

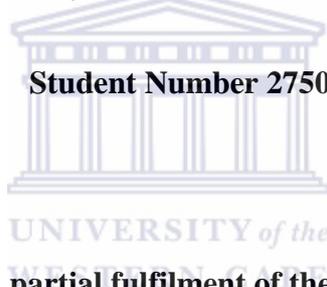


UNIVERSITY *of the*
WESTERN CAPE

**Are traditional African practices relating to child marriages in the face of
HIV/AIDS in violation to the South African legal framework?**

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**Mini-thesis submitted in partial fulfilment of the requirements of the Magister
Philosophiae Law (MPhil Law) degree of in Faculty of Law, University of the
Western Cape.**

Prepared under the Supervision of

Dr Lea Mwambene

27 November 2015

Declaration

'I declare that **'Are traditional African practices relating to child marriages in the face of HIV/AIDS in violation to the South African legal framework?'** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.'

Student: Prudence Ramnath

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Table of Contents

| | |
|--|----|
| Declaration..... | ii |
| ACRONYMS AND ABBREVIATIONS | vi |
| CHAPTER 1 | 1 |
| INTRODUCTION AND BACKGROUND | 1 |
| 1.1. Background..... | 1 |
| 1.2. Problem statement..... | 5 |
| 1.3. Research question | 6 |
| 1.4. Research objectives..... | 6 |
| 1.5. Literature review | 7 |
| 1.6. Significance of research | 8 |
| 1.7. Methodology | 8 |
| 1.8. Chapter outline..... | 9 |
| 1.8.1. Chapter 1 | 9 |
| 1.8.2. Chapter 2..... | 9 |
| CHAPTER 2 | 10 |
| THEORETICAL PERSPECTIVES AND THE INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK ON THE PROTECTION OF CHILDREN AGAINST CHILD MARRIAGES AND HARMFUL CULTURAL PRACTICES | 10 |
| 2.1. Introduction..... | 10 |
| 2.2. Definition of the child and child marriages | 11 |
| 2.3. Consent and child marriages..... | 20 |
| 2.4. The four cardinal principles of the CRC and the ACRWC in their protection of children from child marriages..... | 23 |
| 2.4.1. The Best Interest of the Child (BIC)..... | 24 |
| 2.4.2. The child’s right to survival and development | 27 |
| 2.4.3. Non–discrimination | 30 |
| 2.4.4. Child participation and addressing child marriages..... | 33 |

| | |
|---|----|
| 2.5. Conclusion | 35 |
| CHAPTER 3 | 36 |
| TRADITIONAL CULTURAL PRACTICES IN SOUTH AFRICA | 36 |
| 3.1. Introduction..... | 36 |
| 3.2. Practices linked to customary marriages | 36 |
| 3.2.1. Lobolo..... | 37 |
| 3.2.2. Ukuthwala..... | 41 |
| 3.2.3. Sexual delicts that lead to child marriages linked to HIV/AIDS | 44 |
| 3.2.4. Ukuthwala as a delict..... | 45 |
| 3.2.5. Seduction | 46 |
| 3.2.6. Defloration of a virgin and the Impregnation of an unmarried girl | 46 |
| 3.3. Conclusion | 47 |
| CHAPTER 4 | 48 |
| TRADITIONAL AFRICAN PRACTICES AND THE SOUTH AFRICAN LEGAL FRAMEWORK | 48 |
| 4.1. Introduction..... | 48 |
| 4.2. THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 108 of 1996 | 48 |
| 4.3. THE CHILDREN’S ACT 38 of 2005..... | 57 |
| 4.4. THE RECOGNITION OF CUSTOMARY MARRIAGES ACT 120 OF 1998 (RCMA)..... | 61 |
| 4.5. CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 2007 | 63 |
| 4.6. THE PREVENTION AND COMBATING OF TRAFFICKING IN PERSONS ... | 64 |
| 4.7. Conclusion | 66 |
| CHAPTER 5 | 67 |
| 5.1. Conclusion | 67 |
| 5.2. Recommendation | 67 |

| | |
|---|--------|
| BIBLIOGRAPHY | 69 |
| Books | 69 |
| Chapters in books..... | 70 |
| Journal Articles | 71 |
| Law Commission Papers | 76 |
| Legislation | 76 |
| International Declarations and Conventions..... | 77 |
| Internet Sources | 79 |
| Cases | 83 |
| Reports | 83 |
| Thesis | 84 |
| Word Count | 29 972 |



ACRONYMS AND ABBREVIATIONS

| | |
|-----------------------|--|
| ACERWC | African Committee of Experts on the Rights and Welfare of the Child |
| ACRWC | African Charter on the Rights and Welfare of the child Of the Child |
| AIDS | Acquired Immune Deficiency Syndrome |
| CEDAW | Convention on the Elimination of All Forms of Violence Against Women and Children |
| Convention to Consent | Convention on Consent to Marriage, Minimum age for Marriage Registration of Marriage |
| CRC | Convention on the Rights of Children |
| GC | General Comment |
| HIV | Human Immunodeficiency Virus |
| ICRW | International Centre for Research on Women |
| IPPF | International Planned Parenthood Federation |
| MDGs | Millennium Development Goals |
| Women's Protocol | Protocol to the African Charter on |



| | |
|--|--|
| | Human And Peoples’ Rights on the Rights of Women in Africa |
| RCMA | Recognition of Customary Marriages Act |
| Recommendation on Consent to Marriage | Recommendation on Consent to Marriage, Minimum age for Marriage and Registration |
| SA | South Africa |
| SADC | South African Development Community |
| SADC Protocol | South African Development Community Protocol on Gender and Development |
| SAHRC | South African Human Rights Commission |
| SALC | South African Law Commission |
| UNDHR | Universal Declaration of Human Rights |
| UNFPA | United Nations Population Fund |
| UNGA | United National General Assembly |
| UNICEF | United Nations Children’s Fund |
| WHO | World Health Organisation |



KEY WORDS

South Africa

Traditional

African

Child

Marriages

Girl

HIV/AIDS

Children's Act

Sexual Offences Act

Constitution



CHAPTER 1

INTRODUCTION AND BACKGROUND

1.1. Background

In many developing countries across the world, child marriages are commonly justified as traditional practices.¹ Child marriages have been referred to as, ‘marriages and unions where one or both partners are under the age of 18’.² Although child marriages affect both male and female children,³ research has shown that ‘the practice affect girls in greater numbers’.⁴ Studies also show that there are millions of girl children getting married before the age of 18 years.⁵ It is estimated that the highest rates are in Sub-Saharan Africa and South Asia as well as parts of Latin America and the Caribbean.⁶ According to a study conducted by UNICEF, it revealed that, ‘48 percent of women between 15 and 24 were married before 18 in South Asia’⁷ and 42 percent in Africa⁸. In Latin America and the Caribbean, the prevalence of children marrying before the age of 18 years is 29 percent.⁹ Child marriages, affecting mostly girls,¹⁰ are also common in

¹ International Centre for Research on Woman ‘New insights on preventing Child Marriage: A Global Analysis of Factors and Programs’ (2007) available at <http://www.icrw.org/files/publications/NewInsights-on-Preventing-Child-Marriage.pdf> (accessed 28 October 2013)1.

² United Nations Children’s Fund ‘Early Marriage: A Harmful Traditional Practice; A statistical exploration’ available at http://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf.(accessed 25 November 2015)4.

³ Nour NM ‘Health Consequences of Child Marriage in Africa’ (2006) 12(11). *Emerging Infectious Diseases* 1644.

⁴ Loaiza E & Wong S ‘Marrying too young: End Child Marriage’(2012) <https://www.unfpa.org/sites/default/files/pub-pdf/MarryingTooYoung.pdf> (accessed on the 08 July 2015).

⁵ Hervish A & Feldman-Jacobs C ‘Who speaks for me? Ending Child Marriage’ (2011) *Policy Brief: Population Reference Bureau* 1. ‘In the last decade, 58 million young women in developing countries one in three-have been married before the age of 18...’

⁶ International Planned Parenthood federation on Marriage and the rights of Women and Girls ‘Ending Child Marriage: A guide for Global Policy action’ (2006) available at http://www.unfpa.org/upload/lib_pub_file/662_filename_endchildmarriage.pdf.>6. (accessed 27 October 2013).

⁷ United Nations Children’s Fund ‘Early Marriage: A Harmful Traditional Practice: A statistical exploration’ available at http://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf.(accessed 25 November 2015)4.

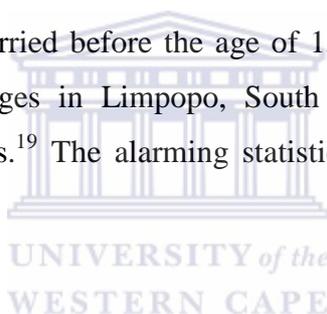
⁸ United Nations Children’s Fund ‘Early Marriage: A Harmful Traditional Practice: A statistical exploration’ available at http://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf.(accessed 25 November 2015) 4.

⁹ United Nations Children’s Fund ‘Early Marriage: A Harmful Traditional Practice: A statistical exploration’ available at http://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf.(accessed 25 November 2015)4.

¹⁰ United Nations Children’s Fund ‘Early Marriage: A Harmful Traditional Practice: A statistical

the Middle East. In Yemen and Palestine approximately half of the girls are married before the age of 18 years old.¹¹

The African continent itself has many different cultures, which predisposes children to child marriages.¹² In the Central African Republic, for example, the percentage of women who were first married before the age of 18 years of age were 68 percent.¹³ Similar high numbers are found in Malawi at 50 percent and also in Uganda at 40 percent.¹⁴ South Africa is also not spared from child marriages linked to traditional African practices. For example, the former Minister in the Presidency office, Manto Tshabalala-Msimang expressed her concerns towards the prevalence of child marriages in South Africa.¹⁵ Archbishop Emeritus Desmond Tutu also expressed a similar concern against child marriages, and was in full support of the campaign to end the practice.¹⁶ Statistics reveal that the total number of women married before the age of 18 years in South Africa was six percent.¹⁷ Additional studies have also shown that in South Africa one percent of girls are married before the age of 15.¹⁸ Furthermore, there have been reports about child marriages in Limpopo, South Africa, that has been linked to traditional African practices.¹⁹ The alarming statistics above indicates that there is a



exploration' available at <http://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf>. (accessed 25 November 2015)1. 'Boys are also affected by child marriage but the issue impacts girls in far larger numbers and with more intensity.'

¹¹ International Planned Parenthood federation on Marriage and the rights of Women and Girls 'Ending Child Marriage: A guide for Global Policy action' (2006) available at <http://www.unfpa.org/upload/lib_pub_file/662_filename_endchildmarriage.pdf>.6. (accessed 27 October 2013)10.

¹² Such as the practice of ukuthwala in South Africa, Nkosi M 'Ukuthwala "Bride abduction" and Education: Critical Challenges and Opportunities faced by school principals in rural Kwazulu-Natal' (2014) and Kupawila in Malawi, Mwambene L *The impact of the Bill of Rights on African Customary family laws: A study of the rights of women in Malawi with some reference to developments in South Africa* (unpublished Doctor Legum thesis, University of the Western Cape, 2008) 180.

¹³ Child Info (2013). http://www.childinfo.org/marriage_countydata.php.

¹⁴ Child Info (2013). http://www.childinfo.org/marriage_countydata.php.

¹⁵ South African Government News Agency (2009:1).

¹⁶ Rein L 'Tutu promotes campaign to end child marriage' (2012) available at <http://articles.washingtonpost.com/2012-10-10/politics/35502805_1_child-marriage-girl-child-child-brides> (accessed on 12 September 2013).

¹⁷ Child Info (2013:1). http://www.childinfo.org/marriage_countydata.php.

¹⁸ De Waal M 'Limpopo child bride: Sold into Marriage, kept there by the system' (2013) <<http://www.dailymaverick.co.za/article/2013-02-01-limpopo-child-bride-sold-into-marriage-kept-there-by-the-system.s>> (accessed on 12 September 2013).

¹⁹ De Waal M 'Limpopo child bride: Sold into Marriage, kept there by the system' (2013) <<http://www.dailymaverick.co.za/article/2013-02-01-limpopo-child-bride-sold-into-marriage-kept-there-by-the-system.s>> (accessed on 12 September 2013).

correlation between child marriages and HIV/AIDS.²⁰ This obviously points to the fact that many rights of those children found in these marriages are violated.

South Africa has ratified many instruments that bind it to fulfil the rights of children, in particular the protection of children from child marriages. It is a party to the Convention on the Rights of the Child²¹ (herein after referred to as the CRC). The Convention on the Elimination of Discrimination against Women²² (herein after referred to as CEDAW), the Convention on Consent to Marriage, Minimum age for Marriage and Registration of Marriage²³ (herein after referred to as the Convention to Consent). Other international instruments that will be observed, are the United Nations Universal Declaration of Human Rights²⁴ (herein after referred to as the UNDHR) as well as the Recommendation on Consent to Marriage, Minimum age for marriage and Registration,²⁵ (herein after referred to as the Recommendation on Consent to Marriage). The regional instruments that will be looked at are the African Charter on the Rights and Welfare of the child; (herein after to referred to as the ACRWC)²⁶ the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, (herein after referred to as the Women's Protocol),²⁷ Southern African Development

²⁰ Clark S; Bruce J & Dude A 'Protecting Young Women from HIV/Aids: The Case against Child and Adolescent Marriage' (2006) 32 (2) *International Family Planning Perspectives* 1. 'When they are violated, as is frequently the case for women who marry at a very young age, sexual intercourse with a spouse is risk. Indeed, in some settings, married adolescents have higher rates of HIV infection than their sexually active unmarried peers.'

²¹ The CRC was adopted and opened for signature, ratification and accession by the UN General Assembly Resolution 44/25 of 20 November 1989 and Signed by South Africa on the 29 January 1993 and Ratified 16 June 1995 accessed at < <http://www.lunm.edu/humanrts/research/ratification-southafrica.html> > (accessed on 14 May 2015).

²² CEDAW was adopted and opened for signature, ratification and accession by the General assembly resolution 34/180 of 18 December 1979. Entry into force 3 September 1981, in accordance with article 27(1). <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>. (accessed 26 November 2015).

²³ Consent to Marriage was opened for signature and ratification by General Assembly resolution 1763 A (XVII) of 7 November 1962. Entry into Force: 09 December 1964, in accordance with article 6. < <http://www.ohchr.org/Documents/ProfessionalInterest/convention.pdf> > (accessed 25 November 2015).

²⁴ UNDHR (Adopted and proclaimed by the General Assembly resolution 217 A (III) of 10 December 1948. < <http://www.un.org/en/universal-declaration-human-rights/> > (accessed 25 November 2015).

²⁵ General Assembly resolution 2018 (XX) of 1 November 1965. < <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RecommendationOnConsentToMarriage.aspx> > (accessed 25 November 2015).

²⁶ Viljoen F, Eborah S, Killander, Madlingozi T & Nienaber A (eds) 'African Human Rights Law Journal 'Chart of Ratifications: AU Human Rights Treaties' (2011) 11(1) *Juta* 315-316. Ratified on the 07 January 2001.

²⁷ The Women's Protocol notes that, '[c]onsidering that Article 66 of the African Charter on Human and Peoples' Rights provides for special provisions for the African Charter, and that the Assembly of Heads of State and Government of the Organization of African Unity meeting in its Thirty-first Ordinary Session in Addis Ababa, Ethiopia, in June 1995, endorsed by resolution AHG/Res.240

Community Protocol²⁸ (herein after referred to as the SADC Protocol). As a party to these international and regional instruments, South Africa is obligated to protect children that are exposed to the traditional African practices that may cause harm to the child in any way which includes the possibility of HIV infection. The relationship between child marriages and HIV/AIDS also form part of the United Nations Millennium Development Goals (herein after referred to as the MDGs).²⁹

In responding to these international legal obligations, South Africa has put in place different policy documents and has enacted legislation aimed at protecting the rights of children.³⁰ For example, the South African Constitution offers special protection of children's rights. Section 28 provides that:

‘(1) Every child has the right-

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

(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. ...³¹

Section (d) speaks to the protection of children; this would include protecting children from child marriages which may be harmful in light of the HIV pandemic.³²

(XXXI) the recommendation of the African Commission on Human and Peoples' Rights to elaborate a Protocol on the Rights of Women in Africa;...’ <http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf> (accessed 25 November 2015) AHRLJ (2011:315-316). Ratified on the 17 December 2004.

²⁸ SADC Protocol, Entry into force on the 22 February 2013, Signed by South Africa on the 17 August 2008. <http://www.sadc.int/documents-publications/show/Protocol_on_Gender_and_Development_2008.pdf>(accessed 25 November 2015).

²⁹ Loaiza E & Wong S ‘Marrying too young: End Child Marriage’ (2012) <<https://www.unfpa.org/sites/default/files/pub-pdf/MarryingTooYoung.pdf>>(accessed on the 08 July 2015)13. This mentions that, ‘As the 2015 deadline for the united Nations Millennium development Goals (MDGs) approaches governments and development partners are recognising that tackling the issue of child marriage will help many countries to close the gap in progress towards the Goals.’

³⁰ These include the Children's Act of 2005 which was assented to on the 8 June 2006 , the Criminal Law (Sexual Offences And Related Matters) Amendment Act 32 of 2007, assented to on the 13 December 2007, The Recognition of Customary Marriages Act.

³¹ Constitution of the Republic of South Africa, Act 108 of 1996.

1.2. Problem statement

Marriage at a young age brings with it great risks particularly for the girl child, as they are not physically developed in terms of child bearing or sexual abilities; neither are they psychologically or emotionally developed to deal with the responsibilities that comes with being a young bride.³³ In addition to this, studies have shown that ,‘[a] child bride faces greater health risks and experiences real physical violation and trauma as her young body is forced to deal with early sexual activity and the strains and pains of pregnancy and child birth’.³⁴ Moreover, child marriages expose children to the dangers of HIV³⁵& AIDS.³⁶ For example, Mutyaba found that girls who, ‘marry before the age of 18 years are susceptible to HIV infection’.³⁷ Wang’s findings revealed that worldwide out of the 45 percent of young people between the ages 15-24 infected with the HIV virus, ‘young women are 1.6 times more likely to be living with HIV/AIDS than young men’.³⁸

Further studies have also shown that there is a higher HIV prevalence rate amongst married adolescent girls in certain parts of Africa.³⁹ This has also been linked to the fear of contracting the HIV virus, steering older men pursuing young virgins⁴⁰ as they are considered not to be infected with the HIV virus.⁴¹ This position is illustrated within Nkosi’s study which points out that there is a high age difference in the child

³² Constitution of the Republic of South Africa, Act 108 of 1996.

³³ Hauser BR ‘Born a Eunuch? Harmful inheritance practices and human rights’ (2003) 21(1) *Law & inequality: A Journal of Theory and Practice* 17.

³⁴ Hauser BR ‘Born a Eunuch? Harmful inheritance practices and human rights’ (2003) 21(1) *Law & inequality: A Journal of Theory and Practice* 17.

³⁵ Ogden J & Nyblade L “Common at its core: HIV-Related Stigma across texts” (2005) *International Centre for Research on Women (ICRW)* (2005:16) ‘HIV (Human Immunodeficiency Virus). HIV is not transmitted easily...HIV can only be transmitted directly by having sexual intercourse with an infected partner without using a barrier, such as a condom; through the direct exchange of blood or bodily fluids; or from an infected mother to her child during pregnancy “delivery or breast milk.”’

³⁶ Clark S ‘Early Marriage and HIV Risks in sub-Saharan Africa’ (2004) 35(3) *Population Council* 491. observed that ‘in a growing number of countries in sub-Saharan Africa, adolescent girls bear the greatest burden of HIV infection...in contrast with adolescent boys , who are rarely married, girls are commonly married early in developing countries.’

³⁷ Mutyaba R ‘Early Marriage: A violation of Girls’ fundamental Human rights in Africa’ (2011) 19 *International Journal of Child Rights* 348.

³⁸ Wang (2010:1).

³⁹ Clark S, Bruce J & Dude A (2006) 80. ‘ In some urban areas of Kenya and Zambia ,for example ,the prevalence of HIV infection among married adolescent females is 33% and 27 % ,respectively, whereas the prevalence of HIV infection among sexually active unmarried females in these areas is 22% and 17%.’

⁴⁰ Hauser BR ‘Born a Eunuch? Harmful inheritance practices and human rights’ (2003) 21(1) *Law & inequality: A Journal of Theory and Practice* 17 ‘In many regions of the world where virginity is given a high social value, girls are married off at a young age, often to men many years older.’

⁴¹ Bayisenge J (2010: 6).

marriages, often with the girls aged between fourteen and seventeen years of age, marrying men whom are between fifty five and 70 years old, whom are either widowed or HIV positive and sometimes both.⁴² Furthermore, Mswela has also observed in his study that greater parts of the population infected with HIV/AIDS are, ‘young African women in developing countries’.⁴³

Against this backdrop, this mini-thesis will look at how different traditional African practices relating to child marriages violate the available South African legal framework in the face of HIV/AIDS.

