

INVESTIGATING THE LEGAL AND POLICY FRAMEWORK ON CHILD MARRIAGE IN NIGER: A COMPARATIVE STUDY OF KENYA AND ETHIOPIA

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ABSTRACT

Globally, as many as 650 million women and girls alive today were married off before their 18th birthday. By the end of this year, 2019, 12 million girls will become child brides. Child marriage has been practiced over thousands of centuries across communities worldwide. To date, it is still perceived by communities in South Asia and Sub-Saharan Africa, the two regions that host the highest numbers of child brides, as a culturally legitimate way of preserving a family's honor by controlling a girl's sexuality. Moreover, the primary factors that motivate families to marry off their daughters (such as poverty and conflict) still exist. The recognition of the harmful effects of child marriage not just for the individual victim but also for her community, society and country has propelled the international, regional and national community to adopt laws and policies and robust plans of action to eliminate the practice. In some countries, accelerated efforts to eliminate the practice have led to the prevention of thousands of potential child marriages. Yet in other countries, girls at risk of child marriage have not been as fortunate.

This research investigates the reasons behind the highest prevalence rate of child marriage in Niger by investigating the deficiencies of its laws and policies against child marriage in comparison with the child marriage laws and policies in Ethiopia and Kenya. The paper argues that weak laws and policies against child marriage, strong deference to cultural norms and laws and reservations to relevant international and regional treaties have contributed to a climate of oppression for Nigerien girls.

LIST OF ABBREVIATIONS

ACHPR- African Charter on Human and People's Rights

ACRWC- African Charter on the Rights and Welfare of the Child

CEDAW- Convention on the Elimination of all Forms of Discrimination against Women

CRC- Convention on the Rights of the Child

ECHR- European Convention on Human Rights

FDRE- Federal Democratic Republic of Ethiopia

FGM/C- Female Genital Mutilation/ Cutting

HTPs- Harmful Traditional Practices

ICCPR- International Covenant on Civil and Political Rights

ICESCR- International Covenant on Economic, Social and Cultural Rights

ICRW- International Center for Research on Women

OECD- Organization for Economic Cooperation and Development

SDGs- Sustainable Development Goals

SADC- Southern African Development Community

UDHR- Universal Declaration of Human Rights

UN- United Nations

UNICEF- United Nations Children's Fund

UNDP- United Nations Development Programme

WHO- World Health Organization

INTRODUCTION

“In a very small village in Turkana, there was a girl who always wanted to go to school. Her parents kept promising to agree, while their agenda was only to ensure she would safely ‘mature’ for marriage. At the tender age of thirteen she was married to a frail seventy year old man, in the age set of her paternal grandfather, who already had several wives. After three years he died, leaving this girl widowed at the age of sixteen. In that short period as a wife, she endured sexual harassment and abuse from the sons and grandsons of her husband, endured humiliation and slavery from the older co-wives, and suffered the health issues of being sexually active at such a young age. What followed her husband’s death was not release but rather her inheritance by his younger brother, a 65-year old man. This was necessary for her parents to keep the bride price – large numbers of animals – that had been paid to them by the first husband. So again she became a prisoner, of another family. This girl was denied her childhood, her adolescence, the right to decide her future, the right to go to school, and the right to a better life. She was helpless to the decisions of her parents, the very persons entrusted by nature and by law to safeguard her.”

- Honourable Joyce Akai Emanikor, HSC Member of Parliament for Turkana County, Kenya

National Assembly Nairobi, Kenya

Honourable Joyce Akai Emanikor’s experience as a former child bride is a reality for approximately 650 million women and girls globally. By the end of this year (2019), approximately 12 million more girls will have similar experiences to recount. That is 23 girls every minute and nearly 1 every 2 seconds. These are the world’s child brides.

These victims of child marriage represent a generation of girls and women whose human rights have been violated and whose true potential in the economic, social, cultural and

political fields might never be realized. And sadly, their future generations, societies, countries and even the entire international community are indirectly affected by the harmful consequences of child marriage. In recognition of these harmful consequences, national authorities have made efforts to eliminate the practice, though with varying degrees of commitment and success. In some countries, thousands of child marriages have been prevented. In others, girls at risk of marriage have not been as fortunate.

Niger is one of these countries. In this sub-Saharan African country, 77 percent of women aged 20-24 today were victims of child marriage. This is the highest prevalence rate of child marriage in the world. Furthermore, this prevalence rate has remained stubbornly high, with very modest progress made over the past decade, compared to other countries that have had a high prevalence rate of the practice. In some regions of Niger, child marriage rates have even doubled over the past decade.

Hence the main objective of this research is to uncover the reasons why the prevalence rate of child marriage in Niger is the highest in the world. Since all the reasons behind this high rate cannot be investigated under this research, the focus will primarily be on the adequacy of the Nigerien legal and policy framework on child marriage. Hence the central questions posed by this research are:

1. How adequate is the Nigerien legal and policy framework in prohibiting hence protecting girls against child marriage?
2. How active are courts and judges in Niger in enforcing the available legal protections against child marriage?

To find answers to these questions, this research compares the legal and policy framework on child marriage in Niger with the one in Ethiopia and Kenya in order to bring to light the deficiencies in Niger's legal protections for its girls. Ethiopia, once among the countries with

the highest prevalence rates of child marriage has significantly reduced the practice due to its robust action plan on eliminating child marriage and a clear legal and policy framework prohibiting the practice. Its annual rate of decline of the practice is the second highest on the continent. Ethiopia is therefore a worthy comparator. Similarly, although Kenya has not had equally high rates of child marriage, the country has adopted a clear legal and policy framework on the rights of children.

The research employed qualitative and comparative research methods using relevant international, regional and national human rights instruments, documents, journals, articles, publications, reports and guidelines of human rights bodies, and books from scholarly experts. Online databases including Google, Google Scholar and Research Gate are the primary sources of secondary data for the research. The United Nations Children's Fund is the primary source of up to date statistics on child marriage, since it has employed credible methods of data collection and its statistics and information have been used in other United Nations organizations, governmental and Non-governmental organizations reports and publications. The credibility and reliability of information produced by scholarly experts is verified by whether such information and experts have been cited in other research studies. Regarding Niger, the main limitation in its research is accessing relevant legal documents online from Nigerien institutions. Hence the legal documents will be retrieved from credible non-Nigerien sources including the reports of human rights monitoring bodies, reports of Special Rapporteurs on Niger, websites of foreign embassies and Department of State reports on the country.

This research is divided into four chapters and proceeds as follows: Chapter one introduces the topic of child marriage and presents a brief analysis of the current situation, trends, progress and future prospects on child marriage; the key drivers and consequences of child marriage on the human rights of girls; and the context of child marriage in Niger, Ethiopia

and Kenya. Chapter two familiarizes us with the international, regional and national framework on child marriage. Chapter three compares the Nigerien legal and policy framework on child marriage with the Ethiopian and Kenyan frameworks with references to its international and regional commitments. The last chapter concludes and offers recommendations for the adoption of more protective laws and policies against child marriage in Niger.

CHAPTER ONE: BACKGROUND AND SITUATION ANALYSIS OF CHILD MARRIAGE

A. DEFINING CHILD MARRIAGE

As evidenced in the reports of NGOs, scholarly work, international, regional and national legal and policy frameworks on child marriage, and the various resolutions on child marriage adopted by UN human rights bodies, child marriage is widely understood to be any formal or informal union in which at least one of the parties is below the age of eighteen years. This understanding is informed by the definition of a “child” in article 1 of the Convention on the Rights of the Child (CRC) as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.¹

The United Nations Children’s Fund (UNICEF) whose primary goal is to defend the rights of children defines child marriage as “any formal marriage or informal union between a child under the age of 18 and an adult or another child.”² In their most recent joint General Comment on ending child marriage in Africa, the African Commission on Human and Peoples’ Rights and the African Committee of Experts on the Rights and Welfare of the Child defined child marriage as “a marriage in which either one of the parties, or both, is or was a child under the age of 18 at the time of union.”³ Similarly, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child in their joint General Comment on harmful practices recognized that child marriage is “any marriage where at least one of the parties is under 18 years of age”.⁴ Scholars and researchers in NGOs often cite these definitions of child marriage in their research.

¹ ‘Convention on the Rights of the Child’ <<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>> Article 1.

² UNICEF, ‘Child Marriage’ <<https://www.unicef.org/protection/child-marriage>> accessed 28 October 2019.

³ ACHPR, ACEWRC, ‘Joint General Comment of the African Commission on Human and Peoples’ Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage’ 6 <https://www.acerwc.africa/wp-content/uploads/2018/04/ENGLISH_Joint_GC_ACERWC-ACHPR_Ending_Child_Marriage_14_March_2018.pdf>.

⁴ Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child, ‘Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices’ 7.

The term “child, early and forced marriage (CEFM)” is often used in human rights discourses on child marriage, and in particular, in the various resolutions of UN human rights bodies. This study will, however, only use the term “child marriage” as it is distinct from early and forced marriage and centers the discussion on the child. The three terms are interrelated. However, whereas child marriages may be early and forced, not all early and forced marriages are child marriages. Early marriages may involve spouses who are older than eighteen years, but due to lower levels of physical, emotional, sexual or psychosocial development, or lack of information regarding one’s life choices, are not yet ready to consent to the marriage.⁵ Forced marriages, on the other hand, are unions of two persons at least one of whom has not given their free and full consent to the marriage.⁶ Even if parties to a marriage do give their free consent, their consent may be influenced by social, cultural and economic circumstances beyond their control. These include parties who are 18 years or older, as well as parties who are under the age of 18. As we have seen, child marriages are a distinct form of forced marriages involving parties who are below the age of 18. However, some child marriages may actually be “voluntary”.

Before proceeding, it is worth noting that child marriage is a gender discriminative cultural practice which disproportionately affects girls more than boys. According to a UNICEF research, the global prevalence rate of child marriage among boys is about one fifth the level of girls’.⁷ Stark differences further exist within countries. In Niger, for instance, 77% of women compared to only 5% of men aged 20 to 49 were married as children.⁸ Even within countries where child marriage is least prevalent, girls are still more likely to be victims of

⁵ Carol Boender and CARE, ‘Child, Early and Forced Marriage: CARE’s Global Experience’1.

⁶ ‘PACE - Resolution 1468 (2005) - Forced Marriages and Child Marriages’
<<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17380&lang=en>> accessed 7 October 2019 Point 4.

⁷ UNICEF, ‘Child Marriage’ (*UNICEF DATA*) <<https://data.unicef.org/topic/child-protection/child-marriage/>> accessed 22 August 2019.

⁸ UNICEF, ‘Ending Child Marriage: Prospects and Progress’ (2014) 2
<https://www.unicef.org/media/files/Child_Marriage_Report_7_17_LR..pdf>.

child marriage. This is true in the Republic of Moldova where compared to 15% of women aged 20 to 49 who were married as children, only 2% of men in the same age group were victims of child marriage.⁹ With this in mind, the Inter-African Committee on Traditional Practices affecting the health of women and children defined child marriage as “any marriage carried out below the age of 18 years, before the girl is physically, physiologically, and psychologically ready to shoulder the responsibilities of marriage.” Hence the focus of this study will be on the child bride.

B. SITUATION ANALYSIS: LATEST TRENDS, PROGRESS AND FUTURE PROSPECTS ON CHILD MARRIAGE

Globally, there are approximately 650 million women and girls alive today who were married or have been married before their 18th birthday.¹⁰ They can be found in every region of the world but in greater numbers in South Asia and Sub-Saharan Africa, in rural areas, in certain ethnic communities and in poorer communities. Every year, 12 million girls become child brides.¹¹

As mentioned, it is South Asia and Sub-Saharan Africa that host the greatest numbers of child brides. According to UNICEF statistics, approximately 4 in 10 women in Sub-Saharan Africa were married before their 18th birthday while in South Asia, 3 in 10 women were married before their 18th birthday.¹² However, due to the region’s large population and its legacy of high rates of child marriages in previous generations, significantly greater numbers of child brides are located in South Asia (44 percent of the global rates) rather than Sub-Saharan Africa (18 percent of the global rates).¹³ In comparison, child marriage rates in Latin America and the Caribbean, the Middle East and North Africa and East Asia and Pacific stand at 19

⁹ *ibid.*

¹⁰ UNICEF, ‘Child Marriage: Latest Trends and Future Prospects’ 2.

¹¹ Girls Not Brides, ‘Child Marriage around the World’ <<https://www.girlsnotbrides.org/where-does-it-happen/>> accessed 22 August 2019.

¹² UNICEF, ‘Child Marriage’ (n 7).

¹³ UNICEF, ‘Child Marriage: Latest Trends and Future Prospects’ (n 10) 3.

per cent, 5 percent, and 12 percent respectively.¹⁴ Other regions account for 12 percent of the global rate of child marriage.¹⁵

With increasing international, regional and national recognition of the harmful consequences of child marriage, and sustained efforts towards eliminating child marriages in line with SDG 5.3, it is worthwhile to examine the progress that has been made towards eliminating the practice. Recent UNICEF statistics reveal encouraging developments. Rates of child marriage have declined over the previous decade from 25 percent to approximately 21 percent globally.¹⁶ This means that 25 million child marriages have been prevented globally due to sustained efforts and campaigns against the practice.

However, progress has been uneven between regions and even within countries. South Asia has seen the most significant decline in the practice, from 50 percent a decade ago to 30 percent today, largely due to major progress in India.¹⁷ On the other hand, child marriage rates in Sub-Saharan Africa have modestly declined largely due to slow progress in West and Central Africa.¹⁸ In part due to population growth, close to 1 in 3 child brides are now located in Sub-Saharan Africa compared to 1 in 7, 25 years ago. Yet even within Sub-Saharan Africa, progress is uneven. Ethiopia, for instance, which had one of the highest rates of child marriage in the world, has seen the practice decline by a third over the past 10 years.¹⁹ In the Middle East and North Africa, progress has been very slow, while in Latin America and the Caribbean, there is no evidence of any progress at all, with child marriage rates remaining as high as they were 25 years ago.²⁰

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ *ibid.* 4.

¹⁸ *ibid.*

¹⁹ *ibid.* 5.

²⁰ *ibid.*

While these positive developments are encouraging, UNICEF estimates that at the current rates of decline of child marriage, no region in the world is on track to meet the Sustainable Development Goal of eliminating the practice by 2030.²¹ Currently, the average annual rate of decline of the practice over the past 10 years stands at 1.9%. In order to eliminate the practice, the average annual rate of decline must increase to 23%. This represents a substantial increase of 12 percent. Failure to achieve this means that 150 million more girls will be married by 2030.²² The elimination of child marriage must therefore remain a top priority for governments, civil society and policy makers.

C. DRIVERS OF CHILD MARRIAGE

In summary, the main drivers of child marriages across the globe include discriminatory traditional practices/belief systems, poverty, religious beliefs, legal gaps, insecurity, low education level, and gender inequality. Underlying each of these factors are social-cultural and patriarchal norms that aim to control women's sexuality and that regard women as inferior and subordinate to men. The Committees on the Rights of the Child and the Elimination of Discrimination against Women in their joint General Recommendation on child marriage recognized that "...harmful practices are all strongly connected to and reinforce socially constructed gender roles and systems of patriarchal power relations and sometimes reflect negative perceptions of or discriminatory beliefs regarding certain disadvantaged groups of women and children."²³ A comprehensive understanding of the drivers of child marriage can therefore be achieved through the lens of patriarchy.

I. Discriminatory traditional practices/ belief systems

As previously mentioned, the belief systems that drive child marriages are rooted in patriarchy and socio-cultural norms that aim to control women's sexuality and that view them

²¹ *ibid.*

²² UNICEF, 'Child Marriage' <<https://www.unicef.org/protection/child-marriage>> accessed 22 August 2019.

²³ Committee on the Elimination of Discrimination against Women of and Committee on the Rights of the Child (n 4) p9.

as inferior to men. Greene et al also found that “socially and culturally defined notions of masculinity, femininity and sexuality shape relationship and marriage practices everywhere in the world.”²⁴ Indeed, parents and relatives often cite the protection of family honor as a key motivation for marrying their daughters early.²⁵ Stigma associated with pre-marital sexual relations, loss of virginity before marriage and pregnancies outside wedlock drive many parents in communities where child marriages are rampant to marry their daughters early.²⁶

The socially and culturally constructed definitions of masculinity and femininity as described by Greene et al are responsible for the perpetration of child marriages. These include the perception that child brides are more submissive and fertile (an important factor in contexts where a man’s social status is defined by the number of children he has).²⁷ In addition, the cultural understanding of masculinity is that a man should be the bread winner, dominant and the maker of most, if not all family decisions.²⁸ On the other hand, women’s role is confined to domestic duties such as cooking, cleaning and producing and taking care of children.²⁹ Hence with such a belief system, we can see how in communities where child marriages are rampant, there is low value attached to girls’ education and empowerment and high value attached to their early marriages, while at the same time higher value is attached towards the education and empowerment of boys.

²⁴ Margaret E Greene and others, ‘Engaging Men and Boys to End the Practice of Child Marriage’ 4 <<https://promundoglobal.org/wp-content/uploads/2015/04/Engaging-Men-and-Boys-to-End-the-Practice-of-Child-Marriage1.pdf>>.

²⁵ Veronique Aubert and Alison Holder, ‘Unspeakable Crimes against Children: Sexual Violence in Conflict’ (2013) 7.

²⁶ Kieran Guilbert, ‘Family Honor, More than Money, Fuels Child Marriage in West Africa’ *Reuters* (30 May 2017) <<https://www.reuters.com/article/us-westafrica-children-marriage-idUSKBN18Q001>> accessed 28 October 2019.

²⁷ Greene and others (n 24) 3.

²⁸ *ibid* 4.

²⁹ *ibid*.

Also worth noting is that in these traditional societies, their understanding of who a child is differs from the legal definition of a child. Under traditional customs, the end of childhood may be marked by the onset of puberty, among other factors.³⁰ Hence, in communities such as the Amhara of Ethiopia, the onset of menstruation signifies a girl's readiness for marriages, and remaining unmarried is an oddity. In communities such as the Samburu of Kenya, Female Genital Mutilation (FGM) which is performed on girls as young as 10, precedes child marriage. These deep belief systems put pressure on community members to conform to the practice of child marriage and any attempt at non-conformity may result in ridicule, disapproval or family shame. These belief systems support the perpetration of practices such as *Telefa* (marriage by abduction) among Ethiopian communities.

II. Poverty

Child marriages are also more prevalent in poorer countries, marginalized and poor communities and poorer households. One may wonder why, if poverty is a motivation for marrying children early, then why are most boys also not getting married early? This points us back to the underlying cause of child marriage- patriarchal norms and gender inequality.

