery & Proudlock (n 7 above) 22

<sup>13</sup> Committee on the Rights of the Child, Concluding observations on the second periodic report of South Africa CRC/C/ZAF/CO/2 2016 para 19-20

<sup>14</sup> ‘Commission wants law allowing 15-year-old girls to marry scrapped’ 702 1 August 2019 [http://www.702.co.za/articles/356582/commission-wants-law-allowing-15-year-old-girls-to-get-married-scrapped?fbclid=IwAR2j8CJ2vX9ddD\\_Vy1R7JAUil51clC9ngVq4DPco2zvwLYkkl2vJu\\_XZyZs](http://www.702.co.za/articles/356582/commission-wants-law-allowing-15-year-old-girls-to-get-married-scrapped?fbclid=IwAR2j8CJ2vX9ddD_Vy1R7JAUil51clC9ngVq4DPco2zvwLYkkl2vJu_XZyZs) (accessed 1 August 2019)

<sup>15</sup> Constitution of the Republic of South Africa secs 9(1)

<sup>16</sup> Constitution (n 13 above) Secs 9(3)

<sup>17</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 Secs 57 read together with secs 1(2) and 1(3)(d)(iv)

<sup>18</sup> Mahery & Proudlock (n 7 above) 21-22



Thirdly, studies have consistently shown that child marriage (any marriage under the age of 18) has several extremely negative effects on the development and future well-being of female children. These include a lack of education or inability to complete education, increased risk to HIV infection, increased risk of developing maternal health problems such as fistulas, higher rates of maternal and infant mortality, as well as increased risk for domestic violence.<sup>19</sup>

While boys may also enter marriage before the age of 18, research has shown that girls are significantly more likely to marry before their 18<sup>th</sup> birthday than boys are.<sup>20</sup> Statistics by the United Nations Population Fund estimate that only one in 25 boys marry before they reach the age of 18, while getting married before age 15 almost never happens for boys.<sup>21</sup> In contrast, 'more than 650 million women and girls alive today were married before their 18th birthday.'<sup>22</sup> The fact that 54 countries legally allow girls to marry between one and three years younger than boys<sup>23</sup> cannot be separated from the different child marriage prevalence rates. According to Arthura et al.

'The disproportionately high rate of child marriage among girls compared to boys is recognized by the international community as reflecting gender discrimination.'<sup>24</sup>

Section 9(4) of the Constitution mandates the State to create and enact legislation to prevent and prohibit unfair discrimination, and to this end the Promotion of Equality and Prevention of Unfair Discrimination Act<sup>25</sup> (PEPUDA) was enacted.<sup>26</sup>

Section 14 of PEPUDA deals with determining whether discrimination that takes place can be categorised as fair or unfair, as the Constitution does make provision for fair discrimination under certain circumstances.<sup>27</sup> Several factors apply when considering whether the minimum marriage age laws qualify as gender discrimination:

'3(a) Whether the discrimination impairs or is likely to impair human dignity

(b) the impact or likely impact of the discrimination on the complainant

(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage

(e) Whether the discrimination is systemic in nature'<sup>28</sup>

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<sup>19</sup> 'New Insights on Preventing Child Marriage A Global Analysis of Factors and Programs' International Center for Research on Women 2007 7

<sup>20</sup> 'Ending Child Marriage: Progress and Prospects' United Nations Children's Fund 2014 [https://www.unicef.org/media/files/Child\\_Marriage\\_Report\\_7\\_17\\_LR..pdf](https://www.unicef.org/media/files/Child_Marriage_Report_7_17_LR..pdf) (accessed 10 June 2018)

<sup>21</sup> 'Child marriage - Frequently Asked Questions' United Nations Population Fund <https://www.unfpa.org/child-marriage-frequently-asked-questions#are%20boys%20ever%20involved%20in%20child%20marriages> (accessed 10 June 2018)

<sup>22</sup> UNPFA (n 19 above) 1

<sup>23</sup> 'Changing Girls Chances' Girls Not brides <https://www.girlsnotbrides.org/wp-content/uploads/2013/10/Child-marriage-infographic-2013-10-04.png> (accessed 10 June 2018)

<sup>24</sup> M Arthura et al. 'Child Marriage Laws around the World: Minimum Marriage Age, Legal Exceptions, and Gender Disparities' *Journal of women, politics & policy* 39.1 (2018): 51-74 51

<sup>25</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

<sup>26</sup> PEPUDA (n 23 above) secs 2(a)

<sup>27</sup> Constitution (n 13 above) secs 9(5)

<sup>28</sup> PEPUDA (n 23 above) secs 14 3(a)(b)(c)(e)

This research paper will use the guidelines above, as well as Constitutional provisions on equality, to examine whether the current minimum marriage ages can be classified as discriminatory based on gender and sex. This research paper will not focus specifically on the practice of child marriage, nor measures aimed at combating the phenomenon of child marriage, but will rather conceptually examine the possible reasons why marriage laws differentiate between boys and girls, and whether this difference can be seen as a violation of equality

## Method

To answer the main research question as well as the three sub-questions, a desk research methodology was used. This entails an analysis of relevant academic literature, reports, statistics, case law, as well as domestic and international legal instruments relating to child marriage and gender equality. Two main research approaches were used, namely:

- Critical Feminist Legal Theory – examining legal equality of the sexes under South African law, gender stereotyping in the law and the violation of women’s rights by harmful cultural practices, and how intersectional aspects such as race and social class lead to early marriage
- Socio-Legal Research – examining the social implications of different minimum marriage age laws, the harmful effects of child marriage, the fact that in South Africa the legal age for sexual consent is higher than the minimum age of consent for marriage, and the consequences of early marriage for girls

The research is based on a multidisciplinary approach. It is not only focused on the legal aspect of equality of the sexes under South African law, but also the social impact of not treating boys and girls equally.

## Structure of the study

Chapter one examines the possible reasons for different age limits for boys and girls in South Africa’s marriage legislation, specifically considering the role that South Africa’s legal system, gender stereotyping, and traditional African cultures may play. Chapter two investigates the social impact of the law treating boys and girls differently with regards to marriage, specifically the potentially negative effects for girls on their education, their physical safety and security, and their future economic prospects. Chapter three raises the question of whether the minimum age differentiation between boys and girls can be considered a violation of equality, based on an analysis of both national and international law.

# Chapter 1 – What are the reasons for the difference in age between boys and girls to enter marriage?

## Introduction

Chapter one aims to answer the research sub-question ‘*What are the reasons for the difference in age between boys and girls to enter marriage?*’ The chapter begins by examining the origins of the South African legal system as well as the minimum legal ages for marriage. The chapter then goes on to examine the effect that gender stereotyping in the law has on the way that minimum marriage ages are viewed and justified, and concludes by looking at the effect that traditional African culture and beliefs around marriage have on the current legislation and its acceptance by society.

### i. The South African legal system

*‘A man at the age of fourteen and a woman at the age of twelve “have Natural and Corporal Ability to perform the duty of Marriage.”<sup>29</sup>*

The first step to understanding the source of the different minimum age laws for marriage in South Africa is to look at the basis of South African common law, which is grounded in Roman-Dutch law.<sup>30</sup>

South African law as it exists in its current form can be described as a

*‘...mixed legal system, an amalgam of different legal systems, and its origins are derived from the civil law systems of Europe and the common law of England.’<sup>31</sup>*

According to Hamilton, the Roman Catholic Church assumed regulation over marriage in the thirteenth century and institutionalised it with clearly defined rules on matters such as incest, polygamy, children born outside of wedlock, as well as adultery.<sup>32</sup> This original canon law introduced the concept of contractual marriages, and an important part of this was introducing a legal age of consent.<sup>33</sup> Both Hamilton and Reid argue that marriage law adopted the concept of legal consent from contractual law, and that consent became a central and non-negotiable prerequisite to solemnise a legal marriage.<sup>34</sup>

The Roman age of consent for legal marriage was set at 12 years for girls, and 14 years for boys.<sup>35</sup> This was regarded as the general age of puberty for both genders respectively. Because the

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<sup>29</sup> H Swinburne ‘*A Treatise of Spousals, or Matrimonial Contracts: wherein all the Questions relating to that Subject are ingeniously Debated and Resolved*’ Daniel Brown 47, see also

C Reid Jr ‘Marriage in Its Procreative Dimension: The Meaning of the Institution of Marriage Throughout the Ages.’ *U. St. Thomas LJ* 6 (2008) 454 480

<sup>30</sup> Lenel, Beat. “The history of South African law and its Roman-Dutch roots.” *Online einsehbar unter* <https://www.lenel.ch/docs/history-of-sa-law-en.pdf> (2002)

<sup>31</sup> ‘History and Background’ Supreme Court of Appeal of South Africa <http://www.justice.gov.za/sca/historysca.htm> (accessed 10 April 2019)

<sup>32</sup> V Hamilton ‘The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage.’ *BUL Rev.* 92 (2012): 1817 1824

<sup>33</sup> Hamilton (n 30 above) 1824

<sup>34</sup> Hamilton (n 30 above) 1850 also Reid (n above)469

<sup>35</sup> Hamilton (n 30 above) 1824

human body becomes capable of reproduction during puberty, it was believed that this was also the age at which people were mature enough to consent to marriage.<sup>36</sup> According to Dahl, the Christianisation of Rome saw these minimum ages become a part of the marriage laws of the Roman Catholic Church, which were later also written into English civil law.<sup>37</sup> These ages of legal consent were generally applied and followed in countries throughout Western Europe, including the Netherlands.<sup>38</sup>

From the 16<sup>th</sup> Century onwards,<sup>39</sup> the Netherlands developed a legal system consisting of a combination of Roman law, feudal law, and Germanic customary law, which became known as Roman-Dutch law.<sup>40</sup> The Dutch settlers who colonised the Cape of Good Hope in the seventeenth century brought this Roman-Dutch legal system with them, and over the years South Africa's legal system has developed into a pluralistic legal system, based on Roman-Dutch law, English civil law, as well as African customary law.<sup>41</sup> However, according to Du Toit, current-day South African private law, which includes the law of contracts and marriage law, is 'governed exclusively by the common law.'<sup>42</sup>

Over the decades certain aspects of South African marriage law have been amended through legislation, including the Marriage Act,<sup>43</sup> the Recognition of Customary Marriages Act,<sup>44</sup> and the Civil Union Act.<sup>45</sup> However, to date, no piece of legislation has ever repealed or replaced the common law minimum marriage age for either sex, and as a result the minimum common law age limit of 12 years for girls and 14 years for boys still stands.

The Marriage Act states that 'no boy under the age of 18 years and no girl under the age of 15 years'<sup>46</sup> can contract a valid marriage without the written consent of the Minister of Home Affairs or an authorised Home Affairs Officer. This shows that both the common law, as referenced earlier, as well as the civil law allows girls to marry much earlier than boys.

Section 28(3) of the South African Constitution,<sup>47</sup> as well as Section 17 of the Children's Act,<sup>48</sup> both state that a child, regardless of gender, reaches majority when they reach the age of 18. Further to this, Section 12(2) of the Children's Act states that 'a child below the minimum age set by law for a valid marriage may not be given out in marriage or engagement,' and Section 18(3)(c)(i) states that it is the responsibility of the child's parent or legal guardian to 'give or

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<sup>36</sup> Reid (n 27 above) 480

<sup>37</sup> G Dahl 'Early teen marriage and future poverty' *Demography* 47(3) (2010): 689-718 689

<sup>38</sup> T James 'The Age of Majority' *American Journal of Legal History* 4(1) (1960): 22-33 31

<sup>39</sup> F du Toit 'Roman-Dutch law in modern South African succession law' (2014): 278

<sup>40</sup> du Toit (n 37 above) 278

<sup>41</sup> B Opperman 'The Impact of Legal Pluralism on Women's Status: An Examination of Marriage Laws in Egypt, South Africa, and the United States' *Hastings Women's LJ* 17 (2006): 65-92 74

<sup>42</sup> Opperman (n 39 above) 66

<sup>43</sup> Marriage Act (n 6 above)

<sup>44</sup> Customary Marriages Act (n 8 above)

<sup>45</sup> Civil Union Act 17 of 2006

<sup>46</sup> Marriage Act (n 6 above) Secs 26(1)

<sup>47</sup> Constitution (n 13 above)

<sup>48</sup> Children's Act (n 2 above)

refuse any consent required by law in respect of the child, including – consent to the child’s marriage.’

Section 3 of the Recognition of Customary Marriages Act begins by stating that no person under the age of 18 may enter into a customary marriage, but then goes on to state that minors may enter into customary marriages if they consent to the marriage, have the consent of their parents or legal guardians, and have the consent of the Minister of Home Affairs or one of their officials.<sup>49</sup> Because none of these pieces of legislation has ever defined a new minimum age of marriage for either gender or prohibited marriages under the age of 18 without exception, the deciding factor in terms of the minimum age limit for marriage has remained the ages defined by the common law.<sup>50</sup>

## ii. Sex and gender stereotyping in the law

When considering the role of stereotypes in the creation and preservation of certain legislation, it is necessary to first define what sex and gender stereotypes are.