1.3. Research question

Are traditional African practices relating to child marriages in the face of HIV/AIDS in violation to the South African legal framework?

1.4. Research objectives

The main aim of this study is to analyse how traditional African practices relating to child marriages violate the South African legal framework in the face of HIV/AIDS, as well as assessing it’s response to child marriage in compliance with international and regional human rights standards.

The specific objectives are:

- 1) To analyse traditional African practices in relation to child marriages in South Africa.
- 2) To discuss international and regional standards on the protection of child marriages linked to harmful cultural practices.
- 3) To show how different traditional African practices relating to child marriages violate the South African legal framework in light of international human rights standards.

⁴² Nkosi M ‘Bride abduction in Kwazulu- Natal schools and its effects on education.’ (2009) *Agenda: Empowering women for gender equity* 109.

⁴³ Mswela M ‘Cultural Practices and HIV in South Africa: A Legal Perspective’ (2009) 12(4) *PER* 172.

1.5. Literature review

There are several studies that have been conducted on the topic of child marriages and HIV/AIDS in South Africa. For example, Sloth-Nielsen examined the existing Children's Act 38 of 2005.⁴⁴ The crux of the study addressed male circumcision within the context of the South African's Children's Act 38 of 2005. Sloth-Nielsen mentioned in her findings that this Act takes cognisance of cultural practices that may harm children and aims at protecting children from this and has also included legislation on the marriage of minors.⁴⁵ The findings further reveal that the Children's Act not only speaks to the protection of children against traditional African practices, but also to health care with regards to HIV/AIDS.⁴⁶

In addition Mwambene and Sloth-Nielsen focused on assessing the effects that the Children's Act 38 of 2005 has on the practice of ukuthwala.⁴⁷ Their research provides a perspective on ukuthwala and its background within the context of the constitutional and human rights frameworks. Mwambene and Sloth-Nielsen paid great attention to section 12 of this Act as this directly observe the rights of children within the context of cultural practices.⁴⁸

Furthermore, in Mswela the focus was on, 'specific cultural factors which increase women's vulnerability and exposure to HIV/AIDS'.⁴⁹ He mentions that there are numerous factors that make women more vulnerable to HIV/AIDS.⁵⁰ Mswela refers to the pattern detected in South Africa as being:

⁴⁴ Sloth-Nielsen J 'A foreskin too far? Religious, "medical" and customary circumcision and the Children's Act 38 of 2005 in the context of HIV/Aids' (2012) 16 *Law and Democracy & Development* 70. The primary focus of the research was built on the traditional cultural practice of 'male circumcision and the provisions related to other harmful or potentially harmful cultural practices now provided for in the Act.'

⁴⁵ Sloth-Nielsen J 'A foreskin too far? Religious, "medical" and customary circumcision and the Children's Act 38 of 2005 in the context of HIV/Aids' (2012) 16 *Law and Democracy & Development* 74.

⁴⁶ Sloth-Nielsen J 'A foreskin too far? Religious, "medical" and customary circumcision and the Children's Act 38 of 2005 in the context of HIV/Aids' (2012) 16 *Law and Democracy & Development* 71.

⁴⁷ Mwambene L & Sloth-Nielsen J 'Benign accommodation? Ukuthwala, "forced marriage" and South African Children's Act' (2011) 11 (1) *AHLJ* 5.

⁴⁸ Mwambene L & Sloth-Nielsen J 'Benign accommodation? Ukuthwala, "forced marriage" and South African Children's Act' (2011) 11 (1) *AHLJ* 13-15.

⁴⁹ Mswela M 'Cultural Practices and HIV in South Africa: A Legal Perspective' (2009) 12(4) *PER* 173.

⁵⁰ Mswela M 'Cultural Practices and HIV in South Africa: A Legal Perspective' (2009) 12(4) *PER* 174. She observes that, 'There are of course a number of pre-disposing factors, besides violence that put women at increased risk of becoming infected with HIV. These include a range of biological, psychological, economic and cultural factors, which clearly show how complex the problem of

‘[T]he general low status of women in society and within relationships; women’s traditional subordinate role in the family and limited personal resources in indigenous communities; general misinformation regarding ignorance with HIV/AIDS. ...’⁵¹

From the above discussion, it is clear that no study has specifically focused on how different traditional African practices relating to child marriages violate the South African legal framework in the face of HIV/AIDS. It is for this reason that this study is necessary to show how different traditional African practices relating to child marriages violate the South African legal framework in the face of HIV/AIDS.

1.6. Significance of research

There are copious amounts of literature pertaining to child marriages and the impact HIV/AIDS has on children in general. This study will however contribute to existing knowledge by looking at how traditional African practices relating to child marriages in the face of the HIV/AIDS epidemic violate the South African legal framework. This information will serve as a guide to influence policy and law makers, about the impact available legislation has on protecting children against this occurrence. In addition academics will be able to use this information to further existing research within this discipline. This information will also assist child care workers and advocacy workers who work with children on cases of child marriages. The recommendations from this study may also be used to improve current domestic laws in South Africa, which may protect children from child marriages.

1.7. Methodology

In assessing how different traditional African practices relating to child marriages violate South African legal framework in the face of HIV/AIDS, this study will discuss various domestic, regional and international legislative instruments to review numerous Acts that are applicable to the protection of children against the traditional African practices leading to child marriages in South Africa. Special attention will be given to the South African Children’s Act (2005), and how it supports the protection of children against traditional African practices that may put them at risk of child marriages.

women’ increased exposure to HIV is.’

⁵¹ Mswela M ‘Cultural Practices and HIV in South Africa: A Legal Perspective’ (2009) 12(4) *PER* 174.

In order to give this research question an adequate response, relevant literature, including books, journals and internet sources focusing on children's rights will be discussed.

1.8. Chapter outline

1.8.1. Chapter 1

This chapter serves as an introduction to the mini-thesis. Furthermore, discussed is the research problem, significance of the study and the methodology that has been employed in this study.

1.8.2. Chapter 2

This chapter will look at international legal instruments that South Africa has adopted and ratified. The General Comments will also be discussed and the means and structure of the various aspects of this comment will be delved into as a point of reference. The focus will be on the provisions aimed at the protection of children's rights from traditional African practices that lead to child marriage in the face of HIV/AIDS.

1.8.3. Chapter 3

This chapter will focus on different traditional African practices that lead to child marriages. The aim is to highlight the manner and the procedures that are followed by people who follow these practices which that lead to the violation of children's rights.

1.8.4. Chapter 4

Chapter 4 will show how the traditional African practices violate existing legislation in South Africa aimed at the protection of children against child marriages in the face of HIV/AIDS.

1.8.5. Chapter 5

The fifth and final chapter will offer a combination of the concluding remarks and recommendations.

CHAPTER 2

THEORETICAL PERSPECTIVES AND THE INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK ON THE PROTECTION OF CHILDREN AGAINST CHILD MARRIAGES AND HARMFUL CULTURAL PRACTICES

2.1. Introduction

This chapter looks at the theoretical perspectives and, international and regional legal framework on the protection of children from traditional African practices leading to child marriages in the face of HIV/AIDS. The instruments that will be discussed are the CRC, the Convention on the Elimination of Discrimination CEDAW,⁵² as well as the CRC and CEDAW Committees' General Recommendations, the UNDHR,⁵³ and the Convention on Consent,⁵⁴ the Recommendation on Consent to Marriage.⁵⁵ The regional instruments that will be explored are the ACRWC,⁵⁶ the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)⁵⁷ and the SADC Protocol on Gender and Development⁵⁸ (SADC Protocol). All of these instruments have been ratified by South Africa.

The chapter is divided into five parts. The first is the introduction. The second part gives the normative framework on the definition of the child and child marriages. The

⁵² Signed by South Africa on the 29 January 1993 and Ratified on the 15 December 1995.

< <http://www.lunm.edu/humanrts/research/ratification-southafrica.html>.> (accessed 13 July 2013).

⁵³ UNDHR (Adopted and proclaimed by the General Assembly resolution 217 A (III) of 10 December 1948. <http://www.un.org/en/universal-declaration-human-rights/>.

⁵⁴ Adopted by South Africa on 29 January 1993.

<https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVI-3&chapter=16&lang=en.

⁵⁵ General Assembly resolution 2018 (XX) of 1 November 1965.

<<http://www.ohchr.org/Documents/ProfessionalInterest/recommendation.pdf>> (accessed 25 November 2015).

⁵⁶ Adopted on 11 July 1989, entered into force on 2 September 1980 and signed by South Africa on the 10 October 1997. The African Charter on the rights and welfare of the child functions as a human rights instrument to specifically address the needs of the child in its provisions. The organization of African unity (herein further referred to as the OAU) noted at its sixteenth ordinary session in July of 1979 that there is a, 'need to take appropriate measures to promote and protect the rights and welfare of the African child.'⁵⁶

⁵⁷ Geldenhuys M, Kaufulu-Kumwenda C, Nabaneh S & Stefizyn K 'The African Women's Protocol and HIV: Delineating the African Commissions General Comment on articles 14(1) (d) and (e) of the Protocol' (2014) 14 *African Human Rights Law Journal* 682. 'The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) was adopted in 2003 by the African Union (AU) and entered into force in 2005.' South Africa has signed this protocol on the 16 March 2004, ratified it on the 17 December 2004 and deposited on the 14 January 2005.< <http://www.achpr.org/instruments/women-protocol/ratification/>.>(accessed 25 November 2015).

⁵⁸ Signed by South Africa on the 17 August 2008.

third part looks at the guidelines on the issue of consent and child marriages. The fourth part discusses the four cardinal principles of the CRC and the ACRWC in their protection of children from child marriages. Herewith this chapter will also consider how instruments such as CEDAW, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa and the SADC protocol have impacted the arena of child protection in the face of harmful practices and exposure to HIV/AIDS. The final part will surmise the detailed analysis of these instruments.

2.2. Definition of the child and child marriages

Both the CRC⁵⁹ and ACRWC⁶⁰ define a child to be any human being who is below 18 years. Different author's analyses of article 2 of the ACRWC indicate that, '[t]he African Children's Charter has established in clear and unambiguous terms when a child is a child'.⁶¹ This article is very significant as, 'defining those that fall within its ambit is of fundamental importance'.⁶² Therefore, a marriage of any person below the age of 18 would be a child marriage. As mentioned in chapter 1, child marriages have commonly been justified as a traditional harmful practice.⁶³ In recognition of this fact, international and regional instruments proscribe child marriage in different ways: The CRC in article (24)(3)⁶⁴ requires that state parties take necessary steps to do away with traditional practices that place the child's health at risk. Child marriages 'directly threatens health and wellbeing...' ⁶⁵ for the child and has adverse effects on their future

⁵⁹ Article 1 CRC. Provides that 'For the purpose of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.'

⁶⁰ Article 2 ACWR, Provides that 'For the purpose of this Charter, a child means every human being below the age of 18 years.'

⁶¹ Lloyd A 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) 2 *African Human Rights Law Journal* 20.

⁶² Lloyd A 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) 2 *African Human Rights Law Journal* 20.

⁶³ Himonga C 'African Customary Law and Children's Rights: Intersections and Domains in a New Era' in Sloth-Nielsen J (ed) (2008) *Children's Rights in Africa: A Legal Perspective* 84. " 'Harmful cultural practices' have not been defined precisely, but they seem to include practices that 'are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychosocial development', such as circumcision and other genital mutilations, virginity testing, child betrothals and child marriages."

⁶⁴ Article (24) (3) CRC. 'State Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.'

⁶⁵ Loaiza E & Wong S 'Marrying too young: End Child Marriage' (2012) < <https://www.unfpa.org/sites/default/files/pub-pdf/MarryingTooYoung.pdf> > (accessed on the 08 July 2015) 6.

development. Nour has observed that '[c]hild marriage is a human rights violation that prevents girls from obtaining an education, enjoying optimal health, bonding with others their own age, maturing and ultimately choosing their own life partners'.⁶⁶ Erulkar and Muthengi have also remarked that there is a risk involved for HIV infection within child marriages.⁶⁷ The CRC General Comment 3(c) mentions that harmful traditional practices such as that of a child marriage also increase the child's chances of contracting HIV.⁶⁸ HIV would also impact the health status of the child as well as development and growth. HIV would be the result of the inability for the child to make informed sexual decisions or powerlessness. As Otoo-Oyortey and Pobi has observed that 'such marriages are still early and represent a grave denial of girls' sexual and reproductive rights.'⁶⁹

Furthermore, article 27 of the ACRWC takes into consideration the sexual exploitation of children. Within child marriages, children are willing or unwillingly involved in sexual practices. Article (27)(a) further elaborates that State Parties should put in place appropriate measures to protect against sexual exploitation, since children at a young age often fall victims to sexual exploitation as they are forced to fulfil the role of a wife and engage in sexual acts which they are not ready for physically or psychologically.⁷⁰

Likewise, CEDAW in article 5 compels State Parties to put measures in place that are aimed at transformation towards social and cultural practices that may be discriminatory towards women and children. More importantly, CEDAW is unequivocal against child marriages by clearly stating in article (16)(2) that marriage, of children will not be deemed as legal and furthermore highlighting that State Parties should implore all measures to safeguard children against child marriages.⁷¹ This has

⁶⁶ Nour NM 'Health Consequences of Child Marriage in Africa' (2006) 12(11). *Emerging Infectious Diseases* 1.

⁶⁷ Erulkar AS & Muthengi E 'Evaluation of Berhane Hewan: A program to delay child marriage in rural Ethiopia' (2009) 35(1) *International perspectives on Sexual and Reproductive Health* 6-10.

⁶⁸ CRC General Comment No 3 (2003:4). Paragraph 11 observes that, 'In this regards, the female child is often subject to harmful traditional practices, such as early and/or forced marriage, which violate her rights and make her more vulnerable to HIV infection, including because such practices often interrupt access to education and information.'

⁶⁹ Otoo-Oyortey N & Pobi S 'Early marriage and poverty: Exploring links for policy and programme development' (2003) *Forum on marriage and the rights of women and girls* 10.

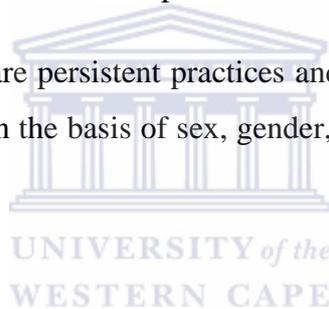
⁷⁰ Article (27) 1 (a) ACRWC. 'the inducement, coercion or encouragement of a child to engage in any sexual activity.'

⁷¹ United Nations Children's Fund 'Early Marriage: A Harmful Traditional Practice: A statistical exploration' available at http://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf, (accessed 25 November 2015)1.

been further emphasised by the CEDAW Committee in General Recommendation 14⁷² that in addition to article (16)(2), an appeal is made to organisations that can offer assistance to eradicate practices that are harmful to women and girls. In addition to this CEDAW Committee's 19th session also noted that traditional practices should only be permitted if they do not infringe human dignity.⁷³

Furthermore, joint recommendations have been made towards the elimination of harmful practices such as child marriages.⁷⁴ These joint recommendations have emerged from the CRC and CEDAW as traditional practices affect the girl child and women.⁷⁵ The harmful and the damaging effects that this may have has been noted in this joint collaboration's objectives as follows: '[t]he Committee acknowledges that harmful practices affect adult women, both directly and owing to the long-term impact of practices to which they were subjected as girls.'⁷⁶ Additionally it also provides as criteria for the determination of harmful practices noting that:

‘Harmful practices are persistent practices and behaviours that are grounded on the discrimination on the basis of sex, gender, age, and other grounds as well as



⁷² CEDAW General Recommendation No.14: Female Circumcision. Adopted at the Ninth session of the Committee on the Elimination of Discrimination against Women, in 1990.

⁷³ CEDAW (1998) 'Report of the Committee on the Discrimination against Women' (Eighteenth and nineteenth sessions). See also Himonga C has similarly discussed the issue of harmful cultural practices and the negative consequences that customs, such as child marriage may have on both the physical and mental development of the child. Himonga C 'African Customary Law and Children's Rights: Intersections and Domains in a New Era' in Sloth-Nielsen J (ed) (2008) *Children's Rights in Africa: A Legal Perspective* 84.

⁷⁴ CEDAW & CRC: Joint Recommendations; General Comment 31 of the Committee on the Elimination of Discrimination against Women and No.18 of the Committee on the Rights of the Child on harmful practices (2014:13). In Paragraph 54(h) the following is recommended: 'The committee recommended that the State Parties to the Convention adopt or amend legislation with a view to affectively addressing and eliminating harmful practices. In doing so, the State Party ensure that ...[a] system of national compulsory accessible and free birth registrations of all children is established, in order to effectively prevent harmful practices including child marriages;...'

⁷⁵ CEDAW & CRC: Joint Recommendations; General Comment 31 Paragraph 1(2014:3). In its introduction it declares that : 'The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) contain legally binding obligations that relate both in general and specifically to the elimination of harmful practices. The Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child have consistently drawn attention to these practices affecting women and children, primarily girls, in the execution of their respective monitoring mandates. It is by virtue of this overlapping mandate and the shared commitment to prevent, respond to and eliminate harmful practices, wherever and in whichever form they occur, that the CEDAW Committee and the CRC Committee decided to develop this joint General Recommendation/General Comment.'

⁷⁶ CEDAW & CRC: Joint Recommendations; General Comment 31.Paragraph 2 (2014:3).

multiple and/ or intersecting forms of discrimination that involve violence and cause physical harm or suffering.’⁷⁷

The Committee has noted that the reason for this linkage between the two Committees and its conventions is that ‘harmful practices are deeply rooted in social attitudes according to which women and girls are regarded as inferior to men and boys based on stereotyped roles’.⁷⁸

The General Recommendations and Comments herein prescribe the following criteria to be met for a practice to be regarded as harmful:⁷⁹

- a) ‘They constitute a denial of the dignity and/ or integrity of the individual and a violation of human rights and fundamental freedoms enshrined in the two conventions;
- b) They constitute discrimination against women or children and are harmful insofar as they result in negative consequences for them as individuals or groups, including physical, psychological, economic and social harm and/or violence and limitations on their capacity to participate fully in society or develop and reach their full potential;
- c) They are traditional, re-emerging or emerging practices that are prescribed and/or kept in place by social norms that perpetuate male dominance and inequality of women and children, based on sex, gender, age, and other intersecting factors;
- d) They are imposed on women and children by family, community members, or society at large, regardless of whether the victim provides, or is able to provide, full, free and informed consent.’

Although the criteria addresses the issue of harm, which is considered as a result of this practice, it fails to acknowledge the harm that may be directly caused as a result of HIV/AIDS, which constitutes that of a negative consequence as contained in section 15(b).

⁷⁷ CEDAW & CRC; Joint Recommendations; General Comment 31 Paragraph 14 (2014:6).

⁷⁸ CEDAW & CRC; Joint Recommendations; General Comment 31 Paragraph 5 (2014:3).

⁷⁹ CEDAW & CRC; Joint Recommendations; General Comment 31 Paragraph 15 (2014:6).

The exceptional circumstances noted within this recommendation, however, may hamper the further development of the child as a provision has been also set that a marriage may take place at the age of 16 years.⁸⁰ In such a case, prior to such decisions being made, the maturity of the child will come into question before the law. In doing so this provision is open for interpretation.

Similarly, at a regional level the ACRWC in article 21⁸¹ offers protection against children from harmful social and cultural practices in the following provisions:

1. '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:
2. those customs and practices prejudicial to the health or life of the child; and
3. those customs and practices discriminatory to the child on the grounds of sex or other status.
4. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.'

This article makes direct mention to child marriages and specifies a clear minimum age for marriage.⁸² Lloyd observed that, this article makes it known in no uncertain terms that State Parties should take action and enforce legislation to protect children against traditional practices that are harmful to children and affects the development of a child.⁸³ Harmful traditional practices such as child marriages are problematic and

⁸⁰ CEDAW & CRC; Joint Recommendations; General Comment 31, Paragraph 18 (2014:7). Provides that: '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. As a matter of respecting the child's evolving capacities and autonomy in making decisions that affect her or his life, in exceptional circumstances a marriage of a mature, capable child below the age of 18 may be allowed provided that the child is at least 16 years old 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 cultures and traditions.'

⁸¹ Article 21 ACRWC.

⁸² Article 2 of the ACRWC. Provides that: 'For the purpose of this Charter, a child means every human being below the age of 18 years.'

