



**CHILD PARTICIPATION IN CHILD MARRIAGE DECISION-MAKING PROCESSES
IN SOUTH AFRICA**

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Chapter 1: Background of the study

1.1 Introduction

Child participation is a term, generally, used to describe and encourage children's active involvement in decisions, procedures, programs, and policies that have an impact on their life.¹ Children's right to participate is a fundamental component of ascertaining the gathering of a child's opinion in everything that concerns the child, duly protected in mainstream children's rights treaties. For example, it is established in article 12 of the United Nations Convention on the Rights of the Child (CRC)² and article 4(2) of the African Charter on the Rights and Welfare of the Child (African Children's Charter).³ In these child based treaties, South Africa, has ratified both the CRC⁴ and the African Children's Charter⁵ and has gone further to domesticate both instruments, in the Constitution of the Republic of South Africa, 1996⁶ and in Chapter 3, section 10 of the 2005 Children's Act.⁷

Legally, child participation is a right that requires and reaffirms the necessity for children to be involved in all decision-making processes relating to matters concerning them. It is also an accepted general principle in international, regional and national children's right jurisprudence and it is central to guiding and allowing children's participation in all matters concerning them.⁸ A child's right to participation further enables and provides an opportunity for children to actively pursue their rights and it also requires a child's meaningful contribution to decisions that affect them.⁹ It has been argued and established that children's participation in matters that concern them, generally happens in two settings. These are the private and public settings. According to Fokala, while a public setting includes children's involvement in law and policy-

¹ Save the Children 'National Child Participation Framework' June 2018 [chrome-extension://efaidnbmnnnibpcajpcqlclefindmkaj/https://www.savethechildren.org.za/sci-za/files/e3/e32b69e4-157c-45f0-aa4d-2b8fcd63387c.pdf](https://www.savethechildren.org.za/sci-za/files/e3/e32b69e4-157c-45f0-aa4d-2b8fcd63387c.pdf) (accessed 7 November 2022).

² Adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

³ Adopted 11 July 1990, entered into force 29 November 1999, CAB/LEG/24.9/49 (1990).

⁴ South Africa ratified the CRC on 16 June 1995.

⁵ South Africa ratified the African Children's Charter on 07 January 2000.

⁶ Section 28 of the Constitution of the Republic of South Africa, 1996.

⁷ Act 38 of 2005.

⁸ E Fokala, 'Calibrating Children's Rights to Participate in a Family Setting 30 Years after the Adoption of the Convention of the Rights of the Child and the African Children's Charter' (2020) 34 *Speculum Juris* at 188.

⁹ Fokala (n 8) 190.

making, law and policy implementation and children in parliament sessions, children's participation in the private setting are decisions made within a child's private space and broadly within the family setting.¹⁰ Even though both settings do intersect, as will be demonstrated in this mini-dissertation, the primary focus of this research is on children's participation in child-marriage decision-making processes within the private setting.

On the other hand, child marriage, as defined by the United Nations International Children's Emergency Fund (UNICEF), is "any formal marriage or informal union between a child under the age of 18 and an adult or another child."¹¹ Further, according to the Joint General Recommendation 31 of the Committee on the Elimination of Discrimination against Women/General Comment 18 of the Committee on the Rights of the Child on harmful practices "a child marriage is considered as a form of forced marriage given that one or both parties have not expressed their full, free and informed consent."¹² Given its negative attributes, especially when juxtaposed with a child's best interest, for example, child marriage is prohibited in law, in South Africa.¹³ However, cultural and societal practices in some communities in South Africa, as discussed in this study, still, regrettably, practice it.

Legally, and particularly from a children's rights perspective, this research, as illustrated below in this chapter and further in chapters two and three, seeks to examine the extent to which children are allowed and can enjoy their right to participate in a family decision-making setting. The study, further seeks to succinctly, argue that if children are allowed to meaningfully participate in the decision-making processes that lead to child marriages, it could significantly reduce and eliminate the prevalence of child marriages in South Africa in particular, and broadly in Africa and the globe. Indeed, creating and establishing a meaningful listening environment in the family space, reconfiguring deep seated, cultural practices and behaviour that position

¹⁰ Fokala (n 8) 190-191.

¹¹ UNICEF, 'Child Marriage' 2017 <https://data.unicef.org/topic/child-protection/child-marriage/> (accessed 15 June 2022).

¹² CRC/C/GC/18 14 November 2014 <https://www.ohchr.org/en/documents/general-comments-and-recommendations/revision-joint-general-comment-no-18-committee> (accessed 11 December 2022).

¹³ Sec 3(1)(a)(i) of the Recognition of Customary Marriages Act 120 of 1998 states that for a customary marriage to be valid, the intending spouses must both be older than 18 years of age.

adulthood as an embodiment of lucid and rational thinkers, encouraging reflexivity of thoughts, upholding, above all other interest, the best interest of the child, and sincere balance of power are key characteristics that guide both the imagination and conceptualisation of this study.¹⁴

According to the African Children's Committee's guidelines on child participation, a family environment comprises of parents of a child as well as legal guardians, extended family members with custody rights and child caregivers in child-headed households.¹⁵ Community leaders who play an active role in decision-making regarding a child in a given community also form part of the child's family environment.¹⁶

Family decisions, frequently have immediate and often lasting consequences on children's development. It is therefore vital to protect a child's right to participate in family decision-making processes, especially in Africa.¹⁷ Indeed, the General Comment 12 of the UN Children's Committee confirms that it is crucial to educate and prepare children to meaningfully exercise their right to be heard (participate) in the private and public sphere.¹⁸ To achieve this goal, the family must encourage children to openly express their opinions and due consideration be given thereto from an early age. Such family environment creates a safe space and inspires self-development, nourishes personal relationships and promotes the social skills of the child.¹⁹ Further, according to the UN Children's Committee, encouraging and allowing a child (especially a girl child) to partake in family decision-making processes that leads to betrothment and eventually marriage is essential in guarding a child against violence and abuse in the private sphere.²⁰ Further, General Comment 12 of the UN Children's Committee confirms that State Parties have a duty to motivate parents, by means of

¹⁴ For more insights on incorporating these components in a family setting, see, E Fokala & A Rudman 'Age or maturity? African children's right to participate in medical decision-making processes' (2020) 20 *African Human Rights Law Journal* at 667-687.

¹⁵ ACERWC Guidelines on Child Participation (2022) 108.

¹⁶ As above.

¹⁷ Fokala (n 8) 187-190.

¹⁸ UN Committee on the Rights of the Child (CRC), 'General Comment 12 (2009): The Right of the Child to Be Heard' 20 July 2009 <https://www.refworld.org/docid/4ae562c52.html> (accessed 11 December 2022).

¹⁹ General Comment 12 of the UN Children's Committee (n 18) para 90-92.

²⁰ General Comment 12 of the UN Children's Committee (n 18) para 90.

the law, to take the views and opinions of their children into consideration when making decisions on matters that affect a child's lives.²¹ It goes further states that “[p]arents should also be advised to support children in realising the right to express their views freely and to have their views duly taken into account at all levels of society.”²²

Child marriage is concluded in South Africa mostly under the premise of cultural practices, as is the case in many African countries, and to escape poverty.²³ Indeed, the South African concept of child marriage is generally referred to as *ukuthwala* where a girl-child is kidnapped to force her parents to the negotiation table.²⁴ The negotiation process and subsequent decision to subject a child into marrying an older man, takes place in the family setting.

The African Children's Charter and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)²⁵ are remarkable human rights instruments that ought to be applauded for setting the marriageable age at 18 for both girls and boys.²⁶ However, despite legal position to eradicate child marriage in Africa, some countries still recognise it as a necessary and beneficial cultural practice in their domestic laws and cultural settings.²⁷

Children, especially the girl child, are more vulnerable to harmful cultural practices and as such legislative intervention is necessary. Globally, around 12 million girls under the age of 18 years, marry each year.²⁸ Child marriage is most prevalent in Africa, especially in West and Central Africa.²⁹ This high prevalence of child marriage on the continent is due to several key drivers. The first is gender inequality, which refers to

²¹ General Comment 12 of the UN Children's Committee (n 18) para 92.

²² As above.

²³ BJ Machaka, 'The Cultural Practice of Ukuthwala in South Africa' LLM dissertation, North West University, 2019 at 23.

²⁴ Machaka (n 23) 2.

²⁵ The Maputo Protocol came into force on 25 November 2005 and was ratified by South Africa on 17 December 2004. C Heyns & M Killander, *Compendium of Key Human Rights Documents of the African Union* (2016) 65.

²⁶ L Mwambene, 'Recent Legal Responses to Child Marriage in Southern Africa: The Case of Zimbabwe, South Africa and Malawi' (2018) 18 *African Human Rights Law Journal* 527 at 528.

²⁷ As above.

²⁸ UNICEF, 'Child Marriage' 2017 <https://data.unicef.org/topic/child-protection/child-marriage/> (accessed 15 June 2022).