The interrelation between poverty and prevalence rates of child marriages on the national level can be observed when one examines the Gross Domestic Product (GDP) and the Human Development Index (HDI) of a country. Based on the 2017 State of the World Children Report by UNICEF, the top 10 countries with the highest rates of child marriage include Niger (76%), Central African Republic (68%), Chad (67%), Bangladesh (59%), Mali (52%), South Sudan (52%), Burkina Faso (52%), Guinea (51%), Mozambique (48%), and India

³⁰ A baseline UNICEF study in Kenyan communities where child marriages are prevalent revealed varying definitions of a child as someone who is not yet circumcised, someone under the age of 15, 10 or 5 years, someone who still lives under the care of his or her parents, or someone who has reached puberty (e.g. menstruation in girls) among others
https://www.unicef.org/kenya/KE_2017_Baseline_Main_Report_on_FGM_and_Child_Marriage.pdf

(47%).³¹ Not surprisingly, the 2018 UNDP Human Development Index Rank of most of these countries is very low. Out of 189 countries, Niger ranks the lowest at position 189 followed by Central African Republic (188), South Sudan (187), Chad (186), Burkina Faso (183), Mali (182), Mozambique (180), and Guinea (175).³² Poor investment by the governments of these countries in crucial sectors such as education and sexual reproductive health create fertile grounds for child marriages to thrive.

Domestically, poor families face economic pressures when sharing limited resources among the family members. The larger a family is, the greater the pressure. Niger, for instance which happens to have the highest child marriage rates in the world, also has the world's highest birth rate with the average Nigerien woman bearing approximately seven children.³³ In societies where patriarchal norms, gender inequality and traditional beliefs about the role of women are deeply rooted, girls often end up being the sacrificial lambs when families decide to lessen the economic burden.³⁴ The payment of bride wealth or bride price in marriages is deeply rooted in such societies, and girls are viewed as sources of wealth, social status, and prestige when they are given in exchange for livestock such as cattle, goats and sheep.³⁵ In other circumstances, poverty may drive girls to decide to get married early.³⁶

III. Religion

In one study, the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) investigated the child marriage, culture and religion nexus in Africa and concluded that religion may be used to condone child marriage on one hand and fight

³¹ UNICEF (ed), 'Children in a Digital World' (UNICEF 2017).

³² UNDP, 'Human Development Indices and Indicators 2018 Statistical Update' (2018) 25.

³³ John F May, 'Niger Has the World's Highest Birth Rate – and That May Be a Recipe for Unrest' (*The Conversation*) <<http://theconversation.com/niger-has-the-worlds-highest-birth-rate-and-that-may-be-a-recipe-for-unrest-108654>> accessed 8 October 2019.

³⁴ UN Women, 'Prospects for Ending Child Marriage in Africa: Implications on Legislation, Policy, Culture & Interventions' 14.

³⁵ Jeniffer Birech, 'Child Marriage: A Cultural Health Phenomenon' (2013) 3 International Journal of Humanities and Social Science 7, 98.

³⁶ Human Rights Watch, 'Ending Child Marriage in Africa' (9 December 2015) <<https://www.hrw.org/news/2015/12/09/ending-child-marriage-africa>> accessed 22 August 2019 para 13.

against it on the other hand.³⁷ On one hand, religious institutions have served as rescue centers for girls escaping child marriages³⁸ and religious leaders have opposed the practice.³⁹ In other cases, religion has provided a supportive frame for the perpetuation of child marriage. The major religions of the world including Christianity and Islam emphasize the sanctity and honor of married life, the subservient position of women in marriage and the importance of sexual purity.⁴⁰ The misinterpretation of these provisions may be used to justify child marriage as a protective measure to ensure these religious virtues. For instance, in the Apostolic faith church of Zimbabwe, as soon as a girl reaches puberty, any man within the church is at liberty to claim her as a wife.⁴¹ Furthermore, some religious leaders have failed to provide a clear demarcation of the appropriate age of marriage, and instead show deference to customary laws, marrying consenting individuals and leaving the definition of appropriate age open to the parties involved.⁴²

IV. Legal gaps and weak enforcement

Although most countries have set the minimum age of marriage at 18, some still allow marriage under the minimum age upon parental consent, government or judicial approval.⁴³ Some countries' laws have clear gender disparities between the ages at which girls and boys are allowed to marry.⁴⁴ Other countries recognize customary and religious marriages but fail

³⁷ UN Women (n 34) 16.

³⁸ Fawe, 'FAWE-Supported Centre of Excellence Shelters Girls at Risk of FGM and Child Marriage in Kenya' (*Forum for African Women Educationalists: Fawe*) <<http://fawe.org/2017/03/18/fawe-supported-centre-of-excellence-shelters-girls-at-risk-of-fgm-and-child-marriage-in-kenya/>> accessed 28 October 2019.

³⁹ Girls Not Brides, 'Religious Leaders Archives' (*Girls Not Brides*)

<https://www.girlsnotbrides.org/resource_solutions/religious-leaders/> accessed 28 October 2019.

⁴⁰ E.g. in the Bible: 1 Corinthians 6:18: Flee from sexual immorality. All other sins a man commits are outside his body but he who sins sexually sins against his own body.

⁴¹ Human Rights Watch (n 36) para 20.

⁴² UN Women (n 34) 17.

⁴³ E.g. Article 7 (2) of Ethiopia's Revised Family Code allows the Minister of Justice, upon application of the future spouses, or the parents or guardians of one of them for serious cause, grant dispensation of not more than two years.

⁴⁴ E.g. Niger Civil Code Article 144 sets the minimum age of marriage for boys as 18, and the minimum age of marriage for girls as 15.

to state the primacy of statutory law on the minimum age of marriage requirements.⁴⁵ Such exceptions allow child marriage to persist.

Where there are no exceptions, elimination of child marriage may be challenged by weak enforcement mechanisms such as police having inadequate training to deal with such cases, police not seeing the elimination of child marriage as their job, or deferring to the wishes of parents.⁴⁶ In other cases, birth certificates which prove the age of the parties may not be available or if available, may not be verified due to deficiencies in the relevant systems.⁴⁷ Furthermore, prosecution against perpetrators of child marriage may be hindered by a system of corruption where magistrates and judges are bribed.⁴⁸ In Kenyan communities where child marriages are rampant, politicians have been noted to frustrate the prosecution of child marriage cases for short-term gains such as election.⁴⁹ Other barriers include low awareness of laws and policies on child marriage, lack of financial and human resources such as children officers, a lack of courts hence increased costs of accessing justice and a lack of rescue centers to host survivors of child marriage.⁵⁰

V. Political Instability, Insecurity and Humanitarian contexts

Child marriages are also more likely to increase in situations of political instability, insecurity and humanitarian contexts. A report produced by the Organization for Economic Cooperation and Development (OECD), reveals that 9 out of the 10 countries with the highest child marriage rates are considered fragile states.⁵¹ In such settings, parents marry off their daughters to “protect” them from physical and sexual violence, or with the belief that she will

⁴⁵ E.g. Niger Civil Code

⁴⁶ Human Rights Watch (n 36) para 15.

⁴⁷ *ibid* para 15.

⁴⁸ *ibid* para 16.

⁴⁹ UNICEF, ‘Female Genital Mutilation/ Cutting and Child Marriage among the Rendille, Maasai, Pokot, Samburu and Somali Communities in Kenya’ (2017) 126.

⁵⁰ *ibid* 127.

⁵¹ ‘Conflict & Fragility - OECD’ <<http://www.oecd.org/dac/conflict-fragility-resilience/conflict-fragility/>> accessed 22 August 2019.

access services or that the family will get services or supplies.⁵² Among Syrian refugees in Lebanon, more girls, some as young as 14 are married off to rich men from the refugee or host community to offset their families' living or accommodation costs.⁵³ In addition, in such settings, young girls and women often become victims of sexual violence and rape. To protect their family's honor, rape victims may be forced to marry their rapists.⁵⁴

During droughts and famine, loss of livelihood in the form of herds of cattle may force parents to marry off their daughters to restore the lost cattle. This is certainly true among communities in northern Kenya, a region prone to drought. The child brides in this region have often been referred to as "drought brides".⁵⁵ On the other hand, in insecure and war torn contexts, risks of abduction and forced marriage to soldiers increase, while other institutions shielding girls from early marriage such as schools and law enforcement agencies break down. The prevalence rate of child marriage in conflict and humanitarian contexts is so alarming that the Human Rights Council, in a July 2017 resolution noted with concern that "the incidence and risk of child, early and forced marriage is highly exacerbated in humanitarian settings". The Committees on the Rights of the Child and on the Elimination of Discrimination against Women in their joint General Recommendation noted that due to factors such as conflict, the practice of child marriage is now re-emerging in countries where it had disappeared.⁵⁶

⁵² Veronique Aubert and Alison Holder (n 25) 7.

⁵³ *ibid* 8.

⁵⁴ *ibid* 7.

⁵⁵ Katy Migiro, 'Child "drought Brides" Sold Secretly in Kenya' (4 August 2011).

⁵⁶ Committee on the Elimination of Discrimination against Women of and Committee on the Rights of the Child (n 4) p8.

VI. Low or lack of education

Halted or low levels of education is both a risk factor and consequence of child marriage.⁵⁷

There is consensus among various scholars such as Adjamagbo et al,⁵⁸ that age at first marriage increases with an increase in education. Dommaraju suggests that the reason for this is that school exposes girls to new ideas and values that compete with traditional norms.⁵⁹ Mensch et al have suggested that it is the autonomy that girls acquire while at school that makes them delay marriage.⁶⁰ They realize that there are other avenues to personal fulfillment and career development hence delaying marriage.

A report by the International Center for Research on Women (ICRW) revealed that across the 18 countries that have the highest rates of child marriage, girls who were not educated were up to six times more likely to marry early compared to their educated counterparts.⁶¹ When a girl is out of school for a long period of time, she faces pressure from family members to get married early because of the fear that she could engage in pre-marital sex, get pregnant and thus bring shame upon them.⁶² A number of factors may cause a girl to drop out of school including expensive or inaccessible schools, a discouraging classroom environment, lack of value for girl's education, early pregnancy, and in some cases the girls themselves not understanding the importance of education, hence choosing the marriage option.⁶³ On the contrary, higher levels of education empower the girl by enabling her to develop skills,

⁵⁷ Jennifer McCleary-Sills and others, 'Child Marriage: A Critical Barrier to Girls' Schooling and Gender Equality in Education' (2015) 13 *The Review of Faith & International Affairs* 69, 71 <<https://doi.org/10.1080/15570274.2015.1075755>> accessed 23 August 2019.

⁵⁸ A Adjamagbo, P Aguessy and A Diallo, 'Changements Matrimoniaux et Tensions Conjugales à Dakar in Marcoux, R. and P. Antoine. *Le mariage en Afrique: Pluralité des formes et modèles matrimoniaux*' (Presses de l'Université du Québec 2014).

⁵⁹ *ibid.*

⁶⁰ B. Mensch, E Soler-Hampejsek and P. Hewett, 'Education and the Timing of Sexual Initiation and Marriage in Rural Malawi: A Longitudinal Analysis of the Effect of Attendance, Attainment and Repetition' (2009).

⁶¹ McCleary-Sills and others (n 57) 71.

⁶² Mara Steinhuis, Natacha Stevanovic Fenn Amy Gregowski and Suzanne Petroni, "'She Cannot Just Sit around Waiting to Turn Twenty'" *Understanding Why Child Marriage Persists in Kenya and Zambia*' (International Center for Research on Women 2016) 6.

⁶³ *ibid* 5.

knowledge of her rights, and confidence to make personal decisions such as if, and when, to marry.⁶⁴

D. CHILD MARRIAGE AS A HUMAN RIGHTS VIOLATION

On 10 July 2019, the UN Human Rights Council adopted its third resolution on child, early and forced marriage recognizing that child marriage is a human rights violation.⁶⁵ Child brides are denied their right to childhood, education, health, development and empowerment on an equal basis as their male peers. Indeed, as Jensen and Thornton have argued, these adverse consequences worsen gender inequalities.⁶⁶ Disturbingly, these consequences extend beyond the child bride to her immediate community, country and her future generations. A country's economic growth and development depends on an empowered and educated population- including women and girls. Without it, countries will surely lag behind in development. One of the Sustainable Development Goals adopted by the UN is to eliminate all child marriages.⁶⁷ Notably, most of the other Sustainable Development Goals including the elimination of poverty, hunger, the promotion of good health and well-being and the provision of quality education will not be achieved if child marriages are not eliminated. In the preceding chapters of this study, we will see how the legal and policy frameworks on child marriage highlight the consequences of child marriage.

I. Violation of the right to education

Education is the gateway to individual and societal empowerment and development. For this reason, many constitutions and human rights instruments enshrine the right to education. Sadly, for most child brides, this right is taken away once they enter marriage, limiting their access to empowerment opportunities and exposing them and their future generations to

⁶⁴ Girls Not Brides, 'Education' (*Girls Not Brides*) <<https://www.girlsnotbrides.org/themes/education/>> accessed 23 August 2019.

⁶⁵ 'OHCHR | Child, Early and Forced Marriage, Including in Humanitarian Settings' <<https://www.ohchr.org/EN/Issues/Women/WRGS/Pages/ChildMarriage.aspx>> accessed 9 October 2019.

⁶⁶ Robert Jensen and Rebecca Thornton, 'Early Female Marriage in the Developing World' (2003) 9–19.

⁶⁷ 'Goal 5: Gender Equality' (*UNDP*) <<https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-5-gender-equality.html>> accessed 10 September 2019.

poverty. The duties and responsibilities that come with marriage including taking care of the home, bearing children and tending to the needs of her husband and children restrict the child bride's mobility and ability to continue schooling.⁶⁸ Even if the child bride chose to go back to school, the school environment may be too discouraging for her to continue her education. Some schools have adopted harsh expulsion policies for pregnant students⁶⁹, hence child brides, who usually become pregnant immediately after marriage are forced to leave school. A review by Gordon Brown, for instance, revealed that only 3 per cent and 2 per cent of married girls in Ethiopia and Nigeria were in school.⁷⁰ Furthermore, in most traditional societies women's role is limited to the domestic sphere, hence there is low value attached to a girl's education.⁷¹ Some hold the view that educating a girl is a waste of money and that getting married will earn her society's respect.⁷² Some simply view marriage and schooling as incompatible.

II. Violation of the right to health

A child bride's health is negatively affected physically, emotionally, psychologically and mentally by being forced into a union before she is mature enough to handle the responsibilities that come with it. Since most child brides are married to much older men, their autonomy and power to make decisions within the marriage is limited.⁷³ This is further compounded by their lack of or low education and knowledge of their rights, limited skills and empowerment, low social support and mobility.⁷⁴ Research reveals that young married girls are often the least informed and knowledgeable about sexual and reproductive health

⁶⁸ UNICEF, 'Child Marriage and the Law' (2007) 35.

⁶⁹ Human Rights Watch, 'Leave No Girl Behind in Africa | Discrimination in Education against Pregnant Girls and Adolescent Mothers' (*Human Rights Watch*, 14 June 2018) <<https://www.hrw.org/report/2018/06/14/leave-no-girl-behind-africa/discrimination-education-against-pregnant-girls-and>> accessed 29 October 2019.

⁷⁰ Gordon Brown, 'Out of Wedlock, into School: Combating Child Marriage through Education' 24.

⁷¹ Greene and others (n 24) 4.

⁷² Human Rights Watch (n 36) para 29.

⁷³ Ruth Gaffney-Rhys, 'International Law as an Instrument to Combat Child Marriage'.

⁷⁴ Sanyukta Mathur, Margaret Greene and Anju Malhotra, 'Too Young to Wed: The Lives, Rights and Health of Young Married Girls' (International Center for Research on Women 2003) 11.

rights within their age group.⁷⁵ According to a research conducted by the World Health Organization (WHO), across different geographical contexts where child marriages are high, there are wide disparities between married and unmarried girls' knowledge of their fertility, STIs and HIV.⁷⁶

The relative lack of power with their husbands also means that they are in no position to refuse sex or to negotiate contraceptive use. Research reveals that due to this lack of control over their sexual lives, child brides are more vulnerable to acquiring HIV and other sexually transmitted infections compared to women married as adults.⁷⁷

In addition, because of the pressure to demonstrate fertility soon after marriage, their little relative power to decide if and when to have a child, and to negotiate contraceptive use, child brides have early and frequent pregnancies.⁷⁸ Due to the physical limitations of younger and smaller bodies, early pregnancies are associated with increased health risks.⁷⁹ These include higher rates of complications during labor and delivery,⁸⁰ increased morbidity after child birth,⁸¹ and increased risks of mortality⁸². Furthermore, the child bride's situation is compounded by her social isolation, lack of knowledge and awareness of pregnancy, and low or lack of access to pre-natal and post-natal care.⁸³

⁷⁵ *ibid* 8.

⁷⁶ World Health Organization and United Nations Populations Fund, 'Married Adolescents: No Place of Safety' (2007) 11.

⁷⁷ Shelley Clark, 'Early Marriage and HIV Risks in Sub-Saharan Africa' (2004) 35 *Studies in Family Planning* 149 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1728-4465.2004.00019.x>> accessed 29 October 2019.

⁷⁸ Jensen and Thornton (n 66).

⁷⁹ Clark (n 77).

⁸⁰ Gaffney-Rhys (n 73).

⁸¹ Durrenda Ojanuga Onolemhemen and CC Ekwempu, 'An Investigation of Sociomedical Risk Factors Associated with Vaginal Fistula in Northern Nigeria' (1999) 28 *Women & Health* 103 <https://www.tandfonline.com/doi/10.1300/J013v28n03_07> accessed 29 October 2019.

⁸² Andrea Nove and others, 'Maternal Mortality in Adolescents Compared with Women of Other Ages: Evidence from 144 Countries' (2014) 2 *The Lancet. Global Health* e155.

⁸³ Mathur, Margaret Greene and Anju Malhotra (n 74) 8.

Child marriage is also associated with poor health outcomes, and suicidal attempts and suicidal ideation.⁸⁴ For instance in one-third of self-immolation cases between 200 and 2006 in three major cities in Afghanistan, Raj et al found that the major cause was forced marriage or engagement.⁸⁵

III. Exposure to risks of sexual, physical and psychological violence

Since child marriage occurs within the context of a patriarchal and gender discriminative society, the social constructions of masculinity, femininity and sexuality are shaped by patriarchal norms. These social constructions support sexual, physical and psychological violence against child brides. The child bride's situation is further worsened by the power imbalance with her husband due to age discrepancies, social isolation, low or lack of education and awareness of her rights.

These social constructions of masculinity and sexuality are evident in how men in many settings are taught that they can freely act upon their desires and that women should expect and accept this behavior.⁸⁶ In a study in Mali, Rwanda, Brazil, Chile, India, Mexico and Croatia on male sexuality and their right to have sex, Greene et al found that more women agreed on the man's right to have sex even if the woman said no.⁸⁷ For child brides, their first sexual encounter often occurs under coercion.⁸⁸

Child brides may also have an internalized acceptance of physical violence committed by their husbands, and thus more likely to remain in abusive marriages. The WHO found that

⁸⁴ Anastasia Jessica Gage, 'Association of Child Marriage with Suicidal Thoughts and Attempts among Adolescent Girls in Ethiopia' (2013) 52 *The Journal of Adolescent Health: Official Publication of the Society for Adolescent Medicine* 654.