⁸³ Lloyd A 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) 2 *African Human Rights Law Journal* 22.

therefore article 21 recognises the need for State Parties to put measures in place to address this.⁸⁴ Furthermore, Mezmur has observed the importance of article 21 of the ACRWC in relation to traditional African practices affecting children, remarking the following:

‘In recognition of this, article 21 of the ACRWC clearly provides for a normative standard so as to minimise and, with time abolish the negative impact of harmful traditional practices and custom on children. This is indeed an important provision reflective of African realities as the majority of children on the continent are regulated by traditional and customary law and practices.’⁸⁵

The concept of childhood has been considered by Kaime, who refers to it ‘as a social institution; an actively negotiated set of social relationships within which the early years of human life are constituted.’⁸⁶ Therefore traditional African practices that can be linked to child marriage would interrupt the child’s early years and have dire effects on further relationships within social settings that should develop through the child’s life.⁸⁷

In addition, traditional African practices, such as child marriages also include violence against the child. The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) has issued a statement on violence against children observing the long term distress that violence has on the child’s development.⁸⁸ Furthermore, the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, also makes a statement on harmful practices in its definition. It begins to address their concerns about harmful practices by defining what such practices would consist of, thereby recognising its significance and declaring it as essential for the

⁸⁴ Gose M *The African Charter on the Rights and Welfare of the Child* (2002) 51-54.

⁸⁵ Mezmur B ‘The African Children’s Charter versus the UN Convention on the Rights of the Child: A zero-sum game?’ (2008) 23 *SAPR/PL* 18.

⁸⁶ Kaime T ‘*The African Charter on the Rights and Welfare of the Child: A socio-legal perspective*’ (2009) 65.

⁸⁷ Kaime T ‘*The African Charter on the Rights and Welfare of the Child: A socio-legal perspective*’ (2009) 65.

⁸⁸ African Committee of Experts on the Rights and Welfare of the child (2011:2).

‘Statement on violence against children.’ The Committee has observed the following: ‘Violence results in severe traumas on children as well as serious and lasting psycho-traumatic consequences on their health, with repercussions on the psychomotor development, their schooling, and their social life in the long term.’

<http://www.endcorporalpunishment.org/assets/pdfs/reference-documents/ACERWC-statement-on-VAC-2011-EN.pdf> (accessed 26 November 2015).

justification of State Parties to employ necessary measures that protect children against such practices.

In its introductory paragraph, in article 5⁸⁹, it stipulates that State Parties should employ measures that contribute towards eliminating harmful traditional practices. Herewith States should take cognisance of their existing legislation and introduce legislative means that remove harmful practices. As Banda has observed, ‘the protocol enjoins states to implement legislation prohibiting harmful practices and specifying punishments for⁹⁰ perpetrators’.⁹¹ Article (5)(a)⁹² furthermore considers the need to create awareness about harmful practices thereby informing communities so that they are able to take the appropriate measures to protect children against child marriages.⁹³ Additionally, article (5)(b)⁹⁴ further addresses the need for states to support all measures that are aimed at eradicating harmful practices.

Additionally, Banda has also observed this and noted that ‘states should adopt a multi-pronged approach which uses law as well as education as preventative measure and rehabilitation for those affected’.⁹⁵ Article 6⁹⁶ asserts that men and women should have equal rights within a marriage and article (6)(a),⁹⁷ which clearly indicates that there should be mutual consent from both parties in a marriage and (b)⁹⁸ recognises that 18 years should be the minimum age for a woman to marry. Within a child marriage there

⁸⁹ Article (5). Women’s Protocol. Indicates that, ‘State Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States parties shall take all necessary legislative and other measures to eliminate such practices...’

⁹⁰ Banda F ‘Building on a global movement: Violence against women in the African context’ (2008) *African Human Rights Law Journal* 16.

⁹¹ Banda F ‘Blazing a trail: The Africa Protocol on Women’s Rights comes into force’ (2006) 50(1) *Journal of African Law* 80.

⁹² Article (5)(a) Women’s Protocol. Provides for the ‘creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;...’

⁹³ Banda F ‘Building on a global movement: Violence against women in the African context’ (2008) *African Human Rights Law Journal* 16.

⁹⁴ Article 5(b) Women’s Protocol provides for the ‘prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalization and para-medicalization of female genital mutilation and all other practices in order to eradicate them...’

⁹⁵ Banda F ‘Building on a global movement: Violence against women in the African context’ (2008) *African Human Rights Law Journal* 14.

⁹⁶ Article 6 Women’s Protocol provides that, ‘States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that...’

⁹⁷ Article 6(a) Women’s Protocol provides that ‘no marriage shall take place without the free and full consent of both parties;...’

⁹⁸ Article 6(b) Women’s Protocol provides that ‘the minimum age of marriage for women shall be 18 years;...’

cannot be equal rights as the child may play a subordinate role to their spouse and Silwa- de Alwis has described this as being ‘one of the most pernicious manifestations of unequal power relations between females and males.’⁹⁹ Erulkar and Muthengi observed that these unequal power relations would exist in the home due to the age difference of the spouses.¹⁰⁰ Jensen and Thornton also observed the age differences involved in a child marriage, may result in imbalances within the household as women who get married at a young age have matured and are unable to affirm themselves.¹⁰¹ This in turn leaves them vulnerable with regards to assuming the role of the wife in the house and leads to her becoming submissive to her older spouse.

The ACERWC additionally mentioned in their statement on violence against children that ‘[b]y adopting the African Charter on the Rights and Welfare of the Child (the Charter), African States committed themselves to the mission of protecting children against abuse and ill-treatment which constitute the key elements of violence against children’.¹⁰² Therein, recognising that children who are abused require special protections, and often harmful cultural practices such as that of child marriage opens up a child to abuse.¹⁰³ The Committee also recognises that ‘[t]he harmful consequences that all forms of violence can have on children should be widely publicised’.¹⁰⁴ This is characterised as part of the awareness raising that State Parties should oblige to and they should furthermore include the harmful effects that this may have on children thereby reducing their risk for suitable growth and development, hampering the positive role that they should have in a societal setting.

Another important instrument used in the protection of children against traditional African practices such as child marriage is the SADC Protocol. Wadesango’, Rembe

⁹⁹ De Silwa-de-Alwis (2008:1).

¹⁰⁰ Erulkar AS & Muthengi E ‘Evaluation of Berhane Hewan: A program to delay child marriage in rural Ethiopia’ (2009) 35(1) *International perspectives on Sexual and Reproductive Health* 6. ‘Moreover, the younger a girl is when she marries, the greater the age difference with her partner, which further comprises her status and negotiating power within her marital home.’

¹⁰¹ Jensen R & Thornton P ‘Early Female marriage in the developing world.’ (2003) 11(2) *Gender and Development* 10.

¹⁰² African Committee of Experts on the Rights and Welfare of the child (2011). ‘Statement on violence against children.’

¹⁰³ ICRW ‘Child Marriage and Domestic Violence ’Too Young To WED: Education towards Ending Child Marriage (2006). <<https://www.icrw.org/files/images/Child-Marriage-Fact-Sheet-Domestic-Violence.pdf>> (accessed 22 November 2015) 2. ‘Child brides often show signs symptomatic of child sexual abuse and post-traumatic stress.’

¹⁰⁴ African Committee of Experts on the Rights and Welfare of the child (2011:2). ‘Statement on violence against children.’

and Chabaya have detected that, the traditional African practice of child marriages are common across the majority of countries that fall under the ambit of the SADC region.¹⁰⁵ The SADC Protocol, in article 1¹⁰⁶ defines gender as ‘the roles, duties and responsibilities which are culturally or socially ascribed to women, men girls and boys;...’.¹⁰⁷ In doing so recognising the special protection that should be afforded to them, as there are roles embedded herein that are ‘culturally ascribed to them’.¹⁰⁸ These prescriptive roles often do not leave the child in a position to negotiate and express their opinions, maintaining a subordinate role and in so doing subjecting them to child marriages. Chinkin has observed these roles that may further give rise to the continued practice of child marriages as a traditional practice by arguing that ‘[t]raditional and cultural assumptions about gender roles within society are used to justify continued oppression and subordination of women, as are various religious doctrines’.¹⁰⁹

An additional provision is article (8)(1)¹¹⁰ of the SADC Protocol recognises that State Parties should adopt the appropriate legislation for marriage, and furthermore addresses the notion that there should be equality within a marriage. This may however not be the case in that of a child marriage, where the child lacks maturity and in most cases their partner may be years older.¹¹¹ This allows for article 8(2)(a)¹¹² which makes reference to the fact that State Parties should ensure that persons under the age of 18 do not

¹⁰⁵ Wadesango’ N, Rembe S & Chabaya O ‘Violation of Women’s Rights by Harmful Traditional Practices’ (2011) 13(2) *Anthropologists* 124.

¹⁰⁶ Article (1) SADC Protocol. ‘In this Protocol, terms and expressions defined in Article 1 of the Treaty establishing SADC shall bear the same meaning unless the context otherwise requires.’

¹⁰⁷ Article (1)(2) SADC Protocol. ‘means the roles, duties and responsibilities which are culturally or socially ascribed to women, men, girls and boys;...’

¹⁰⁸ Munalula MM ‘SADC Protocol on Gender and Development: Road Map to equality?’ (2011) 1 *SADC Law Journal* 193.

¹⁰⁹ Chinkin C ‘Violence against Women: The international legal response’ (1995) 3(2) *Gender and Development* 24. See also Myers & Harvey (2011:5). ‘Although gender roles differ between cultures, and generations, and vary in relation to other factors-including economic status, class, ethnicity, caste, sexuality ,religion, HIV status, or disability-gender norms work to the disadvantage of women of all ages.’

¹¹⁰ Article 8(1) SADC Protocol states that ‘[s]tate Parties shall enact and adopt appropriate legislative, administrative and other measures to ensure that women and men enjoy equal rights in marriage and are regarded as equal partners in marriage.’

¹¹¹ De Silva-de-Alwis (2008:34). ‘Evidence shows that child marriage is a tool of oppression which subordinates not just the women but her family. Not only does child marriage perpetuate an inter-generational cycle of poverty and lack of opportunity, it reinforces the subordinated nature of communities that traditionally serve the powerful classes by giving a girl child in marriage to an older man.’

¹¹² Article 8(2)(a) SADC Protocol provides that ‘Legislation on marriage shall ensure that no person under the age of 18 shall marry, unless otherwise specified by law, which takes into account the best interests and welfare of the child...’

marry. The SADC Protocol in article (11)(C)¹¹³ requires for State Parties to adopt legislation that guarantees children are protected from harmful cultural practices. This protocol clearly outlines that this should be in line with the UNCRC and ACRWC.¹¹⁴ Munalula credits the SADC Protocol, and in doing so realises that although the theme is not unfamiliar ‘it introduces a new approach to the implementation of gender equality goals and objectives, and articulates areas of inequality not previously conceptualised’.¹¹⁵

It should however be pointed out that all of the above instruments do not define a child marriage. However, they do recognise a definition of a child, as well as observing that persons under the age of 18 should not marry.¹¹⁶ These instruments also consider harmful practices and remark that child marriages are considered such as practice as they are damaging towards the child and their long term development and growth.

2.3. Consent and child marriages

The concept of marriage is described as ‘any type of long-term sexual relationship between two or more persons’.¹¹⁷ In addition to this, the expression child marriage is explained as ‘a legal or customary union between two people, of whom one or both spouses is below the age of 18’.¹¹⁸ It is therefore necessary to discuss the protective provisions provided for in the Convention on the Consent to Marriage,¹¹⁹ which

¹¹³ Article 11(c) SADC Protocol states on the consent to Marriage includes for ‘ensuring that girls have equal and enjoy the same rights as boys and are protected from harmful practices in accordance with the United Nations Conventions on the Rights of the Child and the African Charter on the Rights and Welfare of the Child...’

¹¹⁴ Article 11(1)(e) SADC Protocol provides that ‘State Parties shall adopt laws, policies and programmes to ensure the development and protection of the girl child by:...ensuring that girls enjoy the same rights as boys and are protected from harmful cultural attitudes and practices in accordance with the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child; ...’

¹¹⁵ Munalula MM ‘SADC Protocol on Gender and Development: Road Map to equality?’ (2011) 1 *SADC Law Journal* 190.

¹¹⁶ Hodgkin R & Newell P *UNICEF Implementation handbook for the Convention on the Rights of the Child* (2007) 10. (UNICEF: Implementation Handbook for the Convention of the Rights of the Child). ‘In many societies, an age is set when children may marry without parental consent (usually the age of majority), and a lower age is set when they may marry with parental consent.’

¹¹⁷ Mofokeng LL (2009) *Legal Pluralism in South Africa: Aspects of African customary, Muslim and Hindu family law* 19.

¹¹⁸ Loaiza E & Wong S ‘Marrying too young: End Child Marriage’ (2012) <<https://www.unfpa.org/sites/default/files/pub-pdf/MarryingTooYoung.pdf>> (accessed on the 08 July 2015).

¹¹⁹ Article (2) Convention to Consent provides that ‘State Parties to the present Convention shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.’

regulates the issue of consent for a valid of a valid marriage. This protective instrument focuses on a key aspect of marriage, namely that being consent. Consent is defined as, ‘voluntary or uncoerced agreement.’¹²⁰

The Convention to Consent therefore focuses on this and article 1¹²¹ clearly addresses the issue of ‘full and free consent’ of both parties to the marriage. In doing so it leaves no room for false consent. It also expresses the need for this to be done in person.¹²²

In addition to this the UDHR expresses in article (16)¹²³ that:

‘1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage and its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.’

The UDHR takes cognisance of the need for equality within a marriage and reiterates the importance of the view that marriage should only be entered into with full and free consent. De Silva-de-Alwis observes that ‘[t]he recognition that consent cannot be ‘free and full’ when one of the parties involved is not sufficiently mature to make an informed decision about a life partner is a violation of the UDHR’.¹²⁴

Similarly, the Recommendation on Consent to Marriage, expresses in Principle 1(a)¹²⁵ an equal provision that reiterates this as a prerequisite for marriage. However within

¹²⁰ Criminal Law (Sexual Offences and Related matters) Amendment Act 32 of 2007. Assented to 13 December 2007, Date of Commencement: 16 December 2007.

¹²¹ Article 1(1) Convention to Consent. Provides that, ‘No Marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in presence of the authority competent to solemnize the marriage and of witnesses, prescribed by law.’

¹²² Article 1(1) Convention to Consent provides that ‘such consent to be expressed by them in person...’

¹²³ Article 16 UDHR.

¹²⁴ De Silva-de Alwis (2008:4).

¹²⁵ Principle 1(a) Consent to Marriage provides that ‘No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person, after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.’

‘child marriages, girls are usually not given a chance to give their consent. This is instead given by their parents’.¹²⁶ Bennett has also noted that ‘[a] father’s power to arrange the marriages of his children is synonymous with the African cultural tradition’.¹²⁷ In doing so Wadesango’, Rembe and Chabaye also cite various reasons as to why they feel the child should enter into marriage, some of it being for health reasons and to protect against promiscuity, another being poverty.¹²⁸

Wadesango’, Rembe and Chabaye mention that, ‘the young women do not have much choice, parents and other clan members decide whom they marry’.¹²⁹ This then takes away the child’s right to freely choose whom she marries and violates her right to give consent to the marriage. Article 2 of the Convention to Consent makes it clear that marriages of persons under the legal age for marriage that has been prescribed by State Parties are prohibited. Wadesango’, Rembe and Chabaye furthermore observed in their analysis that whilst many of the SADC regions have a fixed age for marriage, due to the variations in the way a child is defined as well as the minimum age that has been prescribed for marriage, this becomes a challenge.¹³⁰

Additional protection is offered in article 16¹³¹ of the ACRWC, as it takes into consideration the protection of children against abuse and torture. This article furthermore also takes into consideration degrading torture maltreatment and sexual abuse. These articles referred to above are all in favour of protection against traditional African practices, as with these practices children are often subjected to abuse as they are not physically or mentally mature to agree to consensual acts of sex and have to forfeit their childhood to become spouses at an early age. Abuse, within traditional African practices such as ‘[e]arly marriage also increases the vulnerability of

¹²⁶ Mikhail SLB ‘Child Prostitution: Two forms of Sexual Exploitation’ (2002) 10(1) *Gender and Development* 46.

¹²⁷ Bennett TW *Customary law in South Africa* (1995) 116.

¹²⁸ Wadesango’, Rembe and Chabaye (2011)125.

¹²⁹ Wadesango’, Rembe and Chabaye (2011)125.

¹³⁰ Wadesango’, Rembe and Chabaye (2011)126.

¹³¹ Article 16 ACRWC provides that ‘1. State parties to the present Charter shall take specific legislative, administrative, social and education measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child. 2. Protective measures under this Article shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting referral investigation, treatment, and follow-up of instances of child abuse and neglect.’

children'.¹³² They are exposed to physical and emotional acts of abuse and need to be protected and the preamble to this Charter notes this distinctly.

Notably, article 21(2)¹³³ makes a clear and direct mention to child marriages and specifies with certainty, a minimum age for marriage, which should be 18 years, as well as making marriage registration compulsory, whereas in the case of child marriages this will not occur as according to the ACRWC.

2.4. The four cardinal principles of the CRC and the ACRWC in their protection of children from child marriages

It has been observed that the CRC and the ACRWC were drafted to afford children rights and to offer protection in the standards that were conceptualised based on occurrences that often predispose children to damaging effects.¹³⁴ The CRC and ACRWC both contain provisions that should be exercised to protect children against child marriages. The following provisions are considered to be the four cardinal principles afforded to children, and are used to support the rights of the child. They are the best interest of the child, the right to survival and development, non –discrimination and participation. The CRC¹³⁵ contains provisions that offer protection to children globally. There are four main goals to the CRC, namely prevention, protection, provision and participation.¹³⁶ The main goals are captured throughout its various provisions. At the first extraordinary Session of the African Committee of the experts of the Rights and Welfare of the Child (ACERWC), in Addis-Ababa, Ethiopia the

¹³² Shamu R; Soneson U; Kimane I & Long S 'Legal and Policy Frameworks to Protect the rights of vulnerable children in Southern Africa' Louise Davis (ed) *Save the Children UK South Africa Programme*.(2006) available at <http://resourcecentre.savethechildren.se/sites/default/files/documents/6575.pdf> (accessed 25 November 2015) 34.

¹³³ Article 21(2) ACRWC provides 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 makes registration of all marriages in an official registry compulsory.'

¹³⁴ Himonga C 'African Customary Law and Children's Rights: Intersections and Domains in a New Era' in Sloth-Nielsen J (ed) (2008) *Children's Rights in Africa: A Legal Perspective* 74. 'Since the idea of children's rights took root in the Convention on the rights of the Child (CRC) , Africa, like most of the rest of the world ,has embarked on a search for new ways of protecting the rights of children within its continental borders ,including inaugurating its own child rights charter, the African Charter on the Rights and Welfare of the Child (ACRWC); increasingly enacting constitutions bearing rights of children in their Bills of Rights; and enacting consolidated national legislation aimed at the promotion and protection of children's rights. . . .'

¹³⁵ This Convention was ratified in 1989, 'by all but two of its members, the United States of America and Somalia.'¹³⁵

¹³⁶ Bainham A *Children-The Modern Law* 3ed (2005) 70. See pages 70-72 for a discussion on the General aims and general obligations of the CRC.

Committee raised their concerns about the issue on consent and child marriages among others to the South African delegates, namely to the Deputy Minister of Social Development Hendriette-Bogopane Zulu and the Deputy Minister of Police Makhotso Maggie Soty (Co leading the delegations).¹³⁷ The four cardinal principles are now discussed.

2.4.1. The Best Interest of the Child (BIC)

Firstly, article 3¹³⁸ of the CRC considers the best interest of the child to be of paramount importance ‘however there is no clear mention of protection against child marriages or HIV and AIDS...’.¹³⁹ Secondly, similarly article (4)(1)¹⁴⁰ of the ACRWC also expresses the best interest of the child as being a significant provision in the protection of children’s rights. Thirdly, the ‘best interest of the child’ has been used widely within the protection of children’s rights. This principle is a universal standard which has its origins in family law, but which has now spread to all other areas of the law to be a guiding principle in decisions to be made about children’.¹⁴¹ Sloth-Nielsen has reiterated the importance and significance of the BIC by noting that it has been used across various children’s issues accentuating areas, ‘such as custody, in both customary law and formal civil law in Africa, dating back to the late eighteenth century, and has been applied consistently since’.¹⁴² Gose emphasises the importance of this principle

¹³⁷ First Extraordinary Session of the African Committee of Experts on the rights and Welfare of the Child.07-11 October 2014. Addis-Ababa, Ethiopia. <<http://acerwc.org/?wpdmdl=8813>> (accessed 25 November 2015). Paragraph 62 observes that the question posed by the Committee noting that ‘[a]dditional issues were raised on the definition of the child and the various consent ages in relation to marriage, virginity testing, the age of consent to sexual intercourse...’. Response was noted in Paragraph 63 to that of age observing ‘On the definition of the child, the Delegation indicated that the Children’s Act defines the child as any person under the age of 18 and despite various Lawson ages, there is a general consensus on the age of majority in South Africa. South Africa has also established a task team with a deadline in 2015 to harmonise all requirements in relation to age and the process will then be finalised and ready for adoption.’ In response to child marriages in Paragraph 70 ‘On issues related to the girl child, the Government indicated that a campaign to End Child Marriage will be launched in 01 November 2014. With regard to some traditional practices, including virginity testing, the Delegation emphasized that it is a traditional practices and the Government won’t be outlawing the practice completely. However this has been outlawed in relation to children under the age of 16...’