²⁹ UNICEF, 'A Profile of Child Marriage in Africa - UNICEF DATA' 23 November 2015 <https://data.unicef.org/resources/a-profile-of-child-marriage-in-africa/> (accessed 4 July 2022).

the widespread perception that the girl-child is less valuable than the boy-child.³⁰ Second, certain cultural and religious traditions favour child marriage either directly or indirectly. This can be seen in South Africa's cultural practice of *ukuthwala* where a girl is kidnapped by a man and his peers to pressure her family to enter into marriage negotiations.³¹ The third and fourth main causes of child marriage are poverty and a lack of education for girls, respectively.³² The fifth factor is legislative frameworks that permit child marriage, and this driving force is typically present in nations with multiple legal systems. The sixth factor is the inadequacy of the procedures that assure birth and marriage registration.³³ Without effective birth and marriage registration mechanisms in place it is difficult to put an end to the practice in so far as it permits child marriage to take place without incurring any legal repercussions.³⁴

Statistics for the prevalence of child marriage in South Africa is low when compared to other African countries. For instance, in Mali the rate of child marriages was as high as 71 percent in 2006 and 53.7 percent in 2018.³⁵ Statistics for South Africa indicate that four percent of girls were married before the age of 18 and one percent before the age of 15.³⁶ According to Statistics South Africa's Community Survey, 2016 more than 91 000 girls aged between 12 and 17 years were married (or either divorced, separated, widowed or cohabitating with a partner).³⁷ Further, Statistics South Africa have also indicated that 207 children were married in 2021 alone.³⁸ Notwithstanding, these statistics, in a country that models itself as a leading human rights abiding country, are very high and must be reduced to zero - to enable a total protection of

³⁰ J Grobbelaar & C Jones, *Childhood Vulnerabilities in South Africa: Some Ethical Perspectives* (2020) 164–180.

³¹ Centre for Human Rights *A Report on Child Marriage in Africa* (2018) 28.

³² Grobbelaar (n 30) 166.

³³ As above.

³⁴ Grobbelaar (n 30) 164–180.

³⁵ CHR (n 31) 19.

³⁶ UNICEF *State of the World's Children 2021: On My Mind - Promoting, protecting and caring for children's mental health*. (2021) <https://www.unicef.org/media/114636/file/SOWC-2021-full-report-English.pdf> (accessed 15 June 2022).

³⁷ P Mbude 'Shocking Child Marriage Stats Paint a Dire Picture' *City Press* (Johannesburg) 31 October 2017 <https://www.news24.com/citypress/news/shocking-child-marriage-stats-paint-a-dire-picture-20171031> (accessed 20 August 2023).

³⁸ N McCain, 'More than 200 Children Were Married in SA in 2021 – Stats SA' *News24* (Johannesburg) 8 August 2023 <https://www.news24.com/news24/southafrica/news/more-than-200-children-were-married-in-sa-in-2021-stats-sa-20230808> (accessed 20 August 2023).

children's rights. The drivers for child marriage in South Africa are mostly gender inequality, poverty and custom.³⁹

South Africa has made some, however limited, attempt to end the practice of child marriage in the country. The Marriages Act⁴⁰ and the Recognition of Customary Marriages Act⁴¹ set the marriageable age at 18 years. However, these respective Acts made room for circumstances under which minors can get married. With parental consent, a person under the age of 18 years can legally get married.⁴² The Children's Act,⁴³ further, does not provide for a minimum marriageable age. This flaw further fuels the assumption that child marriage is allowed and approved of. It would be more appropriate to set the marriageable age at 18 without any exceptions or even to consider criminalising child marriage altogether.⁴⁴

There is however, a glimmer of hope to end child marriages in South Africa with the new draft Marriage Bill, 2022 that sets the minimum age of marriage at 18 without exception and which makes the registration of marriages a legal requirement for its validity.⁴⁵ However, until such time the Marriage Bill is enacted, child marriage remains a human rights challenge in South Africa.

1.2 Research objectives

The leading objective of this dissertation is to determine the extent to which a child could be allowed to participate meaningfully in child marriage decision-making processes in South Africa. The sub-objectives are to spotlight and critique the laws promoting and prohibiting child marriage in South Africa, to situate child participation as a probable tool to end child marriage in South Africa and to advocate for children to be given the space and time to meaningfully participate in child marriage decision-making processes.

³⁹ Machaka (n 23) 23.

⁴⁰ Act 25 of 1961.

⁴¹ Act 120 Of 1998.

⁴² Sec 3(3)(a) of the Recognition of Customary Marriages Act 120 Of 1998 and sec 24(1) of the Marriages Act 25 of 1961.

⁴³ Act 38 of 2005.

⁴⁴ Mwambene (n 26) 534.

⁴⁵ Government of South Africa, 'Marriage Bill: Draft | South African Government' 7 July 2023 <https://www.gov.za/documents/marriage-bill-draft-7-jul-2023-0000> (accessed 20 August 2023).

1.3 Problem statement

Research on child participation in the family or private setting is immensely limited, especially with regard to child marriage. Moses states in her article on child participation:

there is a lack of documented impact assessment around participatory processes in South Africa – both in terms of benefits to individual children in terms of enjoyment, learning and personal development, and resulting impact on the intended processes and outcomes. More research is required in order to understand better the nature of the two-way interaction between interventions and the broader environments in which they are situated... [t]hese factors affect not only who gets to participate in what, but also how children's contributions are received.⁴⁶

As stated above, child marriage violates the basic human rights of a child and is inconsistent with various legal instruments. Section 28(1) of the Constitution of the Republic of South Africa, 1996 provides that:

Every child has the right-

- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
- (c) to basic nutrition, shelter, basic health care services and social services;
- (d) to be protected from maltreatment, neglect, abuse or degradation

Additionally, section 29 of the Constitution confirms the right of everyone to basic education. Section 12 of the Children's Act⁴⁷ states that:

- (1) Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.
- (2) A child-
 - (a) below the minimum age set by law for a valid marriage may not be given out in marriage or engagement; and
 - (b) above that minimum age may not be given out in marriage or engagement without his or her consent.

⁴⁶ S Moses 'Children and Participation in South Africa: An Overview' (2008) 16 *The International Journal of Children's Rights* 327.

⁴⁷ Act 38 of 2005.

Child marriage infringes and violates multiple rights of the child. As previously stated, the rights of the child are recognised and protected in the Constitution, regional and international legal instruments. Child marriage has severe consequences in store for the girl child. It is threatening to the health, security and education of the girl. Most girls are expected to leave school which limits their economic and social opportunities and potential.⁴⁸ Girl brides are at greater risk of being subjected to abuse, domestic violence (sexual, physical and psychological), early pregnancies and HIV.⁴⁹ The consequences of child marriage are prejudicial to the individual, the community and the country.⁵⁰ Having regard for the protection afforded, it becomes apparent that child marriage infringes on these rights.

Further, Article 7 of the African Children's Charter and article 12 of the Convention of the Rights of the Child (CRC) confirm that every child has the right to express their opinion in any matter that concerns them. And when decisions are made with regard to the child, they need to be in the best interest of the child. When parent subject their child to marriage, without due regard for their opinion, it conflicts with the best interest of the child principle and violates the right of the child to be participate. Child marriage seldom takes place with the informed consent and meaningful participation of the child.⁵¹ This demonstrates clear child rights violations that are inconsistent with the Constitution, the African Children's Charter and the CRC.

According to Mtshali, child marriage violates the rights of the girl child and is regarded as a harmful practice that form part of cultural rituals.⁵² In South Africa the public has focused mostly⁵³ on the cultural practice of *ukuthwala*⁵³ which is a form of child marriage.

⁴⁸ J Becker *Campaigning for Children: Strategies for Advancing Children's Rights* (2012) 47.

⁴⁹ UNFPA, 'Child Marriage' December 2014 <https://esaro.unfpa.org/en/topics/child-marriage#:~:text=It%20reinforces%20and%20compromises%20the> (accessed 23 August 2022).

⁵⁰ Grobbelaar (n 30) 166 – 167.

⁵¹ LB Gaanagomo 'The Implications of Ukuthwala on South Africa's Regional and International Law Obligations' LLM dissertation, North West University, 2018 at 14-15.

⁵² V Mtshali, 'Forced Child Marriage Practiced under the Pretext of Customary Marriage in South Africa' (2014) 15 *Child Abuse Research: A South African Journal* 51.

⁵³ Mtshali (n 52) defines it as "...a mock abduction, whereby a suitor and his friends remove the girl from her parents' control and carry her off to her suitor's homestead. She might be caught unawares or she might be part of the plot."

Originally it was practiced with the consent of the bride.⁵⁴ However, the practice is better understood today as a cultural ritual where young girls are forced to marry older men, chosen by their guardians, without the knowledge or consent of the girls.⁵⁵ The practice is more prevalent in rural parts of the country where poverty and lack of education fuel the practice of child marriages.⁵⁶

1.4 Main research question

To what extent can child participation in the child marriage decision-making process reduce the prevalence of child marriage in South Africa?

1.5 Literature review

Research and literature covering more than two decades (2008 to 2022) that deal with child participation, child marriage and the dire consequences of this cultural practice will form the basis of this study. The Centre for Human Rights (CHR) has published a report on child marriage in Africa that discusses data, statistics, causes and recommendations to prevent child marriage from occurring.⁵⁷ The research was conducted on ten African countries. This report will provide relevant information and support in discussing and answering the research question of this study. The report does, however, not make any mention of the roles gender inequality and gender discrimination play as drivers of child marriage. Gender inequality and discrimination will be discussed as part of this research.

Mwambene discusses, in her article, the prevalence of and legal responses to child marriage in South Africa. Mwambene examines how South Africa has domesticated international law, as encouraged by article 21 of the African Children's Charter, to address child marriage.⁵⁸ She further highlights the legal difficulties of regulating cultural practices and the shortcomings in current law reform. Her research provides favourable insights that include country-specific legislation and international instruments that recognise the rights of the child. She briefly touches on recommendations to end harmful cultural practices. She recommends that "law reform

⁵⁴ Machaka (n 23) 2.

⁵⁵ Grobbelaar (n 30) 164–180.