Cusack defines a *stereotype* as a

‘generalised view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, members of a particular group.’<sup>51</sup>

The practice of *gender stereotyping* refers to

‘the practice of ascribing to an individual woman or man specific attributes, characteristics, or roles by reason only of her or his membership in the social group of women or men.’<sup>52</sup>

According to Cusack, gender stereotypes and stereotyping come in many forms, including ‘sex stereotypes,’ ‘sexual stereotypes,’ ‘sex-role stereotypes’ and ‘compounded stereotypes.’<sup>53</sup> Cusack defines a *sex stereotype* as a generalised belief that focuses on the physical, cognitive as well as emotional qualities or characteristics that men and women are perceived to have, or should ideally have.<sup>54</sup> Knouse defines a sex stereotype as a presumption that

‘...female anatomy inherently correlates with female sexual orientation, female personality, female behaviour, and female desires.’<sup>55</sup>

Conversely, a *sex-role stereotype* is a generalised belief regarding the social positions that women and men are expected to hold, as well as the kinds of behaviours that they should conform to.<sup>56</sup> Cusack argues that, traditionally, sex-role stereotypes have assigned men roles in

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<sup>49</sup> Customary Marriages Act (n 8 above) Secs 3(1)(a)(i)

<sup>50</sup> Mahery & Proudlock (n 7 above) 22-23

<sup>51</sup> S Cusack ‘Gender Stereotyping as a Human Rights Violation’ UN Office of the High Commissioner for Human Rights 2013 8

<sup>52</sup> Cusack (n 49 above) 9

<sup>53</sup> Cusack (n 49 above) 9

<sup>54</sup> Cusack (n 49 above) 10

<sup>55</sup> J Knouse ‘Using Postmodern Feminist Legal Theory to Interrupt the Reinscription of Sex Stereotypes Through the Institution of Marriage’ *Hastings Women’s LJ* 16 (2004): 159-176 160

<sup>56</sup> Cusack (n 49 above) 13

the public sphere as breadwinners, while roles assigned to women are usually associated with the private sphere, as homemakers who take care of their family.<sup>57</sup>

The presence of gender stereotypes about women's roles in society manifest in cultural as well as religious norms, especially with regards to topics such as virginity, sexuality and female subordination to men.<sup>58</sup> And because these gender stereotypes are so culturally entrenched and accepted, they have also made their way into national legislations.<sup>59</sup> Sex-role stereotypes can have a significant impact on how national legislation is written,<sup>60</sup> and the difference between minimum marriageable ages for boys and girls is an example of this. Bunting argues that

'The age disparity at marriage between men and women is rooted in stereotypical gender roles that remain in most cultures, which hold that women are to be mothers and wives and men are to be providers for the family unit. Women therefore are deemed to be ready for marriage at an earlier age than men who ought to finish their professional training and ideally be financially secure.'<sup>61</sup>

I believe that two main gender stereotypes lie behind the different minimum marriage age laws in South Africa:

firstly, the sex-stereotype that *girls physically mature earlier than boys*, and are, therefore, ready to marry at an earlier age

and secondly, the sex-role stereotype that *girls are meant to be mothers and wives*, and it, therefore, does not matter if they leave school or home at an early age to marry.

Both of these stereotypes are harmful and misleading on their own, but they are also intrinsically linked to one another. In the initial State party report to the Committee on the Elimination of Discrimination Against Women (CEDAW), South Africa explained the different ages for boys and girls in marriage legislation by stating that, 'One explanation for the difference in ages is that girls mature earlier than boys.'<sup>62</sup>

The belief that girls mature faster both physically and emotionally than boys of the same age is a firmly held belief: one that is often repeated and accepted as fact.<sup>63</sup> This belief could firstly be

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<sup>57</sup> Cusack (n 49 above) 13

<sup>58</sup> A Bunting 'Stages of development: marriage of girls and teens as an international human rights issue.' *Social & Legal Studies* 14(1) (2005): 17-38 29

<sup>59</sup> Bunting (n 56 above) 29

<sup>60</sup> Bunting (n 56 above) 27

<sup>61</sup> Bunting (n 56 above) 27

<sup>62</sup> CEDAW/CZAF/1 106-107

<sup>63</sup> An online search for news and opinion articles on the topic show how decisive this belief is, with many touting it as fact while some discrediting it as a myth based on misogynistic beliefs. See:

'Stop using the excuse that 'boys mature slower than girls' for bad behaviour' Metro 29 January 2018

<https://metro.co.uk/2018/01/29/stop-using-excuse-boys-mature-slower-girls-bad-behaviour-7270774/> (accessed 3 June 2019)

'Why Your Daughter Will Be More Mature Than Your Son' The Bump

<https://www.thebump.com/a/why-your-daughter-will-be-more-mature-than-your-son> (accessed 3 June 2019)

'Girls Don't Mature Faster Than Boys, We Just Live in a Misogynistic World' Affinity 18 October 2018

<http://affinitymagazine.us/2018/10/18/girls-dont-mature-faster-than-boys-we-just-live-in-a-misogynistic-world/> (accessed 3 June 2019)

dismissed as a stereotype for the simple reason that there is no universal age at which *all* children go through the same stages of puberty. Even with the accepted 'normal' sequence and timing of bodily development that most children go through, as outlined in the Tanner Stages<sup>64</sup> for example, there can still exist a four- to five-year variation in the age of the onset of puberty.<sup>65</sup> This variation takes place even in groups of healthy children who live in similar conditions, and is based on factors such as genetics, socio-economic circumstances, nutrition and psychological conditions.<sup>66</sup>

Although there have been studies that found that onset of puberty may occur earlier in girls than in boys, Bourguignon et al. claim that more recent studies have found that there is no difference between the age of onset for the different genders.<sup>67</sup> Cameron et al. also found that there was no significant difference in the age of onset of puberty for South African boys and girls.<sup>68</sup> A study by Patton and Viner, however, found that areas of the brain involving executive functions, planning and organising mature between one and two years faster in girls than in boys.<sup>69</sup> Something to consider though is that while puberty among girls has been widely studied, research regarding puberty in boys is much more limited.<sup>70</sup> It is also much easier to see physical evidence of the start of puberty in young girls, such as the development of breasts, than it is to clearly discern when it starts in boys.<sup>71</sup> These conflicting facts and findings show just how difficult it is to prove that all girls really do mature faster than boys.

One of the main bases for the belief that girls mature earlier than boys, as reflected in the different minimum marriage ages, is the fact that the general age of menarche,<sup>72</sup> or onset of menses, for girls is 12 years old, while the general age of spermatogenesis, or onset of sperm production, for boys is 14 years old.<sup>73</sup> MacKinnon argues that 'Inequality is treating someone differently if one is the same, the same if one is different.'<sup>74</sup> Since male and female bodies play very different roles in human reproduction, and since female bodies develop in a specific manner to be able to bear the physical toll of pregnancy and childbirth, something which male

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'4 Reasons Why Girls Become Mature Faster than Boys' MagforWomen  
<http://www.magforwomen.com/reasons-why-girls-become-mature-faster-than-boys/> (accessed 3 June 2019)

'Why do girls mature faster than the boys?' KnowTeens 19 October 2017  
<http://www.knowteens.com/adolescence/girls-maturity-faster-boys/> (accessed 3 June 2019)

<sup>64</sup> 'Puberty and the Tanner Stages Developed by Professor James M Tanner' Child Growth Foundation, 2018  
<http://childgrowthfoundation.org/wp-content/uploads/2018/05/Puberty-and-the-Tanner-Stages.pdf> (accessed 3 June 2019) see also: J Tanner & R Whitehouse 'Clinical longitudinal standards for height, weight, height velocity, weight velocity, and stages of puberty' *Archives of disease in childhood* 51(3) (1976): 170-179

<sup>65</sup> G Patton & R Viner 'Pubertal transitions in health' *The Lancet* 369, 9567 (2007): 1130-1139 1131

<sup>66</sup> Patton & Viner (n 63 above) 1131

<sup>67</sup> A Parent et al. 'The timing of normal puberty and the age limits of sexual precocity: variations around the world, secular trends, and changes after migration.' *Endocrine reviews*, 24(5) (2003) 668-693 672

<sup>68</sup> L Jones et al. 'Is puberty starting earlier in urban South Africa?' *American Journal of Human Biology: The Official Journal of the Human Biology Association* 21.3 (2009): 395-397 397

<sup>69</sup> Patton & Viner (n 63 above)

<sup>70</sup> Parent et al. (n 65 above) 669

<sup>71</sup> Parent et al. (n 65 above) 699

<sup>72</sup> Patton & Viner (n 63 above) 1131

<sup>73</sup> J Stang & M Story 'Adolescent growth and development' *Guidelines for adolescent nutrition services* 1(6) (2005) 3

<sup>74</sup> C MacKinnon 'Reflections on sex equality under law' *Yale Law Journal* (1991): 1281-1328 1287

bodies do not experience, equating age of menarche with age of spermarche is flawed and contributes to the idea that girls are ready to marry at a younger age than boys.

Although the onset of menses does technically indicate that a girl's body is ready to conceive, it does not mean that her body is yet fully ready for the physical toll of pregnancy or childbirth.<sup>75</sup> At 12 years old, even if menarche has occurred, neither the girls' skeletal nor muscular growth will be complete.<sup>76</sup> This means that the pelvis will not yet be fully developed, and neither will the uterus, cervix or reproductive tract, and sexual intercourse may be painful and even cause physical injury.<sup>77</sup> Dixon-Mueller suggests that rather than using chronological age, or age of menarche, to determine whether a girl is ready for intercourse and pregnancy, a 'gynaecological age' of four to five years after menarche would be a better indicator.<sup>78</sup> Typically, by the age of 18, most young women will be physically mature enough to safely have intercourse and handle pregnancy and childbirth.<sup>79</sup> Girls who become pregnant before their body is fully developed, especially girls under the age of 15, have a heightened risk of prolonged and obstructed labour, obstetric fistula, postpartum haemorrhage, and maternal mortality.<sup>80</sup> If a girl's body has not yet finished growing when she becomes pregnant, her body could compete with the foetus for nutrients, which could also lead to premature delivery, low infant birth weight, and infant mortality.<sup>81</sup>

A study by Brockert et al. found that these negative outcomes and risks did not only apply to young mothers from lower socio-economic backgrounds, or to those who did not have access to adequate prenatal care.<sup>82</sup> Their study found that even when young mothers under the age of 18 are married, live in good socio-economic conditions, and are afforded good quality health care, the risks for serious pregnancy and birth complications for both mother and child remain high.

In comparison, the general age of spermarche for boys is 14, while most will reach full body maturity (stage five of the Tanner Scale) at ages 16-17.<sup>83</sup> Within the current minimum age laws, the age at which boys and girls are generally, technically, able to reproduce or conceive is used as a guiding principle. At the onset of spermarche, a boy may be able to impregnate a girl and father a child. However, in doing so, the boy, even if he is only 14 years old, will not suffer any of the health risks or physical injury that a girl of 12 would experience as a result of conception, pregnancy or childbirth. While the fact that he is under the age of 18 may result in psychological or emotional stress, his body would not be at risk physically because he has become a father at an early age. As outlined above, the same is not true for girls under the age of 18 who become pregnant.