⁸⁵ Anita Raj, Charlemagne Gomez and Jay G Silverman, 'Driven to a Fiery Death--the Tragedy of Self-Immolation in Afghanistan' (2008) 358 *The New England Journal of Medicine* 2201.

⁸⁶ Greene and others (n 24) 4.

⁸⁷ *ibid* 5.

⁸⁸ L Heise, M. Ellsberg and M. Gottemoeller, 'Ending Violence against Women' (1999).

young married girls are slightly more likely than their unmarried counterparts to agree that husbands can beat their wives or force them to have sex.⁸⁹

IV. Infant mortality

The health and lives of children born to child brides may also be negatively affected. Defined by the WHO as the death of a child before reaching the age of one year, almost half of all infant mortality cases, or 2.5 million have occurred within the first month of life, majority of which have taken place in low and middle-income countries.⁹⁰ The situation of the child bride during and after pregnancy puts her child at increased risk of dying before their first birthday. This includes her low or lack of pre-natal and post-natal child care, lack of or poor access to information about caring for her newborn, sexual and domestic violence and STI's, and her physiological underdevelopment which exposes her to risks of obstructed labor.⁹¹ Children born to adolescent mothers are also more likely to have a lower weight at birth and poorer nutrition.⁹²

V. Poverty and poor development outcomes

Child marriage not only results from poverty and poor development but it conversely results in poverty and low development. Not surprisingly, the countries that ranked least in the latest UNDP HDI Report are the countries with the highest rates of child marriage in the world.⁹³ There is thus a correlation between the effects of child marriage such as low women's and girls' empowerment and a country's overall level of development. A child bride's low educational attainment means she will earn 9 per cent less in future compared to her educated counterparts.⁹⁴ In addition, since child brides will have early and frequent pregnancies, they

⁸⁹ World Health Organization and United Nations Populations Fund (n 76) 11.

⁹⁰ United Nations Economic and Social Council, 'Special Edition: Progress towards the SDGs: Report of the Secretary-General' (2019) 7.

⁹¹ Mathur, Margaret Greene and Anju Malhotra (n 74) 14.

⁹² Quentin Wodon and others, 'Economic Impacts of Child Marriage: Global Synthesis Report' (ICRW, World Bank 2017) 46.

⁹³ UNDP (n 32) 25.

⁹⁴ Wodon and others (n 92) 61.

are likely to have more children compared to women who married as adults. Her lack of empowerment, less future earnings and more children to take care of may ultimately tie her and her children in the bondage of poverty.

According to a World Bank and ICRW study, the global economic costs of child marriage will total hundreds of billions of dollars from now until 2030.⁹⁵ The study estimates that if child marriage and early child bearing had ended in 2015, the global estimated welfare benefit from reduced population growth would have been \$22 billion in the first year (2015), and could be \$566 billion by 2030.⁹⁶ Ending under-five mortality rates would have resulted in global gains of \$51 billion in 2015, and a gain in \$98 billion by 2030. The study also sampled 15 countries and concluded that since child brides will earn 9 per cent less in future compared to women who marry later, if child marriage had been eliminated by 2015, each of these countries would have gained an estimated \$26 billion.⁹⁷ In addition, in these sampled countries, governments could save an estimated \$17 billion per year by 2030 by investing in universal secondary education alone.⁹⁸

E. CHILD MARRIAGE COUNTRY INFORMATION

I. KENYA

Data from the 2014 Kenya Demographic Health Survey (KDHS) reveals that marriage in Kenya occurs relatively early. The age at first marriage is influenced by factors such as one's level of education, geographical location and wealth status.⁹⁹ The median age at first marriage varies from county to county. It is lowest in Migori (17.1 years), Tana River (17.3 years), Homa Bay (17.5 years), Wajir (18.1 years), and Marsabit (18.3 years).¹⁰⁰ One thing in

⁹⁵ ICRW and World Bank, 'The Economic Impacts of Child Marriage: Key Findings' (2018) 3 <https://www.icrw.org/wp-content/uploads/2018/07/EICM-GlobalSynthesisSummary_Report_v3_WebReady.pdf> accessed 23 August 2019.

⁹⁶ *ibid.*

⁹⁷ *ibid.*

⁹⁸ *ibid.*

⁹⁹ Kenya National Bureau of Statistics, 'Kenya Demographic and Health Survey' (2014) 59.

¹⁰⁰ *ibid.* 60.

common among these counties is that they are rural and less developed. Generally, the age at first marriage increases among women with at least some secondary education (22.7 years), among women who live in urban areas (21.5 years), and among women from the highest wealth quintile who tend to marry four years later than women from the lowest wealth quintile.¹⁰¹ Overall, the prevalence rate of child marriage in Kenya is 23 per cent, and the number of child brides in Kenya stands at approximately 527,000.¹⁰² In summary, the primary context specific drivers of child marriage in Kenya include traditional customs particularly FGM/C, drought and famine, poverty, early pregnancies, and low levels of education.¹⁰³

II. NIGER

With 76% and 28% of girls married before their 18th and 15th birthdays respectively, Niger has the highest prevalence rate of child marriage in the world, and the 14th highest absolute number of child brides- 676,000.¹⁰⁴ Similar to the context in Kenya, child brides in Niger are primarily located in rural and marginalized areas where there is little development and value for girls' education. Some regions in Niger have prevalence rates that are higher than the average national rate of 76%. These include Maradi (89%), Zinder (87%) and Diffa (82%).¹⁰⁵ Niamey, the capital city has the lowest rate of child marriage at 33%.¹⁰⁶

The prevalence rate of child marriage in Niger has declined minimally from 76.6% to 76.3% between 1998 and 2012.¹⁰⁷ Progress has been largely uneven with regions such as Diffa witnessing a significant increase in child marriage prevalence rates from 62% among women

¹⁰¹ *ibid* 59.

¹⁰² Girls Not Brides, 'Kenya - Child Marriage Around The World. Girls Not Brides' (*Girls Not Brides*) <<https://www.girlsnotbrides.org/child-marriage/kenya/>> accessed 23 August 2019.

¹⁰³ *ibid*.

¹⁰⁴ Girls Not Brides, 'Niger - Child Marriage Around The World. Girls Not Brides' (*Girls Not Brides*) <<https://www.girlsnotbrides.org/child-marriage/niger/>> accessed 23 August 2019.

¹⁰⁵ Natacha Stevanovic Fenn and others, 'Child Marriage, Adolescent Pregnancy and Family Formation in West and Central Africa' (UNICEF, ICRW 2015) 69.

¹⁰⁶ *ibid*.

¹⁰⁷ Save the Children UK, 'Child Marriage in Niger' 4 <<https://www.savethechildren.org.uk/content/dam/global/reports/advocacy/child-marriage-niger.pdf>>.

aged 45-49 years to 82% among women aged 20-24 years.¹⁰⁸ On the contrary, the region of Agadez has significantly reduced its child marriage rates from 77% among women aged 45-49 years to 47% among women aged 20-24 years.¹⁰⁹ The key drivers of child marriage in Niger are poverty, harsh natural environment and frequent droughts, polygamy, protection of family honour, social status, gender norms, and low or lack of education.¹¹⁰

III. ETHIOPIA

Ethiopia is home to 15 million victims of child marriage including girls who are currently married or in union and women who were first married in childhood.¹¹¹ According to the 2016 Ethiopia Demographic and Health Survey, 40 percent of women aged 20-24 were married before their 18th birthday, while 14 percent of women in the same age group were married before their 15th birthday.¹¹² The median age at first marriage of women aged 25-49 is 17.1 years, compared to 16.5 years in 2011. The median age at first marriage for women aged 20-49 is lowest in Amhara (16.2 years), Affar (16.4 years), Benishangul-Gumuz (17.1 years) and Tigray (17.2 years), while it is highest in the capital city, Addis Ababa (23.9 years).¹¹³ Generally, the median age at first marriage increases when one lives in an urban area rather than a rural area, when one is educated beyond the primary level, and when one's household income is higher.¹¹⁴ The key drivers of child marriage in Ethiopia include low or lack of education, displacement, traditional customs, poverty, social status and the personal choice of girls themselves.¹¹⁵

¹⁰⁸ Fenn and others (n 105) 70.

¹⁰⁹ *ibid.*

¹¹⁰ Brides, 'Niger - Child Marriage Around The World. Girls Not Brides' (n 104).

¹¹¹ United Nations Children's Fund, 'Ending Child Marriage: A Profile of Progress in Ethiopia' (UNICEF 2018) 3.

¹¹² Central Statistical Agency, 'Ethiopia Demographic and Health Survey' (2016) 72.

¹¹³ *ibid* 73.

¹¹⁴ *ibid.*

¹¹⁵ Girls Not Brides, 'Ethiopia - Child Marriage Around The World. Girls Not Brides' (*Girls Not Brides*) <<https://www.girlsnotbrides.org/child-marriage/ethiopia/>> accessed 23 August 2019.

Notably, Ethiopia has significantly reduced the prevalence rate of child marriage by a third over the last 10 years.¹¹⁶ Furthermore, the country's average annual rate of reduction of child marriage (4.2%) is the second highest out of 19 eastern and southern African countries that have a high prevalence of child marriage.¹¹⁷

F. THEORETICAL FRAMEWORK

The conventional theory underlying the research is the feminist legal theory which proposes that the law has played a fundamental role in the historical subordination of women.¹¹⁸ Among feminist legal theorists are dominance theorists such as Catherine Mackinnon who argue that women's sexuality is sexually constructed by male dominance or patriarchy and this dominance disempowers women.¹¹⁹ According to Mackinnon, patriarchy and women's disempowerment are reflected in the legal system which perpetuates inequalities between men and women.¹²⁰ Hence this theory is relevant in this research since we are examining the role the laws and policies on marriage in Niger further promote the subordination of girls and women in Niger.

¹¹⁶ UNICEF, 'Child Marriage: Latest Trends and Future Prospects' (n 10) 5.

¹¹⁷ United Nations Children's Fund (n 111) 8.

¹¹⁸ Martha A Fineman, 'Feminist Legal Theory' 13–32.

¹¹⁹ Fineman (n 118).

¹²⁰ Catharine A MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8 *Signs* 635, 181–200 <<https://www.jstor.org/stable/3173687>> accessed 5 November 2019.

CHAPTER TWO: LEGAL AND POLICY FRAMEWORK ON CHILD MARRIAGE

In this chapter, we will examine the international, regional and the three jurisdictions' national laws and policies on child marriage. These laws and policies include those specifically prohibiting child marriage, and those prohibiting practices that contribute to child marriage such as human trafficking. We will see how the international community reiterated the principles of “free and full consent to marriage”, “marriageable age” and “equal rights of spouses” and how these principles were emphasized in all proceeding human rights instruments, including regional instruments and international conferences on women's rights. We will also be familiarized with the status of ratifications and reservations to international and regional human rights treaties made by Niger.

A. INTERNATIONAL LEGAL AND POLICY FRAMEWORK

I. Universal Declaration of Human Rights (1948)

The relevant provision on child marriage in the Universal Declaration of Human Rights (UDHR) is article 16 which specifically states that, “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, during marriage and at its dissolution”¹²¹ and “marriage shall be entered into only with the free and full consent of the intending spouses”¹²².

The relevant phrases here are “men and women of full age”, “free and full consent of the intending spouses”, and “equal rights as to marriage, during marriage and at its dissolution”. Though the definition of “full age” is missing and therefore open to different interpretations depending on cultural context, the phrases “free and full consent” and “equal rights as to marriage, during marriage and at its dissolution” clear any doubt that article 16 prohibits child marriages. As observed in the preceding chapter, most child brides do not freely and

¹²¹ ‘Universal Declaration of Human Rights’ (6 October 2015) <<https://www.un.org/en/universal-declaration-human-rights/>> accessed 9 September 2019 Article 16 (1).

¹²² *ibid* Article 16 (2).

fully consent to marriage and because of this, they lack equal rights with their husbands at the start, during and at the dissolution of their marriage.

In addition, all the other articles of the UDHR use gender neutral terms such as “everyone” “no one” and “all human beings”. However, article 16 is the only article in the Declaration that specifically references the two genders “men” and “women”. By doing so, it lays emphasis that the right to marry is not only the right of men but just as important, the right of women. Hence this article cannot in any way be interpreted as limiting this right to men only.

Beyond this specific provision on child marriage, the Declaration also touches on the various aspects of child marriage, including its root causes and consequences, which if directly addressed would eliminate or lower the prevalence of child marriages. These include article 3 which enshrines the right to life, liberty and security of the person.¹²³ As previously observed, child marriage, by exposing the child bride to potential sexual and domestic violence, maternal health risks through early pregnancy and child birth, halted education and limited liberty violates the child bride’s right to life, liberty and security.

Article 4 prohibits slavery and servitude in all their forms.¹²⁴ Anti-Slavery International has concluded that child marriage amounts to slavery if a child has not given their free and full consent to enter a marriage; if the child is subjected to control and a sense of “ownership” in the marriage itself; and if the child cannot realistically end or leave the marriage.¹²⁵

Article 26 further emphasizes everyone’s right to education.¹²⁶ As earlier observed, halted education is both a root cause and a consequence of child marriage. Access to education plays a key role in safeguarding girls from child marriage. Other provisions include: all human

¹²³ *ibid* Article 3.

¹²⁴ *ibid* Article 4.

¹²⁵ Anti-Slavery International, ‘Child Marriage: When Is It Slavery?’ <<https://www.antislavery.org/slavery-today/child-marriage/>> accessed 9 September 2019.

¹²⁶ ‘Universal Declaration of Human Rights’ (n 121) Article 26.

beings are born free and equal in dignity and rights¹²⁷, everyone's entitlements to all the rights in the Declaration without discrimination on any ground including sex¹²⁸, and everyone's right to freedom of movement and residence¹²⁹. Niger is a signatory to the UDHR.

II. International Covenant on Civil and Political Rights (1966)

The International Covenant on Civil and Political Rights (ICCPR) which was adopted almost two decades after the adoption of the UDHR contains similar provisions on marriage as the UDHR. The importance of the right of men and women to marry, free and full consent of the intending spouses and the equality of rights of spouses as to marriage, during marriage and at its dissolution was still recognized and incorporated into the text. As of 30th September 2019, 173 States are parties to the Covenant while 6 are only signatories.¹³⁰ Niger ratified the ICCPR in 1986 without any reservations.

Article 23 (2) of the Covenant recognizes “the right of men and women of marriageable age to marry and to found a family”.¹³¹ The ICCPR uses the term “marriageable age” instead of “full age” as used in the UDHR. Here, the definition of “marriageable age” is still open to interpretation but it shows that there should be a specific age at which an individual can enter marriage. Read in conjunction with article 23 (3) which specifically states that “no marriage shall be entered into without the free and full consent of the intending spouses”¹³² and article 23 (4) which tasks State parties with the responsibility of ensuring equality of rights and responsibilities of spouses “as to marriage, during marriage and at its dissolution”¹³³, we can conclude that the ICCPR, just like the UDHR prohibits child marriage. As earlier observed,

¹²⁷ *ibid* Article 1.

¹²⁸ *ibid* Article 2.

¹²⁹ *ibid* Article 13.

¹³⁰ ‘OHCHR Dashboard’ <<https://indicators.ohchr.org/>> accessed 30 October 2019.

¹³¹ ‘OHCHR | International Covenant on Civil and Political Rights’

<<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> accessed 9 September 2019 Article 23 (2).

¹³² *ibid* Article 23 (3).

¹³³ *ibid* Article 23 (4).

most child brides do not consent to marriage, and do not have equal rights as to marriage, during marriage nor at its dissolution.

Similar to the UDHR, the ICCPR contains provisions which touch on several aspects of child marriage including: every human being's right to life¹³⁴, the prohibition of slavery, servitude and forced and compulsory labor¹³⁵, the right to liberty and security of person¹³⁶, and the freedom of movement¹³⁷.

Notably, the drafters of the ICCPR improved on the UDHR by recognizing the rights of a specific group of people- children. Article 24 (1) of the Covenant specifically declares the right of every child without discrimination on grounds such as sex, to measures of protection from the State, society or family,¹³⁸ while article 24 (2) proclaims the right of every child to be registered immediately after birth and to have a name.¹³⁹ Child marriages, which primarily affect girls, are a form of gender discrimination that is perpetuated by a girl's family and society. Article 24 (1) calls on both public actors (the State) and private actors (society and family) to end gender discrimination. The right of every child to be registered immediately after birth as stipulated under article 24 (2) is a fundamental right that ensures the child's basic rights and access to services such as education is guaranteed. Regarding child marriage, birth registration helps prove a child's real age, hence protect her in contexts where a minimum age of marriage has been set and where without evidence of age, she would be at risk of being married early.

¹³⁴ *ibid* Article 6 (1).

¹³⁵ *ibid* Article 8.

¹³⁶ *ibid* Article 9.

¹³⁷ *ibid* Article 12.

¹³⁸ *ibid* Article 24 (1).

¹³⁹ *ibid* Article 24 (2).

III. International Covenant on Economic, Social and Cultural Rights (1966)

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted alongside the ICCPR almost two decades after the adoption of the UDHR. Compared to the ICCPR and the UDHR, the ICESCR is less comprehensive regarding marriage. As previously seen, article 11 of the UDHR and article 23 of the ICCPR exclusively address marriage matters. However, article 10 of the ICESCR which contains a minor provision on marriage includes provisions on the rights of mothers and children as well. Article 10 (1) of the Covenant obligates State parties to protect and assist families and specifically emphasizes that “marriage must be entered with the free consent of the intending spouses”.¹⁴⁰ It lacks a marriageable age clause and a clause emphasizing the equal rights of spouses as to marriage, during marriage and at its dissolution present in the ICCPR and UDHR. Notably, the ICESCR, compared to the ICCPR contains fewer articles (only 31 compared to 53 in the ICCPR). The fact that it included the importance of “free consent” rather than marriageable age or equal rights to marriage means that the drafters recognized free consent as the most fundamental when entering marriage. Hence the ICESCR, though it is less comprehensive still manages to prohibit child marriages, which occur without the free consent of child brides.

Other relevant provisions include: the obligation of State parties to ensure the right of everyone to enjoy “the highest attainable standard of physical and mental health”¹⁴¹ and to take steps necessary for “the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child”¹⁴². As we have seen, child marriages negatively impact on the physical and mental health and the healthy development of the child bride, by exposing her to potential sexual and domestic violence and maternal health risks through early child

¹⁴⁰ ‘OHCHR | International Covenant on Economic, Social and Cultural Rights’ Article 10 (1) <<https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>> accessed 9 September 2019.

¹⁴¹ ‘OHCHR | International Covenant on Economic, Social and Cultural Rights’ (n 140) Article 12 (1).