⁵⁶ Grobbelaar (n 30) 166.

⁵⁷ CHR (n 31).

⁵⁸ Mwambene (n 26) 531.

needs to be coupled with practical ways of addressing factors that perpetuate harmful cultural practices linked to child marriage.”⁵⁹

Mtshali published an article on child marriage which argues that the practice takes place under the “pretext” of customary marriage, and he elaborates on the types of child marriages entered into in South Africa.⁶⁰ This information is relevant as I intend to discuss child marriage under the guise of a cultural practice named *ukuthwala*. The article also explores the practice as performed in other countries which sheds additional light on the prevalence and issues relating to child marriage. This author’s research provides insightful information that could be useful when considering responses beyond South Africa to address child marriage. The article however provides limited recommendations to end the cultural practice.⁶¹

Grobbelaar authored ‘Recognising and Responding to Complex Dilemmas: Child Marriage in South Africa’ in the book *Child Vulnerabilities in South Africa*.⁶² She discusses the drivers and consequences of child marriage specifically in relation to South Africa. Her research provides considerable and valuable information on the motivating forces of child marriage in South Africa. Her discussion of the causes of child marriage will be relevant in my research. Her work also refers to the national legislation and international commitments of South Africa which is applicable to my research on the domestication of international law.

1.6 Methodology

The method of this research is based on a multidisciplinary children’s rights-based approach to ending child marriage. A children’s rights-based approach, is a way of research that respects and promotes the rights of children. It aims to prevent and address violations of children’s rights by holding duty-bearers such as the government, parents and/or guardians, family members, teachers and members of the community accountable. This dissertation is based on an analysis of existing academic and grey (UN and NGO) research and literature that examines the prevalence, causes and

⁵⁹ Mwambene (n 26) 534.

⁶⁰ Mtshali (n 52) 51-53.

⁶¹ Mtshali (n 52) 51.

⁶² Grobbelaar (n 30) 168.

consequences of child marriage in South Africa as a cultural practice. The research highlights the importance of child participation in child marriage decision-making process that takes place in the family setting.

1.7 Structure

The dissertation has the following chapters:

1.7.1 Chapter 1: Introduction

The introduction provides a background on the mini-dissertation and will include a concise and contextualised overview of key concepts such as child participation in the family setting and child marriage. A brief overview of relevant legal instruments that recognise and protect children's rights will also be included.

1.7.2 Chapter 2: Child marriage in South Africa

In this chapter, I extensively discuss the nature, prevalence and causes of child marriage in South Africa. This includes a discussion on the cultural tradition, *ukuthwala*, as practiced by the Xhosa and Zulu communities in many parts of South Africa. The chapter discusses the key drivers of child marriage and specific attention is placed on gender inequality, gender discrimination, cultural norms, poverty and access to education in the African context.

1.7.3 Chapter 3: Child marriage, child participation and the law

This chapter focuses on the existing legal and policy measures available in South Africa that govern child marriage and child participation. As previously stated, the African Children's Charter and the Maputo Protocol set the marriageable age at 18 years without any exception. However, the Joint General Recommendation 31 of the Committee on the Elimination of Discrimination against Women/General Comment 18 of the Committee on the Rights of the Child on harmful practices provides a lower standard that set the minimum marriageable age at 16 years. This is problematic because it allows for child marriage to take place under certain circumstances. The same can be said for the Recognition of Customary Marriages Act⁶³ which states the requirements for a valid customary marriage in section 3(1). It is required that both

⁶³ Act 120 of 1998.

parties should be above 18 years and both parties should consent to the customary marriage. However, section 3(3)(a) stipulates that should one or both parties be under the age of 18 years, parental consent is required.

1.7.4 Chapter 4: Conclusion

In the last chapter concluding remarks and recommendations are discussed. The importance of child participation in the child marriage decision-making process as a tool to end child marriage in South Africa is emphasised.

1.8 Limitations of study

Although child marriage is not limited to the girl child, for the purpose of this mini-dissertation, only the girl child in child marriages, and not the boy child, is discussed. Further, although relevant to some extent, I do not analyse the long-term psychological effects that child marriage has on the girl child. It is beyond the scope of this research paper to discuss statutory rape, pedophilia and other sexual crimes committed against children, betrodden at childhood. This research is country-specific. It is beyond the scope of this paper to do a comparative analysis since the focus is on legislative and policy measures in South Africa, child marriage as it is practiced in South Africa and how child participation could combat child marriage in South Africa.

Chapter 2: Child marriage in South Africa

2.1 Introduction

As previously stated, child marriage, akin to several African countries, is concluded in South Africa mostly under the guise of cultural practices.⁶⁴ Cultural practices are prevalent in 'rural' South African communities, in, for example, KwaZulu-Natal, Eastern Cape, Western Cape, North West and Limpopo Provinces. One of the notorious practices which affects the girl-child is commonly known as *ukuthwala*. According to the South African Department of Justice and Constitutional Development, '[u]kuthwala is a form of abduction that involves kidnapping a girl or a young woman by a man and his friends or peers with the intention of compelling the girl or young woman's family to endorse marriage negotiations.'⁶⁵ Even though it is not as intensive as it was in the 20th century, as discussed in detail in this chapter, *Ukuthwala*, still enjoys a disturbing presence in modern, democratic South Africa affecting several girls over many years.⁶⁶

The overarching objective of this chapter is to discuss specifically, the nature, prevalence, causes and consequence of child marriage in South Africa. The first part of this chapter focuses on child marriage as a cultural tradition, known as *ukuthwala*, which is practiced predominantly by the Xhosa and Zulu communities in the KwaZulu Natal and Eastern Cape provinces in South Africa. The second part discusses the key drivers of child marriage, with specific attention on gender inequality, cultural norms and traditions, poverty and access to education in the South African context, through the lens of the judgment in *Jezile v S*⁶⁷ and other relevant cases in South Africa. The importance of the cases highlighted in this section is driven by the central arguments and narrative around the reasonableness and relevance of *ukuthwala* as a practice worth sustaining, abandoned or modified to enable an environment that promotes a girl-child's dignity, rights and promote positive cultural practices that is not harmful to the girl-child and the community at large.

⁶⁴ Machaka (n 23) 23.

⁶⁵ Department of Justice and Constitutional Development, 'Ukuthwala: Let's Stop Stolen Childhoods' (2010) <https://www.justice.gov.za/brochure/ukuthwala/ukuthwala.html#:~:text=Ukuthwala%20is%20a%20form%20of> (accessed 12 August 2023).

⁶⁶ Machaka (n 23) 2.

⁶⁷ 2015 3 All SA (WCC).

2.2 Nature and prevalence of child marriage in South Africa

The practice of *ukuthwala* found its origin in the Xhosa cultural group. The term *ukuthwala* literally means 'to carry'. In the present time, *ukuthwala* is maintained by the Xhosa tribes located in the Eastern Cape province. This cultural practice has gained popularity and has since been adopted by other cultural groups.⁶⁸ *Ukuthwala* has been recorded amongst the Zulu tribes located in the KwaZulu Natal province, as well as among some Sotho tribes who, through contact and interaction with other tribes, adopted the custom previously extrinsic to them.⁶⁹ Rautenbach confirms that *ukuthwala* remains prominent and is practiced in rural areas where communities conform to a traditional lifestyle.⁷⁰

There are different variations of *ukuthwala* which is discussed below. Some of these variations have evolved from the traditional romantic proposal of engagement into a violent and abusive criminal abduction that result in forced child marriage.⁷¹ In essence the cultural practice entails the 'mock abduction' of a girl-child whereby the intending groom forcibly takes her to his home with the intention to compel her family to enter negotiations and consent to a customary marriage.⁷² In executing the abduction, the girl-child is occasionally taken by surprise and without her prior knowledge, but more frequently she is taken in accordance with a prior arrangement and course of action. The practice does however require the girls-child's 'consent', although it is common practise for her to feign resistance.⁷³ Since it is an acceptable custom, onlookers abstain from interfering as it is expected of the girl-child to dramatise her expression of resistance and shed 'crocodile tears'.⁷⁴ This performance of resistance is to inform onlookers of her unwillingness, while she is in fact a willing and consenting participant. Bekker explains it as follows:

⁶⁸ C Monyane, 'Is Ukuthwala Another Form of "Forced Marriage"?' (2013) 44 *South African Review of Sociology* 64.

⁶⁹ WM Seymour, JC Bekker & JJJ Coertze *Seymour's Customary Law in Southern Africa* (1982) 97.

⁷⁰ C Rautenbach *Introduction to Legal Pluralism in South Africa* (2021) 87–88.

⁷¹ L Mwambene & J Sloth-Nielsen 'Benign Accommodation? Ukuthwala, "Forced Marriage" and the South African Children's Act' (2011) 11 *African Human Rights Law Journal* 1.

⁷² Monyane, (n 68) 64.

⁷³ Rautenbach (n 70) 87–88.

⁷⁴ DS Koyana and JC Bekker, 'The Indomitable Ukuthwala Custom' (2007) 40 *De Jure* 139.