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<sup>75</sup> R Dixon-Mueller 'How young is "too young"? Comparative perspectives on adolescent sexual, marital, and reproductive transitions.' *Studies in family planning* 39.4 (2008): 247-262 248

<sup>76</sup> Dixon-Mueller (n 73 above) 248

<sup>77</sup> Dixon-Mueller (n 73 above) 248

<sup>78</sup> Dixon-Mueller (n 73 above) 249

<sup>79</sup> Dixon-Mueller (n 73 above) 249

<sup>80</sup> Dixon-Mueller (n 73 above) 254

<sup>81</sup> A Fraser et al. (1995) 'Association of young maternal age with adverse reproductive outcomes' *New England journal of medicine* 332(17) (1995): 1113-1118 1117

<sup>82</sup> Fraser et al. (n 79 above) 1116

<sup>83</sup> Child Growth Foundation (n 62 above)



Seeing menarche and spermarche as both indicating the same level of physical readiness and maturity in terms of reproductive ability is thus flawed, as it assumes that the physical ability to reproduce means the same thing for girls and boys.<sup>84</sup>

In light of this, the stereotype that girls mature faster than boys, and the use of this stereotype as justification for lower marriage ages for girls than boys, could be challenged by stating that, if the deciding factor for the minimum marriage age is the age at which a body can safely reproduce, meaning that the individual will typically suffer no bodily harm due to the intercourse, conception, pregnancy or childbirth itself, then this age would actually be lower for boys than for girls. In terms of physical and biological ability to reproduce, boys could even be said to mature faster than girls.<sup>85</sup>

The belief that a girl is ready for marriage the moment that she can conceive a child is also closely linked to the stereotype that all girls are meant to be wives and mothers. Knouse argues that since the time of its inception, the legal institution of marriage has been used as a tool to make both men and women conform to roles that are in line with traditional sex stereotypes.<sup>86</sup> These stereotypes expect all women to be heterosexual, to marry to men, and to have children and take care of their household once married.<sup>87</sup>

MacKinnon argues that beliefs about biological differences between men and women, and what these differences mean for their destinies, justified the creation of a separate and inferior legal status for women.<sup>88</sup> The fact that only women have the physical ability to become pregnant and give birth to children created a 'narrow view of women's biological destiny,'<sup>89</sup> that saw women being required both by custom and legislation to only take care of men and children, and not pursue other interests.<sup>90</sup> In many customs and cultures these stereotypes persist, with young girls being socialised and taught from an early age to prepare for their future as wives and mothers, while sons are encouraged to complete their education and pursue a career as they are expected to one day provide for their family.<sup>91</sup> As MacKinnon points out, men as a group have never been disempowered as a result of their reproductive abilities.<sup>92</sup>

Russo refers to the 'motherhood mandate,' the belief that all women should be mothers, and that the ideal mother should have a large number of children and spend the majority of her time caring for them.<sup>93</sup> Gotlib discusses this as 'pronatalism,' the belief that motherhood and womanhood are naturally synonymous.<sup>94</sup> The fact that motherhood is generally regarded as the major goal of every woman's life means that motherhood remains one of the main aspects of

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<sup>84</sup> MacKinnon (n 72 above) 1287

<sup>85</sup> Dixon-Mueller (n 73 above) 249 & 252

<sup>86</sup> Knouse (n 53 above) 168

<sup>87</sup> Knouse (n 53 above) 170

<sup>88</sup> MacKinnon (n 72 above) 959

<sup>89</sup> MacKinnon (n 72 above) 1311

<sup>90</sup> MacKinnon (n 72 above) 959 & 1312

<sup>91</sup> B Rwezaura 'Competing Images of Childhood in the Social and Legal Systems of Contemporary Sub-Saharan Africa' *International Journal of Law, Policy and the Family* 12(3) (1998): 253-278 265

<sup>92</sup> MacKinnon (n 72 above) 131

<sup>93</sup> N Russo ed. *The motherhood mandate*. Vol. 4. Human Sciences Press (1979) 148

<sup>94</sup> A Gotlib "'But You Would Be the Best Mother": Unwomen, Counterstories, and the Motherhood Mandate.' *Journal of bioethical inquiry* 13.2 (2016): 327-347 330

sex-role stereotyping for women.<sup>95</sup> This stereotype contributes to the idea that because the primary goal of a woman's life is to marry and have children, it doesn't matter whether she marries at 12 or 20 years old.

### iii. The role of culture

Melchiorre argues that culture, religion and tradition are all factors that have an important impact on the establishment of minimum marriage age laws.<sup>96</sup> While section i of this chapter showed the influence that Roman and Dutch European culture had on the creation of current marriage legislation, African indigenous customs and law have also influenced how marriage age laws are approached in South Africa.

Nhlapo defines customary law, also referred to as indigenous law, as a custom-based system that governs the lives of black African people, especially those living in rural areas.<sup>97</sup> Nhlapo argues that customary law receives its legitimacy from its direct link to the past and to tradition;<sup>98</sup> however, Nhlapo distinguishes between the adaptability and fluidity of pre-colonial customary law, and the rigidly codified 'official' customary law that exists in South Africa today.<sup>99</sup>

According to Goodsell, before European colonisation, customary law in South Africa was unwritten, which allowed the law to adapt and change based on socio-economic conditions and the needs of the people.<sup>100</sup> Colonisation and the creation of European-based legal systems led to African people being required to codify their indigenous law, specifically through the Black Administration Act no.38 of 1927.<sup>101</sup> Goodsell argues that this codification 'ossified' cultural law, and as a result customary law has become 'outdated', particularly with regards to the treatment of women.<sup>102</sup>

Bennet argues that this is because those responsible for codifying customary law, namely colonial and apartheid state administrators, as well as African elders and chiefs, had a vested interest in maintaining systems which benefitted them by upholding the African 'tradition' of patriarchy.<sup>103</sup> Nhlapo argues that patriarchy has always played an important role in customary law, ensuring that senior males enjoyed the highest status in society.<sup>104</sup> However, the distortion that came with the codification of certain customs following colonisation entrenched the

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<sup>95</sup> Russo (n 91 above) 144

<sup>96</sup> A Melchiorre 'A minimum common denominator? Minimum ages for marriage reported under the Convention on the Rights of the Child' Submission on child, early and forced marriage.' Women's Human Rights and Gender Section OHCHR 3

<sup>97</sup> T Nhlapo 'Indigenous Law and Gender in South Africa: Taking Human Rights and Cultural Diversity Seriously' *Third World Legal Studies* 13 (1994-95): 49-71 53

<sup>98</sup> Nhlapo (n 95 above) 53

<sup>99</sup> Nhlapo (n 95 above) 53

<sup>100</sup> E Goodsell 'Constitution, Custom, and Creed: Balancing Human Rights Concerns with Cultural and Religious Freedom in Today's South Africa' *BYU Journal of Public Law* 21(1) (2007): 109- 152 121

<sup>101</sup> Goodsell (n 98 above) 121

<sup>102</sup> Goodsell (n 98 above) 121

<sup>103</sup> T Bennett 'Proprietary Capacity of Children: A Study of Customary Law and the Bill of Rights in South Africa' *AFR. J. INT'L & COMP. L.* 9 (1997): 83-106 87

<sup>104</sup> Nhlapo (n 95 above) 58

principle of patriarchy even in situations where women and children had been protected and treated fairly in the past.<sup>105</sup>

Another aspect to consider is the communal nature of cultural rights. Rwezaura refers to the idea of 'wealth in people' which was central to pre-capitalist society, in which a child was perceived as a family asset or resource, meaning that the child's labour and even reproductive abilities essentially belonged to its parents and the family unit rather than to the child itself.<sup>106</sup> According to Bennet, children were not considered to be 'independent, self-determining beings' who had the right to express their opinions or preferences, even in matters directly affecting their futures.<sup>107</sup>

Because of this, the interests of the family, rather than the individual, were seen as being the main concern when considering marriage.<sup>108</sup> This means that families believed they were 'entitled' to arrange marriages for their children that were seen to be beneficial to the family as a whole, rather than necessarily taking into consideration the preferences of the prospective spouses.<sup>109</sup>

According to Rwezaura, most African cultures regarded girls aged 12 years and older who had reached puberty as adults, because they had developed the biological ability to bear children.<sup>110</sup> The gender stereotypes detailed in section ii of this chapter are also central to indigenous African culture, and so the belief that a woman's purpose in life is to be a wife and mother means that the ability to bear children automatically moves a girl from being perceived as a child to being perceived as an adult.<sup>111</sup> Rwezaura argues that this is why older men may not see anything wrong with marrying a girl who could be young enough to be their granddaughter, as according to customary views she is already seen as an adult.<sup>112</sup> Nhlapo argues that these views of a woman's role in society, together with a strong cultural focus on respecting the decisions of elders, lead to the practices of child marriage as well as forced marriage being seen as acceptable.<sup>113</sup> This means that older men are often able to justify taking advantage of young girls under the guise of practising their cultural rights.<sup>114</sup>

Also, because it was believed and accepted that parents had the authority to choose spouses for their children, any fixed rule prescribing minimum marriage ages could be seen as attempting to diminish parental power.<sup>115</sup> The fact that one of the main goals of marriage was

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<sup>105</sup> Nhlapo (n 95 above) 58

<sup>106</sup> Rwezaura (n 89 above) 257

<sup>107</sup> Bennett (n 101 above) 84

<sup>108</sup> Rwezaura (n 89 above) 257

<sup>109</sup> 'The Harmonisation of the Common Law and the Indigenous Law Report on Customary Marriage' The South African Law Commission [http://www.justice.gov.za/salrc/reports/r\\_prj90\\_cstm\\_1998aug.pdf](http://www.justice.gov.za/salrc/reports/r_prj90_cstm_1998aug.pdf) 1998 71 (accessed 10 June 2019)

<sup>110</sup> Rwezaura (n 89 above) 260

<sup>111</sup> Rwezaura (n 89 above) 260

<sup>112</sup> Rwezaura (n 89 above) 260

<sup>113</sup> Nhlapo (n 95 above) 57

<sup>114</sup> Nhlapo (n 95 above) 57

<sup>115</sup> SALC (n 107 above) 71

believed to be procreation, meant that puberty became the agreed-upon minimum requirement for both spouses.<sup>116</sup>

I believe that there are two indigenous customs that, although they do not constitute customary marriage in themselves, have an impact on the number of customary marriages taking place involving underage girls in South Africa.

The first is the custom of ukuthwala, that has often been cited as a leading factor contributing to underage girls being forced into customary marriages with older men.<sup>117</sup> According to Mwambene et al. ukuthwala is a 'culturally-legitimated abduction of a woman whereby, preliminary to a customary marriage, a young man will forcibly take a girl to his home'.<sup>118</sup> It is important to understand that ukuthwala is not a form of cultural marriage, and as such is not currently mentioned in the Customary Marriages Act. Historically, it was used as a precursor to marriage for several reasons, including to try and speed up lobola negotiations with the bride's family,<sup>119</sup> to avoid a different, unwanted marriage that had already been arranged, or to circumvent parental opposition to a desired marriage.<sup>120</sup> According to Mwambene et al. this process usually took place with the prospective bride, or at least her family's, consent. If the bride refused to take part in the negotiations, she would be returned to her family unharmed.<sup>121</sup>

Today this custom is mainly still practised in rural parts of the Eastern Cape and KwaZulu-Natal provinces,<sup>122</sup> but it has changed to focus on abduction, rape and forced marriage, often of underage girls.<sup>123</sup> A 2014 report on ukuthwala by the South African Law Reform Commission (SALRC) found that:

'Roughly 20 school girls were being forced to drop out of school every month as a result of ukuthwala;

'The practice had taken on another dimension in that girls as young as 12 years were sometimes forced to marry men aged 40 or older, some of whom were HIV positive;

In some cases the abduction of a girl took place with the consent and knowledge of her parents or guardian, and might even be orchestrated by those adults if they were in dire economic straits and were tempted by lobola offered by the prospective husband.'<sup>124</sup>

Although ukuthwala is not in itself a form of customary marriage, it nevertheless affects the number of customary marriages involving underage girls taking place. Mwambene et al. argues

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<sup>116</sup> SALC (n 107 above) 71

<sup>117</sup> 'Ukuthwala' Department of Justice, <http://www.justice.gov.za/brochure/ukuthwala/ukuthwala.html> 2010 (accessed 11 April 2018)

<sup>118</sup> L Mwambene & J Sloth-Nielsen 'Benign accommodation? Ukuthwala, "forced marriage" and the South African Children's Act.' *African Human Rights Law Journal* 11(1) (2011): 1-22 3

<sup>119</sup> W Smit 'The violent re-emergence of abduction marriage in modern South Africa: Ukuthwala as a diagnostic event for changing marriage practices and the power of discourse' Doctoral dissertation [Sl: sn] (2017) 8

<sup>120</sup> 'The Practice of Ukuthwala' Discussion Paper 132 South African Law Reform Commission <http://www.justice.gov.za/salrc/dpapers/dp132-UkuthwalaRevised.pdf> (2015) 7 (accessed 6 April 2018)

<sup>121</sup> Mwambene et al. (n 116 above) 4

<sup>122</sup> M Maphalala 'The Impact of Ukuthwala on the Schooling and Livelihood of a Girl Child: A Case of the eMangwaneni Tribe in Bergville, KwaZulu-Natal' *Journal of Sociology and Social Anthropology* 7.3 (2016): 149-159 149

<sup>123</sup> Maphalala (n 120 above) 150

<sup>124</sup> SALC (n 107 above) 19

that there are groups who will defend their constitutional right to practice ukuthwala, and that since South Africa's marriage laws make provision for children under the age of 18 to marry under certain circumstances, if ukuthwala takes place with the consent of a girl older than 12 then it cannot be regarded as being illegal.<sup>125</sup> However, in *Jezile v S (National House of Traditional Leaders and others as amici curiae)*,<sup>126</sup> the Western Cape High Court ruled that despite the right to culture, the 'aberrant' form of ukuthwala centring around rape and forced marriage of underage girls could not secure constitutional protection.