¹⁴² *ibid* Article 12 (2a).

bearing. Most child brides also do not access proper pre-natal and post-natal services, which may result in poor health outcomes for her and her baby. The Covenant also proclaims everyone's right to education¹⁴³ and as we have seen education plays a crucial role in safeguarding a girl child against child marriage. Finally, the Covenant obligates State parties to ensure that the Covenant rights apply to everyone without any discrimination on any ground such as sex.¹⁴⁴

Compared to the ICCPR, 170 States are parties to the Covenant, 4 are only signatories, while 23 have not signed it.¹⁴⁵ Niger ratified the ICESCR in 1986 without any reservations.

IV. Convention on the Rights of the Child (1989)

Adopted in 1989, the Convention on the Rights of the Child (CRC) is perhaps the most widely ratified human rights instrument.¹⁴⁶ Niger ratified it in 1990 without any reservations. The Convention laid the foundation for the protection of children's rights by defining who a child is. Article 1 of the Convention stipulates that "a child is any human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."¹⁴⁷ No other human rights instrument contained such a clear definition of a child. Under the UDHR and ICCPR, the definition of "full age" and "marriageable age" was left open to interpretation. Hence the clear definition of a child was necessary. This definition has been adopted by most countries, regional and international organizations in their legal and policy frameworks on child marriage.

The CRC does not specifically mention child marriage. However, it does obligate State parties to take measures to "abolish all traditional practices prejudicial to the health of

¹⁴³ *ibid* Article 13.

¹⁴⁴ *ibid* Article 2(2), Article 3.

¹⁴⁵ 'OHCHR Dashboard' (n 130).

¹⁴⁶ 196 States have signed and ratified the CRC. Only the United States has not ratified it.

<https://indicators.ohchr.org/>

¹⁴⁷ 'OHCHR | Convention on the Rights of the Child'

<<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>> accessed 9 September 2019 Article 1.

children”¹⁴⁸. When we recall the harmful consequences of child marriage on a child bride’s physical, mental, and sexual health, we can conclude that the harmful traditional practices referred to here include child marriages.

Still regarding the right to health, the CRC obligates State parties to ensure that children attain the highest attainable standard of health by taking measures to, among others, ensure appropriate pre-natal and post-natal health care for mothers and basic knowledge of child health and nutrition, to diminish infant and child mortality, and to provide medical assistance and health care to all children.¹⁴⁹ The right to life of every child is also recognized in the CRC.¹⁵⁰ Here, the CRC recognizes that the health of children is determined by adequate and appropriate pre-natal and post-natal care for pregnant women. As we saw in the previous chapter, most child brides do not access appropriate and adequate pre-natal and post-natal care during their pregnancies, endangering the lives and health of their babies during their pregnancy, at child birth or within their first month or year of life.

Just like the ICCPR, the CRC emphasizes the right of every child to be registered after birth. Article 7 provides that “the child shall be registered immediately after birth....”¹⁵¹. Other important provisions relating to child marriage include the right to protection and care necessary for the child’s well-being¹⁵², the right to education¹⁵³, and the right to rest and leisure, to engage in play and recreational activities¹⁵⁴.

¹⁴⁸ *ibid* Article 24 (3).

¹⁴⁹ *ibid* Article 24.

¹⁵⁰ *ibid* Article 6 (1).

¹⁵¹ *ibid* Article 7.

¹⁵² *ibid* Article 3 (2).

¹⁵³ *ibid* Article 28.

¹⁵⁴ *ibid* Article 31 (1).

V. Convention on the elimination of all forms of discrimination against women (1979)

Adopted in 1979, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) has been ratified by 189 States (as at 30 September 2019), while one State has only signed it and 6 others have not signed it.¹⁵⁵ It is also the human rights instrument that has been ratified with the highest number of reservations. Niger has made several reservations to certain main provisions of CEDAW as we shall see below. The CEDAW is very comprehensive regarding child marriage compared to the UDHR, ICCPR, ICESR and CRC.

The CEDAW in article 1 defines the term “discrimination against women” as “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 a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.¹⁵⁶ Child marriages, based on this definition are a form of discrimination against girls, who will become women in future.

As we have seen, since girls are more disproportionately affected by child marriage, we can argue that child marriages are a distinction based on sex. Even though one may argue that parents and families do not marry their daughters early in order to deny them equality with men in the political, economic and socio-cultural spheres but rather to protect the family’s honor and because of poverty, child marriages still result in the denial of the girl’s or woman’s rights on an equal basis as men. Hence article 1 of CEDAW by recognizing that discrimination against women happens where there is an intention or effect of impairing the rights of girls and women on an equal basis as men prohibits child marriages.

¹⁵⁵ ‘OHCHR Dashboard’ (n 130).

¹⁵⁶ ‘OHCHR | Convention on the Elimination of All Forms of Discrimination against Women’ <<https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>> accessed 9 September 2019 Article 1.

In this regard, article 2 (f) of the CEDAW obligates all State parties to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”.¹⁵⁷ Sadly, though Niger has ratified the CEDAW, it has made a reservation to article 2 (f).¹⁵⁸

Regarding child marriage, article 16 (2) of the CEDAW enshrines “the betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory”.¹⁵⁹ Similar to the UDHR and ICCPR, article 16 of the CEDAW reemphasizes the duty of State parties to ensure the equal rights of men and women to choose a spouse, to enter marriage only with their free and full consent (article 16 1b), and to the same rights and responsibilities during marriage and its dissolution (article 16 1c) , and the same rights to decide “freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights” (article 16 1e).¹⁶⁰ Niger has also made reservations to articles 16(1c) and 16(1e).¹⁶¹

The CEDAW goes even further than the UDHR, ICCPR, ICESCR, and CRC by acknowledging the social and cultural roots of discrimination against women. Article 5 (a) obligates State parties to take all appropriate measures to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority

¹⁵⁷ *ibid* Article 2 (f).

¹⁵⁸ ‘OHCHR Dashboard’ (n 130).

¹⁵⁹ ‘OHCHR | Convention on the Elimination of All Forms of Discrimination against Women’ (n 156) Article 16 (2).

¹⁶⁰ *ibid* Article 16 (1).

¹⁶¹ ‘OHCHR Dashboard’ (n 130).

or the superiority of either of the sexes or on stereotyped roles for men and women”.¹⁶² As we have seen, child marriage is a cultural practice that is based on the idea of the inferiority of girls and women. In most societies where child marriages are rampant, girls are seen as economic burdens and that only investment in the boy will bring returns since he remains within the family. Girls and women’s roles are defined within the domestic sphere and there is low value placed on their education. Niger has also made a reservation to article 5a.¹⁶³

Regarding the right to education, the CEDAW’s article 10 (c) emphasizes the importance of women’s education access on an equal basis with men, and obligates States to take measures to ensure the elimination of any stereotyped concept of the roles of men and women.¹⁶⁴ We recall that due to stereotypes such as girls and women’s roles being domestic and that educating a girl will not benefit the family since she will eventually move to her husband’s family, many girls are likely to be married off in traditional communities where child marriages are prevalent. State parties are also obligated to reduce female student drop-out rates and organize programmes for girls and women who have left school pre-maturely.¹⁶⁵ These positive duties on the part of states are crucial in realizing a reduction in the rates of child marriage.

VI. Convention on the consent to marriage, minimum age for marriage and registration of marriages (1964)

This Convention, which was adopted less than a decade after the UDHR emphasizes the importance of free and full consent of both parties to a marriage.¹⁶⁶ More comprehensive compared to the UDHR, it states that such consent must be “expressed by them in person

¹⁶² ‘OHCHR | Convention on the Elimination of All Forms of Discrimination against Women’ (n 156) Article 5 (a).

¹⁶³ ‘OHCHR Dashboard’ (n 130).

¹⁶⁴ ‘OHCHR | Convention on the Elimination of All Forms of Discrimination against Women’ (n 156) Article 10 (c).

¹⁶⁵ *ibid* Article 10 (f).

¹⁶⁶ ‘OHCHR | Convention on Consent to Marriage, Minimum Age for Marriage’ <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/MinimumAgeForMarriage.aspx>> accessed 9 September 2019 Article 1.

after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.”¹⁶⁷ It also obligates states to take legislative action to specify a minimum age of marriage¹⁶⁸ and to make all registrations of marriages compulsory¹⁶⁹. This Convention has one of the least numbers of ratifications (less than 80 parties and signatories). Niger has neither signed nor ratified this Convention.

VII. Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to slavery (1956)

This Supplementary Convention obligates State parties to take all necessary measures, including legislation, to bring about a complete abolition of institutions and practices that are similar to slavery.¹⁷⁰ As earlier observed, child marriages expose child brides to treatment that is similar to slavery, such as sexual and physical violence without any choice to leave the marriage. Among such institutions and practices identified by the Convention include those where “a woman without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group”.¹⁷¹ Child marriages fit within this definition since the girl can neither refuse nor consent to the marriage.

It also includes “any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour”.¹⁷² While those who marry underage girls do not necessarily intend

¹⁶⁷ *ibid* Article 1.

¹⁶⁸ *ibid* Article 2.

¹⁶⁹ *ibid* Article 3.

¹⁷⁰ ‘OHCHR | Supplementary Convention on the Abolition of Slavery, the Slave Trade , and Institutions and Practices Similar to Slavery’

<<https://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx>> accessed 10 September 2019 Article 1.

¹⁷¹ *ibid* Article 1c(1).

¹⁷² *ibid* Article 1d.

to exploit them, child marriage nonetheless results in the exploitation of child brides. Niger is a State party to this Convention.

VIII. Sustainable Development Goals

Adopted in 2015, the United Nations Sustainable Development Goals envision to end poverty, protect the planet and promote peace and prosperity by 2030.¹⁷³ Among the goals that will contribute to this vision include Goal 5, which aims to achieve gender equality and empower all women and girls.¹⁷⁴ In particular, the first target is to end all forms of discrimination against all women and girls everywhere.¹⁷⁵ Child marriage is a form of discrimination against women and girls. Notably, the third target is to eliminate all harmful practices, such as child, early, and forced marriage and female genital mutilation.¹⁷⁶

IX. The Beijing Declaration and Platform for Action

The Beijing Declaration and Platform for Action was adopted at the 1995 Fourth World Conference on Women by 17,000 participants, 30,000 activists and representatives of 189 governments with the aim of advancing gender equality and the empowerment of all women.¹⁷⁷ As a progressive framework for change, guidance and inspiration, the Platform for Action contains comprehensive commitments under 12 critical areas of concern.¹⁷⁸ One of these critical areas of concern is the girl child.

The Platform for Action recognizes that despite the CRC prohibition of discrimination in the enjoyment of all rights on the basis of among other factors, sex, the girl child is still discriminated against through harmful practices such as child marriage.¹⁷⁹ Furthermore,

¹⁷³ 'Sustainable Development Goals' (UNDP) <<https://www.undp.org/content/undp/en/home/sustainable-development-goals.html>> accessed 10 September 2019.

¹⁷⁴ *ibid.*

¹⁷⁵ 'Goal 5: Gender Equality' (n 67).

¹⁷⁶ *ibid.*

¹⁷⁷ 'The Beijing Platform for Action: Inspiration Then And Now' (UN Women / *The Beijing Platform for Action*
Turns 20) <<https://beijing20.unwomen.org/en/about>> accessed 10 September 2019.

¹⁷⁸ *ibid.*

¹⁷⁹ United Nations and Department of Public Information (eds), *Beijing Declaration and Platform for Action: Beijing+5 Political Declaration and Outcome*. (2014) 165.

gender inequalities are reinforced by gender-biased educational processes. It recognizes that the school enrollment of girls is far below that of boys because of cultural practices such as child marriage, female genital mutilation and teenage pregnancies, among others.¹⁸⁰ Regarding child marriage, it recommends States to take, among others, the following strategic actions:

- Taking measures to ensure that a child is registered immediately after birth.¹⁸¹
- Adopting and enforcing laws specifying that marriage should only be entered into with the free and full consent of the intending spouses; adopting and enforcing laws specifying the minimum legal age of consent and the minimum age of marriage; and raising the minimum age of marriage where necessary.¹⁸²
- Educating and sensitizing adults about the harmful effects of certain traditional or customary practices on girls.¹⁸³
- Taking steps to ensure that traditions and religion are not a basis for discrimination against girls.¹⁸⁴

Here we observe that the participants of this conference recognized the importance of registration immediately after birth as a crucial element in the elimination of child marriages. It also reemphasizes the principle of “free and full consent” to marriage present in the legal frameworks examined here. We observe the call for State parties to adopt a minimum age of marriage and to educate and sensitize their populations on the harmful effects of customary practices such as child marriage.

¹⁸⁰ *ibid* 166.

¹⁸¹ *ibid* 168.

¹⁸² *ibid* 169.

¹⁸³ *ibid*.

¹⁸⁴ *ibid* 170.

X. International Conference on Population and Development Programme of Action (1994)

The International Conference on Population and Development articulated a 20 year Programme of Action that serves as a guide to people-centered development. Among others, the Programme of Action recognizes that gender equality and women's empowerment are cornerstones of population and development programmes.¹⁸⁵ Regarding the girl child and harmful traditional practices including child marriage, the Programme of Action urges governments to, *inter alia*:

- Adopt and enforce laws requiring marriage to be entered into only with the free and full consent of the intending spouses; adopt and enforce laws specifying the minimum legal age of consent and the minimum age at marriage, and raise the minimum age of marriage where necessary; generate social support for the enforcement of laws on minimum legal age of marriage, by providing educational and employment opportunities.¹⁸⁶
- “Encourage children, adolescents and youth, particularly young women, to continue their education in order to equip them for a better life, to increase their human potential, to help prevent early marriages and high-risk child-bearing and to reduce associated mortality and morbidity.”¹⁸⁷
- “Create a socio-economic environment conducive to the elimination of all child marriages and other unions as a matter of urgency, and discourage early marriage. The social responsibilities that marriage entails should be reinforced in countries’

¹⁸⁵ ‘International Conference on Population and Development Programme of Action’
</publications/international-conference-population-and-development-programme-action> accessed 10 September 2019.

¹⁸⁶ United Nations Populations Fund, ‘Programme of Action’ 35.

¹⁸⁷ *ibid* 48.

educational programmes. Governments should take action to eliminate discrimination against young pregnant women.”¹⁸⁸

Similar to the Beijing Platform for Action and the legal frameworks examined, we see there is an emphasis on “free and full consent” to marriage and the need for a minimum age of marriage to be adopted. There is also recognition of the role of education and empowerment in eliminating discriminatory traditional practices such as child marriage.

B. REGIONAL LEGAL AND POLICY FRAMEWORK

1. AFRICA

I. African Charter on Human and People’s Rights/ Banjul Charter (1981)

The African Charter on Human and People’s Rights does not directly mention child marriage. However article 18 (3) obligates State parties to ensure the elimination of every discrimination against women and to ensure the protection of the rights of women and children “as stipulated in international declarations and conventions”.¹⁸⁹ The Charter also contains other provisions that relate to child marriage including: entitlements to all rights without distinction of any kind including sex,¹⁹⁰ the prohibition of torture, inhuman and degrading treatment,¹⁹¹ the right to health,¹⁹² the right to education,¹⁹³ the duty to respect human beings without discrimination.¹⁹⁴ With the exception of Morocco, all African States have ratified the Banjul Charter.¹⁹⁵

¹⁸⁸ *ibid* 49.

¹⁸⁹ ‘African Charter on Human and People’s Rights’ <https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf> accessed 11 September 2019 Article 18 (3).

¹⁹⁰ *ibid* Article 2.

¹⁹¹ *ibid* Article 5.

¹⁹² *ibid* Article 16.

¹⁹³ *ibid* Article 17.

¹⁹⁴ *ibid* Article 28.

¹⁹⁵ *ibid*.

II. African Charter on the Rights and Welfare of the Child (1990)

Consistent with the CRC, the African Charter on the Rights and Welfare of the Child (ACRWC) defines a child as any human being who is below the age of 18.¹⁹⁶ Compared to the CRC, the ACRWC is more comprehensive since it addresses the unique factors the African child faces such as traditional customs, natural disasters and armed conflicts. Regarding child marriage, article 21 (2) specifically states 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 eighteen years and make registration of all marriages in an official registry compulsory.”¹⁹⁷

The ACRWC also tasks State parties with the positive obligation of discouraging any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the Charter,¹⁹⁸ and to take all appropriate measures to eliminate harmful social and cultural practices which affect the welfare, dignity, normal growth and development of the child in particular those that are prejudicial to the health or life of the child; and those practices or customs that are discriminatory to the child on grounds of sex or other status.¹⁹⁹ Such practices include child marriages since they negatively impact on the girl child’s life and health, and are discriminatory on grounds of sex.

Other important provisions relating to child marriage include: the right to life, survival, protection and development,²⁰⁰ the right to be registered immediately after birth,²⁰¹ the right to education,²⁰² the right to rest, leisure and recreation,²⁰³ the right to health,²⁰⁴ protection

¹⁹⁶ ‘African Charter on the Rights and Welfare of the Child’ <https://au.int/sites/default/files/treaties/36804-treaty-0014_-_african_charter_on_the_rights_and_welfare_of_the_child_e.pdf> Article 2.

¹⁹⁷ *ibid* Article 21 (2).

¹⁹⁸ *ibid* Article 1 (3).

¹⁹⁹ *ibid* Article 21 (1).

²⁰⁰ *ibid* Article 5.

²⁰¹ *ibid* Article 6.

²⁰² *ibid* Article 11.

²⁰³ *ibid* Article 12.

against child abuse and torture.²⁰⁵ Lastly, it tasks parents with several duties towards their children.²⁰⁶ Such duties should take into account the best interests of the child at all times. Subjecting a child to marriage violates this provision since it results in negative consequences such as halted education. Niger ratified this Charter in 1999.²⁰⁷

III. The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) (2003)

Adopted in 2003, the Maputo Protocol is the most recently adopted African human rights instrument addressing the rights of women. It differs from the CEDAW by addressing the unique circumstances African women find themselves in. These include traditional practices such as child marriage. Regarding marriage, the Maputo Protocol, similar to its predecessor human rights instruments emphasizes the “free and full consent of the intending spouses”, “minimum age of marriage” and “compulsory registration of all marriages”.

The positive obligations the Protocol tasks State parties with regard to marriage include:

- a) Adopting legislative measures to ensure that no marriage takes place without the free and full consent of both parties (article 6a),²⁰⁸ that the minimum age of marriage for women is 18 years (article 6b),²⁰⁹ and that all marriages are registered according to national laws in order to be legally recognized (article 6d).²¹⁰
- b) Adopting legislative and other measures to eliminate harmful practices through creating awareness campaigns of the harmful effects of such practices (article 5a),²¹¹ providing the necessary support to victims of such practices through basic services

²⁰⁴ *ibid* Article 14.

²⁰⁵ *ibid* Article 16.

²⁰⁶ *ibid* Article 20.