The girl to appear unwilling and to preserve her maidenly dignity, will usually put up a strenuous but pretended resistance for, more often than not, she is a willing party.⁷⁵

Following the mock abduction and upon arrival at the man's family home, the girl is received with kindness and cared for by his female elder members.⁷⁶ The man may not engage in any sexual activity with the girl-child as it conflicts with customary law.⁷⁷ The intending groom or his companions must personally notify the girl's family that she is safe and in their care. *Lobolo* payment is then proposed and the payment date is established. This creates a cordial connection between the two families and lobolo payment (such as cattle) is made to the girl's father.⁷⁸

Various rationales for the *ukuthwala* practice exist, of which a fair few are undoubtedly strong and compelling. Mwambene gives a concise summary as follows:

To force the father of the girl to give his consent, to avoid the expense of the wedding; to hasten matters if the woman is pregnant; to persuade the woman of the seriousness of the suitor's intent; and to avoid the need to pay an immediate lobolo where the suitor and his or her family were unable to afford the bride wealth.⁷⁹

In cases where the girl has prior knowledge and willingly consents to the practice, her right to participate is being implemented as she freely expresses a choice. However, in the same vein, there is also conclusive evidence suggesting that, occasionally, the girl-child is *thwala'd* without her prior awareness and thus the practice lacks her full and free consent. This establishes the connection to forced marriage. Additionally, in some instances the girl who is being *thwala'd* is younger than 18 years of age, which raises concerns on child marriage and/or premature marriage. The above two instances therefore necessitate consideration and utilisation of constitutional and human rights standards.⁸⁰

⁷⁵ Seymour and others (n 69) 98.

⁷⁶ Rautenbach (n 70) 88 and M Nkosi, 'African Indigenous Knowledge Systems : Exploring the Differences and Similarities between the Practices of Ukuthwala and Ukubaleka amongst the Zulus' (2016) 15 *Indilinga: African Journal of Indigenous Knowledge Systems* 203 <<https://journals.co.za/doi/pdf/10.10520/EJC-5339da29e>> accessed 25 January 2024.

⁷⁷ M Van Der Watt & M Ovens 'Contextualizing the Practice of Ukuthwala within South Africa' (2012) 13 *Child Abuse Research: A South African Journal* 11.

⁷⁸ Koyana (n 74) 139.

⁷⁹ Mwambene (n 71) 1.

⁸⁰ Mwambene (n 71) 5.

Mwambene recognises 3 different dispositions of *ukuthwala*. In the first form the girl-child who is being *thwala*'d is completely aware and consenting to her mock abduction. This form of *ukuthwala* is similar to an elopement marriage. The consent of the girl brings credibility to the negotiation process to a certain extent. If the parents of the girl reject the marriage proposal and withholds consent, a valid customary marriage cannot take place.⁸¹ In the second form, the girl-child has no prior knowledge and is completely unaware, however in prior negotiations her parents agreed to the abduction without either party consulting with and obtaining consent from the girl. In this instance the girl might disagree with her parent's choice in a husband for her or alternatively, it could be the case when the girl is of higher standing and fails to attract any potential partners for an array of reasons. After the marriage negotiations are concluded the girl is observed until she becomes accustomed, or rather accepts her fate, to the prospect of marriage. It may be challenging and unlikely to argue that consent as understood in the 'west', which is the consent of both the bride and bridegroom, prevails here.⁸²

In the last form, neither the girl nor her parents have any prior knowledge of the abduction, nor have they freely consented to the abduction. The girl is forcefully taken to the man's residence and representatives of his house will then go off to her family to initiate marriage negotiations. This variation of *ukuthwala* is regarded as the most harmful since it is associated with violent acts of rape, physical and sexual abuse and degrading treatment. These violent acts are intended to force the girl to stay and 'consent' to the marriage.⁸³ Since consent of the girl is completely absent, a marriage under these circumstances takes place fully against her will and therefore results in a forced marriage. This variation of *ukuthwala* immensely infringes on the human rights of the girl.⁸⁴ For purposes of this thesis, focus will only be on the former two variants of *ukuthwala*.

Of further concern gleaned from data, it appears as though an escalation of the process is now prevalent. Girls as young as 12 years are forced into marriage with men well advanced in age.⁸⁵ This highlights the plight of these girls, as their ability to

⁸¹ Mwambene (n 71) 6.

⁸² As above.

⁸³ Monyane (n 71) 69-70.

⁸⁴ Mwambene (n 71) 7.

⁸⁵ As above.

sensibly and actively participate, is less pronounced. Studies suggest that this practice is most prevalent in rural and impoverished areas in the Eastern Cape and KwaZulu Natal.⁸⁶

In South Africa, 4% of girls are married before the age of 18 years and 1% of both boys and girls are married before attaining the age of 15 years.⁸⁷ A 2016 Community Survey published by Statistics South Africa found that more than 91 000 South African females between the ages of 12 and 17 were married, either in customary or civil unions, or divorced, separated, widowed, or cohabiting.⁸⁸ The UNICEF country report confirms that 'South Africa is home to nearly 2 million child brides; 1 in 28 young women were married in childhood.'⁸⁹ It should be noted that since registration of customary marriages is not a legal requirement for validity,⁹⁰ most customary marriages remain unregistered, and as such the prevalence of child marriage could very well be much higher.⁹¹ The good news though, is that this is about to change with the passing of the new Marriage Bill, which bans child marriage and emphasizes the need to register customary marriages in formal legal settings.

Until the Bill is enacted in law, child marriage in South African remains a major concern. The main drivers for child marriage in South Africa, relates to poverty and economic factors, gender inequality, cultural attitudes and lack of education amongst others and discussed in greater detail below.

2.3 Causes of *ukuthwala*

Culture practice is not the only reason why this practice has gained popularity in the last decade. As stated above, *ukuthwala* has transformed into a violent and harmful practice that mostly involves forcing young girls into marrying older men without their

⁸⁶ MC Jokani, 'The Customary Law Practice of Ukuthwala – an Antithesis in the South African Constitutional Order' Unpublished LLD Thesis, Nelson Mandela Metropolitan University, 2017 at 29.

⁸⁷ GirlsNotBrides 'Child Marriage Atlas: South Africa' 2023 <https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/atlas/south-africa/> (accessed 15 June 2023).

⁸⁸ Mwambene (n 26) 529.

⁸⁹ UNICEF 'Child Marriage Country Profiles: South Africa' December 2021 <https://data.unicef.org/resources/child-marriage-country-profiles/> (accessed 15 June 2023).

⁹⁰ However, this is expected to change when the draft Marriage Bill, 2022 is enacted which requires registration of all marriages for validity.

⁹¹ GirlsNotBrides (n 86).

consent. This section aims to shed light on the causes of child marriage in South Africa and consequences it has on the lives of the affected girls.

2.3.1 Gender inequality

Gender inequality is probably the most significant driver of child marriage. Research indicates that child marriage predominantly occurs where young girls marry older men.⁹² In order to comprehensively understand the other economic, social and cultural factors of child marriage, it is necessary to highlight the inferior status bestowed on girls in a South African context. In its report on child marriage in Africa, the Centre for Human Rights states that “[g]ender inequality is a cause, a result and exacerbating factor of child marriage.”⁹³ Gender inequality is deeply rooted in patriarchal attitudes and an inherent belief in differentiated gender roles which tend to be prejudicial to women. The belief that the primary role of girls is to become wives and mothers perpetuates the issue further.⁹⁴ Women’s social and economic positions are directly and indirectly influenced by discriminatory laws⁹⁵ as well as social and cultural norms which renders girls more vulnerable to child marriage than boys. This reinforces the cycle of discrimination and limits girls’ access to education, health, economic opportunity, development and decision-making power.⁹⁶

2.3.2 Cultural practice

Another significant cause of child marriage in South Africa is the cultural practice of *ukuthwala* which plays a significant role in perpetuating child marriage in many rural communities. *Ukuthwala* is considered to be a traditional practice which aims to preserve custom and maintain social cohesion.⁹⁷

The most significant and fundamental premise guiding *ukuthwala* is that the responsibility of arranging a union between a man and a woman rest with the families and the community. The single most essential component in forming human identity,

⁹² CHR (n 31) 25.

⁹³ As above.

⁹⁴ As above

⁹⁵ Sec 26(1) of the Marriages Act 25 of 1961 states that no girl under the age of 16 and no boy under the age of 18 are capable of entering a valid marriage except with the consent of the Minister. This age discrimination between girls and boys further perpetuates gender inequality.

⁹⁶ CHR (n 31) 26.

⁹⁷ Machaka (n 23) 25.

is unity and social solidarity. This exemplifies the *Ubuntu* philosophy and a sense of collective responsibility. Thus, relationships between the two families serve as the foundation for *ukuthwala*.⁹⁸ Further, *ukuthwala* is also practiced with the purpose of preserving the sexual innocence and virginity of the girl before marriage.⁹⁹ However, it is important to distinguish between *ukuthwala* as a traditional cultural practice that aims to preserve custom and protect human rights¹⁰⁰ and *ukuthwala* as a harmful cultural practice currently taking place in South Africa.¹⁰¹

2.3.3 Poverty

Failure by government to effectively address poverty is another major driver of child marriage in South Africa. Research indicates that child marriage is more prevalent in impoverished communities¹⁰² where the parents of the girl relies heavily on the lobolo payment, as a financial incentive and to reduce the economic burden of the parents to care for the girl child.¹⁰³ Parents marry off their girls as they believe that the girl will be better cared for, fed and clothed by her husband and they simultaneously have one less child burdening their already strained pockets.¹⁰⁴ As a result hereof, girls are disproportionately affected, even though the entire family experiences the brunt of poverty.¹⁰⁵

The ACERWC Joint General Comment 2017 confirms that ‘in the context of child marriage, the payment of dowry increases girls’ vulnerability and compromises the ability to give free consent.’¹⁰⁶

Children who live in poverty are more likely to be involved in transactional relationships, which occasionally results in child marriage. Parents can also encourage and push for transactional relationships and sex in an effort to gain financial reward

⁹⁸ Jokani (n 86) 54.