Ukuthwala and its negative effects on young girls has received growing media attention in the past few years,<sup>127</sup> and has led to proposals for the *Prohibition of Forced Marriages and Child Marriages Bill* to be enacted.<sup>128</sup> Although the proposed bill would be a positive step towards ending harmful practices such as ukuthwala and child marriage, to date there is no indication of when, or even if, the bill will be passed.<sup>129</sup> Mwambene also argues that the proposed bill has several flaws, namely that it does not set the minimum marriageable age at 18 with no exceptions, it does not address or repeal provisions in the Marriage Act or the Recognition of Customary Marriages Act that allow children to marry, nor does it amend provisions in the Children's Act with regard to the minimum age of marriage or betrothal.<sup>130</sup>

The second indigenous custom that could have an impact on the decision by parents to allow their daughters to marry at very young ages is virginity testing. Bunting argues that for a woman to be a virgin at the time of her marriage is still seen as desirable and even expected in many cultures, and that this drives early marriage in large parts of the world.<sup>131</sup> Walker agrees that early marriage should be viewed through the lens of, amongst other factors, cultural taboos regarding pre-marital sex for girls as well as patriarchal attempts at controlling female sexuality.<sup>132</sup> According to the South African Human Rights Commission (SAHRC), several cultures

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<sup>125</sup> Mwambene et al. (n 116 above) 19

<sup>126</sup> *Jezile v S (National House of Traditional Leaders and others as amici curiae)* [2015] JOL 33004 (WCC)

<sup>127</sup> See as example:

'Shocking cultural practices' The Witness, 21 January 2019

<https://www.news24.com/SouthAfrica/News/shocking-cultural-practices-20190121-2> (accessed 08 August 2019)

'How I was kidnapped and forced to marry' News24, 17 January 2017

<https://www.news24.com/SouthAfrica/News/how-i-was-kidnapped-and-forced-to-marry-20170116> (accessed 08 August 2019)

'Ukuthwala: The sex trafficking scandal devastating rural South Africa' Mail & Guardian, 29 November 2017

<https://mg.co.za/article/2017-11-29-ukuthwala-the-sex-trafficking-scandal-devastating-rural-south-africa> (accessed 8 August 2019)

'Ukuthwala: Culture Correct to Culture Corrupt' Carte Blanche, 11 June 2019

<https://m-net.dstv.com/show/carte-blanche/news/ukuthwala-culture-correct-to-culture-corrupt/news> (accessed 8 August 2019)

<sup>128</sup> SALRC (n above) 47

<sup>129</sup> 'Thousands of girls have their fate sealed while 'child marriages bill' trudges along' City Press, 22 November

2017 <https://city-press.news24.com/News/thousands-of-girls-have-their-fate-sealed-while-child-marriages-bill-trudges-along-20171122> (accessed 08 August 2019)

<sup>130</sup> L Mwambene 'Recent legal responses to child marriage in Southern Africa: The case of Zimbabwe, South Africa and Malawi' *African Human Rights Law Journal* 18(2) (2018): 527-550 543

<sup>131</sup> Bunting (n 56 above) 29

<sup>132</sup> J.A Walker 'Early marriage in Africa-trends, harmful effects and interventions.' *African journal of reproductive health* 16.2 (2012): 231-240 232

and religions link female value with virginity, leading to the belief that losing virginity 'irrevocably' diminishes a woman's value.<sup>133</sup>

The custom of virginity testing, or *ukuhlolwa kwezintombi*,<sup>134</sup> has been practised in South Africa since precolonial times, specifically among the Zulu people, and was used as a way to determine the price for a prospective bride, based on her chastity.<sup>135</sup> Virginity testing involves a gynaecological examination, during which the 'tester' may insert her hands into the girl's vagina to ensure that the hymen is still intact.<sup>136</sup> These tests often take place during public ceremonies, that are attended by other women from the community.<sup>137</sup> If a girl's hymen is found to be intact, she is believed to still be a virgin, and she is rewarded with a certificate.<sup>138</sup> Girls who do not 'pass' the test are taken aside and interrogated as to why they are no longer virgins. Durojaye argues that the public nature of the procedure places girls who fail the test at the receiving end of immense public stigma and shame.<sup>139</sup> According to Behrens, a girl who fails the virginity test may be regarded as a disgrace to her family, and may even be called a prostitute or a bad influence on her peers.<sup>140</sup> Not only that, but the families of girls who fail the test could even be required by the community to pay a fine for allowing their daughter to 'tarnish' the community.<sup>141</sup>

At its very core, virginity testing is aimed at idealising and enforcing female chastity before marriage.<sup>142</sup> As Behrens correctly points out, even though the Children's Act<sup>143</sup> refers to virginity testing in 'children' rather than boys or girls, and even though there are those who claim that virginity testing is carried out on boys as well as on girls, the fact is that there is no objective medical way of physically testing whether or not a boy is a virgin.<sup>144</sup> This means that girls are disproportionately affected by the practice because of their female anatomy and because, while society places great value on female virginity, male virginity has never carried the same value.<sup>145</sup>

Although various organisations and groups have called for virginity testing to be banned as a human rights violation, including the United Nations,<sup>146</sup> the ANC Women's League, the Human Rights Commission as well as the Commission for Gender Equality,<sup>147</sup> the practice still receives

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<sup>133</sup> 'Research Brief on Gender and Equality in South Africa 2013 – 2017' South African Human Rights Commission 2017

<https://www.sahrc.org.za/home/21/files/RESEARCH%20BRIEF%20ON%20GENDER%20AND%20EQUALITY%20IN%20SOUTH%20AFRICA%202013%20to%202017.pdf> 20 (accessed 2 August 2019)

<sup>134</sup> SAHRC (n 131 above) 20

<sup>135</sup> E Durojaye 'The human rights implications of virginity testing in South Africa' *International Journal of Discrimination and the Law* 16(4) (2016): 228–246 228

<sup>136</sup> Durojaye (n 133 above) 228

<sup>137</sup> Durojaye (n 133 above) 228

<sup>138</sup> Durojaye (n 133 above) 231

<sup>139</sup> Durojaye (n 133 above) 231

<sup>140</sup> Kevin Behrens 'Virginity testing in South Africa: a cultural concession taken too far?' *South African Journal of Philosophy* 33(2) (2014): 177–187 182

<sup>141</sup> Behrens (n 138 above) 182

<sup>142</sup> Durojaye (n 133 above) 323

<sup>143</sup> Children's Act (n 2 above) secs 12

<sup>144</sup> Behrens (n 138 above) 185

<sup>145</sup> Durojaye (n 133 above) 240

<sup>146</sup> "'Virginity testing': a human rights violation, with no scientific basis' United Nations 17 October 2018

<https://news.un.org/en/story/2018/10/1023401> (accessed 09 August 2019)

<sup>147</sup> Behrens (n 138 above) 177

widespread support. For example in 2018 a group of cultural activists and Zulu maidens took to the streets of Pietermaritzburg to protest calls by the United Nations that the practice be banned.<sup>148</sup> One of the protesters, who is identified in the article as cultural activist Nomsgugu Ngobese, is quoted as saying, 'We have got the damn right as parents to up bring our children the way we like.'<sup>149</sup>

Even though all of this is a separate human rights issue to minimum marriageable age laws, it does serve to illustrate two points. Firstly, that virginity is still viewed in many African cultures as valuable, and that a woman should 'save' herself for her future husband, even though the same chastity is not expected of him.<sup>150</sup> This virginity is so valuable that losing it before marriage affects a girl's possibilities in terms of future marriage prospects, the amount of lobola her family will receive for her when she gets married, as well as the treatment she and even her family receive from the rest of the community.<sup>151</sup> Secondly, based on the concept of 'wealth in people', because a girl's virginity can have such a major impact on not only her but also her family's lives, it makes sense that many parents believe that the wisest choice for them is to get their daughter married as early as possible, ensuring that she is still a virgin at the time of her marriage.<sup>152</sup> In one of their reports on child marriage, international non-profit organisation CARE writes:

'Female sexuality shapes family honour in the eyes of parents and communities: virginity for the unwed, and faithful, monogamous childbearing for the married. The commodification of girls' sexuality is part of upholding this honour since a girl's virginity and reproductive capacity are exchanged between families. The shame that families want to avoid is sometimes related to fear that their eventual business transaction will be compromised.'<sup>153</sup>

While adult women over the age of 18 have the right to freely consent to practices such as customary marriage and virginity testing, girls under the age of 18 should be protected from any practices that threaten to harm their dignity, as well as their physical safety and well-being.

As Chief Justice Langa stated

'Customary law has, in my view, been distorted in a manner that emphasises its patriarchal features and minimises its communitarian ones. Protecting people from distortions masquerading as custom is imperative, especially for those they disadvantage so gravely, namely, women and children.'<sup>154</sup>

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<sup>148</sup>'Protest over call to ban virginity testing' The Witness 8 November 2018

<https://www.news24.com/SouthAfrica/News/protest-over-call-to-ban-virginity-testing-20181107> (accessed 8 August 2019)

<sup>149</sup>'Protect the culture of virginity testing among girls' SABC News Online 7 November 2018

<http://www.sabcnews.com/sabcnews/protect-the-culture-of-virginity-testing-among-girls/> (accessed 8 August 2019)

<sup>150</sup> Durojaye (n 133 above) 232

<sup>151</sup> Bunting (n 56 above) 29

<sup>152</sup> 'Child, Early and Forced Marriage and the Control of Sexuality and Reproduction' CARE

<https://www.care.org/our-work/womens-empowerment/child-marriage/child-marriage-causes> 1 (accessed 4 April 2018)

<sup>153</sup> CARE (n 150 above) 1

<sup>154</sup> *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another* 2005 (1) BCLR 1 (CC) 30 [89]

## Conclusion

Chapter one examined the main reasons behind the difference in minimum marriage ages for boys and girls in South African legislation. The origin of the minimum marriage ages of 14 years for boys and 12 years for girls can be traced back to old Roman law, that was brought to South Africa by early Dutch settlers and still forms part of our current Roman-Dutch legal system. These minimum ages are linked to the ages at which boys and girls generally reach spermarche and menarche respectively, and have been justified through gender stereotypes regarding women's 'purpose' in life to become wives and mothers. Traditional African cultural beliefs regarding early female marriage and a family's 'right' to choose their child's spouse, as well as practices such as ukuthwala and virginity testing, all play a role in child marriage being viewed as acceptable by some groups.



## Chapter 2 - What is the social impact of this differentiation?

### Introduction

Chapter two aims to answer the research sub-question '*what is the social impact of this differentiation?*' The chapter begins by examining available statistics regarding the prevalence of child marriage in South Africa, and then goes on to detail the physical as well as psychological health implications that marriage under the age of 18 has for girls. The negative effect that marriage under the age of 18 has on girls' education, as well as their increased future likelihood to experience poverty and unemployment are examined, as is the fact that marriage legally changes the status of a child under 18 from a minor to that of a major, that results in the loss of protection for child brides from legislation aimed at protecting children. The chapter concludes by examining the effects that different minimum marriage ages have on gender equality in general and specifically girls' perceptions of their self-worth.

#### i. Statistics

In February 2019 Statistics South Africa (Stats SA) released their 2017 statistics on national marriages and divorces. They reported that in 2017, 70 brides under the age of 18 were married via civil marriage, with 62 of these girls marrying for the first time.<sup>155</sup> This means that eight girls, all under the age of 18, married for the second time in 2017. In addition 77 girls under the age of 18 married via customary marriage during the same year.<sup>156</sup> 147 girls under the age of 18 getting married in one year may seem insignificant in a country with an estimated population of 58.8 million citizens,<sup>157</sup> but for those girls their early marriage could have a severe impact on their future well-being and prospects. It is also important to remember that these figures only reflect the marriages registered at Home Affairs, and so may not reflect the true number of child marriages that have taken place during that period.

As table 1 and 2 show, the number of girls affected by underage marriage every year adds up, meaning that over time a large number of girls are affected by the negative consequences of early marriage. Inconsistency in the manner in which figures are presented by Stats SA in different reports, as well as the fact that marriage and divorce reports have not in the past been released yearly, mean that even these figures do not give a complete picture of how many girls are affected by child marriage. The tables also show that, although child marriage also affects boys, girls are disproportionately affected compared to boys.