²⁰⁷ *ibid*.

²⁰⁸ AU, ‘Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa’ <https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf> accessed 11 September 2019 Article 6a.

²⁰⁹ *ibid* Article 6b.

²¹⁰ *ibid* Article 6d.

²¹¹ *ibid* Article 5a.

such as legal and judicial support (article 5c),²¹² and protecting women who are at risk of being subjected to harmful practices (article 5d).²¹³

Other relevant provisions on child marriage include: the right to dignity,²¹⁴ the right to life, integrity and security of the person,²¹⁵ the right to education,²¹⁶ and health and reproductive rights.²¹⁷ Niger has signed but not ratified the Maputo Protocol.

IV. Southern African Development Community Protocol on Gender and Development (2008)

The SADC Protocol on Gender and Development also defines a child as any human being who is below the age of eighteen years.²¹⁸ Regarding marriage the Protocol obligates State parties to: ensure that legislation on marriages requires, *inter alia*, that no person under the age of 18 marries, unless otherwise specified by law which takes into account the best interests and welfare of the child; that marriage takes place with the free and full consent of both parties;²¹⁹ that women and men enjoy equal rights in marriage and are regarded as equal partners in marriage.²²⁰

Specifically relating to the girl child, the Protocol calls on States to adopt laws, policies, and programmes to ensure the development and protection of the girl child by, *inter alia*: eliminating all forms of discrimination against the girl child in the family, community, institutions and at state levels;²²¹ “ensuring that girls enjoy the same rights as boys and are protected from harmful cultural attitudes and practices in accordance with the United Nations

²¹² *ibid* Article 5c.

²¹³ *ibid* Article 5d.

²¹⁴ *ibid* Article 3.

²¹⁵ *ibid* Article 4.

²¹⁶ *ibid* Article 12.

²¹⁷ *ibid* Article 14.

²¹⁸ Southern African Development Community, ‘SADC Protocol on Gender and Development’ <https://extranet.sadc.int/files/2112/9794/9109/SADC_PROTOCOL_ON_GENDER_AND_DEVELOPMENT.pdf> accessed 11 September 2019 Article 1(2).

²¹⁹ *ibid* Article 8.2.

²²⁰ *ibid* Article 8.1.

²²¹ *ibid* Article 11 (1a).

Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child”;²²² ensuring the perpetrators of gender based violence are tried by a court of competent jurisdiction;²²³ and “discouraging traditional norms, including social, economic, cultural and political practices which legitimise and exacerbate the persistence and tolerance of gender based violence with a view to eliminate them”.²²⁴

V. Cairo Declaration on Human Rights in Islam (1990)

The Cairo Declaration on Human Rights in Islam does not mention child marriage directly. It however obligates states to take certain protective measures towards the child. Article 7 proclaims that every child has the right to be accorded proper nursing, education and material, hygienic and moral care from his or her parents, the society and the state.²²⁵ Child marriages contravene this obligation since they rob the girl child of proper education and care.

VI. African Union Agenda 2063

The African Union’s Agenda 2063 is the continent’s strategic framework for achieving inclusive and sustainable development by the year 2063.²²⁶ It consists of seven comprehensive aspirations, twenty target goals and a set of priority areas.²²⁷ Regarding gender equality, women’s empowerment and child marriage, the AU Agenda 2063’s sixth aspiration is to create “an Africa whose development is people driven, relying on the potential offered by African People, especially its Women and Youth, and caring for Children”.²²⁸ In this regard, its target goals include, *inter alia*: ensuring full gender equality

²²² *ibid* Article 11 (1c).

²²³ *ibid* Article 20 (1b).

²²⁴ *ibid* Article 21 (1).

²²⁵ ‘University of Minnesota Human Rights Library’ <<http://hrlibrary.umn.edu/instree/cairodeclaration.html>> accessed 11 September 2019 Article 7.

²²⁶ ‘Agenda 2063: The Africa We Want. | African Union’ <<https://au.int/agenda2063/overview>> accessed 11 September 2019.

²²⁷ ‘Goals & Priority Areas of Agenda 2063 | African Union’ <<https://au.int/agenda2063/goals>> accessed 11 September 2019.

²²⁸ *ibid*.

in all spheres of life and developing engaged and empowered youth and children.²²⁹ To achieve these target goals, the Agenda's priority areas are:

- Women's and girl's empowerment
- Violence and discrimination against women and girls
- Youth empowerment and children.²³⁰

VII. Southern African Development Community Model Law on Eradicating Child marriage and protecting children already in marriage

The Southern African Development Community Model Law on Child marriage is a comprehensive guide to legislative efforts on child marriage in Southern Africa.²³¹ The Model Law specifically:

- States that "...a person under the minimum age of marriage has no capacity to consent to a marriage or contract a marriage and any marriage purportedly entered into or solemnised is a prohibited marriage and void".²³² The minimum age of marriage is the age of 18 years or an older age as specified by the Constitution or Law of a country, without any exception or gender discrimination.²³³
- Defines a "child" as any human being who is below the age of eighteen years and "child marriage" as any statutory or customary union in which one party is a child or both of the parties are children.²³⁴

²²⁹ *ibid.*

²³⁰ *ibid.*

²³¹ SADC Parliamentary Forum, 'Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage' <<https://www.girlsnotbrides.org/wp-content/uploads/2016/10/MODEL-LAW-ON-ERADICATING-CHILD-MARRIAGE-AND-PROTECTING-CHILDREN-ALREADY-IN-MARRIAGE.pdf>> accessed 11 September 2019.

²³² *ibid* 49.

²³³ *ibid* 31.

²³⁴ *ibid* 29.

- Prohibits the betrothal of a child; the marriage between a child and an adult and between two children; the contracting, solemnizing, abetting, promoting, permitting, coercing, or forcing the betrothal or marriage of a child.²³⁵
- Calls for the liability of any person who allows or promotes the betrothal or marriage of a child, through imprisonment or a fine or both, according to the laws of the member states.²³⁶
- Restates the principle of “the best interest of the child” which shall be paramount in any decision taken concerning the child by any government, judicial institution, appropriate authority, service provider, a body in the private sector or parent.²³⁷
- Restates the principle of non-discrimination in the child’s enjoyment of basic rights on the basis of, inter alia, his or her sex.²³⁸
- Prohibits child marriage and the betrothal of girls and boys and calls on governments to specify a minimum age of marriage.²³⁹
- Allows any judicial institution, child marriage prohibition officer or appropriate authority to remove a child from parental responsibility where it is determined that by continuing to live with the parent, the child is at risk of being married off.²⁴⁰
- Encourages education to be geared towards promoting the child’s understanding of the dangers of child marriage.²⁴¹
- Discourages discrimination by any authority, service provider, person or any person in the private sector of a pregnant child or victim of child marriage.²⁴²

²³⁵ *ibid* 49.

²³⁶ *ibid* 50.

²³⁷ *ibid* 34.

²³⁸ *ibid* 35.

²³⁹ *ibid* 36.

²⁴⁰ *ibid* 37.

²⁴¹ *ibid* 39.

²⁴² *ibid* 40.

- Encourages the Ministers of health to adopt measures to ensure that a pregnant child, child in marriage or victim of child marriage is able to access HIV and AIDS counseling, testing, treatment and family planning.²⁴³
- Restates the right of every child to be registered immediately after birth and the requirement of all marriages to be registered in a register of marriages.²⁴⁴

VIII. African Youth Charter (2006)

Regarding marriage, the African Youth Charter states that young men and women of full age shall enter into marriage only with their free and full consent and shall enjoy equal rights and responsibilities.²⁴⁵ This is a prohibition of child marriages which occur without the free and full consent of the child bride.

The Charter also calls on states to take all appropriate measures to eliminate harmful social and cultural practices that affect the welfare and dignity of youth, in particular, those that harm the health, life, and dignity of youth, and those which are discriminatory to youth on the basis of gender, age or other status.²⁴⁶ Child marriages constitute such harmful social and cultural practices that harm the life, health and dignity of child brides.

Additionally, it calls for the elimination of discrimination against women and girls in conformity with international, regional and national human rights instruments. Such measures should ensure that girls are able to participate on an equal footing with boys, at all levels of social, educational, economic, political, cultural, civic life, leadership and scientific endeavors.²⁴⁷

²⁴³ *ibid* 42.

²⁴⁴ *ibid* 47.

²⁴⁵ African Union Commission, 'African Youth Charter' Article 8 (2).

²⁴⁶ *ibid* Article 25.

²⁴⁷ *ibid* Article 23.

It also obligates States to take all appropriate measures to ensure that girls and young women who become pregnant or are married before completing their education have the opportunity to complete their education.²⁴⁸

2. SOUTH ASIA

I. SAARC Convention on Regional arrangements for the promotion of Child welfare in South Asia (2002)

In line with the CRC, the SAARC Convention defines a child as a national of any member state of the South Asian Association for Regional Cooperation who is below the age of eighteen years.²⁴⁹ Furthermore, Article 4 (3d) obligates State parties to “....make civil registration of births, marriages and deaths in an official registry, compulsory in order to facilitate the effective enforcement of national laws including the minimum age for employment and marriage”.²⁵⁰ Compulsory birth and marriage registration would help curb illegal and underage marriages. In line with keeping girls in school and thereby preventing the likelihood of child marriage, article 4 obligates states to ensure that a child has access to education without any hindrance or discrimination.²⁵¹

II. Regional Action Plan to end Child marriage in South Asia (2015-2018)

The Regional Action Plan adopted by the South Asia Initiative to End Violence Against Children had the overall objective of delaying the age of marriage for girls in at least four countries in South Asia by 2018.²⁵² Its second objective was to raise the age of marriage to 18 for both boys and girls, delaying early marriage in at least four countries in South Asia by 2018.²⁵³

²⁴⁸ *ibid* Article 13 (4h).

²⁴⁹ ‘SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia - The Faculty of Law’ <<https://www.jus.uio.no/english/services/library/treaties/02/2-05/child-welfare-asia.xml>> accessed 12 September 2019.

²⁵⁰ *ibid* Article 4 (3d).

²⁵¹ *ibid* Article 4 (c).

²⁵² South Asia Initiative to End Violence Against Children, ‘Regional Action Plan to End Child Marriage in South Asia (2015-2018)’.

²⁵³ *ibid*.

III. Kathmandu Call for Action to end Child marriage in South Asia (2014)

The Kathmandu Call for Action to end child marriage includes a set of actions to be implemented by the member states of South Asia in order to end child marriage. These actions include among others:

- Ensuring access to legal remedies for victims of child marriage.
- Strengthening the enforcement of national laws prohibiting child marriage.
- Ensuring access to sexual and reproductive health information to boys and girls to inform them about the risks of early marriage and to ensure that married girls have access to such information.
- Supporting efforts by national human rights institutions to ensure accountability for violations resulting from child marriage and to ensure compliance with international norms on child marriage.²⁵⁴

3. THE AMERICAS

I. Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994)

The Convention defines “violence against women” as “any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere”.²⁵⁵ Child marriages do fit within this definition of violence against women since they disproportionately affect girls, and negatively impact their physical, sexual and psychological health. Furthermore, article 6 specifically emphasizes the right of women to be free from all forms of discrimination, and to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority and subordination.²⁵⁶ Such social and cultural practices include child marriages.

²⁵⁴ ‘Kathmandu Call for Action to End Child Marriage in South Asia’.

²⁵⁵ Organization of American States, ‘Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women’ Article 1.

²⁵⁶ *ibid* Article 6.

II. American Convention on Human Rights (1969)

Regarding marriages, the American Convention on Human Rights prohibits marriages that are not based on the free and full consent of the intending spouses.²⁵⁷ In addition, it obligates State parties, families and the society to afford the minor measures of protection required by his or her condition as a minor.²⁵⁸

Other provisions relating to child marriage include: the obligation on state parties to ensure that everyone within their jurisdictions enjoys the convention rights without discrimination based on, *inter alia*, sex;²⁵⁹ the right to life;²⁶⁰ the right to human treatment;²⁶¹ and freedom from slavery;²⁶²

4. EUROPE

I. European Convention on Human Rights (1953)

Regarding marriage, the European Convention on Human Rights (ECHR) declares that men and women of marriageable age have a right to marry according to the national laws of the member state.²⁶³ Its other provisions related to child marriage include the obligation of State parties to ensure the Convention rights to everyone within their jurisdictions (article 1), the right to life (article 2), prohibition of torture (article 3), prohibition of slavery and forced labor (article 4), and the prohibition of discrimination (article 14).²⁶⁴

II. Council of Europe Convention on Preventing and Combatting violence against women and domestic violence

The Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence contains similar provisions as the CEDAW. It defines “violence

²⁵⁷ Inter-American Commission on Human Rights, ‘Basic Documents - American Convention’ (1969) <<https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>> accessed 12 September 2019 Article 17 (3).

²⁵⁸ *ibid* Article 19.

²⁵⁹ *ibid* Article 1.

²⁶⁰ *ibid* Article 4.

²⁶¹ *ibid* Article 5.

²⁶² *ibid* Article 6.

²⁶³ European Court of Human Rights and Council of Europe, ‘European Convention on Human Rights’ Article 12.

²⁶⁴ *ibid*.

against women” as “...a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”.²⁶⁵ Child marriages fit within this definition of violence against women since they disproportionately affect girls and result in physical, sexual, psychological and economic harm and suffering of child brides.

Furthermore, it obligates states to “...take the necessary measures to promote changes in the social and cultural patterns of behavior of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men”.²⁶⁶ This obligation is targeted at practices such as child marriages which are founded on socio-cultural beliefs of the inferiority of women. Lastly, the Convention requires implementation to be secured without any discrimination based on any ground such as sex.²⁶⁷

III. Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms reaffirms the right of men and women of marriageable age to marry and to found a family, according to the national laws governing this right.²⁶⁸

²⁶⁵ Council of Europe, ‘Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence’ Article 3.

²⁶⁶ *ibid* Article 12 (1).

²⁶⁷ *ibid* Article 4 (3).

²⁶⁸ Council of Europe, ‘Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms’ Article 12.

5. MIDDLE EAST

I. Arab Charter on Human Rights (1994)

The Arab Charter on Human Rights does not make any provisions addressing child marriage or any form of marriage. Several provisions, however, relate to child marriage. These include the right to enjoy all rights without discrimination based on any factor such as sex (article 2), the right to life (article 5), the prohibition of torture, inhuman and degrading treatment (article 13), and the right of young persons to physical and mental development (article 39).²⁶⁹

C. NATIONAL LEGAL AND POLICY FRAMEWORK

1. KENYA

I. Constitution of Kenya (2010)

As stipulated in article 2 (1), Kenya's Constitution "...is the Supreme Law of the Republic and binds all persons and all State organs at both levels of government".²⁷⁰ Article 2 (4) reiterates this supremacy by declaring that "any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid".²⁷¹

Furthermore, article 2 (5) declares that "the general rules of international law shall form part of the law of Kenya"²⁷² and article 2 (6) stipulates that "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution".²⁷³ Kenya has signed and ratified a number of international and regional treaties and conventions which prohibit child marriages, including the CEDAW, Convention on Consent to Marriage, CRC, ACHPR, and the Maputo Protocol. These treaties have therefore become part of the law of Kenya.

²⁶⁹ League of Arab States, 'Arab Charter on Human Rights'.

²⁷⁰ 'Constitution of Kenya' (2010)

<<http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010>> accessed 13 September 2019
Article 2 (1).

²⁷¹ *ibid* Article 2 (4).

²⁷² *ibid* Article 2 (5).

²⁷³ *ibid* Article 2 (6).

Regarding child marriage, article 53 (1d) of the Constitution states that “every child has the right to be protected, *inter alia*, from harmful cultural practices”.²⁷⁴ Article 53 (2) restates the principle of the best interests of the child in every matter concerning him or her.²⁷⁵ Furthermore, article 45 (2) declares the right of every adult to marry a person of the opposite sex, based on their free consent.²⁷⁶ In addition, it allows legislation recognizing marriages concluded under any tradition, or system of religious, personal or family law, only to the extent that such marriages are consistent with the Constitution.²⁷⁷ Therefore, child marriages, majority of which occur under tradition or religion and lead to negative consequences for the child bride are prohibited under Kenya’s Constitution.

II. The Marriage Act (2014)

The Marriage Act defines a child as any individual who has not yet attained the age of eighteen years.²⁷⁸ It defines a marriage as the voluntary union of a man and a woman, whether in a monogamous or polygamous union, and registered according to the Act.²⁷⁹ It further prohibits the marriage of a person who has not yet attained the age of eighteen years.²⁸⁰

Furthermore, marriages where either party is below the age of eighteen and where the consent of either party has not been freely given, are considered void marriages under the Act.²⁸¹ Consent is described to not have been freely given if the person is influenced by coercion, or is mistaken as to the nature or purport of the ceremony.²⁸² Child marriages are therefore void and prohibited under the Marriage Act since they involve girls who are below the age of

²⁷⁴ *ibid* Article 53 (1d).

²⁷⁵ *ibid* Article 53 (2).

²⁷⁶ *ibid* Article 45 (2).

²⁷⁷ *ibid* Article 45 (4).

²⁷⁸ ‘The Marriage Act’ <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf> accessed 13 September 2019 Article 2.

²⁷⁹ *ibid* Article 3 (1).

²⁸⁰ *ibid* Article 4.

²⁸¹ *ibid* Article 11 (a, e).

²⁸² *ibid* Article 11 (2 a,b).

eighteen and who do not freely give their consent to the marriage. Lastly, any person who marries a person who is below the minimum age of marriage is liable upon conviction to imprisonment for a term not exceeding five years or a fine not exceeding one million Kenya shillings, or both.²⁸³

III. Children Act (2001)

The Children Act defines a child as any human being who is below the age of eighteen years.²⁸⁴ It defines early marriage as any marriage or cohabitation with a child or any arrangement made for such marriage or cohabitation.²⁸⁵

Regarding child marriage, article 14 of the Act establishes that:

“No person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development.”²⁸⁶

The Act additionally defines the penalties for the infringement of any of the child’s rights recognized in the Act, including the right to be protected from harmful cultural practices such as child marriage. Such a person shall, upon conviction be liable to a term of imprisonment not exceeding twelve months or to a fine not exceeding fifty thousand Kenya shillings, or to both.²⁸⁷

IV. Prohibition of Female Genital Mutilation Act (2011)

Among certain Kenyan communities such as the Kuria, Maasai, and Rendille, FGM is performed on girls between the ages of 9 and 17 and usually symbolizes a girl’s readiness for

²⁸³ *ibid* Article 87.

²⁸⁴ ‘Children Act’ <http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ChildrenAct_No8of2001.pdf> accessed 13 September 2019 Article 2.

²⁸⁵ *ibid* Article 2.

²⁸⁶ *ibid* Article 14.