⁹⁹ Machaka (n 23) 25.

¹⁰⁰ Where the practice takes place between two adults (18 years or older) who give their full and free consent to enter into a marriage.

¹⁰¹ Abduction of a girl below the age of 18 years to enter a marriage without her full and free consent (forced child marriage).

¹⁰² *Mbhamali v S* [2022] 1 All SA 488 (KZD) (12 October 2021) para 34.

¹⁰³ Machaka (n 23) 23.

¹⁰⁴ Mtshali (n 52) 55.

¹⁰⁵ CHR (n 31) 32.

¹⁰⁶ ACERWC Joint General Comment 2017, para 49.

for the family, despite the fact that these arrangements frequently result in child marriage and early pregnancies.¹⁰⁷

2.3.4 Lack of education

Poverty is also linked to lack of education and awareness which further exacerbates the incidence of child marriage in South Africa. Lack of education and awareness about the harmful consequences of child marriage contributes to its persistence. The prevalence of child marriage is higher in areas where education is low.¹⁰⁸ Education is a powerful tool to equip girls to be socially and economically independent and as such, make them less vulnerable to fall victim to child marriage. Cultural and patriarchal norms that bestow on girls the role of care givers is another possible impediment to the education of girls.¹⁰⁹ Research suggests that in South Africa, girls have reportedly been taken out of school to care for ailing family members, particularly in light of the HIV/AIDS pandemic.¹¹⁰ Communities who are uninformed about the physical, psychological and social harm stemming from child marriage are less likely to challenge or question the cultural practice of *ukuthwala*.

2.3.5 Legal frameworks

The legal framework in South Africa also allows for marriage to take place where the intending parties or one of them are below the age of 18 years, if they satisfy the legal requirements.¹¹¹ In addition, hereto, the registration of customary marriages in South Africa is not a legal requirement for its validity.¹¹² This is a significant challenge in combatting child marriage in South Africa. Further, since child marriage occurs in poorer communities, individuals might be reluctant to burden themselves financially to register a customary marriage. Marriage registration can assist in identifying and prosecuting child marriage cases and provide a more accurate picture of the prevalence of child marriage in South Africa. With inaccurate and insufficient data, it

¹⁰⁷ CHR (n 31) 32.

¹⁰⁸ CHR (n 31) 34.

¹⁰⁹ As above.

¹¹⁰ As above.

¹¹¹ However in term of sec 5 of the draft Marriage Bill, 2022 this is expected to change once the Bill is enacted.

¹¹² However, in terms of sec 18 of the draft Marriage Bill, 2022 registration of all marriages is a legal requirement for validity but until enactment of the Bill this remains a challenge in preventing child marriages.

is extremely difficult to effectively combat and eradicate the violent and non-consenting form of *ukuthwala* in South Africa.

2.4 Conclusion

The aberrant form of *ukuthwala* as currently practiced in many rural parts of South Africa is perpetuated by gender inequality, poverty and cultural norms and practices. This violent and harmful practice greatly violates the human rights of the girl child and is detrimental to her education, health, reproductive and social and economic development.

Chapter 3 discusses South Africa's international and regional obligations in terms of children's human rights and looks at how these laws have been domesticated and what protections are afforded to children. The existing marriage laws applicable in South Africa and the legal age of marriage are also discussed in greater detail.

Chapter 3: Child marriage, child participation and the law

3.1 Introduction

This chapter focuses on the existing legal and policy measures applicable to and available in South Africa that govern child marriage and child participation. As previously stated, South Africa has ratified the African Children's Charter and the Maputo Protocol. As part of its regional commitments to the African Union (AU) these treaties must be domesticated and implemented in order to ensure the realisation of children's and women's rights at the national level.

Further to South Africa's accession to the African Children's Charter and the Maputo Protocol, the State has also committed to the CRC as well as CEDAW. Akin to the African Children's Charter and the Maputo Protocol, these international treaties are binding and require proper domestication and implementation at the national level. The above legal instruments all prohibit child marriage, however CEDAW and the CRC have exceptions in respect of the minimum marriageable age. The focus of this chapter, as indicated in the previous chapter, is on children, the girl-child and to ascertain the extent to which these instruments have been translated at the national laws in South Africa to allow, for example, a girl child, to participate in marriage decision making processes that concern her.

3.2 International and regional legal instruments

The CRC is celebrated as the human rights treaty that is most widely ratified since it came into force.¹¹³ Thus, this treaty is the universally accepted framework which recognises children as right holders and strives to protect the rights of children globally. It confirms and defines that any person under the age of 18 years is referred to as a child, and State Parties are urged to take all necessary steps to protect children's rights.¹¹⁴

¹¹³ The treaty was adopted on 20 November 1989 and came into force on 2 September 1990. The United States of America is the only UN member state that has not ratified the CRC. OHCHR 'OHCHR Dashboard' 2014 <<https://indicators.ohchr.org/>> (accessed 14 February 2023).

¹¹⁴ OHCHR (n 112).

Of the 193 UN member states only 6 countries have not ratified CEDAW.¹¹⁵ This treaty recognises and protect the rights of women and girls globally.¹¹⁶ State Parties that ratified this treaty are obligated to end all forms of discrimination against women and girls in all spheres and cycles of life and to ensure that they are able to fully enjoy and exercise their human rights and freedoms equal to boys and men.¹¹⁷ CEDAW came into force on 3 September 1981 and was ratified by South Africa on 15 December 1995.¹¹⁸

The African Children’s Charter entered into force on 29 November 1999 and confirms, in its preamble, that the objective is to promote and protect the rights and welfare of all African children. It further emphasises that:

the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances... and on account of the child’s physical and mental immaturity he/she needs special safeguards and care...

Similar to the CRC, the African Children’s Charter defines a child as any person below the age of 18 years. However, the African Children’s Charter creates no exception to the rule, whereas the CRC provides for circumstances in law where majority can be obtained at an earlier age.¹¹⁹

¹¹⁵ Iran, Somalia, Tonga, Sudan, Palau and the United States of America have yet to ratify CEDAW. O Wittenberg ‘Why Don’t Countries Ratify Human Rights Treaties? A Case Study of Commitment to CEDAW’ 2020 <https://scholar.colorado.edu/downloads/6395w8073> (accessed 14 February 2023).

¹¹⁶ CEDAW for Youth states that “[a]lthough CEDAW mainly refers to ‘women’, the Convention reflects a life cycle approach and countries are obliged to promote the equal rights of women and girls.” UN Women ‘Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) for Youth’ 2016 <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2016/CEDAW-for-Youth.pdf> (accessed 26 June 2023).

¹¹⁷ UN ‘CEDAW in Your Daily Life’ <https://www.ohchr.org/en/treaty-bodies/cedaw/cedaw-your-daily-life#:~:text=Adopted%20by%20the%20United%20Nations> (accessed 14 February 2023).

¹¹⁸ United Nations ‘Convention on the Rights of the Child’ November 1989 <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> (accessed 14 February 2023).

¹¹⁹ Art 1 of the CRC states that a child is any person below the age of 18 ‘...unless under the law applicable to the child, majority is attained earlier.’

The Maputo Protocol, which is arguably the most progressive and comprehensive women’s rights treaty,¹²⁰ provides extensive protection for women’s human rights on the African continent. As the first internationally binding legal instrument to address sexual and reproductive health rights,¹²¹ female genital mutilation¹²² and child marriage,¹²³ it proves its progressiveness and innovation.¹²⁴ It also specifically addresses harmful cultural practices and violence against women and girls.¹²⁵

Both CEDAW and the Maputo Protocol are applicable to all women and includes the girl-child. Article 1 of the Maputo Protocol specifically defines women as “persons of female gender, including girls.” CEDAW for Youth states that “[a]lthough CEDAW mainly refers to ‘women’, the Convention reflects a life cycle approach and countries are obliged to promote the equal rights of women and girls.”¹²⁶ These international and regional instruments confirm that every girl¹²⁷ and woman has the fundamental right to non-discrimination,¹²⁸ to be free from all forms of violence¹²⁹ and that State Parties have a duty to end all traditional and cultural practices that cause harm.¹³⁰ The CRC and African Children’s Charter further establish that the best interest of the child is the primary consideration in every decision that affects the child.¹³¹

It has previously been stated that every child has the right to participate in all decision-making processes that affect their lives. Child marriage and the process leading up to child marriage as currently practiced in South Africa, is void of the child’s opinion and consent. It is further confirmed that child marriage violates not only a child’s right to

¹²⁰ LA Obiora & C Whalen ‘What Is Right with Africa: The Promise of the Protocol on Women’s Rights in Africa’ (2015) 2 *Transnational Human Rights Review* 153.

¹²¹ Art 14 of the Maputo Protocol.

¹²² Art 5(b) of the Maputo Protocol.

¹²³ Art 6(b) of the Maputo Protocol.

¹²⁴ Equality Now ‘The Maputo Protocol: Protecting African Women’s Rights’ 2021 https://www.equalitynow.org/promoting_african_womens_rights/ (accessed 14 February 2023).

¹²⁵ Art 4 of the Maputo Protocol.

¹²⁶ UN Women ‘Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) for Youth’ 2016 <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2016/CEDAW-for-Youth.pdf> (accessed 26 June 2023).

¹²⁷ In this context specific reference is made to the girl child.

¹²⁸ Art 1 of CEDAW and art 2 of the CRC.

¹²⁹ Art 19 of the CRC and General Recommendation 35 on gender-based violence against women, updating General Recommendation 19, CEDAW/C/GC/35 (2017).