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<sup>155</sup> 'Marriages and divorces 2017' Stats SA secs 2.1.4 3

<sup>156</sup> Stats SA 2017 (n 153 above) secs 2.2.2 4

<sup>157</sup> 'SA Population reaches 58,8 million' Stats SA 29 July 2019 <http://www.statssa.gov.za/?p=12362> (accessed 12 August 2019)

<b>Table 1. Civil Marriages for children under 18</b>										
<b>Year</b>	<b>199<sup>158</sup></b>	<b>1997<sup>159</sup></b>	<b>1998<sup>160</sup></b>	<b>2001<sup>161</sup></b>	<b>2004<sup>162</sup></b>	<b>2008<sup>163</sup></b>	<b>2011<sup>164</sup></b>	<b>2014<sup>165</sup></b>	<b>2016<sup>166</sup></b>	<b>2017<sup>167</sup></b>
<b>Girls &lt;18</b>	NA	3073*	2947*	302	545	3039*	238	131	99	70
<b>&lt;16</b>	NA	32	21	0	48	5	**	**	**	**
<b>Boys &lt;18</b>	NA	287*	258*	2	13	296*	18	10	4	2
<b>&lt;16</b>	NA	0	0	0	6	2	**	**	**	**

\*Over the years Stats SA has not been consistent in the manner in which it recorded marriage statistics. For the period 1997-1998, as well as in 2008, marriages were recorded as <16 and then 16-19 age categories, which means that is impossible from this data to see how many of the marriages in the 16-19 category took place before the bride or groom was 18 years old.\*\*Since the 2011 report Stats SA has not been giving figures for marriages of children under the age of 16, only grouping all marriages of under 18's together.

<b>Table 2. Customary Marriages for children under 18</b>					
<b>Year</b>	<b>2008<sup>168</sup></b>	<b>2011<sup>169</sup></b>	<b>2014<sup>170</sup></b>	<b>2016<sup>171</sup></b>	<b>2017<sup>172</sup></b>
<b>Girls &lt;18</b>	No data available	173	46	252	77
<b>Proportion of national customary marriages*</b>	8.3%	3.4%	1.5%	6.3%	3%
<b>Boys &lt;18</b>	No data available	14	7	14	8
<b>Proportion of national customary marriages*</b>	0.8%	0.3%	0.2%	0.4%	0.3%

\*Since Stats SA started recording customary marriages in 2008, they have included a percentage value with each age group with relation to the number of customary marriages during that year as a whole.

<sup>158</sup> 'Marriages and divorces 1996' Stats SA. This report provided no data on age of first marriage or number of children married under the age of 18

<sup>159</sup> 'Marriages and divorces 1997 & 1998' Stats SA secs 1.1

<sup>160</sup> Stats SA 1997 & 1998 (n 157 above) secs 3.1

<sup>161</sup> 'Marriages and divorces 2001' Stats SA, secs 2.5 32

<sup>162</sup> 'Marriages and divorces 2004' Stats SA secs 1.4 12

<sup>163</sup> 'Marriages and divorces 2008' Stats SA Figure 2 5

<sup>164</sup> 'Marriages and divorces 2011' Stats SA secs 2.1.4 3

<sup>165</sup> 'Marriages and divorces 2014' Stats SA secs 2.1.4 3

<sup>166</sup> 'Marriages and divorces 2016' Stats SA secs 2.1.4 3

<sup>167</sup> 'Marriages and divorces 2017' Stats SA secs 2.1.4 3

<sup>168</sup> Stats SA 2008 (n 161 above) secs 2.2.3 3

<sup>169</sup> Stats SA 2011 (n 162 above) secs 2.2.3 4

<sup>170</sup> Stats SA 2014 (n 163 above) secs 2.2.3 4

<sup>171</sup> Stats SA 2016 (n 164 above) secs 2.2.3 4

<sup>172</sup> Stats SA 2017 (n 165 above) secs 2.2.2 4

Girls are already more vulnerable to early marriage than boys,<sup>173</sup> and the current minimum marriage age laws leave South African girls even more susceptible to abuse by allowing them to marry at a younger age than boys. According to Arthura et al. research has shown a clear link between protective laws with higher minimum marriage ages, and lower rates of child marriage.<sup>174</sup> As Melchiorre points out, the problem does not lie with the general age at which marriage is legally allowed, which is 18 in South Africa (as it is in many parts of the world), but rather with the exceptions that are allowed to the general age, making marriage at younger ages possible.<sup>175</sup>

Rwezaura argues that the age of majority generally assigned by law, which in the case of South Africa is 18, is fixed based on the presumption that by that age basic formal education would have been completed.<sup>176</sup> The assumption is also made that by this age individuals would have reached mental, emotional as well as physical maturity, allowing them to make informed and consensual decisions whether they are ready for marriage, and to bear the responsibilities that come with marriage.<sup>177</sup> For girls who marry before they have reached this stage of maturity, there can be serious and long-lasting negative consequences.

## ii. Physical and mental health

The negative physical effects of child marriage have been extensively studied and reported. According to Hamilton, girls who marry at age 18 or younger have a 23% greater risk of diseases including diabetes, stroke, cancer and heart attacks.<sup>178</sup> Conversely, no evidence has been found that boys who marry under the age of 18 experience worsened physical health.<sup>179</sup> The greatest physical health risks for underage girls, however, come from pregnancy and childbirth. The adverse physical effects of pregnancy and childbirth on children under the age of 18 were discussed in the previous chapter, and thus will not be repeated here. But according to Walker, girls who marry under the age of 18 have their first sexual experiences much earlier than their peers, tend to give birth to more children in their lifetime, and lose more children due to neonatal and childhood diseases.<sup>180</sup> Girls under the age of 15 who give birth are five times more likely to die in childbirth than women in their 20's,<sup>181</sup> while girls between 15 and 19 are twice as likely to die during childbirth compared to women in their 20's.<sup>182</sup> With an expectation from older husbands to have sex immediately after marriage, as well as the pressure for girls to have children of their own as soon as possible, Davids argues that the majority of unprotected sex taking place for adolescent girls in developing countries is happening within marriage.<sup>183</sup> According to Davids, most married girls do not have the necessary knowledge about

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<sup>173</sup>'Top 10 myths about child marriage' United Nations Population Fund 12 February 2015 <https://www.unfpa.org/news/top-10-myths-about-child-marriage> (accessed 13 August 2019)

<sup>174</sup> Arthura et al. (n 22 above) 52

<sup>175</sup> Melchiorre (n 94 above) 7

<sup>176</sup> Rwezaura (n 89 above) 261

<sup>177</sup> Rwezaura (n 89 above) 261

<sup>178</sup> Hamilton (n 30 above) 1848

<sup>179</sup> Hamilton (n 30 above) 1848

<sup>180</sup> Walker (n 130 above) 234

<sup>181</sup> Walker (n 130 above) 234

<sup>182</sup> Bunting (n 56 above) 31

<sup>183</sup> L Davids 'Female Subordination Starts at Home: Consequences of Young Marriage and Proposed Solutions' *Regent J. Int'l L.* 5 (2007): 299-324 309

contraception, or the power in their relationships to protect themselves against unwanted pregnancy, HIV infection, or other sexually transmitted diseases.<sup>184</sup> Young girls are also more susceptible to contracting sexually transmitted diseases as their thin vaginal walls could lead to easier tearing of the vaginal membrane.<sup>185</sup> At present over a fifth of South African women aged between 15-49 are HIV positive.<sup>186</sup> This figure, in a country with 7,97 million people living with HIV,<sup>187</sup> should be enough motivation to protect girls from early marriage and unprotected sexual intercourse.

It is not only the physical health of girls that suffer if they marry early. According to Hamilton, there is evidence that child marriage has been associated with a range of psychiatric disorders, including nicotine dependence, major depressive disorder, and antisocial personality disorder in particular.<sup>188</sup> The risk of developing antisocial personality disorder is almost three times higher for women who were married as children compared to women who marry as adults.<sup>189</sup> Hamilton argues that the stress of early marriage and early parenthood contributes to young brides developing antisocial behaviour, especially substance abuse.<sup>190</sup> A contributing factor to the mental health problems of child brides may be the fact that, as children, they are physically unable to manage all the responsibilities of being a wife.<sup>191</sup> This may place them under immense stress, and may lead to angry outbursts and even physical violence if their husbands are not satisfied with their efforts.<sup>192</sup>

The offspring of child mothers may also suffer adverse health consequences. According to Nour, infants born to mothers under the age of 20 have 73% higher mortality rates than those born to older women, and adolescent mothers are 35-55% more at risk of delivering preterm or low-birthweight infants.<sup>193</sup> The babies of adolescent mothers are also at greater risk of contracting HIV during birth or through breastfeeding, and if the mother has other sexually transmitted diseases such as syphilis, herpes or gonorrhoea, it can lead to congenital neonatal infections and future health complications for the foetus.<sup>194</sup> Mothers who are still children themselves and who are unable to complete their education are also less likely to be able to provide their babies with proper nutrition and care.<sup>195</sup>

According to Hamilton, the children of child mothers have elevated risks of behavioural and learning problems, and these adverse outcomes will affect them into their adult lives, with a higher risk of future poverty, unemployment, and even of becoming young spouses and parents

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<sup>184</sup> Davids (n 181 above) 309

<sup>185</sup> Davids (n 181 above) 309

<sup>186</sup> 'Mid-year population estimates' Stats SA 2019 6

<sup>187</sup> Stats SA 2019 (n 184 above) 6

<sup>188</sup> Hamilton (n 30 above) 1847

<sup>189</sup> Hamilton (n 30 above) 1847

<sup>190</sup> Hamilton (n 30 above) 1849

<sup>191</sup> Davids (n 181 above) 310

<sup>192</sup> Davids (n 181 above) 310

<sup>193</sup> N Nour 'Health consequences of child marriage in Africa' *Emerging infectious diseases* 12(11) (2006): 1644-1649 1646

<sup>194</sup> Nour (n 191 above) 1646

<sup>195</sup> 'Taking action to address child marriage: the role of different sectors Education' Girls Not Brides, <https://www.girlsnotbrides.org/wp-content/uploads/2016/03/2.-Addressing-child-marriage-Education.pdf> 2016 1 (accessed 6 April 2018)

themselves.<sup>196</sup> Dahl argues that children of teenage mothers are often victims of child abuse and neglect, are more likely to have academic problems in school, and exhibit behavioural problems and even criminal behaviour when older.<sup>197</sup>

### iii. Education and poverty

Dauids argues that 'Female subordination and enslavement begins with limiting female educational opportunities.'<sup>198</sup> According to the organisation, Girls Not Brides, it is not always clear whether child marriage causes girls to drop out of school, or whether dropping out of school leads to child marriage. But what is clear is that child marriage undermines girls' ability to attend school and complete their education.<sup>199</sup>

Child marriage denies girls their right to education, as most girls are forced to end their schooling after marriage to focus on their new duties as a wife.<sup>200</sup> Jain et al. also stress the importance of education in attempting to prevent child marriages, as they argue that

'Secondary education specifically emerges as the factor most strongly associated with reduced prevalence of child marriage.'<sup>201</sup>

Ensuring girls' right to education, therefore, has a twofold importance, both in preventing child marriage from taking place, as well as protecting girls from the lifelong negative effects of not completing their education. Without attending school, girls are unable to develop the skills and knowledge they would need to find employment, and they are deprived of an environment where they can learn to express their opinions and desires with confidence.<sup>202</sup> Because of this, Dauids argues that young brides become 'mere possessions of their husbands, submissive to their identity and will',<sup>203</sup> as they usually lack the confidence or the ability to stand up for themselves against older husbands who may be dominating or even outright abusive.<sup>204</sup> And if women married as children are later abandoned by their husbands, or they find the courage to leave them, they are usually unable to find work to support their children or themselves because they lack education and skills.<sup>205</sup>

Becoming a mother will make returning to school and completing their education even more unlikely for child brides. According to Hamilton, pregnant teenage mothers who marry before the birth of their child are less likely to return to school than teenage mothers who have a child but do not marry.<sup>206</sup> Married teenage mothers are also likely to have more children over the course of their lifetime, and to have those children in short succession.<sup>207</sup>

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<sup>196</sup> Hamilton (n 30 above) 1849

<sup>197</sup> Dahl (n 35 above) 693

<sup>198</sup> Dauids (n 181 above) 311

<sup>199</sup> Girls Not Brides (n 193 above) 1

<sup>200</sup> Dauids (n 181 above) 311

<sup>201</sup> S Jain & K Kurz *New insights on preventing child marriage: A global analysis of factors and programs* (2007) 2

<sup>202</sup> Dauids (n 181 above) 311

<sup>203</sup> Dauids (n 181 above) 311

<sup>204</sup> Dauids (n 181 above) 311

<sup>205</sup> Dauids (n 181 above) 311

<sup>206</sup> Hamilton (n 30 above) 1846

<sup>207</sup> Dahl (n 35 above) 693

The likelihood of the marriage failing and the woman being left on her own to take care of her children is also quite prevalent if statistics regarding the connection between the timing and success of marriages are analysed. According to Hamilton, the age of spouses when entering marriage has for years been seen as the most accurate prediction of whether or not the marriage will be successful, adding that 'age at marriage is one of the strongest and most consistent predictors of marital stability ever found by social science research.'<sup>208</sup> Statistics show that children who marry while in their mid-teens have a future divorce rate of almost 80%.<sup>209</sup> According to Dahl, a woman who marries as a teenager is 'two-thirds more likely to divorce within 15 years' compared to a woman who postpones marriage.<sup>210</sup>

If faced with divorce and having to provide for herself and her children, a woman who married as a child and was unable to finish her education as a result will, most likely, face extreme poverty. This does not only affect the mother and her children, as Dahl argues that high divorce rates, together with low employment or unemployment and large family size will all lead to increased pressure on the state to assist with child and unemployment grants.<sup>211</sup>

South Africa has a high poverty rate with 49,2% of the population living below the lower bound poverty line (LBPL). This means that these households have to choose between buying food or non-food essential items as they do not have the money to afford both.<sup>212</sup> The majority of people affected by poverty in South Africa are women, especially black women living in rural areas,<sup>213</sup> as well as children under the age of 17.<sup>214</sup> A 2017 report on poverty trends by Stats SA states that more than two out of every five South African women, or an estimated 41,7%, were living below the LBPL.<sup>215</sup>

Poverty is globally acknowledged as one of the main factors leading to and enabling child marriage,<sup>216</sup> but child marriage is also a cause of future poverty. A study by Dahl, which looked at over 140,000 child brides, found that early teen brides were 31 percentage points more likely to live in poverty later in life.<sup>217</sup> If Government is serious about reducing poverty, girls need to be able to complete their education rather than being allowed to marry as children, thus further perpetuating the cycle of poverty that many of them already live in.