²⁸⁷ *ibid* Article 20.

marriage.²⁸⁸ Prohibiting and eliminating the practice would therefore lower the prevalence rates of child marriages in these communities. The FGM Act describes the act of performing female genital mutilation as an offence,²⁸⁹ and that any person who causes the death of another while committing this offence will be liable upon conviction to imprisonment for life.²⁹⁰ In addition, aiding and abetting the performance of FGM, procuring a person to perform FGM in another country, allowing one's premises to be used to perform FGM, possessing the tools and equipment for performing FGM, failing to report the commission of FGM, and using derogatory and abusive language to ridicule anyone who has not undergone FGM are all described as offences under the Act.²⁹¹ Furthermore, it is no defense if a person has consented to undergoing FGM.²⁹²

V. Penal Code

Relating to FGM, the Penal Code in article 234 proclaims that “any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life”.²⁹³ Additionally, article 251 enshrines, “any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.”²⁹⁴

VI. Counter-trafficking in Persons Act (2010)

The Counter-trafficking in Persons Act defines exploitation as any act which includes, *inter alia*, child marriage and forced marriage.²⁹⁵ It further elaborates that the offence of trafficking in persons occurs “when a person recruits, transports, transfers, harbors, or receives another person for the purposes of exploiting him or her by means of: threat or use of force or other forms of coercion; abduction; fraud; deception; abuse of power or of position of

²⁸⁸ Brides, ‘Kenya - Child Marriage Around The World. Girls Not Brides’ (n 102).

²⁸⁹ Prohibition of Female Genital Mutilation Act 2011 Article 19 (1).

²⁹⁰ *ibid* Article 19 (2).

²⁹¹ *ibid* Articles 20-25.

²⁹² *ibid* Article 19 (6).

²⁹³ ‘KEN28595.Pdf’ <<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/28595/115477/F-857725769/KEN28595.pdf>> accessed 17 October 2019 Article 234.

²⁹⁴ *ibid* Article 251.

²⁹⁵ ‘Counter-Trafficking in Persons Act’ <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Counter-TraffickinginPersonsAct_No8of2010.pdf>2 (i,j).

vulnerability; giving payments or benefits to obtain the consent of the victim of trafficking in persons; or giving or receiving payments or benefits to obtain the consent of a person having control over another person.”²⁹⁶

Even without using these means, the Act still considers the recruitment, transfer, harboring or receipt of a child for the purposes of exploitation a form of “trafficking in persons”.²⁹⁷ It clarifies that an act of trafficking a person may occur internally within the borders of Kenya or internationally across the borders of Kenya.²⁹⁸ The penalty for the offence of trafficking a person is imprisonment for a term of not less than thirty years or to a fine of not less than thirty million shillings or to both, and upon subsequent conviction, to imprisonment for life.²⁹⁹ Furthermore, any person who finances, controls, aids or abets the commission of trafficking of a person is liable to the same penalties.³⁰⁰

VII. Sexual Offences Act (2006)

According to article 8 of the Kenyan Sexual Offences Act, “any person who commits an act which causes penetration with a child is guilty of defilement”.³⁰¹ If the child is 11 years or below, the person upon conviction shall be imprisoned for life.³⁰² If the child is between the age of 12 and 15 years, the person upon conviction shall be imprisoned for a term not less than 20 years.³⁰³ And if the child is between the age of 16 and 18, the person shall be imprisoned for not less than 15 years.³⁰⁴ The Act defines a child as any person who is below the age of 18. We know that once married, child brides are subjected to sexual acts. Hence the husbands of child brides, who are usually much older than them, are guilty of the offence of defilement under the Sexual Offences Act.

²⁹⁶ *ibid* Article 3 (1).

²⁹⁷ *ibid* Article 3 (3).

²⁹⁸ *ibid* Article 3 (4).

²⁹⁹ *ibid* Article 3 (5).

³⁰⁰ *ibid* Article 3 (6).

³⁰¹ Sexual Offences Act 2006 Article 8 (1).

³⁰² *ibid* Article 8 (2).

³⁰³ *ibid* Article 8 (3).

³⁰⁴ *ibid* Article 8 (4).

VIII. The National Children Policy (2010)

The National Children Policy draws its context from existing international, regional and national legal and policy frameworks to ensure the full realization of children's rights in Kenya. Among several provisions on children's rights, it touches on retrogressive cultural beliefs and practices. It outlines various measures that must be taken to eradicate retrogressive cultural beliefs and practices, including the provision of Information Education and Communication (IEC) programs to discourage retrogressive cultural beliefs and practices, the enforcement of legislation and Plan of Action against Female Genital Mutilation and child marriage, and the creation of child friendly centers to shelter those rescued from retrogressive cultural beliefs and practices.³⁰⁵

IX. National Plan of Action for Children in Kenya (2015-2022)

Among the four pillars of the seven year National Plan of Action for Children in Kenya is Child Protection. The National Plan of Action recognizes that retrogressive cultural practices including FGM and child marriage are among the areas that children in Kenya require protection against.³⁰⁶ To achieve child protection against retrogressive cultural practices, the National Plan of Action urges the relevant stakeholders to reinforce the implementation of the FGM act and other legal provisions and to eliminate child marriages.³⁰⁷

X. Vision 2030

Kenya's Vision 2030, the blue-print for long-term development lays its development foundation on three key pillars, namely, the social pillar, the economic and macro pillar and the political pillar.³⁰⁸ Child marriage interventions are addressed in the social pillar, specifically in the Gender, Youth and Vulnerable groups, and the Education and Training

³⁰⁵ National Council for Children's Services, 'The National Children Policy' Article 5.12.

³⁰⁶ National Council for Children's Services, 'National Plan of Action for Children in Kenya' 28.

³⁰⁷ *ibid* 36.

³⁰⁸ 'About Vision 2030 | Kenya Vision 2030' <<https://vision2030.go.ke/about-vision-2030/>> accessed 16 September 2019.

Sectors.³⁰⁹ To address child marriages, the Social Pillar's Gender, Youth and Vulnerable groups sector's several gender mainstreaming interventions include launching public awareness intervention campaigns against FGM, early and forced marriages and issuing sanctions and recommending prosecution on gender discrimination cases.³¹⁰ Furthermore, the same sector aims to establish child protection centers as part of its child protection programmes.³¹¹ In relation to education and training, the Social Pillar's gender sensitive interventions and voucher systems will primarily target learners from poor households and children rescued from early marriages and child abuse to encourage them to stay in school.³¹²

2. NIGER

There are three sources of law in the Niger, namely statutory, customary and religious law.³¹³ Customary law remains the most commonly accepted and naturally applied source of law, rather than statutory law which is perceived to be originating "elsewhere".³¹⁴ This source of law therefore significantly influences family and marriage matters. The legal and policy framework on child marriage in Niger is limited and attempts at intervening against the practice have faced opposition from religious, traditional and even political leaders.³¹⁵ Attempts to adopt a Children's Code and Family Code have been unsuccessful. Current national policies and strategies only address certain aspects of child marriage. Examples of such policies are the National Policy on Nutritional Security which addresses early pregnancy, the National Gender Policy and the National Strategy for the Prevention and

³⁰⁹ *ibid.*

³¹⁰ 'Social Pillar | Kenya Vision 2030' <<https://vision2030.go.ke/social-pillar/#69>> accessed 16 September 2019.

³¹¹ *ibid.*

³¹² *ibid.*

³¹³ United Nations High Commissioner for Refugees, 'Refworld | UN Committee on the Elimination of Discrimination against Women: Concluding Comments, Niger' (*Refworld*) <<https://www.refworld.org/docid/468b5dfa2.html>> accessed 16 October 2019 para 15.

³¹⁴ Stephanie Lagoutte, 'Dissolution of Marriage, Legal Pluralism and Women's Rights in Francophone West Africa' 41 <https://www.humanrights.dk/files/media/billeder/nyheder/engelsk_version.pdf>.

³¹⁵ 'Niger MPs Reject Protocol on Women's Rights | IOL News' <<https://www.iol.co.za/news/africa/niger-mps-reject-protocol-on-womens-rights-280492>> accessed 16 October 2019.

Management of Gender-based Violence and its action plan- which contains strategic pillars one of which addresses child marriage and early pregnancies.

To date however, no holistic action plan or policy exists to eradicate child marriage in the country. We will however examine the country's 2010 Constitution, the 2005 Civil Code, the 2003 Penal Code, and the Ordinance of 2010.

I. Constitution of Niger (2010)

Niger's constitution in its preamble reaffirms the country's commitments to the principles of human rights defined in the UDHR, ICCPR, ICESCR, the ACHPR, and the regional and international human rights instruments signed and ratified by Niger.³¹⁶ These principles include those of gender equality and elimination of violence against women and girls, including harmful traditional practices such as child marriage. Article 171 clarifies the legal status of treaties, stating that "the treaties or agreements regularly ratified have, from their publication, an authority superior to that of the laws, subject to, for each agreement or treaty of its application by the other party."³¹⁷

Article 22 charges the state with the duty to eliminate "all forms of discrimination concerning women, young girls and handicapped persons. The public policies in all the domains assure their full development and their participation in the national development. The state takes, among others, measures to combat violence done to women and children in public and private life."³¹⁸ Finally, article 23 obligates parents to raise, educate and protect their children.³¹⁹

³¹⁶ 'Constitution of Niger, 2010' <https://www.constituteproject.org/constitution/Niger_2010.pdf> accessed 16 September 2019 Preamble.

³¹⁷ *ibid* Article 171.

³¹⁸ *ibid* Article 22.

³¹⁹ *ibid* Article 23.

II. Civil Code (2005)

Article 146 prohibits any marriage that is not based on consent.³²⁰ Article 148 prohibits minors from marrying without the consent of their parents.³²¹ Article 150 stipulates that ascendants can also give consent for minors to marry if the minors' parents are deceased or if they are unable to give their consent.³²² Article 144 sets the minimum age of marriage for a boy as eighteen years, and the minimum age of a girl as fifteen years.³²³ Furthermore, articles 165-169 require all marriages to be officially registered before the civil registrar.³²⁴

III. Criminal Code (2003)

As concluded in the preceding chapter of this study, child brides may undergo treatment that is similar to slavery. Niger's 2003 Criminal Code's definition of slavery and the consequences of subjecting a person to slavery is very comprehensive. Article 270.1 of the Code defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. A "slave" is the person who has that status or condition. A "person of servile status" means a person in the condition or status resulting from any of the institutions or practices associated with slavery, such as: any institution or practice whereby:

- a) a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her master;
 - b) the master of a woman considered to be a slave has the right to transfer her to another person for value received or otherwise;
 - c) the master has the right to maintain sexual relations with the enslaved woman;
2. any institution or practice whereby minors under the age of 18 years are delivered by their natural parents, their guardian, their master or the master of one or both of their

³²⁰ 'Niger Civil Code' Article 146.

³²¹ *ibid* Article 148.

³²² *ibid* Article 150.

³²³ *ibid* Article 144.

³²⁴ *ibid* Article 165-169.

parents to another person, whether for reward or not, with a view to the exploitation of the minors or their labor.”³²⁵

Article 270.2 further stipulates that the offence of subjecting a person to slavery is punishable by 10 to 30 years’ imprisonment and a fine of between CFAF 1 million and CFAF 5 million.³²⁶

IV. Ordinance of 16 December 2010

Young Nigerien girls are often trafficked and married off to men from neighboring countries.³²⁷ Hence the purpose of the Ordinance of 16 December 2010 adopted by the government is to: “prevent and combat trafficking in persons, especially women and children; protect, support and assist victims of trafficking by upholding their fundamental rights; punish traffickers for all trafficking-related offences; facilitate cooperation among States parties to the United Nations Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Convention.”³²⁸

Article 2 of the Ordinance defines trafficking in persons as “any operation or action aimed at recruiting, transporting, transferring, harboring or receiving persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of benefits to achieve the consent of a person having control over another person for the purpose of exploitation”.³²⁹

³²⁵ United Nations High Commissioner for Refugees, ‘Refworld | Niger: Code Pénal’ (*Refworld*) <<https://www.refworld.org/docid/47fb8e642.html>> accessed 16 October 2019 Article 270.1.

³²⁶ *ibid* Article 270.2.

³²⁷ ‘Early Marriage – from Rural Custom to Urban Business’ (*The New Humanitarian*, 16 January 2009) <<http://www.thenewhumanitarian.org/feature/2009/01/16/early-marriage-%E2%80%93-rural-custom-urban-business>> accessed 16 October 2019.

³²⁸ United Nations, ‘Second Periodic Report Submitted by the Niger under Article 40 of the Covenant, Due in 1994’ (2018) 14.

³²⁹ *ibid*.

This legislation also provides for the “establishment of an institutional framework, including a National Coordinating Commission against Trafficking in Persons, a National Agency to Combat Trafficking in Persons and a special fund for the compensation of victims of trafficking”.³³⁰

3. ETHIOPIA

I. Constitution of the Federal Democratic Republic of Ethiopia (1995)

To begin with, the FDRE Constitution recognizes the importance of gender equality in advancing the economic and social development of Ethiopia. In its preamble, the Constitution affirms the commitment of the people of Ethiopia to the rule of law, lasting peace, democratic order and social and economic development.³³¹ It recognizes that in order to achieve these commitments, there must be “...full respect of individual and people’s fundamental freedoms and rights, to live together on the basis of equality and without any sexual, religious or cultural discrimination”.³³²

Similar to international and regional provisions on child marriage, article 34 (1) of Ethiopia’s constitution reaffirms the right of men and women of marriageable age as defined by law to marry and to found a family.³³³ Furthermore, marriage shall be entered into only with the free and full consent of the intending spouses³³⁴ who will be entitled to the same rights when entering marriage, during marriage and at its dissolution.³³⁵ As observed before, most child marriages proceed without the free and full consent of child brides and because of this they rarely have equal rights with their husbands who are usually much older and more powerful than them.

³³⁰ *ibid.*

³³¹ ‘Constitution of the Federal Democratic Republic of Ethiopia’ Preamble.

³³² *ibid* Preamble.

³³³ *ibid* Article 34 (1).

³³⁴ *ibid* Article 34 (2).

³³⁵ *ibid* Article 34 (1).

Article 35 addresses the rights of women. In particular article 35 (4) charges the state with the responsibility to enforce the right of women to eliminate the influences of harmful customs.³³⁶ It specifically prohibits “laws, customs and practices that oppress or cause bodily or mental harm to women”.³³⁷ Child marriages fall within the category of harmful customary practices that cause bodily and mental harm to women since they result in adverse long-term negative consequences on the girl child.

Furthermore, article 36 proclaims the right of children. Among other rights, this article declares the right of every child not to be subjected to exploitative practices or to be required or permitted to perform work that is harmful to his or her education, health or well-being.³³⁸ Child marriages fall within this prohibited category. Child brides have to bear the emotional and physical responsibilities early before they are physically and emotionally mature to handle such responsibilities. These responsibilities as observed, usually negatively impact on the child bride’s education, health and well-being.

Finally, article 9 proclaims that “the Constitution is the supreme law of the land. Any law, customary practice or decision of an organ of state or a public official which contravenes this constitution shall be of no effect”.³³⁹ It further states that all international agreements ratified by Ethiopia are an integral part of the law of the land.³⁴⁰ Since child marriages violate the rights of the child as enshrined in article 36, we can conclude that the FDRE Constitution prohibits them. Furthermore, the international and regional treaties on child marriage ratified by Ethiopia, including the CEDAW and the Maputo Protocol are an integral part of the law of Ethiopia.

³³⁶ *ibid* Article 35 (4).

³³⁷ *ibid* Article 35 (4).

³³⁸ *ibid* Article 36 (1d).

³³⁹ *ibid* Article 9 (1).

³⁴⁰ *ibid* Article 9 (4).

II. The Revised Family Code (2000)

Section two of the Revised Family Code defines the essential conditions of a marriage, which are, among others, the presence of consent and the marriageable age. Article 6 states that “a valid marriage shall take place only when the spouses have given their free and full consent”.³⁴¹ Child marriages are therefore invalid under the Revised Family Code since majority of them proceed without the free and full consent of the child bride. Additionally, article 7 prohibits a man and a woman who has not attained the age of eighteen from concluding a marriage.³⁴² However, for serious cause, the Minister of Justice may, “upon application of the future spouses, parents or guardians, grant dispensation of not more than two years”.³⁴³

Lastly, the Revised Family Code recognizes both religious and customary marriages. Yet even under these forms of marriages, the essential conditions of marriage, including the presence of consent and the legal marriageable age must be complied with.³⁴⁴

III. Criminal Code of the Federal Democratic Republic of Ethiopia (2004)

Article 648 of the Criminal Code lays the sanctions for concluding child marriage. It states that a person who concludes a marriage with a minor apart from the circumstances permitted under the Revised Family Code is liable to imprisonment for a term not exceeding three years, if the victim is above the age of thirteen years, and a term not exceeding seven years, if the victim is below the age of thirteen years.³⁴⁵

IV. National Policy on Ethiopian Women (1993)

The National Policy on Ethiopian Women recognizes that harmful customs and practices including early marriage through parental arrangement or kidnapping, are among the factors

³⁴¹ ‘The Revised Family Code’ Article 6.

³⁴² *ibid* Article 7.

³⁴³ *ibid* Article 7 (2).

³⁴⁴ *ibid* Article 26, Article 27.

³⁴⁵ ‘Criminal Code of the Federal Democratic Republic of Ethiopia’ Article 648 (a,b).

negatively impacting the development and progress of Ethiopian women.³⁴⁶ One of its objectives is therefore to eliminate step by step, prejudices, customary and other practices that are based on the idea of male superiority.³⁴⁷ Additionally, it aims to modify or abolish existing laws, regulations, customs and practices which perpetuate discrimination against women, and eliminate discriminatory attitudes towards women by men and women themselves through an elevated awareness.³⁴⁸ It also tasks the government, with the cooperation of the people of Ethiopia with raising awareness among the concerned communities about the dangers of child marriage and Female Genital Mutilation.³⁴⁹

V. National Costed Roadmap to end child marriage and FGM/C (2020-2024)

Adopted in August 2019, this National Roadmap outlines the key strategies, packages of interventions, and expected results, targets, and milestones towards the elimination of child marriage and FGM/C in Ethiopia by 2025. The five pillar strategies of the Roadmap include:

1. Empowering adolescent girls and their families;
2. Community engagement (including faith and traditional leaders);
3. Enhancing systems, accountability and services across sectors;
4. Creating and strengthening an enabling environment
5. Increasing data and evidence generation, and use.³⁵⁰

Underpinning these five pillars are four core approaches: the social norms approach, the gender transformative approach, the multi-sectoral approach, and the social ecological framework.³⁵¹

³⁴⁶ ‘National Policy on Ethiopian Women’ Para 2.3.

³⁴⁷ *ibid* Section 2 para 3.

³⁴⁸ *ibid* 14.

³⁴⁹ *ibid* 16.

³⁵⁰ Federal Democratic Republic of Ethiopia, Ministry of Women, Children and Youth, ‘Summary: National Costed Roadmap to End Child Marriage and FGM/C (2020-2024)’ 7.