¹³⁰ Art 24 of CRC and art 5 of CEDAW.

¹³¹ Art 3 of the CRC and art 4 of the African Children’s Charter.

participation, but a number of other rights protected in all the treaties highlighted above.¹³² The following section examines the legality of child marriage under the above instruments. Specific reference is made to the child's right to meaningfully participate in a child marriage decision-making process in the context of South Africa.

3.3 Child marriage

According to UNICEF, child marriage is any formal or informal union/marriage where one or both parties are below the age of 18 years.¹³³ Further, the Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage (ACERWC Joint General Comment 2017) states that children below the age of 18 years are incapable of giving their full and free consent to enter a marriage. It also noted that a child's incapacity to give their consent cannot be restored by substituting it for parental consent on behalf of the child to enter a marriage.¹³⁴ This is confirmed in the Joint General Recommendation 31 of the Committee on the Elimination of Discrimination against Women/General Comment 18 of the Committee on the Rights of the Child on harmful practices, which states that "a child marriage is considered as a form of forced marriage given that one or both parties (especially the child involved) have not expressed their full, free and informed consent."¹³⁵

Child marriage is linked to many other human rights violations and severely impacts the well-being of the girl child. It is threatening to the health, security, development, education and survival of the girl.¹³⁶ Most girls are expected to leave school which limits their economic and social opportunities and potential.¹³⁷ Girl brides are at greater risk of being subjected to abuse, domestic violence (sexual, physical and

¹³² Gaanakgomo (n 51) 6 -19.

¹³³ UNICEF 'Child Marriage' June 2022 <https://www.unicef.org/protection/child-marriage#:~:text=Child%20marriage%20refers%20to%20any> (accessed 26 June 2023).

¹³⁴ ACERWC (2017) Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee on the Rights and Welfare of the Child on Ending Child Marriages para 6.

¹³⁵ CRC/C/GC/18 14 November 2014 <https://www.ohchr.org/en/documents/general-comments-and-recommendations/revision-joint-general-comment-no-18-committee> (accessed 11 December 2022).

¹³⁶ ACERWC Joint General Comment 2017, para 12.

¹³⁷ Becker (n 48) 47.

psychological), early pregnancies and HIV/AIDs.¹³⁸ The consequences of child marriage are prejudicial to the individual, the community and the country.¹³⁹ It infringes the CRC and the African Children's Charter as these recognise and protect the right to education,¹⁴⁰ the right to health,¹⁴¹ the right to non-discrimination,¹⁴² the right to be free from all forms of violence and abuse¹⁴³ and the right to a childhood.¹⁴⁴ Having regard for the protection afforded, it becomes apparent that child marriage infringes on a broad spectrum of a girl-child' rights.

It should also be noted that the CRC and the African Children's Charter state the best interest of the child must be the primary consideration in all matters that concern the child. The CRC and African Children's Charter classify the best interest principle as one of four principles applicable and critical in interpreting and implementing children's rights.¹⁴⁵ General comment 14 on the right of the child to have his or her best interests taken as a primary consideration in all matters concerning the child, states that the child's best interest principle aims to ensure, firstly, that all rights enshrined in the CRC are enjoyed fully and effectively and secondly, the overall development of the child.¹⁴⁶ It goes further and quotes: "an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention" from General Comment 13 on the right of the child to freedom from all forms of violence.¹⁴⁷ It confirms that all rights in the CRC are in the child's best interest and "no right could be compromised by a negative interpretation of the child's best interests."¹⁴⁸ In light hereof it is clear that child marriage cannot, under any circumstances, be in the best

¹³⁸ UNFPA 'Child Marriage' December 2014 <https://esaro.unfpa.org/en/topics/child-marriage#:~:text=It%20reinforces%20and%20compromises%20the> (accessed 23 August 2022).

¹³⁹ Grobbelaar (n 30) 164–180.

¹⁴⁰ Art 28 of the CRC and art 11 of the African Children's Charter. Both the Maputo Protocol, in art 12, and CEDAW, in art 10, protects the right to education.

¹⁴¹ Art 24 of the CRC and art 14 in the African Children's Charter.

¹⁴² Art 2 of the CRC and art 3 of the African Children's Charter. Art 2 of the Maputo Protocol and art 2 of CEDAW confirm that women (and the girl child) have the right to non-discrimination.

¹⁴³ Art 19 of CRC and art 16 of the African Children's Charter.

¹⁴⁴ Art 31 of the CRC and art 12 of the African Children's Charter.

¹⁴⁵ The other 3 principles recognised by the CRC and African Children's Charter are non-discrimination, the best interest of the child as the primary consideration, the right to survival and development and the right to be heard.

¹⁴⁶ General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1) CRC/C/GC/14 (2013) para 4.

¹⁴⁷ CRC/C/GC/13 (2011) para 61.

¹⁴⁸ General comment 14 on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1) CRC/C/GC/14 (2013) para 4.

interest of the child since it violates other human rights protected in the CRC, the African Children's Charter and the Constitution of South Africa.

In addition to the above, both the CRC¹⁴⁹ and the African Children's Charter have placed an obligation on State Parties to take all necessary measures to abolish harmful practices that is detrimental to the health of the child. Article 21(1) of the African Children's Charter states:

State Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

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

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

The African Children's Charter goes even further and specifically prohibits child marriage and sets the minimum marriageable age at 18 years without any exception.

Article 21(2) states:

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.

The Maputo Protocol also sets the marriageable age at 18 years without any exception. This has been reiterated in the ACERWC Joint General Comment 2017 which state that the prohibition against child marriage should be applied broadly to all types of unions or marriages, as it does not differentiate between customary, religious or civil law.¹⁵⁰ It goes even further and emphasises that child marriage is a harmful practice which should be condemned and prohibited.¹⁵¹ However, the Joint General Recommendation 31 of the Committee on the Elimination of Discrimination against Women/General Comment 18 of the Committee on the Rights of the Child on harmful practices provide a lower standard and states that:

¹⁴⁹ Art 24(3) of the CRC.

¹⁵⁰ ACERWC Joint General Comment 2017, para 16.

¹⁵¹ Article 5 of the Maputo Protocol; ACERWC Joint General Comment 2017, para 48.

a marriage of a mature, capable child below 18 years of age may be allowed in exceptional circumstances, provided that the child is at least 16 years of age and that such decisions are made by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity, without deference to culture and tradition.

This lower standard is problematic as it allows for child marriage to take place under certain circumstances. However, it discourages child marriage to take place if the purpose for such marriage is solely embedded in culture.¹⁵² Additionally, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage¹⁵³ confirms in article 2 that State Parties are required to specify a minimum age for marriage which must be reflected in its legislation. Failure to specify the minimum age of marriage to be 18 years and older is problematic as the broad interpretation of this article could justify the occurrence of marriage below the age of 18 years. When reflecting on the African Children's Charter which sets the marriageable age at strictly 18 years or older, this provision lacks protection by failing to explicitly prohibit child marriage and ought to have stated the minimum age of marriage to be 18 years without leaving room for different interpretations or exceptions.

As stated, the right of the child to meaningfully participate in all decision-making processes that affect their lives is a recognised right in both the CRC and the African Children's Charter. This right is especially ignored in child marriage as it mostly occurs without the full and free consent of the child. This right, which is also a core principle recognised in both the CRC and the African Children's Charter,¹⁵⁴ creates an obligation to ensure child participation at every level. This is discussed in greater detail below.

¹⁵² Joint General Recommendation 31 of the Committee on the Elimination of Discrimination against Women/General Comment 18 of the Committee on the Rights of the Child on harmful practices, para 20.

¹⁵³ Adopted 7 November 1962, entered into force on 9 December 1964. South Africa has acceded this treaty on 29 January 1993.

¹⁵⁴ Art 12 of the CRC and art 7 of the African Children's Charter.

3.4 Child Participation

Child participation is a means to encourage children's meaningful inclusion and contribution in decisions, procedures, programs, and policies that have an impact on their life.¹⁵⁵ Legally, child participation is a right that requires and reaffirms the necessity for children to participate in all decision-making processes relating to matters concerning them. This right is recognised in both the CRC¹⁵⁶ and the African Children's Charter.¹⁵⁷ The CRC Committee has also published a general comment¹⁵⁸ specially on the right of the child to be heard and elaborates extensively on what the state party's obligations entail, how child participation should be facilitated and what the right entails. It further reestablishes that child participation is an accepted general principle in that all other children's rights are interpreted and implemented with the participation of children.¹⁵⁹ A child's right to participation further enables and provides an opportunity for children to actively pursue their rights and it also requires a child's meaningful contribution to decisions that affect them.¹⁶⁰ It has been argued and established that children's participation in matters that concern them generally happens in two settings. These are the private and public settings. According to Fokala, a public setting includes children's involvement in law and policy-making, law and policy implementation and children in parliament sessions and on the other hand children's participation in the private setting are decisions made within a child's private space, and in most cases within the family setting.¹⁶¹ The primary focus of this research is on children's participation in the private setting, with a particular focus on child marriage decision-making processes within the family environment.

Further, since it can be assumed that most children, especially younger children, do not possess the level of maturity to be able to give their full and free consent to marry, "consensus under international law is that children should not be permitted to enter

¹⁵⁵ Save the Children (n 1).

¹⁵⁶ Art 12 of the CRC.

¹⁵⁷ Arts 4(2),7 and 12 of the African Children's Charter.

¹⁵⁸ UN Committee on the Rights of the Child (CRC) 'General Comment 12 (2009): The Right of the Child to Be Heard' 20 July 2009 <https://www.refworld.org/docid/4ae562c52.html> (accessed 11 December 2022).