#### iv. Loss of protection from certain legislation

The Declaration of the Rights of the Child states that

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<sup>208</sup> Hamilton (n 30 above) 1844-1845

<sup>209</sup> Hamilton (n 30 above) 1845

<sup>210</sup> Dahl (n 35 above) 693

<sup>211</sup> Dahl (n 35 above) 693

<sup>212</sup> 'Five facts about poverty in South Africa' Stats SA 4 April 2019 <http://www.statssa.gov.za/?p=12075> (accessed 16 August 2019)

<sup>213</sup> Stats SA (n 210 above)

<sup>214</sup> P Lehohla 'Poverty Trends in South Africa An examination of absolute poverty between 2006 and 2015 Statistics South Africa (2017) <https://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf> (accessed 4 April 2018)

<sup>215</sup> Lehohla (n 212 above) 29

<sup>216</sup> Saranga, J, & Kurz, K. *New insights on preventing child marriage: A global analysis of factors and programs*. International Center for Research on Women 2007 9

<sup>217</sup> Dahl (n 35 above) 699, 717

‘the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.’<sup>218</sup>

In line with this belief, special legislation has been created both nationally and internationally, aimed at providing specific protection to children as a vulnerable group. However, as Melchiorre points out, although most of these pieces of legislation, such as the Convention on the Rights of the Child (CRC), state that a child is anyone under the age of 18 years, most legislation, including the CRC, go on to state that 18 is the age of majority, ‘unless under the law applicable to the child majority is attained earlier’.<sup>219</sup> Historically, even when an age of majority has been set by legislation, provisions were made for majority to be attained earlier, and one of the ways in which this can happen is through marriage.<sup>220</sup> South Africa is no different. The Age of Majority Act<sup>221</sup> sets the age of majority at 21 years, but majority may be attained earlier either through marriage or through a court order granting majority.<sup>222</sup> In 2007, the age of majority was changed from 21 to 18 years, to bring it in line with the definition of a child as captured in Section 28(3) of the Constitution.<sup>223</sup> However, children under the age of 18 who marry still reach majority through their marriage.<sup>224</sup> This means that children under the age of 18 who marry lose the protection of child-focused laws, as they are legally seen to be adults who no longer need special protection. For this reason, the current minimum marriage age laws of 12 years for girls and 14 years for boys contradict several South African laws, as well as international human rights protection mechanisms.

Children’s right to education is enshrined in several South African laws. Section 29 of the Constitution<sup>225</sup> guarantees all children the right to basic education, including adult basic education. The Schools Act<sup>226</sup> states that it is compulsory for all children to attend school between the ages of seven and 15 or until the learner has reached grade nine,<sup>227</sup> while section 8(g) of PEPUDA prohibits gender discrimination in the form of limiting women or girls’ access to education.<sup>228</sup> According to the International Centre for Research on Women, ‘child marriage is associated with lower levels of schooling for girls in every region of the world,’<sup>229</sup> and they add that the reasons why most girls who marry as children drop out of school is due to the burden of taking care of a household and of raising children, as well as societal beliefs that being married and attending school are not compatible.<sup>230</sup> According to a report by the SAHRC,

‘At the peak schooling years of 7-15 years, 22 percent of learners who left school prematurely, the majority of whom is female, cited a lack of money as the reason for doing so. Significantly,

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<sup>218</sup> Declaration of the Rights of the Child UN General Assembly 1959 Preamble

<sup>219</sup> Melchiorre (n 94 above) 3 see also Convention on the Rights of the Child article 1

<sup>220</sup> Melchiorre (n 94 above) 3

<sup>221</sup> Age of Majority Act 57 of 1972 secs 1

<sup>222</sup> JD Van Der Vyver ‘Constitutionality of the Age of Majority Act’ *South African Law Journal* 114 (4) (1997): 750-759 750

<sup>223</sup> Children’s Act (n 2 above chapter 2 secs 17)

<sup>224</sup> Mahery & Proudlock (n 7 above)

<sup>225</sup> Constitution (n 13 above chapter 2 secs 29 (1))

<sup>226</sup> South African Schools Act 84 of 1996

<sup>227</sup> Schools Act (n 224 above) chapter 2, 3(1)

<sup>228</sup> PEPUDA (n 23 above) secs 8(g)

<sup>229</sup> ‘Too young to wed: Education & action toward ending child marriage’ International Centre for Research on Women 2005 1

<sup>230</sup> Saranga & Kurz (n 214 above) 1

9.4 percent of those who prematurely left school, cited family commitments, such as getting married, minding children or pregnancy, as the reason for doing so. Of these, the vast majority is female.<sup>231</sup>

A study by Lloyd and Mensch found that early marriage is more likely to negatively impact on girls' ability to complete their education than teenage pregnancy outside of marriage.<sup>232</sup> Allowing girls to marry from the age of 12, whilst knowing what the studies and data from around the world reveal about the impact that this will have on their ability and chances of completing their education, goes directly against the protection afforded by the Constitution, the Schools Act, PEPUA, as well as international treaties such as the Children's Charter,<sup>233</sup> the Maputo Protocol,<sup>234</sup> and the CRC,<sup>235</sup> all of which South Africa has ratified. This also means that boys' rights to education are more protected than girls, as they are less likely to be affected by child marriage and therefore more likely to complete their schooling.

Another important contradiction regarding the minimum marriageable ages in South Africa is the age of sexual consent, as enshrined in the Sexual Offences Act.<sup>236</sup> Sections 15 and 16 of the Act state that the minimum age at which a child can consent to a sexual act with an adult is 16 years, while children between 12 and 16 may engage in consensual sexual acts together. As Dixon-Mueller points out, most countries have minimum age laws regarding sexual consent, but in many countries, including South Africa, this law does not apply within a marriage relationship.<sup>237</sup> This means that if an adult male were to have sex with a 12-year-old girl, it would be considered rape or at best statutory rape. But if the man is married to the girl, their sexual relationship is no longer considered exploitative even though the child's age is well below the legal age of sexual consent. Davids argues that this, in essence, becomes a socially accepted form of paedophilia, because the same acts that would be punishable by law as sexual abuse become acceptable under the guise of marriage.<sup>238</sup> As Mtshali rightly argues, if children under the age of 16 are considered by the law to be incapable of giving 'voluntary or uncoerced agreement' to sexual acts with adults, then they must also be incapable of giving consent to marriage.<sup>239</sup>

According to the Child's Rights International Network (CRIN), 'there is a presumption of capacity in adulthood and a presumption of incapacity in childhood.'<sup>240</sup> Viewing girls as young as 12 as adults in the eyes of the law is problematic, because they are physically and psychologically still children, but are now viewed as adults and expected to be able to understand consequences for actions and take responsibility for areas of their life that they are not yet equipped for.<sup>241</sup> Although still children physically and mentally, they lose the protection afforded their peers in

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<sup>231</sup> SAHRC (n 131 above) 18

<sup>232</sup> CB Lloyd & BS Mensch 'Marriage and childbirth as factors in dropping out from school: an analysis of DHS data from sub-Saharan Africa' *Population Studies* 62.1 (2008): 1-13 11

<sup>233</sup> Children's Charter (n 3 above) article 11

<sup>234</sup> Maputo Protocol (n 4 above) article 12

<sup>235</sup> Conventions on the Right of the Child article 1

<sup>236</sup> Sexual Offences Act (n 15 above) article 28

<sup>237</sup> Dixon-Mueller (n 73 above) 256

<sup>238</sup> Davids (n 181 above) 307

<sup>239</sup> V Mtshali 'Forced child marriage practiced under the pretext of customary marriage in South Africa.' *Child Abuse Research in South Africa* 15.2 (2014): 51-61 52

<sup>240</sup> 'Discussion paper Age is Arbitrary: setting minimum ages' Child's Right International Network 5

<sup>241</sup> Melchiorre (n 94 above) 3



legislation such as the Children's Act and the CRC.<sup>242</sup> This means that girls who marry under that age of 18 are disadvantaged compared to other children their age, male and female, who still enjoy protection from these pieces of legislation, and they are more vulnerable to abuse and mistreatment as a result.

#### v. Implications for gender equality

While the next chapter will look in detail at whether the current marriage age laws constitute gender discrimination, this section will briefly discuss the implications of allowing laws to treat girls differently to boys.

Allowing the current minimum age marriage laws to stay in their present form has consequences for gender equality in South Africa. Although the Constitution, as well as legislation such as PEPUDA, specifically aim to counter discrimination based on gender, systemic gender inequalities continue to negatively affect women and girls.<sup>243</sup> According to the SAHRC, women in South Africa have historically been 'regarded as unequal to men', and this has led to inequalities socially, culturally and economically.<sup>244</sup> The legacy of Apartheid also means that black women are still disproportionately affected by discrimination in all areas.<sup>245</sup> This inequality manifests in several ways. For example, men still earn 'almost twice what women earn on an annual basis' in terms of household income, and female-headed households are more likely to depend on social grants for income than male-headed households.<sup>246</sup> The poverty that many women face because of economic and social inequality, in turn, leaves them more vulnerable to gender-based violence and health problems, including HIV/AIDS.<sup>247</sup> Gender discrimination can also have severely negative effects on women psychologically. According to Foster and Tsarfati, the fact that gender discrimination is often 'chronic' and 'ambiguous' leads to constant stress for women, that can result in psychological conditions such as depression, anxiety and posttraumatic stress disorder.<sup>248</sup>

Schmitt et al. argue that the majority of members of disadvantaged as well as privileged groups recognise that certain people in society are treated better than others. But whether they are generally part of a privileged or disadvantaged group will affect how they experience discrimination when it happens to them.<sup>249</sup> According to Schmitt et al. women experience discrimination differently than men because, for women, any single act of gender discrimination falls within the context of an ongoing, pervasive discrimination they face daily, while for most men a single act of discrimination will be a fairly isolated incident.<sup>250</sup> Allowing girls to marry at a younger age than boys may seem like an isolated problematic aspect of South African

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<sup>242</sup> CRIN (n 238 above) 18, see also CRC General Comment No.4 CRC/GC/2003/4 para 20

<sup>243</sup> SAHRC (n 131 above) 6

<sup>244</sup> SAHRC (n 131 above) 14

<sup>245</sup> SAHRC (n 131 above) 14

<sup>246</sup> SAHRC (n 131 above) 14,16

<sup>247</sup> SAHRC (n 131 above) 6

<sup>248</sup> MD Foster & EM Tsarfati 'The effects of meritocracy beliefs on women's well-being after first-time gender discrimination.' *Personality and Social Psychology Bulletin* 31(12) (2005): 1730-1738 1730

<sup>249</sup> MT Schmitt et al. 'Perceiving discrimination against one's gender group has different implications for well-being in women and men' *Personality and Social Psychology Bulletin* 28.2 (2002): 197-210 198

<sup>250</sup> Schmitt et al. (n 247 above) 308

legislation, unlikely to affect the majority of South African children, but its existence adds to the already-pervasive gender discrimination that women and girls face.

Being aware of systemic discrimination against one's member group can be harmful in several ways. Schmitt et al. argue that being aware of systemic discrimination against yourself or a group of which you are a member can lead to 'a sense of hopelessness and depression,' reduced feelings of control over life outcomes, and feelings of worthlessness as your identity is devalued by the dominant group in society.<sup>251</sup> Allowing girls to marry at an earlier age than boys, when research has shown the negative outcomes it can hold for girls' education, physical and mental health, as well as for future economic outlooks, teaches girls that their current and future well-being is worth less than that of boys.