³⁵¹ *ibid*.

VI. National Strategy and Action Plan on Harmful Traditional Practices (HTPs) against Women and Children in Ethiopia

The National Strategy defines HTPs as “traditional practices which violate and negatively affect the physical, sexual or psychological well-being, human rights and socio-economic participation of women and children”.³⁵² Child marriage is identified as one of the types of HTPs practiced in Ethiopia.³⁵³ The general objective of the National Strategy and Action Plan on HTPs against women and children in Ethiopia is to “institutionalize national, regional and grassroots level mechanisms by creating an enabling environment for the prevention and elimination of all forms of HTPs and to ensure the availability of multi-sectoral mechanisms to support women and children through prevention, protection and the provision of services”.³⁵⁴

To this end, the Strategy’s key pillars include:

- Prevention- harmful traditional practices will be prevented through sustained community mobilization to bring about behavioral change through shifting community beliefs, social norms and values.³⁵⁵
- Protection- anti-HTPs efforts will be effectively implemented through a stronger and improved policy and legal framework, effective law enforcement and institution building.³⁵⁶
- Provision/Response- remedial or restorative services and support will be provided to women and children affected by HTPs through the creation and expansion of equal

³⁵² Federal Democratic Republic of Ethiopia, Ministry of Women, Children and Youth, ‘National Strategy and Action Plan on Harmful Traditional Practices (HTPs) against Women and Children in Ethiopia’ 13.

³⁵³ *ibid* 14,15.

³⁵⁴ *ibid* 28.

³⁵⁵ *ibid* 30.

³⁵⁶ *ibid* 33.

and easy access to user-friendly, quality and affordable services, building the capacity of service providing institutions, and initiating and piloting specialized services.³⁵⁷

VII. Growth and Transformation Plan (2010)

The key strategic pillars of Ethiopia's Growth and Transformation Plan included, among others, the promotion of gender and youth empowerment and equity.³⁵⁸ In addition, the Growth and Transformation Plan's specific targets for Gender Development and Children's Affairs included, *inter alia*, reducing the rate of abduction, early marriage and female genital mutilation.³⁵⁹

³⁵⁷ *ibid* 34.

³⁵⁸ Ministry of Finance and Economic Development, 'Growth and Transformation Plan' 22.

³⁵⁹ *ibid* 111.

CHAPTER THREE: COMPARATIVE ANALYSIS OF NATIONAL LEGAL AND POLICY FRAMEWORKS

In the previous chapter, we examined the international, regional and national legal and policy framework on child marriage in Kenya, Niger and Ethiopia. In this chapter, we will compare the laws and policies on child marriage in Niger with the laws and policies in Kenya and Ethiopia in order to understand how adequate these laws and policies are in protecting vulnerable girls against child marriage.

Even though legal protections alone are not enough to achieve total elimination of child marriages, they are crucial in encouraging government follow up and providing levers for civil society advocates to hold leaders accountable to national and international commitments.³⁶⁰ They also shape public debate around an issue thereby signifying its importance and acting as a first step towards broader change.³⁶¹ It is therefore important that the available legal protections do not create loopholes that allow a certain harmful practice to persist. Regarding child marriage, we observe that though legal provisions setting the minimum age of marriage may be present, these same provisions are undermined by others that allow exceptions to these minimum age laws, and plural legal systems that render statutory law not superior.

A. Minimum age laws and gender disparities

A strong legal and policy framework should clearly prohibit child marriage by setting the age of 18 as the legal age at which both girls and boys can get married, in line with article 16 (2) of the CEDAW, article 21 (2) of the ACRWC and article 6 (b) of the Maputo Protocol. Researchers have established that consistent laws setting the minimum marriage age of

³⁶⁰ UNICEF, 'Early Marriage: Child Spouses' (UNICEF Innocenti Research Center 2001) 7 <<https://www.unicef-irc.org/publications/pdf/digest7e.pdf>>.

³⁶¹ Jensen and Thornton (n 66) 9–19.

eighteen are associated with lower rates of child marriage.³⁶² In their first ever joint General Recommendation, the CEDAW and CRC committees recommended that State parties should adopt or amend legislation to ensure that “a minimum legal age of marriage for girls and boys is established, with or without parental consent, at eighteen years”.³⁶³ There must be no difference of age at which girls and boys can get married. Allowing such disparities perpetuates gender discrimination and inequality, especially if the legal age at which girls can get marriage is lower than eighteen. Examining the legal and policy framework of the three jurisdictions, we can observe some notable differences.

The 2010 Constitution of Kenya lacks a minimum age clause. However, article 45 (2) declares the right of every adult to marry.³⁶⁴ The Constitution defines an adult as any individual who has attained the age of eighteen years, and a child as any individual who has not attained the age of eighteen years.³⁶⁵ Hence this provision limits the right to marry to persons who have attained the age of eighteen years. More comprehensively, article 4 of the Marriage Act clearly prohibits child marriage by declaring that “a person shall not marry unless that person has attained the age of eighteen years”.³⁶⁶ Furthermore, among the void marriages listed in the Act is one in which either of the parties was below the minimum age of marriage.³⁶⁷ Here, the provisions have used gender neutral terms such as “adult”, “person” and “party”. Therefore, there are no gender disparities in age of marriage in the Kenyan legal and policy framework.

³⁶² Belinda Maswikwa and others, ‘Minimum Marriage Age Laws and the Prevalence Of Child Marriage and Adolescent Birth: Evidence from Sub-Saharan Africa’ 64

<<https://www.guttmacher.org/sites/default/files/pdfs/pubs/journals/4105815.pdf>>.

³⁶³ Committee on the Elimination of Discrimination against Women of and Committee on the Rights of the Child (n 4) para 55(f).

³⁶⁴ ‘Constitution of Kenya’ (n 270) Article 45 (2).

³⁶⁵ *ibid* Article 260.

³⁶⁶ ‘The Marriage Act’ (n 278) Article 4.

³⁶⁷ *ibid* Article 11 (1a).

The 1995 FDRE Constitution also lacks a minimum age clause. It reaffirms the right of both men and women who have attained marriageable age as defined by law to marry.³⁶⁸ In its essential conditions for marriage, the 2000 Revised Family Code establishes this marriageable age as eighteen years.³⁶⁹ Article 7 (1) of the Revised Family Code clearly prohibits child marriage by declaring that “neither a man nor a woman who has not attained the age of eighteen years shall conclude a marriage”.³⁷⁰ Similar to Kenya’s minimum age clause in the Marriage Act, Ethiopia’s provision extends legal protection to boys as well as girls.

In comparison, the 2010 Constitution of Niger also lacks a minimum age clause. According to the 2005 Civil Code, however, the minimum age at which boys and girls can get married with parental consent is eighteen years and fifteen years respectively.³⁷¹ Here, we can see that there is a clear gender disparity in the minimum age law. It basically legalizes child marriages of girls while prohibiting child marriages of boys. Hence the legal and policy framework in Ethiopia and Kenya has clearly stipulated the age of 18 as the minimum marriage age for both boys and girls, in line with the CEDAW and CRC recommendation and the ACRWC which they have all ratified. In comparison, Niger’s Civil Code violates Niger’s obligations under the ACRWC and leaves a loophole clearly permitting child marriage.

B. Exceptions to minimum age laws: Parental Permission

Minimum age laws would not adequately protect girls from child marriages where there are provisions allowing them to get married at an earlier age with their parents’ consent. We know that in a majority of cases, it is parents who arrange for their daughters to get married early and not the girls themselves. Hence a majority of child marriages proceed as a result of parental arrangement, approval and consent. The sad case is that as many as ninety-nine

³⁶⁸ ‘Constitution of the Federal Democratic Republic of Ethiopia’ (n 331) Article 34 (1).

³⁶⁹ ‘The Revised Family Code’ (n 341) Article 7 (1).

³⁷⁰ *ibid* Article 7 (1).

³⁷¹ ‘Niger Civil Code’ (n 320) Article 144.

countries (52 percent) around the world permit girls under the age of eighteen to be married with parental consent.³⁷²

The legal and policy framework in Kenya and Ethiopia do not have any provision allowing marriages under the minimum age with parental or guardian approval. There is no available data on this. However, as we recall, Kenya's Marriage Act and Ethiopia's Revised Family Code have clearly prohibited marriages under the age of eighteen for both genders. These clear prohibitions offer protection.

Niger's 2005 Civil Code, however, permits such marriages. In fact, article 148 of the Civil Code prohibits minors from contracting a marriage without their parents' consent.³⁷³ The same article proclaims that in case there is disagreement between the father and mother regarding the issue, "this division entails consent".³⁷⁴ This means that even one parent's opposition to the daughter's marriage is not enough to protect her. Furthermore, article 149 declares that in case one of the parents is deceased or unable to express his or her consent, then the consent of the other parent is sufficient.³⁷⁵ In addition, in case both parents are deceased or unable to express their consent, then the ascendants' consent is sufficient.³⁷⁶ In case there is disagreement between the ascendants regarding a girl's marriage, the consent of one of them is enough.³⁷⁷ Here, we see how Niger's Civil Code has created a very fertile ground for child marriages to thrive.

³⁷² Megan Arthur and others, 'Child Marriage Laws around the World: Minimum Marriage Age, Legal Exceptions, and Gender Disparities' (2018) 39 *Journal of Women, Politics & Policy* 51 <<https://doi.org/10.1080/1554477X.2017.1375786>> accessed 22 October 2019.

³⁷³ 'Niger Civil Code' (n 320) Article 148.

³⁷⁴ *ibid* Article 148.

³⁷⁵ *ibid* Article 149.

³⁷⁶ *ibid* Article 150.

³⁷⁷ *ibid* Article 150.

C. Exceptions to minimum age laws: Customary and religious law

Minimum marriage laws are likewise undermined in plural legal systems, or where customary and religious law are recognized as sources of law without emphasizing that they must not contravene human rights norms enshrined in the Constitution and international and regional human rights standards. Child marriages have been practiced for many generations in Africa and till date they are regarded as culturally-legitimate ways of protecting girls from premarital sex, pregnancies out of wedlock and protecting a family's honor.³⁷⁸ Moreover, factors such as poverty that drive families to marry their daughters young still exist. Hence, any legal and policy framework that does not address the place of customary or religious law in child marriage practices creates loopholes that allow these practices to persist. Indeed, many child marriages occur under customary or religious law.

Within the three jurisdictions, customary and religious law is recognized by the respective constitutions. However, there are notable differences in the extent to which certain traditions conducted under customary and religious law are allowed to take place.

In Kenya, customary and religious law is inferior to the Constitution, which is the supreme law of the land as stated in article 2 (1) of the 2010 Constitution of Kenya.³⁷⁹ Furthermore, article 2 (4) clearly states that “any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid”.³⁸⁰ Additionally, the Constitution tasks Parliament with the duty to enact legislation recognizing marriages concluded under any tradition, or system of religious, personal or family law, but only to the extent that such marriages are consistent with the Constitution.³⁸¹ Hence the validity of customary and religious law is determined by its consistency with the Constitution. Child marriages, which

³⁷⁸ Maswikwa and others (n 362) 59.

³⁷⁹ ‘Constitution of Kenya’ (n 270) Article 2 (1).

³⁸⁰ *ibid* Article 2 (4).

³⁸¹ *ibid* Article 45 (4).

are primarily conducted under customs or religion contravene several provisions of the Constitution including the right of every child to be protected from harmful cultural practices (article 53.1d), the principle of best interests of the child (article 53.2) and the right of every adult to marry based on their free consent (article 45.2).

Kenya's 2014 Marriage Act recognizes religious, customary and civil marriages.³⁸² However, this recognition does not give leeway for customary child marriages. The same Act makes marriage notification to the Registrar compulsory, and this notification must, among others, confirm that the parties were eighteen years at the time of the marriage.³⁸³ So even if customary marriages are recognized, the Act at the same time prohibits child marriage. The one limitation about the Act however is that the same age notification requirement is not mandated for Hindu and Islamic marriages. In fact, for marriages under Islamic Law, article 49 (3) proclaims that "any provision of this Act which is inconsistent with Islamic Law and practices shall not apply to persons who profess the Islamic faith."³⁸⁴ This provision is problematic because there has been controversy among Muslims on the position of Islam on child marriage, with some using the example of Prophet Muhammad marrying an underage girl as a justification for child marriage.³⁸⁵ Hence this provision could be used to justify child marriages under Islam. This was the case in *Republic v BF, Halima Mohamed and Yunus Abdulrahman* where the petitioners cited article 49 (3) of the Marriage Act as a source of protection for marrying off an underage girl under Islamic Law.³⁸⁶ This is a loophole that needs to be addressed.

³⁸² 'The Marriage Act' (n 278) Article 6.

³⁸³ *ibid* Article 45 (3a).

³⁸⁴ *ibid* Article 49 (3).

³⁸⁵ Berkley Center for Religion University Peace and World Affairs at Georgetown, 'Muslim Marriage Law That Empowers Girls' <<https://berkleycenter.georgetown.edu/responses/muslim-marriage-law-that-empowers-girls>> accessed 22 October 2019.

³⁸⁶ 'Constitutional Petition 40 of 2011 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/115306/>> accessed 22 October 2019 para 8.

Similarly, Ethiopia's Revised Family Code recognizes religious and customary marriages.³⁸⁷

Yet even these marriages must fulfill the essential conditions of marriage which, *inter alia*, include the presence of consent and the legal minimum age of marriage which is eighteen years.³⁸⁸ Furthermore, article 9 (1) of the FDRE Constitution proclaims the supremacy of the Constitution and "any law, customary practice or a decision of an organ of state or public official which contravenes the Constitution shall be of no effect".³⁸⁹ Among the Constitutional provisions that child marriages violate include article 34 (1) on limiting the right to marry to people of marriageable age, and article 34 (2) on the free and full consent of intending spouses. Article 35 of the FDRE Constitution is a clear "prohibition of laws, customs and practices that oppress or cause bodily or mental harm to women". Hence we see that these provisions are very clear on the position of customary and religious law vis a vis statutory law. As much as they recognize customary and religious laws, they at the same time subject them to a superior law which protects girls from child marriage.

The case is different in Niger where three sources of law namely civil, customary and religious law operate. Most marriages in Niger are conducted under customary law. Compared to Ethiopia and Kenya, customary law in Niger seems to be deeply entrenched, accepted and respected. As Stephanie Lagoutte argues, Nigerien citizens are more familiar with customary law, and other legal standards, be they civil, regional or international are perceived to be foreign hence not fit to be invoked in court.³⁹⁰ Understanding how deeply entrenched customs are in the Niger, this is perhaps the reason why the Nigerien government made several reservations to the key provisions of the CEDAW, with the argument that "they cannot be applied immediately because they are contrary to existing customs and

³⁸⁷ 'The Revised Family Code' (n 341) Article 26, Article 27.

³⁸⁸ *ibid* Article 26, 27, 6, 7.

³⁸⁹ 'Constitution of the Federal Democratic Republic of Ethiopia' (n 331) Article 9 (1).

³⁹⁰ Stephanie Lagoutte (n 314) 41.

practices”.³⁹¹ Lagoutte argues that even judges, whether or not they are familiar with ratified regional and international human rights instruments find it difficult to apply them, and more comfortable applying customary law.³⁹²

In view of this great deference to customary law in the Nigerien society, it is difficult to perceive how any other law prohibiting child marriage would be respected. The Civil Code establishes 18 and 15 as the minimum ages of marriage for boys and girls respectively. Yet as we have seen, most marriages in Niger are conducted under customary law which does not set any minimum legal age of marriage. The Constitution of Niger’s article 171 provides that “the treaties or agreements regularly ratified have, from their publication, an authority superior to that of the laws, subject to, for each agreement or treaty of its application by the other party”³⁹³ and Act No. 2004-50 on the organization of the judiciary provides that customs are applicable in family law as long as they do not contradict international conventions duly ratified by Niger.³⁹⁴ Yet even this latter provision is limited by the reservations that Niger has made to such international conventions.

D. Exceptions to minimum age laws: Government or court approval

In certain countries, marriages below the minimum marriage age may be permitted by a government official or a court’s approval. The CEDAW and CRC Committees in their joint General Recommendation recommended that eighteen be the minimum age of marriage for both boys and girls, but “under exceptional circumstances in respecting the evolving capacities of a child, 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

³⁹¹ ‘OHCHR Dashboard’ (n 130).

³⁹² Stephanie Lagoutte (n 314) 41.

³⁹³ ‘Constitution of Niger, 2010’ (n 316) Article 171.

³⁹⁴ ‘G1017193.Pdf’ <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/171/93/PDF/G1017193.pdf?OpenElement>> accessed 1 November 2019 p106.

based on legitimate exceptional grounds defined by law and on the evidence of maturity without deference to cultures and traditions”.³⁹⁵

Article 7 (2) of the FDRE Revised Family Code establishes that despite the minimum age of marriage of eighteen for both boys and girls, “the Minister of Justice may, on the application of the future spouses, or the parent or guardian of one of them for serious cause, grant dispensation of not more than two years”.³⁹⁶ This is partly in line with the recommendation as the absolute minimum age at which a minor can get married would be sixteen years, and not any younger. However, the definition of what constitutes “serious cause” here remains vague. The Code fails to define the exceptional grounds under which such an exception may be made, leaving the discretion to the Minister of Justice.

Similarly, Niger’s Civil Code in article 145 permits the President of the Republic to grant dispensation of age for serious cases.³⁹⁷ The existence of this provision is indeed unnecessary in a context in which the legal age of marriage for girls is already low at fifteen years. Granting any further dispensation below this age means that a Nigerien girl can get married below the absolute minimum age of marriage established by the CEDAW and CRC Committees. Furthermore, it does not specify that the dispensation in age should not be “more than two years” like the FDRE Revised Family Code has provided. This leaves the discretion to the President who may even grant dispensation of five years or more. Similar to FDRE’s Revised Family Code provision, the definition of “serious cause” here is also vague and open to subjective interpretation. Hence even if most marriages in Niger are conducted under customary law, for those who choose to do it under civil law, the law already contains a loophole that fails to adequately protect girls from child marriage.

³⁹⁵ Committee on the Elimination of Discrimination against Women of and Committee on the Rights of the Child (n 4) para 6.2 (19).

³⁹⁶ ‘The Revised Family Code’ (n 341) Article 7 (2).

³⁹⁷ ‘Niger Civil Code’ (n 320) Article 145.

In contrast, the legal and policy framework in Kenya does not make any exception to the minimum age of marriage based on governmental or court approval.

E. Conditions of marriage: Consent

The issue of consent may be more relevant to legal marriages, that is, marriages involving parties that have reached the minimum age of marriage, because even though an underage girl freely and fully consents to a marriage, she may still be prohibited from contracting a marriage by laws and policies that set a minimum age of marriage without exceptions. But in contexts where dispensation of age may be granted by a court or government official, it is necessary for the laws and policies to elaborate on what “consent” means. This is particularly so in Ethiopia and Niger where exceptions to minimum marriage age may be made. The laws and policies on marriage in the three jurisdictions emphasize the importance of consent. So whether it is an underage marriage approved by government like the case of Ethiopia and Niger, it must still proceed with the consent of the parties.