¹⁵⁹ Fokala (n 8) 188.

¹⁶⁰ Fokala (n 8) 190.

¹⁶¹ Fokala (n 8) 190-191.

into marriage”.¹⁶² Since child marriage rarely takes place with the free and informed consent of the child it infringes multiple international and regional legal instruments.¹⁶³ The Maputo Protocol and CEDAW specifically state that the full and free consent of both parties is required when entering a marriage.¹⁶⁴ The consent requirement for a legal marriage is also reflected in article 1 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage which states that “[n]o marriage shall be legally entered into without the full and free consent of both parties...”.The absence of consent undeniably infringes on the right of the child to be heard (participate). The ACERWC Joint General Comment 2017 confirms that:

Having regard to the ... primacy of the principle of the best interests of the child, a child’s right to participate in decisions and matters affecting them shall not be used to justify any exception to the minimum marriageable age of 18 years... the best interests of the child require that no exceptions to the minimum marriageable age of 18 can be tolerated.¹⁶⁵

It is for this purpose that child marriage should be abolished in its entirety and the necessity for a legally binding requirement of a minimum marriageable age of 18 years without exception and customary or religious acts of abduction with the intention to marry must also be outlawed.¹⁶⁶

3.5 South Africa

Since South Africa has ratified all the mentioned treaties, it is under a legal obligation to implement the rights entrenched therein in its national legislation and policies in order to ensure the full realisation of all rights recognised in the respective treaties. Section 39 of the Constitution of the Republic of South Africa, 1996, specifically states that the court must consider international law when tasked with interpreting the right in the Bill of Rights. The Bill of Rights contains many of the rights recognised in both the African Children’s Charter and the Maputo Protocol such as the right to equality,¹⁶⁷

¹⁶² CHR (n 31) 47.

¹⁶³ CHR (n 31) 28.

¹⁶⁴ Art 16(1)(b) of CEDAW and art 6(a) of the Maputo Protocol. The Universal Declaration of Human Rights confirms consent is a requirement for marriage in art 16(2) and the International Covenant on Civil and Political Rights confirms the requirement of consent in art 23(3).

¹⁶⁵ ACERWC Joint General Comment 2017, para 14.

¹⁶⁶ ACERWC Joint General Comment 2017, para 18.

¹⁶⁷ Sec 9 of the Constitution.

dignity,¹⁶⁸ life,¹⁶⁹ freedom and security of the person¹⁷⁰ and association.¹⁷¹ The Constitution also makes specific reference to reproductive health rights¹⁷² harmonious to article 14 of the Maputo Protocol. Section 12(2)(a) of the Constitution specifically state that ‘everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction.’ However, it should be noted that the Constitution does not directly provide for the right to family life as the basic unit of society. It also fails to address full and free consent with regard to the right to marry.¹⁷³ Despite the omission in the Constitution, the Children’s Act does provide protection of these rights and is discussed below.

Of particular importance is section 28 of the Constitution which makes specific provision for the protection of children’s rights. Section 28(1) states as follows:

Every child has the right-

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation

Further, similar to international and regional instruments, a child is defined as any person below the age of 18 years¹⁷⁴ and section 28 also emphasises that the best interest of the child is of paramount importance in all matters that concern the child.¹⁷⁵

The Children’s Act¹⁷⁶ was enacted to enforce, protect and give effect to the rights contained in section 28 of the Constitution. The Children’s Act confirms that a child is any person below the age of 18 years. Section 7 of the Children’s act further provides an extensive list of factors that should be considered when applying the best interest

¹⁶⁸ Sec 10 of the Constitution.

¹⁶⁹ Sec 11 of the Constitution.

¹⁷⁰ Sec 12 of the Constitution.

¹⁷¹ Sec 18 of the Constitution.

¹⁷² Sec 27(1)(a) of the Constitution.

¹⁷³ In *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) the court held that the right to marriage and family life is indirectly protected in other provisions of the Constitution, paras 97-103.

¹⁷⁴ Sec 28(3) of the Constitution.

¹⁷⁵ Sec 28(2) of the Constitution.

¹⁷⁶ Act 38 of 2005.

of the child standard and confirms in section 9 that the best interests of the child are of paramount importance in all matters impacting the child.¹⁷⁷ Most relevant is section 10 of the Children's Act which confirms that every child has the right to participate in any matter that concerns him/her and due weight must be given to the views of the child in accordance with the age, maturity and stage of development of the child. The Children's Act also protects children against harmful cultural and religious practices and states in section 12 as follows:

- (1) Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.
- (2) A child -
 - (a) below the minimum age set by law for a valid marriage may not be given out in marriage or engagement; and
 - (b) above that minimum age may not be given out in marriage or engagement without his or her consent.

Although it appears as though the Children's Act prohibits child marriage, it is concerning that no minimum age for marriage is specified.¹⁷⁸ When considering that the section specifically refers to 'a child', it becomes clear that persons below the age of 18 years are legally competent and capable to enter a marriage. This omission to specify a minimum age further fuels confusion on child marriage and almost appears to be in favour thereof. However, what is abundantly clear is that no marriage above the minimum age may take place without the consent of the child. The requirement of consent could undoubtedly be linked to a child's right to participation.

Although neither the Constitution nor the Children's Act provides for a minimum marriageable age, the Recognition of Customary Marriages Act¹⁷⁹ makes mention of a minimum marriageable but not without fault. The Recognition of Customary Marriages Act set the minimum age of marriage at 18 years but makes provision for marriage to take place under the age of 18 years. Section 3(1) set out the requirements for a valid customary marriage and states that both parties should be above 18 years

¹⁷⁷ In *Fletcher v Fletcher* 1984 (1) SA 130 (A) 143 the court upheld the best interest of the child principal and reiterated that in all decisions affecting children, the best interest of the child is the primary or paramount consideration and not the rights of the parents.

¹⁷⁸ This could however be as a result of the fact that the Marriages Act makes provision for the minimum age of marriage.

¹⁷⁹ Act 120 of 1998.

and both parties should consent to the customary marriage. However, section 3(3)(a) stipulates that should one or both parties be under the age of 18 years, parental consent is required. This exception is often used to circumvent the consent of the child or coerce the child into marriage. Although enacted to protect all forms of customary marriages and to afford equal status and capacity spouses, this Act opened another can of worms. It fails to protect children against *ukuthwala* and it can be argued to encourage child marriage given that only parental consent is required for validity of such customary marriage. It is counter-productive to the rights afforded in the Constitution, the Children's Act and the African Children's Charter. Law reform of the Recognition of Customary Marriages Act is imperative in ensuring it aligns with the Constitution, the Children's Act and the African Children's Charter by setting the minimum marriageable age at 18 years or older without exception.

It is noteworthy to mention that South Africa has made positive strides in an effort to prevent child marriage by introducing the draft Marriage Bill, 2022 which is open for public commentary until 31 August 2023. The Marriage Bill, 2022 states in section 6 that the consent of both intending spouses must be obtained and confirmed by the marriage officer. Section 7 states, without exception, that the minimum age for marriage is 18 years or older, which would be a remarkable progression if enacted as it currently reads. Section 18 of the Marriage Bill further makes registration of all marriages compulsory which is an additional progression seeing that unregistered child marriages can no longer be concluded undetected and unrecorded making prosecution of violation possible.

3.6 The landmark decision, *Jezile v S*

As stated in chapter 2 above, child marriage is often the result of *ukuthwala* in South Africa, has gained popularity in recent years and transformed from its original form to a violent and forced practice. The phenomenon has been highlighted in *Jezile v S*¹⁸⁰ (*Jezile* case). The appellant, N. Jezile, visited his home village with the intention of finding a young woman, preferably a virgin girl below 18 years of age, to conclude a customary marriage with. The appellant noticed the complainant who was 14 years

¹⁸⁰ 2015 3 All SA 201 (WCC).

old at the time and initiated *lobolo* negotiations with her family.¹⁸¹ The girl was taken from her home to the appellant's residence where she was forced to partake in ceremonies in order to conclude a customary marriage.¹⁸² The complainant ran away after a few days to hide from the appellant. She was found and returned by male members of her family.¹⁸³ The appellant took the complainant to Cape Town, assaulted her and raped her several times over the course of a few days.¹⁸⁴ The complainant managed to escape and reported the incidents at the nearest police station. The court found Jezile guilty of 3 counts of rape, human trafficking, assault with the intent to do grievous bodily harm and common assault and sentenced him to imprisonment for a total of 22 years.¹⁸⁵

On appeal Jezile raised the defense that he performed the cultural ritual of *ukuthwala* and acted in accordance with customary law.¹⁸⁶ The court confirmed that the appellant's actions could not be justified since he applied an aberrant form of *ukuthwala* that excludes consent and disregards the age of the girl. Further this aberrant form of *ukuthwala* is inconsistent with requirements set out in the Recognition of Customary Marriages Act.¹⁸⁷

The above case clearly reiterates the importance of consent. However, as raised by the *amici curiae*, the practice of *ukuthwala* seems to be more concerned with the consent of the intending families than that of the intending spouses, particularly the girl.¹⁸⁸ In such instances the right of the girl to meaningfully participate in the decision-making process regarding her betrothal is ignored and violated.

¹⁸¹ Jezile case, para 7.

¹⁸² Jezile case, para 9.

¹⁸³ Jezile case, para 10.

¹⁸⁴ Jezile case, para 10-11.

¹⁸⁵ L Mwambene and H Kruuse, 'The Thin Edge of the Wedge: Ukuthwala, Alienation and Consent' (2017) 33 South African Journal on Human Rights 25.