Girls and women who experience poverty, abuse and hardships caused by gender inequality may fail to realise that these problems are a result of a system that discriminates against them as a gender, rather than as a result of their individual actions.<sup>252</sup> Foster and Tsarfati found that women who believed in meritocracy, a system in which people succeed based on their skills and hard work rather than on economic means or political connections, were more likely to attribute discrimination they experience to personal failures or wrongdoing as opposed to a discriminatory system.<sup>253</sup> They also found that women who believed in meritocracy and experienced discrimination were more likely to report lower self-esteem and higher rates of anxiety compared to women who experienced discrimination but did not believe in meritocracy.<sup>254</sup> Ruggiero and Taylor argue that if groups such as women minimise discrimination by blaming it on their own behaviour or failures it can have important social implications.<sup>255</sup> If groups do not realise that they are being discriminated against, or if they blame themselves for the discrimination, they will be less likely to work towards removing discriminatory systems, while their readiness to blame themselves for discrimination will also give privileged groups justification for ongoing inequality and victimisation.<sup>256</sup> Allowing laws to differentiate between genders, and to offer one gender more protection than the other, reinforces the societal idea that men are worth more than women.

## Conclusion

Chapter two examined the societal effects of allowing different minimum marriage ages for boys and girls. Marriage before the age of 18 poses several physical health risks to girls, especially with regards to pregnancy and childbirth, because their bodies are still developing. Girls' psychological health also suffers as a result of early marriage and motherhood, leading to a higher likelihood of psychological conditions such as depression and substance abuse. The majority of girls who marry as children are forced to leave school, and incomplete education leads to higher rates of poverty and unemployment in future. Because children under the age of 18 who marry legally attain majority, child brides lose the protection of national and

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<sup>251</sup> Schmitt et al. (n 247 above) 198 -199

<sup>252</sup> Foster & Tsarfati (n 246 above) 1731

<sup>253</sup> Foster & Tsarfati (n 246 above) 1731

<sup>254</sup> Foster & Tsarfati (n 246 above) 1731

<sup>255</sup> KM Ruggiero & DM Taylor 'Why minority group members perceive or do not perceive the discrimination that confronts them: the role of self-esteem and perceived control' *Journal of personality and social psychology* 72(2) (1997): 373-389 387

<sup>256</sup> Ruggiero & Taylor (n 253 above) 384

international legislation such as the CRC and the Criminal Offences Act. Allowing different marriageable ages for boys and girls also contributes to the ongoing systemic gender discrimination that women and girls face in South Africa. This discrimination has negative effects on how girls perceive their self-worth and can lead to psychological conditions such as depression.

## Chapter 3 – Can this differentiation be seen as a violation of equality?

### Introduction

Chapter three aims to answer the research sub-question ‘*can this differentiation be seen as a violation of equality?*’ The chapter analyses the current minimum marriage age laws in terms of national legislation, as well as legislation prohibiting discrimination based on gender, specifically the Constitution and PEPUDA. The second part of the chapter examines international legislation and treaties that South Africa has ratified to determine whether the marriage age law can be viewed as being discriminatory based on gender.

#### i. National Legislation

Bentley argues that although South Africa appears to have an excellent paper-based ‘human rights culture’ regarding women’s rights, based on both national legislation as well as ratified international legislation, the reality is that women are still one of the most marginalised groups in the country due to an ‘enduring patriarchal culture’.<sup>257</sup> This marginalisation can be seen in the extremely high levels of gender-based violence that women face, high rates of female poverty and economic exclusion, as well as the fact that women bear the brunt of diseases such as HIV/AIDS.<sup>258</sup>

Hassim agrees that both national legislation and government institutions have proven themselves to be ‘historically constructed frameworks’, that fail to adequately address inequalities of power.<sup>259</sup> However, the amount of legislation that has been passed and ratified relating to women’s rights and non-discrimination could be argued to show a commitment towards achieving gender equality, even if this goal has not yet been achieved in full.<sup>260</sup>

The South African Constitution serves as the ‘supreme law of the Republic’, and Chapter one of the Constitution states that any ‘law or conduct inconsistent with it is invalid.’<sup>261</sup> Chapter one also states that South Africa is founded on the achievement of equality and the value of non-sexism.<sup>262</sup> According to Amien, the concept of equality is an integral part of the Constitution, and in fact ‘defines the very ethos upon which the Constitution is premised.’<sup>263</sup> Section 9 of the Constitution deals specifically with equality, and states that

- ‘(1) Everyone is equal before the law and has the right to equal protection and benefit of the law’
- (2) Equality includes the full and equal enjoyment of all rights and freedoms.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one

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<sup>257</sup> K Bentley ‘Women's human rights & the feminisation of poverty in South Africa’ *Review of African Political Economy* 31(100) (2004): 247-261 247

<sup>258</sup> Bentley (n 255 above) 247

<sup>259</sup> S Hassim ‘The gender pact and democratic consolidation: Institutionalizing gender equality in the South African state’ *Feminist Studies* 29(3) (2003): 505-528 508

<sup>260</sup> Hassim (n 257 above) 509

<sup>261</sup> Constitution (n 13 above) chapter 1, para 2

<sup>262</sup> Constitution (n 13 above) chapter 1, para 1(b)

<sup>263</sup> W Amien ‘Overcoming the conflict between the Right to Freedom of Religion and Women's Rights to Equality: a South African case study of Muslim marriages’ *Human rights quarterly* (2006): 729-754 747

or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.'

The Constitution also states that the right to non-discrimination based on sex is non-derogable.<sup>264</sup> Both Albertyn and Amien argue that the vision of the Constitution is one not only of formal equality, but of substantive equality.<sup>265</sup> Substantive equality is not concerned only with formal equal treatment that sees everyone being treated the same regardless of their differences, but rather focuses on the social and economic contexts in which discrimination takes place, to try and remedy these systemic inequalities as a means of achieving equality.<sup>266</sup> As Albertyn points out, inequality is not only about differences, but also about how these differences are related to hierarchies of power, as well as exclusion and limitations.<sup>267</sup>

It can be argued that allowing different marriageable ages for boys and girls constitute a violation of both formal and substantive equality. It is a violation of formal equality, in that boys and girls are not treated equally as children who have the same rights in terms of dignity, equality and protection from harm, and a violation of substantive equality in terms of the current law contributing towards the systemic discrimination and unequal treatment that women and girls already face in South Africa. In allowing girls to marry at a younger age than boys, the State is also contravening girls' rights to equal protection under the law,<sup>268</sup> their right to equal enjoyment of all their Constitutional rights,<sup>269</sup> as well as their right to be protected against unfair discrimination by the State or individuals based on their sex or gender.<sup>270</sup>

Venter argues that, because the Constitution provides that neither customary nor common law may limit the rights enshrined in the Bill of Rights, it is important to ascertain when provisions in either customary or common law conflict with the Constitution so that these contradictions may be addressed.<sup>271</sup> In the case of marriage age laws, the common law ages of 12 and 14 years respectively are clearly a contravention of Section 9 of the Constitution, as well as with the Sexual Offences Act and PEPUDA.

Section 28 of the Constitution deals specifically with children's rights, and states that children have the right

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<sup>264</sup> Constitution (n 13 above) 18

<sup>265</sup> C Albertyn 'Substantive equality and transformation in South Africa' *South African Journal on Human Rights* 23(2) (2007): 253-276 258, also Amien (n 261 above) 748

<sup>266</sup> T Loenen 'The equality clause in the South African Constitution: Some remarks from a comparative perspective' *South African Journal on Human Rights* 13(3) (1997): 401-429 403, also 'Substantive gender equality' European Institute for Gender Equality <https://eige.europa.eu/thesaurus/terms/1401> (accessed 22 August 2019)

<sup>267</sup> Albertyn (n 263 above) 260

<sup>268</sup> Constitution (n 13 above) chapter 9(1)

<sup>269</sup> Constitution (n 13 above) chapter 9(2)

<sup>270</sup> Constitution (n 13 above) chapter 9(3&4)

<sup>271</sup> CM Venter 'The new South African constitution: Facing the challenges of women's rights and cultural rights in post-apartheid South Africa' *J. Legis.* 21 (1995): 1-22 7

- (1) (d) to be protected from maltreatment, neglect, abuse or degradation;
- (e) to be protected from exploitative labour practices;
- (f) not to be required or permitted to perform work or provide services that—
  - (i) are inappropriate for a person of that child’s age; or
  - (ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;
- (2) A child’s best interests are of paramount importance in every matter concerning the child.
- (3) In this section “child” means a person under the age of 18 years.’

Subsection (1)(d) and (e) are non-derogable rights, meaning that abuse, neglect and exploitative labour practices against a child may never be allowed under any circumstances.<sup>272</sup>

Allowing girls to marry from the age of 12 is exposing them to physical harm as well as potential violence and abuse, that violates Section 1(d). The fact that girls who marry under the age of 18 will be expected to drop out of school and take on the physical duties of managing a household that will likely entail cooking and cleaning as well as child rearing, could also be argued to contravene Section f(i) and (ii), as these girls are being expected to perform work that is inappropriate for their age. It also places their education at risk as they are taken out of school. It affects their physical and mental health because they are physically and psychologically not yet ready to bear the responsibilities of running a household and bearing or raising children, and it jeopardises their social development, as taking girls out of school isolates them from their peers and takes them out of an environment in which they can learn and develop their identity.

Rwezaura argues that since Section 28(2) states that the child’s best interests are paramount when considering matters concerning children, the concept of ‘best interests of the child’ has become a legal standard against which all other decisions regarding children should be measured.<sup>273</sup> The Children’s Act is an example of this, as the act defines the ‘best interest of child standard’,<sup>274</sup> and states that the best care standard should be applied in any case regarding the ‘care, protection and well-being’ of a child.<sup>275</sup> This, together with the legal definition of a child as anyone under the age of 18, means that allowing girls under 18 to marry could be argued to be against the best interest standard, and should therefore not be allowed.

Amien argues that since the Constitutional Court was established in 1995 to rule over matters relating to the ‘interpretation, protection or enforcement of the Constitution’,<sup>276</sup> it has been developing equality jurisprudence through its judgments.<sup>277</sup> A significant case in terms of legal precedent regarding non-discrimination based on gender and customary law is *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another*.<sup>278</sup> The case concerned the customary law of

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<sup>272</sup> Constitution (n 13 above) 18

<sup>273</sup> Rwezaura (n 89 above) 265

<sup>274</sup> Children’s Act (n 2 above) secs 7

<sup>275</sup> Children’s Act (n 2 above) secs 9

<sup>276</sup> Constitution (n 13 above) secs 167 (7)

<sup>277</sup> Amien (n 261 above) 748

<sup>278</sup> *Bhe and Others* (n 152 above)

succession, and the court found that the customary rule of male primogeniture was unconstitutional, and specifically in violation of Section 9(3) of the Constitution, as it excluded women from inheriting property.<sup>279</sup> In his ruling, Chief Justice Langa stated

‘The importance of the right to equality in our constitutional democracy cannot be gainsaid. This Court has in the past emphasised the importance of the right to equality. The right to equality is related to the right to dignity. Discrimination conveys to the person who is discriminated against that the person is not of equal worth. The discrimination against women conveys a message that women are not of equal worth as men.’<sup>280</sup>

This ruling could be argued to create legal precedence, strengthening the idea that any aspect of common law or customary law that treats men and women differently based on their gender or sex is unconstitutional as it breaches section 9(3) of the Constitution.

The current legislation also violates sections 8(a), (d), (g) and (i) of PEPUDA, relating to protection from gender-based violence, protection against discriminatory traditional, customary or religious practices, limiting women’s rights to education and health, and the perpetuation of systemic discrimination due to unfair distribution of labour.<sup>281</sup>

The facts and arguments presented in the previous chapters all support the idea that allowing girls to marry at a younger age than boys does, in fact, constitute unfair discrimination according to the criteria listed in section 14 3(a)(b)(c)(e) of PEPUDA. Allowing girls to marry at a younger age impairs their human dignity, as it suggests that girls are worth less than boys and are less deserving of legal protection from the dangers of child marriage, and the practice of child marriage itself has a severe impact on their dignity and well-being. The discrimination is likely to have a serious impact on girls, as they are more likely than boys to marry as children and therefore require more protection against child marriage practices. Girls are already positioned in society as a group who have a history of marginalisation and discrimination, especially girls from previously disadvantaged groups. This means that for the majority of South African girls, being disadvantaged is a part of everyday life, whether it is due to gender, racial, economic or other forms of discrimination. Gender discrimination is systemic in South Africa, and the current marriage age laws form a part of a much larger system that has for hundreds of years discriminated against women based on their gender.

In terms of both Constitutional provisions for equality, as well as PEPUDA, the different minimum marriage ages for boys and girls clearly constitute gender discrimination.