¹³⁸ Article (3)(1) CRC states that ‘[i]n all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authoritative or legislative bodies, the best interest of the child shall be a primary consideration.’

¹³⁹ Gose M *The African Charter on the Rights and Welfare of the Child* (2002) 24.

¹⁴⁰ Article (4)(1) ACRWC provides that ‘[i]n all actions concerning the child undertaken by any person or authority the best interest of the child shall be the primary consideration.’

¹⁴¹ Skelton A ‘The Development of a Fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments’ (2009) 9 *African Human Rights Law Journal* 486.

¹⁴² Lloyd A ‘The African Regional System for the protection of Children’s Rights’ in Sloth-Nielsen (ed) (2008) *Children’s Rights in Africa: A legal perspective* 37.

and proposes that it, ‘seems to maximize the influence of the best interests’ principle in proclaiming its supremacy over other considerations.’ Himonga notes the importance of the best interest of the child principle within both these instruments and reiterates the importance for State Parties to enact this within its domestic legislative systems, remarking ‘whether this be received law or customary law...’.¹⁴³

In addition Moyo has in the context of child marriages, rightly observed that, ‘[d]ecisions claimed to be made in the best interest of children often reflect what parents want of their children and may not necessarily be in the interests of children’.¹⁴⁴ This is because most traditional African practices that lead to child marriages are in the best interest of the parents.¹⁴⁵

Furthermore, article 31 of the ACRWC, recognises the cultural responsibilities of a child. Child marriage firstly includes a marriage of a child, and within a child marriage there are the roles that the child would have to take on, for example engaging in sexual intercourse, that they are not ready for. However article 31 provides that a child has the responsibility to uphold African culture.

Sloth-Nielsen has remarked on article 31¹⁴⁶ that:

‘Firstly, the duties of the child are subject to ‘such limitations as may be contained in the present Charter, recalling all other rights and protection

¹⁴³ Himonga C ‘African Customary Law and Children’s Rights: Intersections and Domains in a New Era’ in Sloth-Nielsen J (ed) (2008) *Children’s Rights in Africa: A Legal Perspective* 87.

¹⁴⁴ Moyo A ‘Reconceptualising the ‘paramouncy principle’: Beyond the individualistic construction of the best interest of the child’ (2012) 12 *African Human Rights Law Journal* 144.

¹⁴⁵ Jansen RM ‘Customary family law’ in Rautenbach C, Bekker JC & Goolam NMI (eds) *Introduction to Legal Pluralism* (2010) 66. Jansen observed that ‘[i]n terms of customary law, the father’s right to the custody and guardianship of his children was absolute and could not be taken away from him. In a customary law context it is more appropriate to say that the children belong to the family group of the father.’

¹⁴⁶ Article (31) ACRWC provides that ‘[e]very child shall have responsibilities towards his family and society, the State and other legally recognised communities and the international community. The child, subject this age and ability, and such limitations as may be contained in the present Charter, shall have the duty: (a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need; (b) to serve his national community by placing his physical and intellectual abilities at its service; (c) to preserve and strengthen social and national solidarity; (d) to preserve and strengthen African cultural values in his relations with other members of society; (e) to preserve and strengthen the independence and the integrity of his country; (f) to contribute to the best of his abilities, at all times and at all levels, to promotion and achievement of African Unity.’

afforded children in the ACRWC. It cannot justifiably be argued, therefore, that the languages of duties paves the way to rights violations.¹⁴⁷

Sloth-Nielsen rightly observed the emphasis on duties, to upholding a traditional African culture, such as a child marriage violates the best interest of the child. Sloth-Nielsen furthermore noted that, ‘the potential of the best interest’s principle to meaningfully advance children’s rights, its wider incorporation in Africa constitutions is worth motivating for’.¹⁴⁸ This provision has also been used in the protection of children in custody matters and sentencing issues,¹⁴⁹ to protect children whom are asylum seekers¹⁵⁰ among others. In *S v Ntikedzeni*,¹⁵¹ even though the accused pleaded guilty to culpable homicide of the deceased, the court took into consideration the two children the accused had with the deceased in sentencing. The accused had testified that he has a relationship with the children and that he assists them with homework at night. As a result of this the court took into consideration the best interest of the children as the accused was the only living biological parent, therefore the judgement included a periodic sentence, served over weekends only.¹⁵²

Traditional African practices that are considered harmful and which will have a negative impact on the life of the child, as well as directly impact the health and development of the child may not be in the best interest of any child. This has furthermore been echoed in article 24(3)¹⁵³ of the CRC which requires measures to be taken to eliminate traditional practices that are detrimental to the wellbeing of children. The wellbeing of the child may be negatively impacted should they become infected with HIV/AIDS as a result of a traditional African practice. Therefore, Myers and

¹⁴⁷ Sloth-Nielsen J ‘Domestication of Children’s Rights in National Legal Systems in African Context: Progress and Prospects’ in Sloth-Nielsen J (ed) (2008) *Children’s Rights in Africa: A Legal Perspective* 63.

¹⁴⁸ Sloth-Nielsen J ‘Domestication of Children’s Rights in National Legal Systems in African Context: Progress and Prospects’ in Sloth-Nielsen J (ed) (2008) *Children’s Rights in Africa: A Legal Perspective* 62-63.

¹⁴⁹ *S v M* (CCT 53/06).

¹⁵⁰ Dalrymple J K Seeking Asylum Alone: Using the Best Interests of the child to Protect Unaccompanied Minors. (2006) 26(1) *Boston College Third World Law Journal* 131-143.

¹⁵¹ *S v Ntikedzeni CC26\2010* (judgement 31 August 2011).

¹⁵² *S v Ntikedzeni CC26\2010* (judgement 31 August 2011).

¹⁵³ Article 24 (3) CRC provides that ‘[s]tate Parties shall take all effective and appropriate measures With a view to abolish traditional practices prejudicial to the health of children.’ See also Himonga C ‘African Customary Law and Children’s Rights: Intersections and Domains in a New Era’ in Sloth-Nielsen J (ed) (2008) *Children’s Rights in Africa: A Legal Perspective*.

Harvey remarked that contracting HIV/AIDS is not in the best interest of the child as it hinders their development and affects their health.¹⁵⁴

In all of the above, the view maintained is that the BIC should be considered no matter what, therefore conserving the child's right to a healthy physical and psychological development. Himonga has therefore rightly observed that, 'there can be no doubt that practices that are harmful to the child can never be in the child's best interest'.¹⁵⁵

2.4.2. The child's right to survival and development

To start with, article 6¹⁵⁶ of the CRC takes into account that the child has a right to survival and development, and child marriage as traditional African customary practices this could deter the child from this right. Their development might be impeded through a marriage at a young age which will necessitate sexual activity. The child may not be developed for this physically and emotionally making them vulnerable to HIV infection.¹⁵⁷

This article therefore carries great significance and supports protecting children against child marriages and exposure to HIV/AIDS as it considers the child's right to life.¹⁵⁸ These two concepts are critical and important to the child having a full and healthy life, therefore they are interconnected.¹⁵⁹ This process has been described as '[t]he right to maximum survival and development speaks to a continuum that begins at the maximum survival and progresses to an endpoint represented by the optimum development of the child'.¹⁶⁰ This is of significance as the ACRWC, is clear and concise and it places

¹⁵⁴ Myers J & Harvey R 'Breaking Vows: Early and Forced Marriage and Girls Education. Plan: Because I am a Girl' (2011) available at <<http://www.plan-uk.org/resources/documents/Breaking-Vows-Early-and-Forced-Marriage-and-Girls-Education/>> (accessed 03 August 2015).Page 3

'Married young, girls are frequently taken out of school, are at higher risk of HIV infection, early pregnancy and health conditions such as obstetric fistula, if she survives childbirth her children are less likely to grow up healthy and go to school, continuing the cycle of poverty for generations to come.'

¹⁵⁵ Himonga C 'African Customary Law and Children's Rights: Intersections and Domains in a New Era' in Sloth-Nielsen J (ed) (2008) *Children's Rights in Africa: A Legal Perspective* 84.

¹⁵⁶ Article 6 CRC provides that 'State Parties recognises that every child has the inherent right to life. State Parties shall ensure to the maximum extent possible the survival and development of the child.'

¹⁵⁷ Bainham A *Children-The Modern Law* 3ed (2005)70.

¹⁵⁸ Article 6 CRC.

¹⁵⁹ Dutschke M & Abrahams K 'Children's Right to Maximum Survival and Development. Child Survival Project, Children's Institute. University of Cape Town, Cape Town' (2006) available at <http://ci.org.za/depts/ci/pubs/pdf/health/resource/Rights_in_brief_survival.pdf> (accessed 26 November 2015)1.

¹⁶⁰ Dutschke M & Abrahams K 'Children's Right to Maximum Survival and Development. Child Survival Project, Children's Institute. University of Cape Town, Cape Town' (2006) available at

emphasis on the child's right to life. The ACRWC also includes in section 2,¹⁶¹ the protection of children, thereby acknowledging that the protection of children is significant to their survival and development, whereas the Convention only takes cognisance of their survival and development.

The right to survival is important and in order for this right to be realised it is necessary that the child is protected as a whole, meaning all other rights contained in the ACRCW. Lloyd has remarked that '...without the other provisions of the ACRWC being read in compliance with the child's right to life, survival and development, a child will always remain vulnerable and incapacitated.'¹⁶² The ACRWC is hereby held in high esteem as child marriages and children contracting HIV/AIDS within a child marriage deters not only their survival, but also development, and it is from this that they need to be protected from.¹⁶³ Moreover, General Comment 2 of the CRC, based on article 4 of the CRC was established to encourage state institutions to assist independent organisations and to help with the promotion and monitoring of the Convention.¹⁶⁴ The CRC in article (24) (3) note that parties to the Convention should take the necessary steps to do away with traditional practices that place the child's health at risk.¹⁶⁵

Importantly, although the CRC does not observe the importance of protecting against HIV/AIDS when dealing with the rights of the child, the General Comment 3 to the CRC observes the importance thereof.¹⁶⁶ The General Comment 3 notes that minors are often at a higher risk to contracting HIV/AIDS as the various environmental

<http://ci.org.za/depts/ci/pubs/pdf/health/resource/Rights_in_brief_survival.pdf>
(accessed 26 November 2015)1.

¹⁶¹ Article (5)(2) of the ACRWC provides that 'States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child.'

¹⁶² Lloyd A (2008) 37.

¹⁶³ Sloth-Nielsen J & Mezmur B (2008) 281. 'The diverse effects of HIV/Aids on children can include being orphaned, growing up in incapacitated and low capacity households, dropping out of school, being forced into child labour, failing to access health services, facing severe emotional burdens occasioned by the illness and death of kin, and social stigma.'

¹⁶⁴ General Comment 2. Paragraph 2 provides that 'The Committee issues this general comment in order to encourage State parties to establish an independent institution for the promotion and monitoring of implementation of the Convention and to support them in this regard by elaborating the essential elements of such institutions and the activities which should be carried out by them.'

¹⁶⁵ CRC Article (24)(3) provides that 'State Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.'

¹⁶⁶ General Comment 3 Paragraph 27. Provides that, 'Reducing HIV/AIDS related vulnerability requires first and foremost that children, their families and communities be empowered to make informed choices about decisions, practices or policies affecting them in relation to HIV/AIDS.'

upbringings may not have informed them to the risk and educated them about protected measures that could be employed.¹⁶⁷

Safeguarding of children against exposure to HIV/AIDS is clear within the objectives of the General Comment. They clearly illustrate the need to comprehend the context of the child and his/her human rights in the face of HIV/AIDS.

The objectives state that:

- (a) ‘To identify further and strengthen understanding of all human rights in the context of HIV/AIDS;
- (b) To promote the realisation of the human rights of children in the context of HIV/AIDS, as guaranteed under the Convention on the Rights of the Child (hereinafter “the Convention”);
- (c) To identify measures and good practices to increase the level of implementation by states of the rights related to the prevention of HIV/AIDS and the support, care and protection of children infected with or affected by this pandemic;
- (d) To contribute to the formulation and promotion of child-oriented plans of action, strategies, laws, policies and programmes to combat the spread and mitigate the impact of HIV/AIDS at the national and international levels.’

This General Comment takes cognisance of the fact that HIV/AIDS and child rights should be all-inclusive¹⁶⁸ and this includes socio-cultural aspects such as that of child marriages which disturb the development of the child.¹⁶⁹ This General Comments takes into consideration article 24 of the CRC as this deals with implementation, as well as ‘abolishing traditional practices prejudicial to the health of children.’¹⁷⁰

¹⁶⁷ General Comments Paragraph 2 (page 2) “Adolescents are also vulnerable to HIV/AIDS because their first sexual experience may take place in an environment in which they have no access to proper information and guidance.”

¹⁶⁸ General Comments No 3; (2003) 5 & 6. ‘The Convention’s Perspectives on HIV/AIDS: The Holistic Child-Rights –Based Approach.’

¹⁶⁹ General Comment 3; (2003: 2-3). Paragraph 5 observes that: ‘HIV/AIDS impacts so heavily on the lives of all children that it affects all their rights-civil, political, political, economic, social and cultural...’

¹⁷⁰ General Comment 3 Paragraph 10 states that ‘The obligations attached to this right are fundamental to

In addition, General Comment 4 of the CRC recognises that adolescence is a significant component of a child's development and developing healthy sexual relations is part of this process.¹⁷¹ Therefore, General Comment 4 further elaborates on the child's right to health and development which may furthermore be deterred as a result of early marriage.¹⁷²

Herewith, the CRC General Comment 13¹⁷³ is also instrumental in safeguarding children against traditional practices, as it focuses on the right of the child to have freedom from all forms of violence.¹⁷⁴ In its analysis of article 19 of the CRC, and the protective measures it also includes the 'taking [into] account of socio-cultural traditions and legal system of the state party.'¹⁷⁵ These traditions can also reflect those of harmful cultural practices as section 29 includes harmful practices which takes cognisance in sub section (e) of 'Forced and early marriage' therein although not explicitly mentioning child marriage in itself, but realising it.

2.4.3. Non-discrimination

Importantly, there is '[t]he increased physiological risk borne by women and girls in Africa [which] is compounded by the HIV risk they bear from subordination, discrimination, and inequality under the law.'¹⁷⁶ Children subjected to traditional African practices that lead to child marriages and are then exposed to HIV/AIDS are discriminatory against girls. As a result of this perceived discriminatory practices, Article 3¹⁷⁷ of the ACRWC observes the need to address concerns that may

guiding the action of States in relation to HIV/AIDS. The child should be placed at the centre of the response to the pandemic, and strategies should be adapted to children's rights and needs.'

Furthermore observed is article 24 of the CRC which provides that, 'State Parties shall take all effective and appropriate measures with a view to abolish traditional practices prejudicial to the health of children.'

¹⁷¹ General Comment 4 (2003:1). Paragraph 2.

¹⁷² General Comment 4 (2003:6) in paragraph 20 observes that 'The Committee is concerned that early marriage and pregnancy are significant factors in health problems related to sexual and reproductive health, including HIV/AIDS.'

¹⁷³ General Comment 13 (2011) provides for: 'The right to the child to freedom from all forms of violence.'

¹⁷⁴ General Comment 13 (2011) states in paragraph 2 on the Rationale observes the importance of, '[m]easures to end violence must be massively strengthened and expanded in order to effectively put an end to these practices which jeopardize children's development and societies' potential non-violent solutions for conflict resolution.'

¹⁷⁵ General Comment 13(2011:18).Paragraph 45.

¹⁷⁶ Csete J 'Policy Paralysis: A call for action on HIV/AIDS-related human rights abuses against women and girls in Africa' *Human Rights Watch* (2003) available at

<<https://www.hrw.org/sites/default/files/reports/africa1203.pdf>> (accessed 25 November 2015) 9.

¹⁷⁷ Article 3 ACRWC states that 'Every child shall be entitled to the enjoyment of the rights and

discriminate against children. Simplified, this means that no child should be discriminated against regardless of any of the mentioned factors.¹⁷⁸ Furthermore, Chirwa echoes article 3 declaring that, '[e]very child is entitled to enjoy the rights and freedoms guaranteed in the Charter without discrimination'.¹⁷⁹ A health risk¹⁸⁰ of child marriages is that of contracting HIV/AIDS¹⁸¹ which may further pose as a risk for having a child discriminated against as a result of the societal stigma.¹⁸² Therefore the 'other status'¹⁸³ that the ACRWC refers to could be interpreted as that of the child's HIV/AIDS status and protection against the stigma. However no direct mention is made of this in its wording and therefore it implores for further clarification. Shu-Acquaye has observed that discrimination is evident within various settings and it furthermore may hamper the incorporation of a healthy and societal existence.¹⁸⁴

While the ACRWC includes age and sex as a basis for non-discrimination, this practice has also been referred to as 'gender discrimination', seeing that when the girl child is older and able to make more informed decisions will have a positive impact on the lifespan and lifestyle however when they are married young decisions are made for them.¹⁸⁵ Wadesango', Rembe and Chabaye echoes this and highlights that due to the fact that they marry older men they have no protection from contracting HIV/AIDS.¹⁸⁶ Ankut expresses the need for equality in analysing the ACRWC, and highlights an

Freedoms recognized and guaranteed in this Charter irrespective of the Child's or his/her parents' or guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.'

¹⁷⁸ Simplified Guide to the African Charter on the Rights and welfare of the African Child (2012) available at

<http://www.hurisa.org.za/wp-content/uploads/2012/02/SIMPLIFIED-GUIDE-TO-THE-AFRICAN-CHARTER-ON-THE-RIGHTS-AND-WELFARE-OF-THE-AFRICAN-CHILD.pdf>

(accessed 25 November 2015). Article 3 provides that 'This Charter applies to every child within Africa irrespective of his/her parents' or legal guardians race, ethnic group, colour, sex, language, religious, political or other opinion, national and social origin, fortune, birth or other status. No child should be discriminated against.'

¹⁷⁹ Chirwa DM 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 158.

¹⁸⁰ Van der Watt & Ovens (2012)20.

¹⁸¹ Clark S, Bruce J & Dude A (2006) 2.

¹⁸² Shu-Acquaye F 'The legal implications of living with HIV/AIDS in a developing country: The African Story (2004) 32(51) *Syracuse J.Int'll. & Com* 69-71. See pages 69-71 for a discussion on Discrimination and Stigmatization.

¹⁸³ Article 3 ACRWC provides that 'Every child shall be entitled to the enjoyment of the rights and Freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or Legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.'

¹⁸⁴ Shu-Acquaye (2004) 69.

¹⁸⁵ See Rivers (2007) and Waterhouse (2008).

¹⁸⁶ Wadesango', Rembe and Chabaye (2011)125.

important aspect in that ‘... non-discrimination is the important review of the concept of discrimination and its relationship to equality which pre-supposes that all children (male and female) should be treated equally.’¹⁸⁷ This again brings into the fore gender discrimination and the importance for children to be protected from discrimination regardless of their sex. The male and female child should enjoy equal protection under the articles which focus on non-discrimination in both the ACRWC and the CRC.

The ACRWC however observes in its opening sentence that every child has these rights as also within the Convention noting that State Parties should ensure these rights. Sloth-Nielsen additionally observes that the General Comment 3 to the CRC clearly suggests that, ‘discrimination makes children more vulnerable to HIV/AIDS.’¹⁸⁸ Sloth-Nielsen & Mezmur reiterates the importance of addressing discrimination and the consequence of being infected or affected by HIV/AIDS has on children.¹⁸⁹

Moreover, article 1 of CEDAW offers a broad definition of the various forms of discrimination that women may endure clearly including equality and their human rights.¹⁹⁰ These rights feature some of the factors that may be detrimental to the welfare of the growth and development of women. Article (2)(f) further takes into consideration discrimination against women that may stem from traditional customary practices.¹⁹¹ Additionally Article (5)(a) also requires that State Parties to this Convention examine cultural arrangements which more often than not are advantages for men.¹⁹²

¹⁸⁷ Ankut PY ‘The African Charter on the Rights and Welfare of the child: Linking Principles with Practice’ (2006) available at < <http://www.fairplayforchildren.org/pdf/1299577504.pdf> > (accessed 25 November 2015) 5.

¹⁸⁸ Sloth-Nielsen J ‘Realising the rights of children growing up in child-headed households: A guide to laws, policies and social advocacy’ (2004)7.