¹⁸⁶ Jezile case, para 51-52.

¹⁸⁷ Jezile case, para 91-95.

¹⁸⁸ Centre for Reproductive Rights, International Reproductive and Sexual Health Law Program, University of Toronto and Centre for Human Rights, University of Pretoria, *Legal Grounds III: Reproductive and Sexual Rights in Sub-Saharan African Courts* (2017) 23.

3.7 Conclusion

From the above, it is clear that child marriage infringes on a number of rights protected by international, regional and domestic laws. South Africa has a legal obligation to implement and enforce these rights in order to protect children from harmful cultural practices such as child marriage and/or *ukuthwala*. The practice of *ukuthwala* violates a number of protected human rights, especially the rights of the girl child and the right to participate in the decision-making process. The role of child participation in child marriage decision-making processes is discussed in chapter 4 along with other recommendations to eliminate and prevent child marriage in South Africa.

Chapter 4: Conclusion and Recommendations

4.1 Introduction

Ukuthwala as practiced in many traditional communities in South Africa is a pressing social issue that violates a number of children's human rights. As discussed in chapter 3, South Africa has ratified a number of international and regional treaties that protect children against harmful cultural practices (such as child marriage) and obligates the state to take positive action in ensuring children are provided with the space and opportunity to actively participate in all decisions that affect their lives.

The current and aberrant form of *ukuthwala* entails the violent abduction of girls as young as 12 years old who are forced to marry older men. Child brides face severe health risks due to their young age and lack of physical and emotional maturity. Early pregnancy renders them more susceptible to complication during pregnancy and childbirth, including fistulas and maternal mortality. These girls are, in many cases, exposed to domestic and sexual violence, abuse and isolation and at greater risk of falling victim to sexually transmitted infections and HIV. Child brides often face emotional trauma and psychological distress resulting from early and forced marriages. Their limited autonomy and lack of agency can lead to a sense of disempowerment and low self-esteem. Additionally, early marriage often denies girls access to education and reproductive health services, perpetuating a cycle of poverty and limited development and economic opportunities. Education is crucial in empowering girls as it equips them to become self-reliant and make informed decisions about their future.

As demonstrated above, in South Africa child marriage is practiced under the guise of customary marriage known as *ukuthwala*. The drivers of child marriage as discussed in chapter 2 include traditional and cultural customs, poverty, gender inequality, lack of education and domestic laws allowing child marriage. This 'violent' and harmful cultural practice can only be eliminated if the root causes are sufficiently and effectively addresses coupled with the active involvement of children in the decision-making processes.

The following section explores the significance of child participation as a response to *ukuthwala* and its potential to empower the girl-child in the fight against this harmful cultural practice. In addition hereto, recommendations to combat *ukuthwala* are made starting with the importance of enabling child participation in child-marriage decision-making processes in South Africa as a crucial attempt to reduce and in time eradicate child marriage.

4.2 Recommendations

The Marriage Bill, 2022 ought to be celebrated for its progressive and inclusive language. The Marriage Bill has the potential to effectively eradicate child marriage in South Africa. It established that the minimum age for marriage is 18 years and leaves no room for exceptions such as parental consent to marriage on behalf of the child.¹⁸⁹ It further makes the registration of all marriages a legal requirement for its validity¹⁹⁰ and confirms that all marriages entered into before commencement of the Marriage Bill must be formally registered within a year after its commencement.¹⁹¹ This will further ensure that child marriages cannot be entered into in secret or undetected by government. The Marriage Bill further endeavors to reconcile the rules and laws governing all forms of marriage (including customary and religious marriages) and to ensure that marriages are recognised independent of the beliefs in terms of religion, culture, sex, gender, or sexual orientation of the spouses.¹⁹² It would be a tremendous victory for South African children, especially the girl child, if Parliament enacts the Marriage Bill which outright prohibits child marriage from taking place.

4.2.1 Education and awareness

Education is a powerful tool to prevent child marriage in South Africa. Through education it is possible to inform children, parents, teachers, community leaders and other relevant stakeholders of the nature, causes and harmful consequences of *ukuthwala* as it is currently practiced in South Africa. Human rights education at primary and secondary levels of schooling is strongly encouraged. All individuals must be informed of the patriarchal social and cultural norms that perpetuate gender

¹⁸⁹ Sec 7 of the Marriage Bill, 2022.

¹⁹⁰ Sec 8(1) of the Marriage Bill, 2022.

¹⁹¹ Sec 8(6)(a) of the Marriage Bill, 2022.

¹⁹² Foreword of the Marriage Bill, 2022.

inequality in a cultural practice such as *ukuthwala*, child marriage and forced marriage.¹⁹³ Education must be utilised to break the shackles of gender biases and stereotypes that reduce girls to submissive objects whose sole purpose is to serve men. Through education girls (and boys) are equipped to make informed decisions about their bodies and their future and empowers them to be human rights champions for themselves. Education enables children to break the cycle of poverty, escape economic and social isolation, avoid early marriage, unwanted pregnancies and premature school dropout.¹⁹⁴ South Africa must, through the school curricula, inform children of their human rights and the available avenues in case of violation or threat thereof. Children must possess comprehensive knowledge and understanding of how and where they can voice their opinion and demand respect and protection for their rights, especially in decisions that affect them.¹⁹⁵ The government must prioritise disseminating information about child rights and the severe consequences of *ukuthwala* that reach the minds of parents, caregivers, teachers, community members and religious and traditional leaders.¹⁹⁶

4.2.2 Child participation

Children are empowered when they are actively involved in decisions that affect their lives.¹⁹⁷ Child participation provides a platform for children to voice their opinions, concerns and experiences. It ensures that their perspectives are acknowledged and considered when addressing issues like *ukuthwala*. Involving children in decision-making processes could influence reform in policies and programmes and lead to more effective solutions.¹⁹⁸

Child participation enhances protection of children's human rights. Children become advocates for their own and other children's rights and well-being by actively participating in decisions that affect them.¹⁹⁹ By engaging in discussions and

¹⁹³ ACERWC Joint General Comment 2017, para 11.

¹⁹⁴ ACERWC Joint General Comment 2017, para 31.

¹⁹⁵ Fokala (n 8) 189.

¹⁹⁶ ACERWC Joint General Comment 2017, para 20.

¹⁹⁷ RK Olsen, 'Key Factors for Child Participation – an Empowerment Model for Active Inclusion in Participatory Processes' (2023) 14 *Frontiers in Psychology* <<https://www.frontiersin.org/articles/10.3389/fpsyg.2023.1247483/full>> accessed 13 October 2023.

¹⁹⁸ As above.

¹⁹⁹ Fokala (n 8) 189-190.

deliberations on child marriage, children gain awareness of their rights and become knowledgeable about the detrimental consequences of *ukuthwala*. This knowledge empowers them to protect themselves and their peers and helps to prevent and resist the harmful cultural practice.

Child participation initiatives can be most instrumental in educating children about their rights, including the right to be free from child marriage. Through workshops, community dialogue and awareness campaigns, children can be equipped with the knowledge about their human rights, consent, gender equality and the harmful consequences of early marriage.²⁰⁰ These insights and education empower them to make informed decisions and resist societal pressures.

Child participation fosters collaboration between children, community leaders and members, civil society organisations and governmental institutions. In collaboration with diverse stakeholders, ideas and perspectives are shared resulting in comprehensive and sustainable solutions. Children can and should become active members in shaping policies and programmes aimed at eradicating *ukuthwala*. This ensures that interventions are both effective and sensitive to the needs and experiences of children.

It is thus vital to encourage and enforce child participation in public and private spheres. The legal framework in South Africa recognises and promotes child participation as enshrined in national law and policies. This includes the right of the child to express their opinions freely, be heard and participate in all decision-making processes affecting their lives. Government has a duty to protect children from discrimination and harmful practices and prioritise children's rights by providing adequate and convenient mechanisms for their active involvement.²⁰¹

Child participation can further be promoted through capacity building interventions. Building the capacity of children, parents, community leaders and relevant stakeholders is essential for effective child participation. Training programmes should be implemented to educate the vulnerable and other key role players about children

²⁰⁰ ACERWC Joint General Comment 2017, para 36.

²⁰¹ ACERWC Joint General Comment 2017, para 61.

rights, child protection, gender equality and the importance of child participation. These efforts facilitate the creation of safe spaces where children feel safe and comfortable expressing their ideas and opinions.²⁰²

Engaging communities is crucial to promote child participation and to address cultural norms and attitudes that perpetuate the violent *ukuthwala* practice. Sensitisation campaigns should be conducted to raise awareness about the detrimental consequences of *ukuthwala* and the value of and benefits flowing from child participation. Community dialogues involving children, parents and community leaders can assist in challenging harmful practices, promote gender equality and create supportive environments for children to meaningfully participate and speak out.²⁰³

Child participation holds immense potential in responding to issues such as *ukuthwala*. By empowering children to actively participate in decision-making processes, we enable them to become agents of change in the fight against child marriage. Their voices and perspectives bring valuable insights and contribute to the development of comprehensive and sustainable strategies. Through legal reform, capacity building and community engagement we can create an environment where children's rights are protected and where they feel confident and safe to meaningfully contribute. Child participation is what is vital to eradicate child marriage. Unsilenced children possess the power to change the minds, hearts, behavior and attitudes in respect of child marriage among parents, community members and other stakeholders.

²⁰² ACERWC Joint General Comment 2017, para 51.

²⁰³ ACERWC Joint General Comment 2017, para 61.

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