## ii. International Legislation

South Africa ratified the CRC<sup>282</sup> on the 16<sup>th</sup> of June 1995.<sup>283</sup> The CRC defines a child as ‘every human being below the age of eighteen years,’<sup>284</sup> and while the CRC itself does not make any

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<sup>279</sup> *Bhe and Others* (n 152 above) 25

<sup>280</sup> *Bhe and Others* (n 152 above) 57

<sup>281</sup> PEPUDA (n 23 above) secs 8

<sup>282</sup> CRC (n 233 above)

<sup>283</sup> ‘Reporting status for South Africa’ OHCHR

[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=ZAF&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=ZAF&Lang=EN)

(accessed 5 August 2018)

<sup>284</sup> CRC (n 233 above) article 1

further direct mention of either child marriage or minimum marriage ages,<sup>285</sup> two General Comments issued by the CRC have aimed to address child marriage specifically.

CRC General Comment No.4 of 2003 recommended that state parties

‘...review and, where necessary, reform their legislation and practice to increase the minimum age for marriage with and without parental consent to 18 years, for both girls and boys,’<sup>286</sup>

while General Comment No.20 of 2016 states that, ‘The Convention prohibits any gender-based discrimination, and age limits should be equal for girls and boys,’<sup>287</sup> as well as reaffirming 18 as the minimum age of marriage.<sup>288</sup>

The Children’s Charter<sup>289</sup> was ratified by South Africa on the 7<sup>th</sup> of January 2000,<sup>290</sup> and it defines a child as ‘every human being below the age of 18 years.’<sup>291</sup> The Children’s Charter specifically prohibits child marriage by stating that State Parties should take measures to eliminate harmful cultural and social practices,<sup>292</sup> as well as stating that

‘Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.’<sup>293</sup>

South Africa ratified the Maputo Protocol<sup>294</sup> on the 17<sup>th</sup> of December 2004.<sup>295</sup> The Maputo Protocol calls on State Parties to ‘...ensure that women and men enjoy equal rights and are regarded as equal partners in marriage,’<sup>296</sup> as well as to change national legislation so that the ‘minimum age of marriage for women shall be 18 years.’<sup>297</sup>

The United Nations Convention on the Elimination of All Forms of Discrimination Against Women,<sup>298</sup> (CEDAW) was ratified by South Africa on the 15<sup>th</sup> of December 1995.<sup>299</sup> CEDAW states that State Parties should ‘take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations...’<sup>300</sup> as well as explicitly prohibiting child marriage by stating that

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<sup>285</sup> J Sloth-Nielsen ‘Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law’ *South African Journal on Human Rights* 11(3) (1995): 401-420 416

<sup>286</sup> CRC General Comment No.4 (n above) para 20

<sup>287</sup> CRC General comment No. 20 (2016) para 38

<sup>288</sup> CRC General Comment No. 20 (n above) 40

<sup>289</sup> Children’s Charter (n 3 above)

<sup>290</sup> ‘OAU/AU Treaties, Conventions, Protocols & Charters’ African Charter <https://au.int/en/treaties> (accessed 20 January 2019)

<sup>291</sup> Children’s Charter (n 3 above) article 2

<sup>292</sup> Children’s Act (n 2 above) article 21

<sup>293</sup> Children’s Act (n 2 above) article 21(2)

<sup>294</sup> Maputo Protocol (n 4 above)

<sup>295</sup> African Charter (n 289 above) (accessed 20 January 2019)

<sup>296</sup> Maputo Protocol (n 4 above) article 21(1)

<sup>297</sup> Maputo Protocol (n 4 above) article 21(2)

<sup>298</sup> United Nations Convention on the Elimination of All Forms of Discrimination Against Women (1979)

<sup>299</sup> OHCHR (n 282 above) (accessed 20 January 2019)

<sup>300</sup> CEDAW (n 296 above) article 16(1)



‘The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.’<sup>301</sup>

Despite recommendations from the international bodies mentioned, South Africa has to date failed to repeal or change the minimum marriage age laws. In the Concluding Observations on the second periodic report of South Africa, The Committee on the Rights of the Child raised concerns over the minimum marriage age laws currently in place, stating that,

‘The Committee is deeply concerned that the Children’s Act, of 2005, sets the minimum age for marriage at 12 years for girls and 14 years for boys and that the Marriage Act, of 1961, and the Recognition of Customary Marriages Act, of 1998, set different conditions for marriages for girls and boys under 18 years of age. The Committee urges the State Party to harmonize all its relevant legislation in order to ensure that the minimum age for marriage is established at 18 years for both girls and boys.’<sup>302</sup>

In both State Party reports and follow-up reports, South Africa has consistently acknowledged that the current legislation regarding minimum age marriage laws is problematic, without taking any steps to rectify the legislation to bring it in line with international standards. In its reports and feedback to the Committee on the Rights of the Child South Africa stated that:

‘...the potentially harmful effect of early marriage on children’s rights to education and development is regarded with a serious concern.’<sup>303</sup>

‘There remains, both in law and in practice, widespread discrimination against children, particularly the girl child.’<sup>304</sup>

‘The South African Law Commission is currently scrutinizing customary law rules that regulate the position of children in order to ensure that the equality clause of the Constitution is not unduly infringed.’<sup>305</sup>

In reports and feedback to CEDAW, South Africa has stated that:

‘One explanation for the difference in ages [regarding minimum marriageable age] is that girls mature earlier than boys. The practice is, however, discriminatory and the SALC will be required to investigate the issue.’<sup>306</sup>

‘The Sexual Offences Act (1957) provides that it is a criminal offence to have unlawful sexual intercourse with a girl under the age of 16 years and a boy under the age of 19 years. The minimum ages for sexual intercourse are contradictory since they do not correspond with the minimum age of marriage. The SALC is proposing that this anomaly be clarified.’<sup>307</sup>

However, in the report submitted in 2010 South Africa stated that:

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<sup>301</sup> CEDAW (n 296 above) article 16(2)

<sup>302</sup> CRC/C/ZAF/CO/2 para 22 5

<sup>303</sup> CRC/C/ZAF/2 para 70 19

<sup>304</sup> CRC/C/51/Add.2 para 95 18

<sup>305</sup> CRC/C/51/Add.2 para 47 18

<sup>306</sup> CEDAW/CZAF/1 106-107

<sup>307</sup> CEDAW/CZAF/1 107

'The minimum age for consent to marriage in South Africa is 18 years for both boys and girls, and this has been extended to customary marriages through the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998).<sup>308</sup>

It is concerning that in official reporting South Africa seems to claim that the minimum age at which a child may consent to marriage is 18 without exception, when in reality this is not the case.

In May 2019, South Africa submitted the fifth CEDAW Annual Country Report,<sup>309</sup> in which it made no mention of minimum marriage age laws. The report does mention the practice of ukuthwala as an 'irregular' form of marriage that violates the rights of girls under the age of 18.<sup>310</sup> While addressing forced child marriages that take place as a result of practices such as ukuthwala is very important, as explained in Chapter 1, it is also necessary to recognise that 'consensual' marriages with participants under the age of 18 are also harmful, and need to be addressed.

South Africa has ratified several international treaties that set 18 as the minimum age of marriage for both genders, and these treaties are very clear on the fact that setting different minimum ages of marriage for boys and girls is discriminatory. The treaties and their treaty bodies provide clear legal guidelines and recommendations on how marriage age laws should be formulated and gender discrimination prevented through national legislation. However, to date, South Africa has not complied with any of the recommendations regarding existing marriage age legislation.

## Conclusion

Chapter three examined provisions by both national and international legislation in terms of gender equality as well as child marriage. Allowing different minimum marriage ages for boys and girls violates section 9 of the South African Constitution regarding gender equality, as well as section 28 regarding the best interests of the child. Allowing girls to marry at a younger age than boys also violates sections 8 and 14 of PEPUA regarding protection from discriminatory practices, gender-based violence and harm to personal dignity. South Africa has ratified international legislation such as the CRC, the Maputo Protocol and CEDAW, all of which prohibit gender discrimination, as well as prohibiting the marriage of children under the age of 18. Despite the recommendations by these international bodies, South Africa has not yet made changes to the minimum marriage age laws. Taking into account the provisions made by both national and international legislation, the different minimum marriage ages for boys and girls under South African legislation does constitute a violation of gender equality.

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<sup>308</sup> CEDAW/C/ZAF/2-4 secs 16.20 148

<sup>309</sup> CEDAW/C/ZAF/5

<sup>310</sup> CEDAW/C/ZAF/5 secs 37 8-9

## Conclusion

The aim of this research paper is to address the research problem *'Is the difference in minimum legal ages of marriage for girls and boys in South Africa a violation of equality?'* Through a desktop research methodology, three research sub-questions were addressed to answer the research problem:

- 1) *What are the reasons for the difference in age between boys and girls to enter marriage?*  
The legal practice of allowing boys and girls to get married at different ages can be traced back to old Roman law, which still forms part of South Africa's Roman-Dutch legal system. The minimum ages defined by law relate to the generally accepted ages of spermarche and menarche respectively, at which reproduction becomes possible. Gender stereotypes regarding women's 'destiny' to become wives and mothers has been used for centuries to justify allowing girls to get married as children, while traditional African cultural beliefs and practices also contribute towards child marriage being viewed as acceptable by some.
- 2) *What is the social impact of this differentiation?*  
Marriage and childbirth before the age of 18 pose serious physical and psychological health risks to young girls, which can have lifelong adverse consequences for both the girl and any children she may have. Girls who marry as children are typically unable to complete their education, leading to higher rates of poverty and unemployment in future. Due to the fact that children married under the age of 18 legally attain majority, child brides lose the protection of legislation aimed at protecting children. Allowing different marriage ages also contributes to the ongoing systemic gender discrimination that South African women and girls face.
- 3) *Can this differentiation be seen as a violation of equality?*  
Allowing boys and girls to get married at different ages violates sections 9 and 28 of the South African Constitution, as well as sections 8 and 14 of PEPUDA. The laws are also in violation of international legislation that has been ratified by South Africa, such as the CRC, the Maputo Protocol and CEDAW. To date, South Africa has ignored recommendations by treaty bodies to change existing marriage legislation. Based on national and international legislative provisions, and taking into account the various negative consequences of child marriage outlined in chapter two, the different minimum marriage ages for boys and girls under South African legislation constitute a violation of gender equality.

Based on the findings related to each of the three research sub-questions, arrived at through an analysis of academic literature, national and international law, case law and other relevant sources, it is the conclusion of this research paper that the difference in legal minimum ages for marriage for boys and girls in South Africa does constitute a violation of equality, leading to severe human rights abuses and physical and psychological harm for affected girls.

MacKinnon writes that

'No woman had a voice in the design of the legal institutions that rule the social order under which women, as well as men, live. Nor was the condition of women taken into account or the interest of women as a sex represented.'<sup>311</sup>

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<sup>311</sup> MacKinnon (n 72 above) 1281

The historical subordination of women has been 'socially institutionalised' through legislation and cultural norms, and has influenced the future and well-being of millions of women for thousands of years.<sup>312</sup> South Africa is no different, as both European colonial and African traditional cultures are based on patriarchal systems that did not consider the well-being of women or female children to be a primary concern, and these beliefs are evident through legislation and cultural laws that have survived to this day.<sup>313</sup> Because of this, Law argues that, to achieve gender equality, a social movement is required that transforms the family unit, the current economy and wage labour market, as well as societal beliefs regarding gender roles, something that no single piece of legislation on its own will be able to achieve.<sup>314</sup>

However, legislation does play an important part in trying to achieve gender equality. Eliminating child marriage has proven to be possible when strict laws are in place prohibiting marriage before the age of 18.<sup>315</sup> The South African Government, therefore, has a responsibility to uphold the gender equality promised in the Constitution, legislation such as PEPUDA, as well as the international treaties that South Africa is party to, and change current marriage legislation. Currently, South African girls are left more vulnerable to the harmful practice of child marriage, because legislation allows them to marry at an earlier age than boys. This violates their right to equal protection from the law, as well as violating their right to dignity and to protection from unfair discrimination based on gender. To rectify this, Government should change the minimum age of consent to marriage to 18 for both genders without exceptions in line with international standards.

To quote Kabeer

'Today's inequalities are translated into the inequalities of tomorrow as daughters inherit the same discriminatory structures that oppressed their mothers.'<sup>316</sup>

It is only by breaking down discriminatory structures that South African women and girls will achieve true substantive gender equality, and changing marriage laws that perpetuate gender inequality is one step towards this.

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<sup>312</sup> MacKinnon (n 72 above) 1299

<sup>313</sup> PE Andrews 'Violence Against Women in South Africa: The role of culture and the limitations of the law' *Temp. Pol. & Civ. Rts. L. Rev.* 8 (1998): 425-456 441

<sup>314</sup> SA Law 'Rethinking sex and the constitution' *University of Pennsylvania Law Review* 132(5) (1984): 955-1040 956

<sup>315</sup> Davids (n 181 above) 324

<sup>316</sup> N Kabeer 'Gender equality and women's empowerment: A critical analysis of the third millennium development goal 1' *Gender & Development* 13(1) (2005): 13-24 16

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