¹⁸⁹ Sloth-Nielsen J & Mezmur BD ‘HIV/Aids and Children’s rights in law and Policy in Africa: Confronting the Hydra Head on.’ in Sloth-Nielsen J (ed) (2008) *Children’s Rights in Africa: A Legal Perspective* 281. The authors takes cognisance of the rights of the child that is placed at risk as a result of HIV/AIDS. Their reflections include the following: ‘[t]he human rights of the child is placed at risk in the context of HIV/Aids include: the right to life; the right to the highest attainable standard of mental and physical health; the right to non-discrimination, equal protection and equality before the law; the right to privacy; the right to freedom of expression and opinion and the right to freely receive and impart information; the right to equal access to education; the right to an adequate standard of living; the right to social security; assistance and welfare; and the right to parental care.’

¹⁹⁰ Article 1 CEDAW states: ‘For the purpose of the present Convention, the term “discrimination Against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social cultural, civil or any other field.’

¹⁹¹ Article (2)(f) CEDAW states: ‘To take all appropriate measures, including legislation, to modify or abolish laws, regulations, customs and practices which constitute discrimination against women.’

¹⁹² Article (5)(a) CEDAW states: ‘To modify the social and cultural patterns of conduct of men and

Furthermore rooted in Article (16) (b) is the right to freely enter into marriage,¹⁹³ which enables women the right to choose who and when she wants to marry.

Additionally, CEDAW also emphasize that there is a need for protection against discriminatory practices. Whilst CEDAW contains provisions which strongly oppose the discrimination of women on various platforms and reiterates the importance of equality between men and women, it does not specifically address the child. Although under provisions 5 and 11 cultural practices receive attention, it is only in Article (16) (2) where there is specific direction taken towards the child marriages. CEDAW's also includes access to healthcare however does not directly cover those infected or affected by HIV/AIDS.

An additional source of protection would be the Women's Protocol.¹⁹⁴ This protocol like CEDAW, reinforces the basis of equality and attempt to move away from discriminatory frameworks. It however expresses its provisions without ambiguity, thereby leaving minimal room for interpretations that may impact negatively in addressing the protection of children against child marriages linked to HIV/AIDS. This protocol unlike the ACRWC, is all encompassing of the female gender not specifying an age limit thereby encouraging all women regardless of age to be protected in its provisions.¹⁹⁵ Regardless of the ACRWC acknowledging various rights of the child, it makes no reference to HIV/AIDS and the protection of children against Africa customary practices such as child marriages against this occurrence.

2.4.4. Child participation and addressing child marriages

Child participation within children's rights is a new founded but very important concept. Additionally contained in Article 12¹⁹⁶ of the CRC it addresses child

women, with a view to achieving the elimination of prejudices and customary and all other practices based on the idea of the inferiority or the superiority of either of the sexes or stereotyped roles for men and women.'

¹⁹³ Article (16)(b) CEDAW states that 'The same right freely to choose a spouse and to enter into marriage only with their free and full consent.'

¹⁹⁴ Viljoen F 'An introduction the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009)16(1) *Wash & Lee J.C.R & SOC* 12. 'Adopted in July 2003 by the African Union Assembly of Heads of State and government.'

¹⁹⁵ Viljoen F 'An introduction the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009)16(1) *Wash & Lee J.C.R & SOC* 24.

¹⁹⁶ Article 12 CRC provides that 'States parties shall assure to the child who is capable of forming his or own views the right to express those views freely in all matters affecting the child ,the views of the child being given due weight in accordance with the age and maturity of the child.(2) For this

participation. This is vital in structuring safeguards for children against traditional African customary practices linked to HIV/AIDS. It also makes room for the child to be heard¹⁹⁷ and their predicaments to receive a higher quality of attention in the drafting of legislation which has an impact on their well-being. Traditional practices such as child marriages do not give the child the opportunity to participate in decisions that influence their future. Ankut also highlights that within the ACRWC, the issue of participation prevail and it recognises the importance of child participation and notes that children have specific and different needs that should be engaged with.¹⁹⁸ However this platform also encourages the education of children, nonetheless not dismissing the parents' and other adults role and responsibilities to the child.¹⁹⁹ The CRC General Comment 12²⁰⁰ takes into consideration the right of the child to be heard. In paragraph 13,²⁰¹ it refers to the process that involve children being heard as that of child participation, and it considers that there should be discussions that include the views of the child in formulating systems and procedures that have an impact on the life of the child. Moyo has observed that '[a] major decision in respect of the child includes a decision concerning the consent to the child's marriage...'.²⁰² This is because most traditional African practices that lead to child marriages are in the best interest of the parents.²⁰³

purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'

¹⁹⁷ Westman K, Dramme N, Libby W, Sakulpitakph P, King S, Upadhyay J & Gnandi M 'ECPAT International: Confronting the Commercial Sexual Exploitation of Children in Africa' (2007) available at <http://www.ecpat.net/ei/Publications/Journals/Confronting_CSEC_ENG.pdf> (accessed on the 7 July 2013)42.

¹⁹⁸ Ankut PY 'The African Charter on the Rights and Welfare of the child: Linking Principles with Practice' (2006) available at<<http://www.fairplayforchildren.org/pdf/1299577504.pdf>> (accessed 25 November 2015) 9.

¹⁹⁹ Ankut PY 'The African Charter on the Rights and Welfare of the child: Linking Principles with Practice' (2006) available at<<http://www.fairplayforchildren.org/pdf/1299577504.pdf>> (accessed 25 November 2015) 9.

²⁰⁰ CRC/C/GC/12 (2009:3). Paragraph 2 provides that 'The right of all children to be heard and taken seriously constitutes one of the fundamental values of the convention.'

²⁰¹ CRC/C/GC/12 (2009:5).Paragraph 13 provides that, 'These processes are usually called participation. The exercise of the child's or children's right to be heard is a crucial element of such processes. The concept of participation emphasizes that including children should not only be a momentary act, but the starting point for an intense exchange between children and adults on the development of policies, programmes and measures in all relevant contexts of children's lives.'

²⁰² Moyo A 'Reconceptualising the 'paramountcy principle': Beyond the individualistic construction of the best interest of the child' (2012) 12 *African Human Rights Law Journal* 171.

²⁰³ United Nations Children's Fund 'Early Marriage: A Harmful Traditional Practice; A statistical exploration' available at <http://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf>.(accessed 25 November 2015)1. Observes that; 'Marriage before the age of 18 is a reality for many young women. In many parts of the world parents encourage the marriage of their daughters while they are still children in hopes that the marriage will benefit them both financially and socially.' See also Mikhail SLB

Further linked to both the notion of non-discrimination and being given the right to be heard is addressed in the CRC General Recommendation 12 which provides that ‘State parties shall address discrimination, including against vulnerable or marginalized groups of children to ensure that children in all matters affecting them on an equal basis with all other children.’²⁰⁴

2.5. Conclusion

The international and regional instruments, in particular the ACRWC and the CRC, play a huge role in addressing child marriages in the face of HIV/AIDS. The General Comment 3 to the CRC does however bring to the forefront the issues of HIV/AIDS and read together with the CRC this would aid in the protection of the child. The joint recommendations and comments by CEDAW and the CRC are in an effort to deter such harmful practices such as child marriages in the face of the on-going HIV/AIDS pandemic. South Africa is a party to these instruments. In the chapter to follow, traditional African practices applicable to South Africa are examined. This chapter 2 and chapter 3 lay a foundation to the analysis of how some of the different traditional African practices observed violate the South African legal framework for the protection of children from child marriages.

(2002:44) for a discussion on dowry payment, as observed: ‘In child marriages, a girl usually receives nothing at all. The third party, usually her parents, receives the whole amount.’

²⁰⁴ CRC/GC/12. (2009:16). Paragraph 75.

CHAPTER 3

TRADITIONAL CULTURAL PRACTICES IN SOUTH AFRICA

‘The African girl is born into a culture of male supremacy. This is a feature of the African traditional society that is patriarchal in structure. This structure enables the male to dominate the female and gives control over female sexuality. The male in the traditional African culture, lords his words over the family and his word is law. Daughters, in particular, dare not disobey the fathers’ wishes and wives, especially the child brides, dare not disobey the husbands’ wishes. Females are subjugated to the males’ will and even forced to submit to the man’s will at their own expense and revulsion.’²⁰⁵

3.1. Introduction

This chapter discusses traditional African practices that may lead to child marriages linked to HIV/AIDS in South Africa. The aim is to lay a foundation for chapter 4 which will show how these practices violate the South African legal framework. For purposes of this study, the traditional practices that lead to child marriages will be divided into two parts: firstly, those that are linked to customary marriages, and secondly, those linked to delicts under customary law. The chapter is divided into five parts, the first is the introduction. The second part will look at traditional practices that are linked to customary marriages. The third part looks at practices that are linked to delicts recognised under customary law. The fourth part will analyse how these practices violate the national and international framework on the protection of children. The fifth part is the conclusion.

3.2. Practices linked to customary marriages

According to the Recognition of Customary Marriages Act 120 of 1998 (hereinafter referred to as the RCMA), a customary marriage ‘means a marriage concluded in accordance with customary law.’²⁰⁶ Customary law ‘means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which

²⁰⁵ Bamgbose O ‘Legal & Cultural Approaches to Sexual Matters in Africa: The cry of the adolescent girl’ (2015) 10(2) *University of Miami International and Comparative Law Review* 129.

²⁰⁶ Section 1 of the RCMA.

form part of the culture of those peoples'.²⁰⁷ There are different cultural practices related to the formation of a customary marriage in accordance with customary law that may lead to child marriages and expose children to HIV/AIDS.²⁰⁸ The discussion will however mainly focus on lobolo and ukuthwala.

3.2.1. Lobolo

The term lobolo is derived 'from the Zulu noun *ilobolo*, from the verb *lobolo*'.²⁰⁹ Under the RCMA, lobolo is defined as 'the property in cash or in kind ...which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage'.²¹⁰ Various indigenous communities in South Africa observe the custom of lobolo.²¹¹ Section (3)(1)(b) articulates that 'the marriage must be negotiated and entered into or celebrated in accordance with customary law'.²¹² This section, however does not directly mention lobolo as a requirement for a valid marriage.²¹³ Some authors however, are of the view that, 'the *lobolo* agreement is in fact a silent requirement for the validity of a customary marriage in terms of section 3(1)(b)'.²¹⁴ Nkosi in his analysis of the *Mabata v*

²⁰⁷ Section 1 of the RCMA.

²⁰⁸ For example lobolo, ukuthwala, virginity testing and female genital mutilation.

²⁰⁹ Olivier NTT, Bekker JC, Olivier (Jnr) NJJ & Olivier WH Indigenous law: The law of South Africa. (1995) vol 32. (1995) 24. 'Other communities have their own word, for example ikhazi (Hhosa), bogadi, bohari (Sotho-Tswana), lenyalo (Pedi), theka (Venda), rovoru (Shona). The often –used English translation "dowry" is a misnomer.'

²¹⁰ RCMA (1998:1). '...the property in cash or kind, whether known as *lobolo*, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaks*, *ikhazi*, *magadi*, *emabheka* or by any other name, which a prospective husband or head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage;...' Other authors have also described lobolo. Church J, Schulze C & Strydom H *Human Rights from a Comparative and International Perspective* (2007) 4. Other authors have described lobolo as '[t]he institution of *Lobolo*, which involves the transfer of marriage goods (*lobolo*, *ikhazi*, *bogadi*) from the family of the groom to that of the bride which is an essential incident in the traditional African marriage...' Herbst M & Du Plessis W 'Customary law v Common Law Marriages: A Hybrid Approach in South Africa.' (2008) (12)1 *Electronic Journal of Comparative law* 7. '*Lobolo* could consist of cattle, other animals or any other property as agreed to by the parties. In modern times cash is the preferred *lobolo*. The validity of a customary marriage is based on the agreement to pay *lobolo*.' Mofokeng LL (2009) *Legal Pluralism in South Africa: Aspects of African customary, Muslim and Hindu family law* 47. For the purpose of contextual background it is important to take cognisance of the fact that , lobolo agreements were not recognised during the colonial era and were forbidden²¹⁰, it however now enjoys recognition in the form of a definition within the Recognition of Customary Marriages Act.

²¹¹ Ngema NM 'The enforcement of the payment of *Lobolo* and its impact on Children's rights in South Africa' (2013) 16(1) *PER* 405.

²¹² RCMA 3(1) (b).

²¹³ Mofokeng LL 'The lobolo agreement as the "silent" prerequisite for the validity of a customary marriage in terms of the Recognition of Customary Marriages Act' (2005) 68 *THRHR* 277. See also Mwambene L and Kruuse H (2013) as well as Mwambene L and Sloth-Nielsen J (2012).

²¹⁴ Mofokeng LL 'The lobolo agreement as the "silent" prerequisite for the validity of a customary marriage in terms of the Recognition of Customary Marriages Act' (2005) 68 *THRHR* 277.

Department of Home Affairs and Others (GP) (unreported case no A844/2012) has also observed that ‘...lobolo is an *essentiale* of a customary marriage...’²¹⁵ Other authors, for example, Herbst & Du Plessis have observed that according to section 3 (1)(b), ‘[l]obolo is not a requirement for any other recognised marriage in South Africa’.²¹⁶ The South African Law Commission has also, in their report on Customary Marriages, recommended that lobolo should not be a necessity to deem a customary marriage valid.²¹⁷

The cultural significance of lobolo vis-a-viz, a customary marriage has been captured by Heeren, Jemmott, Tyler, and Tshabe & Ngwane in the following ways:

‘There is an understanding that the practice of paying *lobolo* is to seal the relationship between the two people who plan to get married and their families or clans. The *lobolo* demonstrates that the man getting married is capable of taking care of a family and also serves as a token of gratitude to the bride’s family for raising wonderful women.’²¹⁸

For the purpose of this discussion, it is necessary to point out how the methodology to determine the amount of lobolo can lead to child marriages linked to HIV/AIDS.²¹⁹ This then will provide a further understanding of the processes involved within this customary practice, and how it feeds into child marriages creating an opportunity for

²¹⁵ Nkosi, S ‘Customary marriage as dealt with in *Mxiki v Mbata in re: Mbata v Department of Home Affairs and Others* (GP) (unreported case no A844/2012, 23-10-2014) (Matojane J): opinion.’ *De Rebus* 549 (2015): 67-68 available at < [²¹⁶ Herbst M & Du Plessis W ‘Customary law v Common Law Marriages: A Hybrid Approach in South Africa’ \(2008\) \(12\)1 *Electronic Journal of Comparative law* 8.](https://scholar-google-co-za.ezproxy.uwc.ac.za/scholar?q=Customary+marriage+as+dealt+with+in+Mxiki+v+Mbata+in+re%3A+Mbata+v+Department+of+Home+Affairs+and+Others+%28GP%29+%28unreported+case+no+A844%2F2012%2C+23-10-2014%29+%28Matojane+J%29&btnG=&hl=en&as_sdt=0%2C5>” (accessed 22 November 2015) 2.</p>
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²¹⁷ South African Law Commission report on customary marriages (1998:61). ‘Lobolo should not be deemed essential for the validity of a customary marriages. If parties wish to give lobolo, they should be free to do so, but payment or non-payment should have no effect on their rights to any children born of the marriage.’

²¹⁸ Heeren GA, Jemmott JB, Tyler JC, Tshabe S & Ngwane Z ‘Cattle for wives and Extramarital Trysts for Husbands? Lobola, Men, and HIV/STD Risk behaviours in Southern Africa’ 2011 21(1) *J Hum Behave Soc Environ* 74.

²¹⁹ See generally Rautenbach, Bekker, Goolam (2010:57) on the different methods. These include ‘(a) custom (tradition), (b) through negotiation procedures and agreements between the parties; (c) unilaterally by the man’s family; and (d) among the Xhosa tribes, it is not agreed upon beforehand, but depends on the circumstances. These tribes follow the *theleka* custom according to which the wife’s father is permitted to remove the wife and her children from time to time and “impound” her. The husband has to deliver additional *lobolo* for their return. This process continues until the wife’s family has received a reasonable amount of *lobolo* in this manner.’ See also Ngema (2013:407).

HIV/AIDS infection amongst children. Firstly, the large amount of lobolo is usually paid in the case where the girl is still a virgin.²²⁰ In this instance, as rightly pointed by Olivier, Bekker, Olivier, Olivier while the virginity status is important, there is an indication that the women involved is a girl child. This assumption is made with two reasons: Olivier, Bekker, Olivier, Olivier, does not refer to woman in this criterion and in most cases it is young girls who would still be virgins by the time they are getting married.

The second assumption is illustrated in the matter between *Jezile v S*.²²¹ The appellant who was 28 years old at the time went from his Cape Town home to the Eastern Cape to seek out a young woman whom he would marry. This took place during late December 2009 or early January 2010. At some point in January 2010 the appellant saw a young girl aged 14 years of age, who was in grade 7 at school, and he determined that he would marry her.²²² The same day that he saw the girl he asked her family to commence with lobolo negotiations.²²³ The young girl who is the complainant did not want to get married but was forced by her grandmother and uncle to follow through with the traditions. After the ceremonial events she had tried to run away but her attempts were unsuccessful. The appellant then brought the complainant to his home in Cape Town towards the end of February 2010. Sexual intercourse then took place numerous times, as well as a wound to her leg.²²⁴

The issue before the court was whether the complainant had travelled willingly to Cape Town with the appellant or whether she was trafficked to be exploited and whether the appellant had injured her leg. The appellant was convicted at the Wynberg regional court in Cape Town, on 07 November 2013, on three counts of rape, one count of human trafficking, one count of assault to cause grievous bodily harm and one of common assault. He was sentenced to an effective 22 years direct imprisonment, and his name to be added to the National Register for Sexual Offenders in accordance with s 50(2)(a) of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007.²²⁵ The appellant appeal the charges of trafficking and rape, as he was in a

²²⁰ Olivier NTT, Bekker JC, Olivier (Jnr) NJJ & Olivier WH Indigenous law: The law of South Africa. (1995) vol 32. (1995) 26. See also Olivier et al for the determination of the size of lobolo.

²²¹ *Jezile v S* A 127/2014.

²²² *Jezile v S* A 127/2014. (2014:4).Paragraph 6.

²²³ *Jezile v S* A 127/2014. (2014:4).Paragraph 7.

²²⁴ *Jezile v S* A 127/2014. (2014:6).Paragraph 11.

²²⁵ *Jezile v S* A 127/2014. (2014:3).Paragraph 2.

customary marriage with the complainant when the events took place.²²⁶ He also appealed against his charges of assault.²²⁷ The appellant only succeeded in his appeal against the assault charges, with the Appeal court upholding the other judgements of the trial court.²²⁸

Coming back to the point under discussion, in this case, the appellant *Jezile*, had stated that he wanted to marry a young woman, preferably 16 years of age, because there was a high likelihood that such a girl would be a virgin.²²⁹ He had then found a girl in January 2010 who was 14 years old at the time. After seeing her for the first time he started lobolo negotiations with her family.²³⁰ The judgements reads that the negotiations were seemingly concluded in one day, and that he paid R8000 to the complainants grandmother as her father was deceased and her mother worked in a nearby village.²³¹ From the above sentiments, it is clear that there is a preference that exists for the girl to be a virgin. This factor then enables the practice of child marriages. In addition, as displayed in *S v Jezile*, sexual intercourse was forced upon the girl,²³² which can lead to HIV infection. Thus ‘women’s rights campaigners are of the view that the practice of *lobolo* should be abolished because it can facilitate the spread of HIV/AIDS and compromises the reproductive health of women by treating them as commodities’.²³³

Secondly, ‘[i]t is against the culture of the couple to have any sexual relationship prior to the day of the lobola ceremony, which is considered to need to be the day of the traditional wedding’.²³⁴ The above discussion on how virginity can lead to child marriages and HIV is also relevant. Most men would prefer to marry virgins. Thirdly, the link between lobolo and HIV affecting girls can be shown through the practice of polygyny. Where there is a child in the marriage, and the husband can afford lobolo for many wives, such a child can also be exposed to HIV. This assumption is made on the

²²⁶ *Jezile v S A* 127/2014. (2014:23).Paragraph 51.

²²⁷ *Jezile v S A* 127/2014. (2014:24).Paragraph 52-53.

²²⁸ *Jezile v S A* 127/2014. (2014:58).Paragraphs 105-106.

²²⁹ *Jezile v S A* 127/2014. (2014:3).Paragraph 5.

²³⁰ *Jezile v S A* 127/2014. (2014:4).Paragraphs 6-7.

²³¹ *Jezile v S A* 127/2014. (2014:4).Paragraphs 6.

²³² *Jezile v S A* 127/2014. (2014:15).Paragraphs 31.

²³³ Wengo C ‘African women denounce bride price’ (2004) 363 *The Lancelot* 716.

²³⁴ Heeren GA, Jemmott JB, Tyler JC, Tshabe S & Ngwane Z (2011)74.

general understanding that there is a direct link between polygynous marriages and high incidences of HIV infections.²³⁵

Heeren, Jemmott, Tyler, Tshabe, Ngwane stated the following:

‘The lobolo tradition is known as the “Customary Law of Marriage” (South Africa ;Act 120 Justice Department,2000), which permits the husband to marry up to four wives....Many see this as equal to multiple concurrent partners (Fray, 2008). In the case of one of the partners ‘contracting an infection everyone involved in this sexual network is at risk of infection (Duncan, et al., 1994, Morrison, Suntu, Musabas & Glover, 1997; Leclerec- Madlala, 2009; Asamoah-odei.1996; Dunkle et., 2008).’²³⁶

This observation is significant as it shows how the child that is involved in a polygamous marriage would become vulnerable to HIV infections. As already discussed, in chapter 2 children are often not in a position to negotiate condom use, making them vulnerable.

3.2.2. Ukuthwala

Ukuthwala originates in the IsiXhosa culture.²³⁷ Ukuthwala is defined as,

‘a form of abduction that involves kidnapping a girl or a young women by a man and his friends or peers with the intention of compelling the girl or young woman’s family to endorse marriage negotiations.’²³⁸

²³⁵ Albertyn C ‘Contesting Democracy: HIV/AIDS and the achievement of Gender Equality in South Africa’ (2003). 29(3) *Feminist Studies* 600.

²³⁶ Heeren GA, Jemmott JB, Tyler JC, Tshabe S & Ngwane Z (2011) 75.

²³⁷ Choma H ‘Ukuthwala Custom in South Africa: A Constitutional Test’ (2011) 8 *US-China Law Review* 875.

²³⁸ Department of Justice and Constitutional Development (2009:1) also cited in a Report on a Workshop on the violation of Children’s Rights through the abuse of the Cultural Practice of ukuthwala (2011:31). Nkosi M (2012:109) has also noted that there have been reports of bride abduction in Lesotho, Transkei, Seleone and Swaziland. Maya (2014:6). Several authors have similarly defined this practice. See also Himonga C, Nhlapo T, Maithufi IP, Weeks SM, Mofokeng &, Ndima D (2014: 36). “traditionally, ‘a mock abduction of an unmarried woman [with our without her consent] by a man who intends to marry her...resorted to primarily where there is some obstacles to a marriage, for example when the girl’s father unreasonably withholds consent to the marriage of his daughter.’ See also cited in Mofokeng (2009:57). See also Koyana (1980:1) ‘The word *ukuthwala* means “to carry”. *Ukuthwala* is a custom whereby, preliminary to a customary marriage, a young man will forcibly take the girl to his home. he, accompanied by one or two friends, will waylay her when she goes to the river to fetch water, or to the forest to get a head-load of firewood.’

For purposes of this discussion this definition recognises the fact that ukuthwala involves girls, who are children, and therefore exposing them to child marriages. Ntlokwana in his submission to the South African Law Commission comments that this practice affects, '[g]irls as young as 12 who are forced to marry men who are old enough to be their fathers'.²³⁹

It is also regarded as a cultural process involving marriage negotiations in South Africa.²⁴⁰ Nhlapo's affidavit to the court in *Jezile v S*, mentions the requirements of ukuthwala as a process as follows:

- (a) 'The woman must be of marriageable age, which in customary law is usually considered to be child-bearing age;
- (b) consent of both parties is necessary to perform *ukuthwala*. He notes though that there are instances where a woman would be taken unaware and acquiescence in the process only occurs after the fact. If however the woman does not agree the process fails and her father could institute a civil action against the man's guardian;
- (c) as part of the process, the parties would arrange a mock abduction of the woman at dusk. The woman would put up a show of resistance for the sake of modesty but in fact would have agreed beforehand to the arrangement;
- (d) the woman would then be smuggled into the man's homestead and placed in the custody of the women folk to safeguard her person and reputation. The father of the man would thereupon be informed of the presence of the woman in his homestead and of his son's desire to marry;
- (e) sexual intercourse between the couple is strictly prohibited during this period. If it does occur between the couple either willingly or by coercion, it is punishable by the payment of a fine or "*bopha*" of one herd of cattle to the woman's father. This, Nhlapo remarks, is akin to damages for seduction at common law; and

²³⁹ Ntlokwana N 'Submissions to the SA Law Commission on Ukuthwala' (2009) available at < <https://www.google.com/search?q=ntlokwana+2009&ie=utf-8&oe=utf-8> >(accessed 22 November 2015)7.

²⁴⁰ Nkosi M 'Ukuthwala "Bride abduction" and Education: Critical Challenges and Opportunities faced by school principals in rural Kwazulu-Natal' (2014) 41 *J Soc Sci* 443.

- (f) the man's family would then send an invitation to the woman's homestead either on the day of the mock abduction or on the following morning to inform her family that she was with his family. This would be a signal to the woman's family that the man's family wished to commence negotiations to marry.'²⁴¹

The cultural significance²⁴² of ukuthwala is well surmised by Report on a Workshop on the violation of children's rights through the abuse of the cultural practice of ukuthwala, and states as follows:

- (a) 'To force the father of the girl to give consent;
- (b) To hasten matters if the woman was pregnant;
- (c) To persuade the woman of the seriousness of the intent to marry her; and
- (d) To avoid the payment of lobola.'

For purposes of this discussion, the reasons and the cultural significance of ukuthwala can lead to child marriages linked to HIV in the following ways. Firstly, research has found that one shared factor amongst abducted girls is that they are between 14 and 17 years.²⁴³ These girls, are abducted by men who are between 55 and 70 years, widowed and HIV- positive.²⁴⁴ Secondly, research by Van der Watt and Ovens reveal that '[t]he impact of this practice on the girl child includes health issues such as HIV, Sexually transmitted infections (STI's) and pregnancy related complications'.²⁴⁵ In addition, Mubangi has also observed the close relationship between ukuthwala, child marriages, and the risks involved. These include becoming 'victims of domestic violence, premature and undesired pregnancies, and sexually transmitted infections including

²⁴¹ *Jezile v S A* 127/2014.

²⁴² Report on a Workshop on the violation of Children's Rights through the abuse of the Cultural practice of ukuthwala (2011) 31.

²⁴³ Otoo-Oyortey N & Pobi S 'Early marriage and poverty: Exploring links for policy and programme development' (2003) *Forum on marriage and the rights of women and girls* 47. 'In some contexts, abduction remains an acceptable form of finding a bride...[a] survey conducted in Ethiopia with 227 female spouses showed that 60 percent of the wives were abducted before the age of 15, and 93 percent before the age of 20....[and] [a] global analysis of the[HIV/AIDS] epidemic shows that "the prevalence of HIV infection is highest in women aged 15 -24 and peaks in men between five to ten years later" (Tallis, 2002).' See also UNICEF (2005) in chapter 1 of this mini-thesis.

²⁴⁴ Nkosi M 'Bride abduction in Kwazulu- Natal schools and its effects on education.' (2009) *Agenda: Empowering women for gender equity* 109.

²⁴⁵ Van Der Watt M & Ovens M 'Contextualizing the practice of Ukuthwala within South Africa' (2012) 13(1) *Child Abuse Research: A South African Journal* 20.

HIV/AIDS.’ Ntlokwana has further observed that ‘[s]ome of these girls are virgins and the men they are forced to marry are HIV positive’.²⁴⁶

The issue of consent is mentioned in both the requirements and the cultural significance of ukuthwala as demonstrated above. Jensen and Thornton have furthermore noted that consent is a very important aspect in marriage, and also highlights that minors do not have the capacity to be able to provide consent as ‘young people are less capable of understanding the implications of long-term decisions and do not have the full autonomy and independence or the mental and emotional maturity required for such decision-making’.²⁴⁷ Mikhail agrees with the notion that ‘[g]irls are not often given the opportunity to give their consent or otherwise in a decision that will affect their entire life.’²⁴⁸ She further notes that child marriage is being compared to prostitution as they both involve economic gain whereas in prostitution there is monetary gain for sexual purposes, in child marriages there is often a dowry payment involve and the child has to engage willingly or unwillingly in sexual relations with the spouse.²⁴⁹

3.2.3. Sexual delicts that lead to child marriages linked to HIV/AIDS

According to Knoetze ‘[t]he customary law of delict, actionable by individuals, gives redress for the violation of any right representing material value, and can be acquired by a family head’.²⁵⁰ Furthermore, Himonga, Nhlapo, Maithufi, Weeks, Mofokeng, Ndima places emphasis on the role that the head of the family has in relation to delictual liability and support this by indicating that ‘the head of the family is liable for delicts committed by the members of the family... [and]... also institutes claims for delicts committed in respect of members of the family unit’.²⁵¹ Knoetze has also observed that ‘[s]exual delicts can properly be understood against the background of the subordinate

²⁴⁶ Ntlokwana N ‘Submissions to the SA Law Commission on Ukuthwala’ (2009) available at <<https://www.google.com/search?q=ntlokwana+2009&ie=utf-8&oe=utf-8>> (accessed 22 November 2015) 7.

²⁴⁷ Jensen R & Thornton P ‘Early Female marriage in the developing world.’ (2003) 11(2) *Gender and Development* 9-10.

²⁴⁸ Mikhail SLB (2002)46.

²⁴⁹ Mikhail SLB (2002)43-45.

²⁵⁰ Knoetze E ‘Customary Law of Delict’ in Rautenbach C, Bekker JC & Goolam NMI (eds) (2010) *Introduction to Legal Pluralism* 105.

²⁵¹ Himonga C, Nhlapo T, Maithufi IP, Weeks SM, Mofokeng &, Ndima D *African Customary Law in South Africa: Post –Apartheid and living law perspectives* (2014) 197. Note also that Bennett TW (1995:102), indicates that ‘Children, i.e all persons who are not yet deemed independent heads of households, have no proprietary capacity under customary law.’

position a woman occupies in customary law and the fact that her sexual integrity and child-bearing capacity belong to a male person'.²⁵²

The customary law of delict includes various delicts.²⁵³ However for the purpose of this discussion the focus will be on sexual wrongs and carrying-off of brides. These sexual wrongs include ukuthwala, seduction and adultery.

3.2.4. Ukuthwala as a delict

Firstly, ukuthwala as a delict,²⁵⁴

'literally means "to carry away", the custom to which a man and a woman resort where they have agreed to marry each other, but there is an obstacle to their marriage and that becomes a delict when it does not result in a negotiated marriage because of the refusal of the bride's family to consent to the marriage.'²⁵⁵

This practice becomes a delict when the prospective bride's family is not willing to negotiate for a marriage.²⁵⁶ The requirements for this practice to become a delict is, when the girl's guardian does not give consent as well as either 'prior to the payment of *lobolo* or after the partial or full payment of *lobolo* whenever there is an obstacle to the actual marriage of the parties, in other words, their living together as husband and wife.'²⁵⁷ Ukuthwala is considered as a delict within certain tribes such as the Mfengu and in the Pondo and Bhaca it depends on the circumstances.²⁵⁸ The procedure to be

²⁵² Knoetze E (2010)108.

²⁵³ Knoetze E (2010)105. 'Thus the customary law of delicts originally comprised various sexual wrongs, certain instances of the carrying –off of the brides-to-be, damage to property, limited instances of defamation and theft.'

²⁵⁴ Labushagne JMT & Van den Heever JA 'Law of Delict' in Kekker JC, Labuschagne JMT & Vorster LP (eds)(2003) 90-91. The term sexual delicts can alone, 'be properly understood against the background of the sexual position which a woman occupies in indigenous law and the fact that her sexual integrity and her childbearing capacity belong to a male person, namely her father, guardian, holder of *lobolo* or her husband. See also Koyana DS (1980)81. Sexual delicts in itself has many themes, namely defloration of an unmarried girl; the common law action for seduction; impregnation of an unmarried girl; adultery; sexual intercourse with impregnation of a woman in an ukengena relationship and sexual intercourse with impregnation of widows and divorced women.

²⁵⁵ Himonga C, Nhlapo T, Maithufi IP, Weeks SM, Mofokeng &, Ndima D (2014)206.

²⁵⁶ Himonga C, Nhlapo T, Maithufi IP, Weeks SM, Mofokeng &, Ndima D (2014)207.

²⁵⁷ Himonga C, Nhlapo T, Maithufi IP, Weeks SM, Mofokeng &, Ndima D (2014)207. See also Bekker Seymour's Customary Law in Southern Africa (1998)98. Jansen RM (2010) 47 in Rautenbach, Bekker, Goolam (2010). 'If the woman was abducted without her parents' consent, it would under certain circumstances, constitute a delict and damages could be claimed in the form of the so called bopha cattle.

²⁵⁸ Labushagne JMT & Van den Heever JA 'Law of Delict' in Kekker JC, Labuschagne JMT & Vorster

followed in claiming the damages and how it affects the girl has been discussed under 3.2.3 above.

3.2.5. Seduction

Bennett, Mills & Muninick refer to seduction as ‘leading someone astray’.²⁵⁹ Seduction is defined in customary law as ‘sexual intercourse with a virgin’.²⁶⁰ Within this delict, ‘customary law provides for the payment of a penalty or fine to a woman’s guardian for the defloration of the woman, but also for a further act of extramarital intercourse if pregnancy ensues’.²⁶¹ The procedure to be followed in the case of seduction is that the girl has to report the seduction to her family and once the seducer admits guilt, the claim is then instituted, and depending on the community the fine ranges from one to six cattle, which is referred to as the ngquthu beast. However, should the girl be pregnant, as a result of the seduction another claim may be instituted.²⁶² The procedure to be followed in claiming the damages and how it affects the girl has been discussed under 3.2.3 above.

3.2.6. Defloration of a virgin and the Impregnation of an unmarried girl

LP (eds) (2003) 99. ‘With yet other tribes, such as the Pondo and Bhaca, *ukuthwala* comprises a delict only certain circumstances, namely if (i) the man or his father or guardian refuses to follow the *thwala* up with an offer of marriage, or (ii) is not in a position to collect the required *ihhazi* (lobolo), or (iii) the girl’s father or guardian does not consent to the marriage with the man concerned.’ See paragraph 2 ‘Ukuthwala as a delict’.

²⁵⁹ Bennett TW, Mills C & Munnick G ‘The anomalies of seduction: A statutory crime or an obsolete, unconstitutional delict?’ (2009) 25 *SAJHR* 330. See pages 330-333 for a discussion on seduction.

²⁶⁰ Himonga C, Nhlapo T, Maithufi IP, Weeks SM, Mofokeng &, Ndimba D (2014) 203. There are different terminologies within seduction, which Himonga and et al (2014: 203) have elaborated on as follows. ‘umgezo, in the Nguni languages, meaning literally “the cleansing”, and the penalty imposed for the cleansing of the family and all the virgins in that community resulting from the delict of seduction. Ukumsoma, in the Nguni languages, a form of sexual intercourse without the penetration by the man for which no fine is claimable. ngquthu beast, in the Nguni languages, the east claimable where the defloration of a virgin is not followed by pregnancy. Mvimba beast, in the Nguni languages, the beast claimable for each pregnancy where seduction of an unmarried woman is followed by pregnancy.’

²⁶¹ Himonga C, Nhlapo T, Maithufi IP, Weeks SM, Mofokeng &, Ndimba D. (2014)203 have also noted that, [a]ccording to case law, there is nothing that prevents the father of an African woman from claiming damages for seduction under customary law for the seduction of his daughter despite the fact that she can simultaneously take the same legal action herself under common law. This may lead to a problem of double jeopardy because the defendant may be liable for ‘double’ damages payable for the same delicts.’

²⁶² Himonga C, Nhlapo T, Maithufi IP, Weeks SM, Mofokeng &, Ndimba D (2014)204. It is important to note that under customary law, ‘[a]n unmarried girl is under the guardianship of her father or his their who has a reasonable expectation of receiving *lobolo for her in due course*.’ This is an important aspect in customary law as there is an expectation that a girl is treated as a commodity, which in essence can be traded at a price, depending on her status.

The defloration of a virgin and impregnation of an unmarried girl is also considered as a sexual delict. In the context of defloration a sexual delict applies when there was sexual intercourse with a virgin.²⁶³ The proof and procedure involved within this delict would be, that it is necessary for the girl to report the incident and an investigation will be carried out by the women in this family, thereafter if the accused admits his guilt procedures for a claim would start, however should the offender deny this claim, the matter is referred to the chief or magistrate court.²⁶⁴ The amount payable is twofold, and it has been observed that ‘[i]n several cases the payment of the seduction beast was considered a form of “punishment” whereas the virginity beast is considered a form of compensation payable to the mother of the girl for keeping her virginity intact’.²⁶⁵

3.3. Conclusion

The introductory quotation to this chapter was used to show that within traditional practices male dominance continues to be the order of the day. It was also used to show how submissive a child bride is towards her father. This chapter illustrated various ways how the cultural significance of different traditional African practices and their procedures deny children, particularly girls, and the enjoyment of children’s rights as protected under international and regional instruments, discussed in chapter 2. Furthermore, in discussing these various traditional African practices that lead to child marriages, it has also shown how some of these practices may be linked to HIV/AIDS infections. The following chapter will show how these practices violate the South African legal framework for the protection of children from child marriages linked to HIV/AIDS.

²⁶³ Knoetze (2010)108. The sexual delict of defloration can be claimed against persons who have had sexual intercourse with a virgin, as well as the second person who has had sexual intercourse with the same person. See also Bamgbose (2015:137). ‘[m]uch importance is attached to virginity under the African culture, therefore, rape victims are considered unmarriageable or of less value in the context of being assessed for marriage.’

²⁶⁴ Knoetze (2010)109.

²⁶⁵ Knoetze (2010)109. See also Bekker “Law of Delict” in Joubert, Faris and Church (eds) *LAW SA* vol 32 (2009).

CHAPTER 4

TRADITIONAL AFRICAN PRACTICES AND THE SOUTH AFRICAN LEGAL FRAMEWORK

4.1. Introduction

In chapter 2 the discussion centred on the international normative standards for the protection of children against harmful cultural practices that may lead to child marriages linked HIV/AIDS. In complying with these standards, South Africa, as a party to these instruments has legislative framework that can be used to address traditional African practices linked to child marriages. This chapter, however, focuses on how the different cultural practices discussed in chapter 3 are in violation of the legislative framework aimed at the protection of children from child marriages in South Africa.

The legislative framework that will be examined is the South African Constitution,²⁶⁶ the Children's Act,²⁶⁷ Criminal Law (Sexual offences and Related Matters) Amendment Act,²⁶⁸ and the RCMA. This chapter will be divided into four parts. The first part will look at the provisions within the Constitution, since it is the supreme law of the land.²⁶⁹ The second part looks at the position of cultural and traditional laws and children's rights in South Africa. The third part will explore the protection that the Children's Act offers to children who against traditional practices that may lead to child marriages linked to HIV/AIDS. The fourth part will examine the Criminal Law (Sexual offences and other related matters).

4.2. THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 108 of 1996

The different traditional cultural practices discussed in the preceding chapter are in violation of the Constitutional provisions in the following ways. Firstly, the Preamble to the South African Constitution is aimed at eliminating injustices, as well as acknowledges that it is an inherent requirement to have respect for all and unite

²⁶⁶ South African Constitution, Act 108 of 1996.

²⁶⁷ Children's Act 38 of 2005.

²⁶⁸ Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007.

²⁶⁹ Chapter 1, section 2 states that 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

regardless of diversity.²⁷⁰ The traditional cultural practices, for example, ukuthwala and most of the sexual delicts which affects girls are seen to be discriminatory on the basis of sex and gender. They therefore, are an obvious defilement of this aspiration. In addition, section 2 provides that '[t]he Constitution is the supreme law of the Republic'.²⁷¹ This provision has been noted to address inequalities and affirm human rights as an overriding law of the country.²⁷² In the context of harmful cultural practices leading to child marriages linked to HIV, Mswela's observation becomes relevant. She observed that section 39²⁷³ of the Constitution applies to all law. Therefore traditional practices that are in conflict with the Bill of Rights are in violation of the Constitution.²⁷⁴

Choma addressed the practice of ukuthwala in South Africa in relation to the South African Constitution, and addresses sections of the constitution that are pivotal not only to the protection of culture and religion but also that of the best interest of the child. Choma notes that the South African Constitution states that, '[a] child's best interests are of paramount importance in every matter concerning the child'.²⁷⁵ This is in line with the foundation of the United Nations Convention on the Rights of the Child, which also echoes the best interest of the child principle, as discussed in chapter 2.²⁷⁶

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²⁷⁰ Constitution of the Republic of South Africa, 1996. The preamble expresses, 'We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity. We, therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to-Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which every citizen is equally protected by law; and Improve the quality of life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations....'

²⁷¹ Ch1 ss 2 of the Constitution states that: 'The Constitution Is the supreme law of the republic; law or Conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

²⁷² Bessler J D 'In the spirit of Ubuntu: Enforcing the rights of orphans & vulnerable children affected by HIV/AIDS in South Africa' (2008) *Hastings International & Comparative Law Review* (2008)4. 'The Constitution of the Republic of South Africa, adopted in 1996, is "the supreme law of the Republic."'

²⁷³ Section 39 provides for the: ' Interpretation of Bill of Rights (1) When interpreting the Bill of Rights, a court, tribunal or forum- (a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.

²⁷⁴ Mswela M 'Cultural Practices and HIV in South Africa: A Legal Perspective' (2009) 12(4) *PER* 193- 194.

²⁷⁵ Choma H (2011)878.

²⁷⁶ Article 3(1) CRC states that in 'In all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authoritative or legislative bodies, the best interest of the child shall be a primary consideration.'

Although the Constitution takes cognisance of the protection of culture and as ukuthwala is a cultural practice,

‘[t]his practice directly and indirectly impacted negatively on the development of the girl child, in that the culture resulted in social isolation, denial of the right to education, poor life skills, psycho-social harm, early pregnancy and childbirth and risk of exposure to HIV/AIDS.’²⁷⁷

Secondly, section 9²⁷⁸ of the Constitution provides that discrimination on any basis is not allowed. Mwambene & Sloth-Nielsen have observed that alongside other international human rights instruments²⁷⁹ that section 9 of the Constitution acknowledges the need to prohibit discrimination and create uniformity.²⁸⁰ In the context of this discussion, cultural practices linked to customary marriages and delicts that are recognised under customary law are in violation of this provision in the following ways: firstly, most of these practices target persons that are under the age of 18 years old; and secondly, girls are generally affected than boys.²⁸¹ Bekker & Rautenbach have similarly observed that ‘[s]ection 9 of the Constitution is of particular significance because some customs and usages may be regarded as discriminatory’.²⁸² More importantly, section 9(3)²⁸³ emphasises that no person may be discriminated against regardless of their age, sex or gender. This provision supports the notion that

²⁷⁷ Choma H (2011)875.

²⁷⁸ Section 9 on equality 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. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one 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. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’

²⁷⁹ As also discussed in chapter 2 of this thesis

²⁸⁰ Mwambene L & Sloth-Nielsen J ‘Benign accommodation? Ukuthwala, “forced marriage” and South African Children’s Act’ (2011) 11 (1) *AHRLJ* 8. See paragraph on Ukuthwala and the right to equality, pages 8-10 of this study.

²⁸¹ See also chapter 1. UNICEF (2005:1). “Boys are also affected by child marriage but the issue impacts girls in far larger numbers and with more intensity.”

²⁸² Bekker JC & Rautenbach C ‘Nature and sphere of Application of African Customary Law in South Africa.’ in Rautenbach C, Bekker JC & Goolam NMI (eds) *Introduction to Legal Pluralism* (2010)41.

²⁸³ CH 2 Section 9 ss 3 states that: ‘The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth.’

traditional practices that are discriminatory on the basis of age, sex or gender, leading to child marriages are an upfront violation of the Constitution.

Thirdly, sections 15, 30, 31 and 211(3) are provisions that are aimed at the protection of traditional cultural practices. Section 15(3)(a) provides that ‘this section does not prevent any legislation recognising, marriages concluded under any tradition, or a system of religious, personal or family law...’.²⁸⁴ Sections 30²⁸⁵ and 31²⁸⁶ respectively deals with the right to language and culture and culture, religious and linguistic communities. Therefore one could argue that the belief in child marriages, which can be justified on different cultural practices, is a right that is afforded to indigenous groups who follow this custom.²⁸⁷ Jansen has similarly observed that section 30, implies that any person who wishes to do so could get married according to customary law.²⁸⁸ Maluleke echoed the significance of sections 30 and 31 and deduces that this could include the protection of various customary practices which may also include that of child marriages.²⁸⁹

Van der Watt and Ovens position the practice of Ukuthwala in a South African context. Their findings observe that section 30 and 31 of the 1996 South African Constitution recognise that South Africa is a country with many different cultures and propose that, ‘customary law should be accommodated in South African law, providing that specific rules or provisions are not in conflict with the constitution’.²⁹⁰ Their findings

²⁸⁴ Section 15(3)(a).

²⁸⁵ S30 ‘Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.’

²⁸⁶ S31 Cultural, religious and linguistic communities

(1) ‘Persons belonging to a cultural, religious or linguistic, community may not be denied the right, with other member of that community-

(a) To enjoy their culture, practice their religion and use their language; and

(b) To form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.’

²⁸⁷ Fishbayn L ‘Litigating the right to culture: Family Law in the new South Africa’ (1999) 13 *International Journal of Law, Policy and the Family* 148. Fishbayn has however commented that, ‘[a]ll these rights are subject to internal limitation that they must be exercised in manner that is consistent with other provisions in the Bill of Rights.’

²⁸⁸ Jansen RM ‘Customary family law’ in Rautenbach C, Bekker JC & Goolam NMI (eds) *Introduction to Legal Pluralism* (2010) 50.

²⁸⁹ Maluleke MJ ‘Culture, Tradition, Custom, Law and Gender Equality’ (2012) 15(1) *PER/PELJ* 6. ‘...recognition could be interpreted as protecting polygamy as well as related practices such as spouse inheritance, *Ukuthwala* and other customary practise which have the impact of undermining the Constitutional guarantee of gender equality.’

²⁹⁰ Van der M Watt & Ovens M (2012)11.

deconstruct the practice of ukuthwala and they emphasise the importance of differentiating the practice within its traditional form and in the manner in which it is presently taking place in South Africa. The authors furthermore observe the practice of ukuthwala as a social construct and explore the complexity of the concept delving into various theoretical explanations as well as the legislative framework and the criminal justice processes that are involved when looking at this traditional practice.

The authors however pose a noteworthy question in their contribution that being, ‘whether African culture makes females more vulnerable to becoming victims of this crime when the act is perpetrated under the guise of a “traditional practice”’.²⁹¹ The authors hereof surmise that education and awareness is of paramount importance and that these measures will aid in the protection of ‘vulnerable members of a society and empower communities to take a stand against criminals who act under the protection of “culture”’.²⁹²

Traditional practices leading to child marriages linked to HIV/AIDS can be regarded as discriminatory on the basis of age, sex and gender, and the right to culture may well be a catalyst for such incidents.²⁹³ Furthermore, even though section 15(3)(a) does not prevent legislation recognising customary marriages such as that of child marriages, this cannot violate the right of the child to be protected from African traditional practices such as child marriages which could result in HIV/AIDS.

Moreover, Amien’s remarks with regard to muslim personal law are equally relevant in the context of traditional practices that lead to child marriages. Commenting on sections 15 (3) of the Constitution, she observed that the ‘implementation of these rights cannot conflict with sex/gender equality.’²⁹⁴ In addition, she points out that the importance of protecting women within its application reiterates that there should be ‘a fair balancing of the rights to sex/gender equality and religious freedom, and especially to ensure that a respect for religious freedom does not yield negative results for women.’²⁹⁵ This line

²⁹¹ Van der Watt M & Ovens M (2012)11.

²⁹² Van der Watt M & Ovens M (2012)24.

²⁹³ Fishbayn L (1999)148. Fishbayn has observed that, ‘...invocation of the rights to culture may be used to insulate discriminatory practices against members of a cultural community from the full impact of human rights review.’

²⁹⁴ Amien W ‘Overcoming the Conflict between the Rights to Freedom of Religion and Women’s Rights to equality: A South African Case Study of Muslim Marriages.’ (2006) 28(3) *Human Rights Quarterly* 750.

²⁹⁵ Amien W (2006)754.

of thinking, applied to traditional practices that lead to child marriage linked to HIV/AIDS, leaves no room for the justification of violating children's rights, under the guise of the right to culture.

However, a close reading of these provisions show that the right to culture and the recognition of customary laws is limited.²⁹⁶ The right to culture in terms of section 31 (2) stipulate that, '[th]e rights in subsection (1) may not be exercised in a manner inconsistent with any provisions of the Bill of Rights.'²⁹⁷ Maluleke furthermore reiterated that the 'provisions protecting the right to culture explicitly include a qualification'.²⁹⁸ With these limitations, traditional practices that lead to child marriages that are inconsistent with any provisions of the Bill of Rights are clearly a violation of sections 30, 31, and 211(3) of the Constitution.

Moreover, section 28(2) of the Constitution considers the best interest of the child as paramount consideration in all matters pertaining the child. As Mubangizi has observed 'child brides then become victims of domestic violence, premature and undesired pregnancies and sexual transmitted infections including HIV/AIDS'.²⁹⁹ This is then an obvious violation of section 28(2) and other provisions that are aimed at the protection of children's rights.

Fourthly, another key provision which is violated by traditional cultural practices leading to child marriages is section 28.³⁰⁰ Devenish has reflected that this section,

²⁹⁶ See the internal limitation in section 30, 31 and 211(3).

²⁹⁷ Section 31(2).

²⁹⁸ Maluleke MJ (2012)6.

²⁹⁹ Mubangzi JC 'Legislating and Litigating against harmful cultural practices that violate sexual and reproductive rights of women in South Africa' available at (2014) <<http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmde/wccl/papers/ws7/w7-mubangizi.pdf>>. (accessed 01 November 2014).

³⁰⁰ Section 28 provides that:

- (1) 'Every Child has the right -
 - (a) to a name and a nationality from birth;
 - (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;
 - (e) to be protected from exploitative labour practices;
 - (e) 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;

realises the rights of children that were neglected and overlooked in past laws and herein offers them a voice.³⁰¹ Sloth-Nielsen has observed the importance of this provision in the Bill of Rights for the future of South Africa children.³⁰² More importantly, section 28(2)³⁰³ states that ‘[a] child’s best interests are of paramount importance in every matter concerning the child.’³⁰⁴ This has been observed as ‘[t]he general principle, so long espoused in our statutory law that the child’s best interest is of paramount importance in all matters pertaining to the child’.³⁰⁵ Skelton has taken cognisance of this provision and observes the importance thereof within the interpretation and use of other rights found in Chapter 2.³⁰⁶ Additionally Skelton pointed out that ‘[as] much as section 28(2) is a self-standing right, it also appears alongside and strengthens other rights’.³⁰⁷ Moreover, by incorporating this international provision of the ‘best interest of the child’ in this section, ‘has led to an elaborate array of instances in which the principle has influenced or advanced judicial decision – making’.³⁰⁸

In the context of this discussion, sexual delicts which ultimately benefits the male guardian, promotes the violation of the best interest of the child principle. Moreover, in

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- (f) not to be detained except as a measure of last resort, in which case, in addition to the rights as child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-
- (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child’s age;
- (g) to have a legal practitioner assigned to the child by the state expense, in civil proceeding affecting the child, if substantial injustice would otherwise result; and
- (h) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(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.’

³⁰¹ Devenish GE A *Commentary on the South African Bill of Rights* (1999) 371-372. According to Devenish section 28 ‘intended to give expression to the social and moral conscience of the South African nation and the desire of its leaders to give social compassion some meaningful constitutional and legal effect in relation to the children of South Africa, who in the past have suffered so inordinately because of unconscionable laws and policies.’

³⁰² Sloth-Nielsen J ‘Realising the rights of children growing up in child-headed households: A guide to laws, policies and social advocacy’ (2004) 25-34. See also Sloth-Nielsen J ‘A foreskin too far? Religious, “medical” and customary circumcision and the Children’s Act 38 of 2005 in the context of HIV/AIDS (2012)16 *Law, Democracy & Development* 79.

³⁰³ Ch 2 S 28 (2).

³⁰⁴ Ch 2 S 28 (2).

³⁰⁵ Devenish GE A *Commentary on the South Constitution* (1998)75.

³⁰⁶ Skelton A ‘Constitutional Protection of Children’s Rights’ in Boezaart T (ed) *Child Law in South Africa* (2009) 280. ‘Section 28 (2) has indeed become a key provision in Bill of Rights jurisprudence. It has helped to develop the meaning of some of the other rights in the Bill of Rights. It has been used to determine the ambit and to limit, other competing rights.’

³⁰⁷ Skelton A ‘Constitutional Protection of Children’s Rights’ in Boezaart T (ed) *Child Law in South Africa* (2009)280.

³⁰⁸ Sloth-Nielsen (2008:62).

the protection of children from child marriages, Dausab mentions that the best interest of the child provision ‘cannot be conveniently excluded on the basis of culture, historical context and/or any matter that may seem justified in the circumstances’.³⁰⁹ In addition, Mubangizi rightly observes the different children’s rights violations which are a result of child marriages.³¹⁰ These violations expose the child to health risks such as HIV/AIDS Infection.

In addition, section 28(3) provides a clear definition of who are considered children. According to this provision, a child ‘means a person under the age of 18 years.’³¹¹ This definition is similar to the CRC and the ACRWC discussed in chapter 2. However, as previously discussed, most traditional practices allow children below this age to get married. Child brides also violates section 28(3) as a person under the age of 18 years is regarded as a child and therefore should not be exposed to marriage at an early age nor to the risks associated with the practice. Devenish has observed that in terms of the above provision children are in ‘need of special protection because of their vulnerability to violations of [children’s] human rights’.³¹²

Fifthly, as can be inferred from the above discussions, rights have limitations and also interpretation of the rights itself may produce limitations.³¹³ Du Plessis has observed that the limitation clause is not as stringent as it should be.³¹⁴ It recognises that the nature of the right and the nature and extent of the limitation. Therefore due consideration should be given to whether the limitation is reasonable and justifiable. For purposes of this discussion, the question that should be asked is: Can the traditional cultural practices that lead to child marriages be justified under section 36 of the Constitution?

³⁰⁹ Dausab Y ‘Best Interest of the child’ in C Ruppel (ed) Child Rights in Namibia’ (2009) <http://www.kas.de/wf/doc/kas_18139-1522-1-30.pdf?110125181424> (accessed on 07 August 2015) 151.

³¹⁰ Mubangizi JC ‘Legislating and Litigating against harmful cultural practices that violate sexual and reproductive rights of women in South Africa’ available at (2014) <<http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws7/w7-mubangizi.pdf>>. (accessed 01 November 2014).1-3.

³¹¹ Section 28(3).

³¹² Devenish GE (1999)376.

³¹³ Fishbayn L (1999)156.

³¹⁴ Du Plessis L ‘Freedom of or Freedom porn Religion? An Overview of Issues Pertinent to the constitutional Protection of Religious Rights and Freedom in “the New South Africa” ’ (2001) 2 BYU Law Review 446.

The answer to the above question first lies in section 30 and 31. As previously discussed, these provisions have internal limitations which do not allow one to practice one's culture at the expense of violating other rights, for example section 28. In addition, section 39 of provides for the interpretation of the Bill of Rights. Interpretation of the provisions is fundamental in promoting the rights of children and protecting them against traditional practices, such as child marriages which may lead to HIV/AIDS, Mokgoro observed, 'that in the Bill of Rights or any legislation, courts have a specific injunction to develop indigenous law taking into account the spirit, purport and object the Bill of Rights.'³¹⁵ This provision also recognises international law as part of interpretation. In recognising the value of international and foreign law, this provision acknowledges the instruments discussed in chapter 2 which contains provisions that protect children from harmful traditional practices and the health risks such as HIV/AIDS associated with it. Du Plessis has evaluated the interpretation clause and deduces that this provision is uniform to all the other provisions in the Constitution.³¹⁶ More importantly, Devenish has noted that, '[s]ection 39(3) recognises the existence of other rights and freedoms conferred by the common law or customary law only "to the extent that they are not inconsistent with" fundamental rights contained in chapter 2'.³¹⁷ In recognising both the rights contained in common and customary law, it subtly also recognises the limitations set out within each, thereby also opening the floodgates for interpretation.

In addition to the provisions set out in the Bill of Rights, Chapter 12, on traditional leaders provides for in section 211(3), which observed that '[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'.³¹⁸ Mubangizi has observed that 'a balance has to be struck between the enjoyment of cultural rights and the protection of sexual reproductive rights that are seen to be violated by cultural practices'.³¹⁹ He has further alluded to the fact that it should still offer more support to the sexual and

³¹⁵ Mokgoro JY 'Ubuntu and the Law in South Africa' (1998) 1 (1) *Potchefstroom Electronic Law Journal* 10.

³¹⁶ Du Plessis L (2001) 439.

³¹⁷ Devenish GE (1999) 33.

³¹⁸ Section 211(3).

³¹⁹ Mubangizi JC 'An assessment of the Constitutional, Legislative and Judicial Measures against Harmful Cultural Practices that Violate Sexual Reproductive Rights of Women in South Africa' 16(3) (2015) *Journal of International Women's Studies* 166.

reproductive rights as cultural rights have restrictions.³²⁰ As Mubangizi rightly pointed out that sexual and reproductive rights should be given more value in courts, as child marriages violate young children when they have to participate in sexual activities at a young age which could lead to HIV/AIDS, as well as the risk of pregnancy which their bodies are not able to handle.

4.3. THE CHILDREN'S ACT 38 of 2005

The Children's Act 38 of 2005³²¹ is the principle legislative framework for the protection of children's rights in South Africa.³²² The different traditional practices discussed in chapter 3 can lead to the violation of the Children's Act in the following ways. Firstly, similar to international and regional legislation as well as the Constitution, the Children's Act defines a child as a person under the age of 18 years of age.³²³ Most traditional practices where children are married before the age of 18 visibly violate this provision.

Secondly, the Children's Act in defining abuse states that it is 'in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child...'.³²⁴ Traditional customary practices that may have dire health effects on children and could increase their risk of becoming infected with HIV. Mswela observes that within African

³²⁰ Mubangizi JC 'An assessment of the Constitutional, Legislative and Judicial Measures against Harmful Cultural Practices that Violate Sexual Reproductive Rights of Women in South Africa' 16(3) (2015) *Journal of International Women's Studies* 166.

³²¹ Children's Act 38 of 2005 [Assented to 8 June 2005].

³²² Children's Act 38 of 2005 states that: 'The objectives of this Act are-

- (a) To promote the preservation and strengthening of families;
- (b) To give effect to the following constitutional rights of children, namely-
 - (i) family care or parental care or appropriate alternative care when removed from the family environment;
 - (ii) social services;
 - (iii) protection from maltreatment, neglect, abuse or degradation; and
 - (iv) that the best interests of a child are of paramount importance in every matter concerning the child;
- (c) to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic;
- (d) to make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children;
- (e) to strengthen and develop community structures which can assist in providing care and protection for children;
- (f) to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (g) to provide care and protection to children who are in need of care and protection;
- (h) to recognise the special needs that children with disabilities may have; and
- (i) generally to promote the protection, development and well-being of children.'

³²³ Children's Act 38 of 2005 " 'child' means a person under the age of 18 years;..."

³²⁴ Children's Act 38 of 2005 Section 1: 'Interpretations.'

societies where young women marry at an early age, they often have partners their own age outside of the marriage which could increase the risk of HIV infection.³²⁵ Mswela's finding further take cognisance of the physical immaturity³²⁶ of the young child's body which makes them in turn more vulnerable during sexual intercourse and therefore increases the risk of HIV infection.³²⁷ In addition to this, the child might be dependent on their husband's finances for survival and therefore cannot request that her husband be tested for HIV which in turn leaves her vulnerable to the risk of infection.³²⁸ Clearly these traditional practices that eventually harm young children are in violation of this provision.

Thirdly, section 7(g)(i)³²⁹ stipulates a number of factors that should be taken into consideration when applying the best interest of the child principle. As shown in chapter 2 and 3, persons under the age of 18 years of age should not be married as they are not developed physically or emotionally for such an institution, and HIV/AIDS infection could be a result of such practices. Age is an important factor which has been discussed throughout this paper in international, regional and domestic instruments. Standards have also been developed which consider the development of the child, therefore it would not be in the child's best interest to develop correctly and a child marriage as well as the risk of contracting HIV/AIDS will hinder this development.

Fourthly, similarly section 9 clearly outlines the importance of the best interest of the child, which echoes section 28 of the Constitution, as it states that '[i]n all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied'.³³⁰ This reiterates the overriding nature of this provision as well as including a clear path for identification with regards to protection and the wellbeing of children, and as literature as shown child marriages may not be in the best interest of the child, and therefore applying the

³²⁵ Mswela M 'Cultural Practices and HIV in South Africa: A Legal Perspective' (2009) 12(4) *PER* 185.

³²⁶ Mswela M 'Cultural Practices and HIV in South Africa: A Legal Perspective' (2009) 12(4) *PER* 200. 'It is submitted that because the bodies of these young girls are physiologically underdeveloped, they are more easily injured through sexual intercourse and are thus extremely vulnerable to diseases such as HIV. This is due to the young girl's unripe cervix and the low vaginal mucus production.'

³²⁷ Mswela M 'Cultural Practices and HIV in South Africa: A Legal Perspective' (2009) 12(4) *PER* 200.

³²⁸ Nour NM 'Health Consequences of Child Marriage in Africa' (2006) 12(11). *Emerging Infectious Diseases* 1645. 'One fundamental difficulty with child marriage is that girls are financially dependent on their husbands and therefore lack the power to make demands upon them.'

³²⁹ Chapter 2; Section 7(g)(i) 'age, maturity and stages of development'

³³⁰ Section 9 states that 'In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.'

need to protect the child from child marriages that may lead to HIV/AIDS. The discussion points to the fact that traditional cultural practices that are in conflict with these provisions are not to be tolerated.

Fifthly, section 12(1)³³¹ of the Act emphasises the importance of protecting children from religious or cultural practices that may be harmful to children. Van der Watt and Ovens observe that section 12(1) offers protection to children and, ‘affords children the right not to be subjected to social, cultural and religious practices which are detrimental to their well-being.’³³² Himonga rightly observed that harmful practices, ‘intersect with the various rights of the child, such as the right to life, dignity and health...’.³³³ Himonga furthermore remarked that ‘there can be no doubt that practices that are harmful to the child can never be in the child’s best interest.’³³⁴ However, section 12 does not specifically mention some of the cultural practices that lead to child marriages in South Africa, namely ukuthwala.³³⁵ It has been argued that such practices are not a violation of section 12.³³⁶

For the purpose of this discussion, however, this provision unambiguously conditions that ‘[e]very child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being’.³³⁷ Herein a child has protection from social, cultural and religious practices that may be harmful. Section

³³¹ S12(1) states that: ‘Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.’

³³² Van der Watt M & Ovens M (2012)21.

³³³ Himonga C ‘African Customary Law and Children’s Rights: Intersections and Domains in a New Era’ in Sloth-Nielsen J (ed) (2008) *Children’s Rights in Africa: A Legal Perspective* 84.

³³⁴ Himonga C ‘African Customary Law and Children’s Rights: Intersections and Domains in a New Era’ in Sloth-Nielsen J (ed) (2008) *Children’s Rights in Africa: A Legal Perspective* 4.

³³⁵ Sloth-Nielsen J and Mwambene L ‘Talking the talk and walking the walk: How can the development of African customary law be understood?’ (2012) 28 (2) *Law in Context* 35.

³³⁶ Sloth-Nielsen J and Mwambene L (2012)

³³⁷ Section 12 states that: Social, cultural and religious practices. Provides 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. 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. (3) Genital mutilation or the circumcision of female children is prohibited.(4) Virginity testing of children under the age of 16 is prohibited. (5) Virginity testing of children older than 16 may only be performed-(a) if the child has given consent to the testing in the prescribed manner; (b) after proper counselling of the child; and (c) in the manner prescribed.(6) The result of a virginity test may not be disclosed without the consent of the child. (7) The body of the child who has undergone virginity testing may not be marked.(8) Circumcision of male children under the age of 16 is prohibited, except when- the practice of the religion concerned and in the manner prescribed or (b) circumcision is performed for medical reasons on the recommendation of a medical practitioner. (9) Circumcision of male children older than 16 may only be performed- (a) if the child has given consent to the circumcision in the prescribed manner; (b) after proper counselling of the child; and (c) in the manner prescribed.’

(12)(2)(a) asserts that '[a] child below the minimum age set by law for a valid marriage may not be given out in marriage or engagement;...'.³³⁸ This provision contains protection to children from social and cultural practices, such as that of ukuthwala negotiations, that has been discussed above, which leads to child marriage. As discussed in chapter 3, the practice of ukuthwala is in violation of many rights of the child, as well as section 12 of the Children's Act as such practices are harmful to children.

Finally, just like the Constitution and the international legal framework section 17 states that '[a] child, whether male or female, becomes a major upon reaching the age of 18 years'.³³⁹ The wording of this provision shows no distinction between a male and a female child. This is relevant in that most of the traditional practise leading to child marriages discriminate between a male and a female child. In addition as discussed under section 28(3) of the Constitution, such traditional practices would be in violation of section 17 of the Children's Act.

Most of the provisions in the Children's Act, are in clear opposition to child marriages. However, section 18(3)(c)(i)³⁴⁰ which allows for parents to give 'consent to the child's marriage may be used as justification for some of the traditional practices discussed in chapter 3. This section does create the possibility for coercion. The Children's Act makes references to the RCMA in terms of customary marriages, which implies, 'that the customary law regulating marriage may not depart from the provisions of the Children's Act involving marriage. Thus, the age of majority can no longer be defined in terms of the customary concept of adulthood'.³⁴¹

Moreover in line with the regional and international framework discussed in chapter 2 of this thesis, this Act also contains provisions for child participation. Section 10 provides that '[e]very child that is of such an age, maturity and stage of development as to be able to participate in an appropriate manner concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration'.³⁴² Section 10 and section 18 can also be read in conjunction with section

³³⁸ Children's Act 2005: Section 12(1)(b).

³³⁹ Section 17.

³⁴⁰ Chapter 3 Section 3(c)(i).

³⁴¹ Himonga C, Nhlapo T, Maithufi IP, Weeks SM, Mofokeng &, Ndimba D (2014)112.

³⁴² Section 10.

31(1)(a)(b)(i) and (iv) which recognises all major decisions involving the child in instances that may lead to child marriages and exposure to HIV/AIDS, which states that:

(1)(a) ‘Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child’s age, maturity and stage of development.

(b) A decision referred to in paragraph (a) is any decision-

(i) in connection with the matter listed in section 18(3) (c);

(ii) affecting contact between the child and a co-holder of parental responsibilities and rights;

(iii) regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or

(iv) which is likely to significantly change, or to have an adverse effect on, the child’s living conditions, education, health, personal relations with a parent or family member or, generally, the child’s well-being.³⁴³

From the traditional practices discussed children are not offered the right to participate in decisions that would affect their future. This is a violation of this provision as well as constitutional and legal international instruments on the protection of children’s rights to participation.

4.4. THE RECOGNITION OF CUSTOMARY MARRIAGES ACT 120 OF 1998 (RCMA)

Customary marriages in South Africa are regulated by the RCMA.³⁴⁴ It sets out provisions as to what constitutes a valid customary marriage, which has also been discussed in *Jezile v S*.³⁴⁵ The requirements for a valid customary marriage are provided

³⁴³ Section 31.

³⁴⁴ Mswela M ‘Cultural Practices and HIV in South Africa: A Legal Perspective’ (2009) 12(4) *PER* 182.

³⁴⁵ *Jezile v S* A 127/2014. (2014:46). ‘Nhlapo argued that in as much as ukuthwala is no more than a portal, albeit an irregular one, to a marriage, the substantive minimum requirements prescribed by the RCMA must by necessary implication apply to the validity of *ukuthwala*. A version of *ukuthwala*

under section 3(1)³⁴⁶ of the RCMA. Sloth-Nielsen and Mwambene have remarked that the RCMA in recognising ‘consent’ ‘the RCMA is probably to be conceptualised in the common law tradition, as a highly individualised time bound agreement furnished by the prospective spouse concerned with the full appreciation of the nature and purposes of the consent given and the consequences thereof’.³⁴⁷ In the context of this discussion, this provision requiring both parties to be over the age of 18 and to fully give their consent mean that child marriages cannot be justified under customary law. The traditional practices discussed which are in disregard of the requirements of age and consent conflicts with this provision. Moreover, Curren and Bonthuys opined as far back as 2004 this provision, requiring that consent is given from both parties, ‘the ukuthwala marriage could therefore no longer be used to overcome the bride’s lack of consent’.³⁴⁸

In the fight against child marriages, section 3(3)(a) which provides that ‘if either of the prospective spouses is a minor, both his and her parents, or if he or she has no parents, his her legal guardian, must consent to the marriage...’.³⁴⁹ can be used as justification for the traditional practices that lead to child marriages. This section is buttressed by section 5 which provides for determination of age of a minor whereby:

‘[a] registering officer may, in respect of a person who allegedly is a minor, accept a birth certificate, an identity document, a sworn statement of a parent or relative of the minor or such other evidence as the registering officer deems appropriate as proof of that person’s age.’³⁵⁰

Moreover, section 3(1)(b), as interpreted by the courts to include the requirements of lobolo,³⁵¹ can also be a stimulus for parents to consent to child marriages. The relevance of this discussion, in the context of this thesis is that traditional African practices that lead to child marriages may not be in violation of these provisions.

that permitted a marriage to follow when these requirements were not met would not only be inconsistent with the Constitution but also inconsistent with the RCMA.’

³⁴⁶ Section 3(1) provides that: ‘(a) the prospective spouses- (i) must both be above the age of 18 years;(ii) and must both consent to be married to each other under customary law;(b) the marriage must be negotiated and entered into, or celebrated in accordance with customary law’

³⁴⁷ Mwambene L & Sloth-Nielsen J (2012)30.

³⁴⁸ Curren E & Bonthuys E ‘Customary law and domestic violence in rural South African communities: notes and comments’ (2005) 21(4) *South African Journal on Human Rights* 607-635.

³⁴⁹ Section 3(3)(a); RCMA.

³⁵⁰ Section 5(1); RCMA.

³⁵¹ *Bhe v Magistrate Khayelitsha and Others* 2005 (1) BCLR 1 (CC).

4.5. CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 2007

The Criminal Law (Sexual Offences and Other related matters) Amendment Act 32 of 2007³⁵² contains specific provisions which offer special protection to children who are sexually violated. The Sexual Offences Act, observes that a ‘sexual act means an act of sexual penetration or an Act of sexual violation.’³⁵³ The Sexual Offences Act specifically contains provisions in chapter 3 (15-22),³⁵⁴ that highlight sexual offences against children. Moreover ‘sexual relations within child marriages involving girls under the age of 16 years, by necessity constitute the crime of statutory rape’.³⁵⁵ This Act offers protection by prohibiting sexual acts with children and declares it a criminal offence punishable by law.³⁵⁶ Child marriage, as a traditional African practice, is harmful to children as, children have to participate in sexual activity willingly or unwillingly which is in direct violation of various provisions contained within the Sexual Offences Act. It has been observed that within children marriages, children are often not able to negotiate condom use thereby leaving them vulnerable to HIV infections.³⁵⁷ Additionally Wang has observed that, ‘[e]xperiences of sexual violence

³⁵² Criminal Law (Sexual Offences & Related Matters) Amendment Act 32 of 2007. [Assented to 13 December 2007]. [Date of Commencement: 16 December 2007].

³⁵³ Criminal Law (Sexual Offences & Related Matters) Amendment Act 32 of 2007.

³⁵⁴ Chapter 3 ss 15 Acts of Consensual Sexual penetration with certain children (statutory rape) (1) ‘A person (‘A’) who commits an act of sexual penetration with a child (‘B’) is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child.’

Chapter 3 ss 16 Acts of consensual sexual violation with certain children (statutory sexual assault) A person (‘A’) who commits an act sexual violation with a child (‘B’), despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child.’

Chapter 3 ss 17 Sexual exploitation of children. A person (‘A’) who unlawfully and intentionally engages the services of child complaint (‘B’), with or without the consent of B, for financial or other reward, favour or compensation to B or to a third person (‘C’)- for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or by committing a sexual act with B, is, in addition to any other offence which he or she may be convicted of, guilty of the sexual exploitation of a child.’

³⁵⁵ Martin P & Mbambo B Save the Children *An exploratory study on the interplay between African customary law and practices and children’s protection rights in South Africa* (2011) Save the Children Sweden 62. See also *Jenzile v S* in which ukuthwala ended up to be statutory rape.

³⁵⁶ Section 15 (1) of the Children’s Act. Provides that, ‘A person (‘A’) who commits an act of sexual penetration with a child (‘B’) is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child.’

³⁵⁷ Geldenhuys M, Kaufulu-Kumwenda C, Nabaneh S & Stefizyn K ‘The African Women’s Protocol and HIV: Delineating the African Commissions General Comment on articles 14(1) (d) and (e) of the Protocol’ (2014) 14 *African Human Rights Law Journal* 696. Provides that ‘The unequal status of women in society, particularly within African society, which has a number of cultural practices that fail to promote women as equal members of a community, as a major contributing factor. This places them in a disadvantageous situation when promoting safe sexual relations, particularly in the use of

during childhood have been found to be associated with higher risks for HIV infections...'.³⁵⁸ Clearly, different cultural practices discussed in chapter 3 would be in violation of the Sexual Offences Act. This was so displayed in the *Jenzile v S* as previously discussed.

4.6. THE PREVENTION AND COMBATING OF TRAFFICKING IN PERSONS

The Prevention and Combating of Trafficking in Persons Act³⁵⁹ addresses child protection as well as includes aspects of marriage. The Trafficking Act moreover observes the Children's Act as well as the Sexual offences Act and is a further commitment to combat trafficking.

The Children's Act defines trafficking:³⁶⁰

'in relation to a child-

(a) Means the recruitment, sale, supply transportation, transfer, harbouring or receipt of children, within or across the borders of the Republic-

(i) By any means, including the use of threat, force or other forms of coercion, abduction, fraud, deception, abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control of a child; or

(ii) Due to a position of vulnerability,

For the purpose of exploitation; and

(b) Includes the adoption of a child facilitated or secured through illegal means;...'

condoms for sexual intercourse.' See also chapter 1 of this mini-thesis which observes the following by Ogden J & Nyblade L (ICRW (2005:16) 'HIV (Human Immunodeficiency Virus). HIV is not transmitted easily...HIV can only be transmitted directly by having sexual intercourse with an infected partner without using a barrier, such as a condom; through the direct exchange of blood or bodily fluids; or from an infected mother to her child during pregnancy 'delivery or breast milk.'

³⁵⁸ Wang S K 'Violence & HIV/Aids: Violence against women and girls as a cause and consequences of HIV/AIDS' (2010) 17(313) *Duke Journal of Law and Policy* 5. 'Experiences of sexual violence during childhood have been found to be associated with higher risks for HIV infections, as well as for a host of other risks behaviours –drug abuse, having multiple sexual partners, engaging in transactional sex, having male partners at risk for HIV, engaging in unprotected sex—that are themselves risk factors for heightened risk for HIV transmission.'

³⁵⁹ Prevention and combating of Trafficking in Persons Act No 7. Of 2013. [Assented to 28 July 2013].

³⁶⁰ Children's Act 38 of 2005.

The Act therein includes ‘coercion, abduction’³⁶¹ which are both components of a child marriage and the practice of ukuthwala. The Trafficking Act also defines a child as, ‘a person under the age of 18 years.’³⁶² The Trafficking Act does not make a direct reference to traditional African practices, but however defines forced marriage,³⁶³ which is often for the purpose or the result of trafficking. Section 4(2)(b)³⁶⁴ unambiguously uses the word ‘child’ and exploitation in its provision on trafficking in persons in detailing offences, penalties and extra-territorial, jurisdiction.

The definition of a forced marriage detects the importance of consent of both parties which is aligned with the RCMA which in Section 3(1)(a)(ii)³⁶⁵ mentions that consent of both parties is necessary for a valid customary marriage. The Act also refers to children being trafficked for exploitation and as this is transpires in child marriages it offers protection against this in section 4(2)(b). Luya has remarked that there is a link to child marriages that are as a result of cultural practices and linked to HIV/AIDS and trafficking and deduced that:

‘Some entrenched cultural norms and values that could be detrimental to the psychological and personal development of young women and girls survive in South Africa. Notably, child marriages due to HIV/AIDS, child placement, as well as materialism and immediate gratifications are some of the cultural practices drawing young women and girls to human traffickers in this country.’³⁶⁶

³⁶¹ Children’s Act 38 of 2005.

³⁶² Children’s Act 38 of 2005 defines trafficking, ‘in relation to a child-

(a) Means the recruitment, sale, supply transportation, transfer, harbouring or receipt of children, within or across the borders of the Republic-

(i) By any means, including the use of threat, force or other forms of coercion, abduction, fraud, deception, abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control of a child; or

(ii) Due to a position of vulnerability,

For the purpose of exploitation; and

(b) Includes the adoption of a child facilitated or secured through illegal means;...’

³⁶³ Trafficking Act. Forced marriage for this purpose ‘means a marriage concluded without the consent of each parties to the marriage.’

³⁶⁴ Section 4 (2)(b) ‘Any person who concludes a forced marriage with another person, within or across the borders of the Republic, for the purpose of the exploitation of that child or other person in any form or manner, is guilty of an offence.’

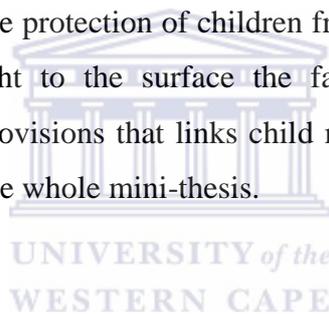
³⁶⁵ RCMA 3(1)(a)(ii). ‘The prospective spouses must both consent to be married to each other under customary law;...’

³⁶⁶ Luya TM ‘Human Trafficking of young women and girls for sexual exploitation in South Africa’ (2012) available at <<http://cdn.intechopen.com/pdfs-wm/37751.pdf>> (accessed on the 17 November 2015) 16.

Molo Songolo have also observed that that South African cases involving trafficking amongst other things include that of children being forced into marriage.³⁶⁷ In *Jezile v State*³⁶⁸ the appellant was charged with human trafficking, and received a sentence to 10 years imprisonment as he transported a child from the Eastern Cape to the Western Cape after forcing her into marriage. Therefore the traditional African practices that lead to child marriages which have the element of trafficking such as ukuthwala are in violation of the provisions of the Trafficking Act as discussed.

4.7. Conclusion

This chapter has shown how traditional African practices violate the different provisions in the South African legal framework on the protection of children rights, particularly linked to child marriages. The chapter also highlighted that most of the South Africa legal framework complies with the international and regional instruments discussed in chapter 2 on the protection of children from child marriages. However, the discussion has also brought to the surface the fact that the South African legal framework has no direct provisions that links child marriages to HIV/AIDS. The next chapter is a conclusion of the whole mini-thesis.



³⁶⁷ Molo Songololo 'Human Trafficking Week 2-9 October 2015: Stop Child Trafficking' (2015) available at <<http://www.molosongololo.com/?p=2079>> (accessed 17 November 2015).

³⁶⁸ *Jezile v S A* 127/2014.

CHAPTER 5

CONCLUSION AND RECOMMENDATION

5.1. Conclusion

This mini-thesis looked at how the traditional African practices relating to child marriages in the face of HIV/AIDS violate the South African legal framework on children's rights. The focus was on selected provisions of the Constitution, the Children's Act, the RCMA, the Sexual Offences Act and the Trafficking Act. The research has also highlighted the international and regional treaty's provisions that South Africa have ratified, in an effort to protect children against traditional African practices that lead to child marriages in the face of HIV/AIDS. The research has also observed that the current legislative framework on the protection of children against traditional African practices that lead to child marriages has not directly linked this practice to HIV/AIDS. The following discussion, therefore, offers some general recommendations to address this shortcoming.

5.2. Recommendation

It has been shown that some traditional African practices that lead to child marriages expose children to HIV/AIDS. Therefore, there is a need for amendments within existing legislation to include additional protection to children who are infected by HIV/AIDS as a result of child marriages.

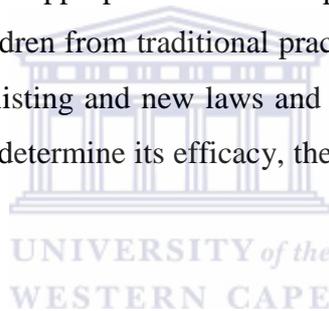
In addition, Skelton's observation with regard to the importance of legislation in the protection of children is relevant. She observed the following:

‘The drafting of child-friendly laws and constitutions is only part of the endeavour that must be undertaken to ensure a protective legal environment. Laws (both old and new) must be interpreted against the backdrop of constitutional protections as well as against international instruments. The law can thus incrementally develop through the setting of precedents.’³⁶⁹

³⁶⁹ Skelton A ‘The Development of a Fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments’ (2009) 9 *African Human Rights Law Journal*. 486.

Therefore, the final recommendation to this mini thesis is that awareness raising³⁷⁰ on the different legislation on the protection of children from child marriages is precisely important. In order for this to take place, community development workers for the State and Civil society should receive adequate training in this field of study. The training provided should enable them to create awareness among traditional leaders, so that they are able to educate their communities. Further awareness raising within schools, and places of worship is necessary, and this should include aspects of what child marriages are, the negative effects that this could have on the child's development as well as the role of legislation.

In my opinion South Africa has progressed well with regards to enacting legislation that protects children from traditional practices such as child marriages. It is however necessary that law and policy makers detect the link between child marriages and HIV/AIDS, and develop the appropriate laws and policies that can be used to offer additional protection to children from traditional practices such as child marriages. The implementation phase of existing and new laws and policies should also be monitored more rigorously in order to determine its efficacy, therein providing inputs for revisions where and when necessary.



³⁷⁰ As prescribed in article (5)(a) Women's Protocol. Provides for the 'creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;...'

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