The Constitutions of Kenya and the FDRE state that consent should be “free” and “full”, while Niger’s Constitution only states that there should be consent. The questions here would be what is consent and how can one determine whether consent was free and full? The legal and policy frameworks, aside from emphasizing the importance of consent should define its scope.

Kenya’s Marriage Act describes conditions under which consent is said to not have been freely given. These include where either party is influenced by coercion or fraud, is mistaken as to the nature or purport of the ceremony, is suffering from any mental condition whether permanent or temporary, or is intoxicated or under the influence of drugs.³⁹⁸

³⁹⁸ ‘The Marriage Act’ (n 278) Article 11 (2 a,b, c).

According to the FDRE Revised Family Code, consent is said to not have been freely given if it was extorted through violence.³⁹⁹ Such consent is extorted by violence if it is given by the spouse to “protect himself or one of his ascendants or descendants, or any other close relative from a serious and imminent danger or threat of danger”.⁴⁰⁰ One wonders why this provision did not use a more gender neutral term instead of “himself” and “his”, since it is women and girls rather than men and boys who are the main victims of forced marriages. Article 587 (1) of the Criminal Code of Ethiopia rectifies this gap by declaring that “whoever with intent to marry a woman abducts her by violence, or commits such an act after having obtained her consent by intimidation, threat, trickery or deceit, is punishable with rigorous imprisonment from three years to ten years”.⁴⁰¹ Here, we see that if a woman agreed to a marriage because she was intimidated, threatened, tricked or deceived then the Criminal Code stipulates that she did not consent to it.

In comparison, Niger’s Civil Code in article 146 declares that there is no marriage without consent.⁴⁰² We see later that this consent is parental or from ascendants rather than from the parties themselves.⁴⁰³ There is no elaboration on what “consent” means, even if it is parental or from ascendants. It is possible that a girl’s parents or grandparents consent to her marriage could be involuntary. One can therefore conclude that the legal framework in Niger fails to protect Nigerien girls’ right to marry with their free and full consent.

In addition to defining consent, the legal and policy framework should establish mechanisms to determine valid consent. The FDRE Revised Family Code declares that each of the spouses should “personally be present and consent to the marriage at the time and place of its

³⁹⁹ ‘The Revised Family Code’ (n 341) Article 14 (1).

⁴⁰⁰ *ibid* Article 14 (2).

⁴⁰¹ ‘Criminal Code of the Federal Democratic Republic of Ethiopia’ (n 345) Article 587 (1).

⁴⁰² ‘Niger Civil Code’ (n 320) Article 146.

⁴⁰³ *ibid* Article 148, 149, 150.

celebration”⁴⁰⁴ and that where for serious cause, the spouse cannot attend the ceremony, the Minister of Justice may allow it to proceed provided the absent spouse has fully consented to the marriage.⁴⁰⁵ Similarly, Kenya’s Marriage Act makes it obligatory for both parties to be present at the ceremony.⁴⁰⁶ Niger’s Civil Code also requires both parties to be present at the ceremony.

F. Provisions on marriage: marriage rights

Additionally, provisions that emphasize the equal rights of both spouses when entering marriage, during marriage and at its dissolution offer more comprehensive protection than those which do not. As observed earlier on in this study, the power balance between child brides and their husbands is unequal. Child brides do not have the same rights and decision making powers as their husbands due to their significantly younger age, lower levels of education and awareness of their rights, and their social isolation from their family, friends and justice systems. Moreover, majority of them do not freely consent to the marriage making the power balance even more unequal before the union. Hence my argument is that by having provisions on the equality of rights between spouses, the legal and policy framework further emphasizes the illegal nature of child marriages.

Article 45 (3) of Kenya’s Constitution emphasizes that parties are entitled to equal rights at the time of the marriage, during the marriage and at its dissolution.⁴⁰⁷ The Marriage Act similarly emphasizes that parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at its dissolution.⁴⁰⁸ Ethiopia’s Constitution similarly declares the equal rights of women and men while entering into, during marriage

⁴⁰⁴ ‘The Revised Family Code’ (n 341) Article 12 (1).

⁴⁰⁵ *ibid* Article 12 (2).

⁴⁰⁶ ‘The Marriage Act’ (n 278) Article 11 (f).

⁴⁰⁷ ‘Constitution of Kenya’ (n 270) Article 45 (3).

⁴⁰⁸ ‘The Marriage Act’ (n 278) Article 3 (2).

and at the time of divorce.⁴⁰⁹ Neither the Nigerien Constitution nor Civil code explicitly states the equal rights of men and women at the time of marriage, during marriage and at its dissolution. In fact the Nigerien government made reservations to article 16 of the CEDAW concerning the same rights and responsibilities of both spouses during marriage and at its dissolution, in accordance with existing customs and practices.⁴¹⁰

G. Protection of children

The laws and policies should also explicitly declare the right of children to be protected from harmful cultural practices and traditions. By including this specific provision in the Constitution or Acts of Parliament, this right can be more securely guaranteed and protected than if there were no such specific provision.

Article 53 (d) of Kenya's Constitution declares the right of every child to be protected from, *inter alia*, harmful cultural practices.⁴¹¹ In addition, article 55 (d) obligates the State to take measures to ensure that youth are protected from harmful cultural practices and exploitation.⁴¹² Young girls at risk of child marriage are part of this category. Article 14 of Kenya's Children's Act also makes this provision. It states that "no person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development".⁴¹³

Ethiopia's Constitution on the other hand does not directly mention the right of children not to be subjected to harmful cultural practices but proclaims the right of every child not to be subjected to exploitative practices or work which may be hazardous or harmful to his or her

⁴⁰⁹ 'Constitution of the Federal Democratic Republic of Ethiopia' (n 331) Article 34 (1).

⁴¹⁰ 'OHCHR Dashboard' (n 130).

⁴¹¹ 'Constitution of Kenya' (n 270) Article 53 (d).

⁴¹² *ibid* Article 55 (d).

⁴¹³ 'Children Act' (n 284) Article 14.

education, health or well-being.⁴¹⁴ In comparison, the laws and policies in Niger lack specific provisions protecting children from harmful cultural practices.

H. Protection of women

Similarly, the laws and policies should contain explicit provisions protecting women from harmful cultural practices and traditions. In particular, including such provisions in the Constitution which is the supreme law of the land and therefore more difficult to change, ensures that women and girls right to be protected from child marriage can be more securely guaranteed.

Examining the Constitution of Kenya, one fails to find such an explicit provision on protecting women from harmful cultural practices. On the other hand, Ethiopia's Constitution has positively made this provision. The Constitution contains a separate and specific section which recognizes and protects the rights of women. Article 35 (4) declares that "the State shall enforce the right of women to eliminate the influences of harmful customs. Laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited".⁴¹⁵ Similar to Kenya's Constitution, Niger Constitution lacks such a specific provision.

I. Birth and marriage registration

As noted in the first chapter of this study, deficiencies in birth and marriage registration especially in rural areas are one of the drivers of child marriage. Lack of birth registration and hence a birth certificate makes it difficult to determine a child's age, exposing her to risk of early marriage. Recalling that the CEDAW and CRC Committees in their joint General Recommendation recommended that State parties to the Conventions should, among others,

⁴¹⁴ 'Constitution of the Federal Democratic Republic of Ethiopia' (n 331) Article 36 (1d).

⁴¹⁵ *ibid* Article 35 (4).

establish a legal requirement of marriage registration⁴¹⁶ and a system of national compulsory, accessible and free birth registration of all children in order to prevent harmful practices such as child marriage,⁴¹⁷ it is worthwhile to investigate the laws and policies on birth and marriage registration in the three jurisdictions.

Despite containing a specific section recognizing and protecting the rights of children, neither the Kenyan Constitution nor the FDRE Constitution emphasizes the right of the child to be immediately registered after birth. Niger's Constitution similarly fails to recognize this right.

Regarding birth registration, the Births and Deaths Registration Act Chapter 149 of Kenya does not explicitly state that birth registration is compulsory or free and what sanctions there are for failing to register a birth. Rather, it permits the Minister, by notice in the Gazette, to declare birth registration in any town, district or area compulsory,⁴¹⁸ and appoint any area to be a registration area for the purposes of the Act.⁴¹⁹ In addition, the Act provides that failure to register a birth within six months shall require a payment of the prescribed fee.⁴²⁰

Birth registration in Niger is established by "Law 2007-30 (3 December 2007) establishing the civil registry". Under article 31 of the Law, there is a legal obligation to register a child, free of charge.⁴²¹ The Law imposes a penalty for registering a child's birth after ten days, if he or she was born in a health facility, and after thirty days if he or she was born outside a health facility.⁴²² It also establishes that the main places of registration are in the Chief places of the Commune and the Central Registry, while the secondary places of registration are in

⁴¹⁶ Committee on the Elimination of Discrimination against Women of and Committee on the Rights of the Child (n 4) para 54 (g).

⁴¹⁷ *ibid* para 54 (h).

⁴¹⁸ Births and Deaths Registration Act Chapter 149 Sect 9 (2).

⁴¹⁹ *ibid* Sec 5 (1).

⁴²⁰ *ibid* Sec 8.

⁴²¹ 'CRVS - Birth, Marriage and Death Registration in Niger' (*UNICEF DATA*)

<<https://data.unicef.org/crvs/niger/>> accessed 24 October 2019.

⁴²² *ibid*.

“groups of districts, villages and tribes, or groups of villages and tribes according to their demographic weight.”⁴²³ These areas are easily accessible to the population.

In Ethiopia, birth registration as established in Proclamation No. 760/2012 and Proclamation No. 1049/2017, is free and compulsory.⁴²⁴ The places of registration include the civil registration office nearest to the principle residence of the parents.⁴²⁵ Failure to register the birth of a child as described by law attracts a fine not exceeding five hundred Ethiopian Birr, or simple imprisonment not exceeding one month, according to the Criminal Code.⁴²⁶

Regarding marriage, Kenya’s Marriage Act emphasizes the importance of marriage registration. Only marriages that have been registered according to the Act are recognized and any marriage that fails to be registered is a voidable marriage.⁴²⁷ It also states that failure to register a marriage is an offence and a person found guilty of it is liable to a fine not exceeding five thousand shillings or to community service or to both.⁴²⁸ Similarly, under the FDRE Criminal Code, failure to, *inter alia*, “....make to the competent authorities a declaration required to ensure the due entry in the official registers of marriages is punishable with simple imprisonment not exceeding three months or fine not exceeding one thousand Birr”.⁴²⁹ Under Niger’s “Law 2007-30 (3 December 2007) establishing the civil registry”, there is a legal obligation to register marriages within ten days if they are not celebrated before the registrar.⁴³⁰ The same centers where birth registrations take place are where marriages are registered. Hence the laws on birth and marriage registration in Niger are as comprehensive as Kenya’s and Ethiopia’s.

⁴²³ *ibid.*

⁴²⁴ ‘CRVS - Birth, Marriage and Death Registration in Ethiopia’ (*UNICEF DATA*) <<https://data.unicef.org/crvs/ethiopia/>> accessed 24 October 2019.

⁴²⁵ *ibid.*

⁴²⁶ ‘Criminal Code of the Federal Democratic Republic of Ethiopia’ (n 345) Article 656 (1).

⁴²⁷ ‘The Marriage Act’ (n 278) Article 12 (e).

⁴²⁸ *ibid* Article 42 (3).

⁴²⁹ ‘Criminal Code of the Federal Democratic Republic of Ethiopia’ (n 345) Article 434 (1).

⁴³⁰ LOI N°2007-30 PORTANT REGIME DE L’ETAT CIVIL AU NIGER ET SON DECRET D’APPLICATION 2007 Article 43.

J. Treaties/Conventions ratified

It is also worthwhile to examine whether the international and regional legal framework on child marriage automatically becomes applicable domestically through the respective states' ratification. Examining each of the three jurisdictions, there are explicit constitutional provisions on the position of international and regional treaties ratified vis-a-vis domestic legislation.

Kenya's Constitution explicitly states that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.⁴³¹ This means that all the international and regional laws that have relevant provisions on child marriage, such as the importance of free and full consent to marriage provision in the ICCPR automatically applies within the Kenyan jurisdiction. Similarly, Ethiopia's Constitution states that all international agreements ratified by Ethiopia shall form an integral part of the law of Ethiopia.⁴³² Similarly, Niger's Preamble recognizes the country's attachment to the regional and international juridical instruments of protection and promotion of human rights as signed and ratified by Niger.⁴³³ The Constitution in article 171 also declares that "the treaties or agreements regularly ratified have, from their publication, an authority superior to that of the laws, subject to, for each agreement or treaty of its application by the other party."⁴³⁴ In addition, article 63 of Law 2004-50 establishing the organization and competence of Courts in the Republic of Niger provides that laws must conform not only to the laws which secure public order and the freedom of the people, but also to any properly ratified treaties or international agreements, as well as to the Constitution. Hence similar to Kenya and Ethiopia, Niger's international and regional commitments are recognized under its laws and policies. However, whether such

⁴³¹ 'Constitution of Kenya' (n 270) Article 2 (6).

⁴³² 'Constitution of the Federal Democratic Republic of Ethiopia' (n 331) Article 9 (4).

⁴³³ 'Constitution of Niger, 2010' (n 316) Preamble.

⁴³⁴ *ibid* Article 171.

commitments are respected is a whole different matter. Furthermore, the reservations Niger has made to core article of treaties such as the CEDAW renders such recognitions powerless.

K. Criminalization of child marriage

In their joint General Recommendation, the CRC and CEDAW Committees called upon State parties to “explicitly prohibit by law and adequately sanction or criminalize harmful practices, in accordance with the gravity of the offence and harm caused, provide for means of prevention, protection, recovery, reintegration and redress for victims and combat impunity for harmful practices.”⁴³⁵ If there are no sanctions, the law will not act as an effective deterrent against child marriage.

Article 648 of Ethiopia’s Criminal Code criminalizes child marriage. It specifically states that “whoever concludes a marriage with a minor apart from circumstances permitted by relevant Family Code is punishable with: a) rigorous imprisonment not exceeding three years, where the age of the victim is thirteen years or above; or b) rigorous imprisonment not exceeding seven years, where the age of the victim is below thirteen years.”⁴³⁶

Similarly, Kenya’s Marriage Act criminalizes child marriage. Article 87 of the Act declares that “any person who marries a person who is below the minimum age commits an offence and shall on conviction be liable to imprisonment for a term not exceeding five years or a fine not exceeding one million shillings (approximately 10,000 dollars) or to both.”⁴³⁷ To deter child marriages, it is also important that criminal liability is extended beyond an individual perpetrator to those who witness such a marriage and do not condemn or report it. The Marriage Act in article 92 enshrines any person who celebrates or witnesses a union where he or she knows or ought to know that, among others, either party is below the age of eighteen

⁴³⁵ Committee on the Elimination of Discrimination against Women of and Committee on the Rights of the Child (n 4) Para 13.

⁴³⁶ ‘Criminal Code of the Federal Democratic Republic of Ethiopia’ (n 345) Article 648.

⁴³⁷ ‘The Marriage Act’ (n 278) Article 87.

also commits an offence and is liable to imprisonment for a term not exceeding six months or a fine not exceeding fifty thousand shillings (approximately 500 dollars) or to both.⁴³⁸

Under Kenya's Children's Act, the punishment is less rigorous. Article 20 proclaims that any person who infringes the rights of a child as enshrined in the Act (one of them being the right of the child to be protected from harmful cultural rites such as child marriage), is liable to imprisonment for a term not exceeding twelve months, or to a fine not exceeding fifty thousand shillings (approximately 500 dollars), or to both such imprisonment or fine.⁴³⁹ The penalty proclaimed here is very minor. In comparison, the Counter-trafficking in Persons Act states a very vigorous punishment for trafficking a person. As we recall from the previous chapter, the Counter-trafficking in Persons Act recognizes that recruiting, transporting or harboring a person for the purposes of exploiting him or her constitutes a form of trafficking. Exploitation includes, among others, subjecting a minor to marriage. Hence the penalty for the offence of trafficking a person is a term not less than thirty years or to a fine of not less than thirty million shillings (approximately 300,000 dollars) or to both, and upon subsequent conviction, to imprisonment for life.⁴⁴⁰

Niger on the other hand has not criminalized child marriage. Since child marriage is legal in Niger, it would not make sense for the legal and policy framework to criminalize it at the same time.

L. Enforcement of laws

In addition to enacting legislative provisions on eliminating child marriage and protecting girls from being married early, international conventions and reports on child marriage have called for the enforcement of those provisions. Indeed, if there is no enforcement of such laws, such a society would not be different to one where no legal and policy framework on

⁴³⁸ *ibid* Article 92 (2).

⁴³⁹ 'Children Act' (n 284) Article 20.

⁴⁴⁰ 'Counter-Trafficking in Persons Act' (n 295) Article 3 (5).

child marriage existed. Hence the legal and policy framework should provide guidelines on how one can initiate proceedings regarding the violation of provisions on marriage.

Article 22 of Kenya's Children Act allows any person who alleges that any provision from section 4 to 19 (section 14 stipulates the right of every child to be protected from harmful cultural rites such as early marriage) of the Children Act "has been, is being, or is likely to be contravened in relation to a child" may apply to the High Court for redress on behalf of the child.⁴⁴¹ Article 22 of the 2010 Constitution of Kenya also allows any person, acting on their own behalf, on behalf of another person, in the public interest or in the interest of a group of a class of persons to initiate court proceedings free of charge claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.⁴⁴²

Article 13 of the FDRE Constitution tasks all Federal and State organs with the responsibility of enforcing all the Constitutional rights.⁴⁴³ Article 35 (4) states that the "State shall enforce the right of women to eliminate the influences of harmful customs".⁴⁴⁴

In Niger, the enforcement of human rights standards is more difficult. Textual standards, whether legal, international, regional or constitutional are viewed as originating "elsewhere" and not fit to be invoked in court.⁴⁴⁵ Customary law is more naturally accepted, and even the judges in court may be inclined to make judgments respecting their customary beliefs. This was the case in *Hadijatou Mani Koraou v The Republic of Niger* where the ECOWAS Community Court of Justice established that the defendant was responsible under international and national law for violating the human rights of the applicant "because of its tolerance, passivity, inaction and abstention with regard to the practice of slavery". Here, the

⁴⁴¹ 'Children Act' (n 284) Section 22.

⁴⁴² 'Constitution of Kenya' (n 270) Article 22.

⁴⁴³ 'Constitution of the Federal Democratic Republic of Ethiopia' (n 331) Article 13.

⁴⁴⁴ *ibid* Article 35 (4).

⁴⁴⁵ Stephanie Lagoutte (n 314) 41.

applicant, Hadijatou had been sold as a slave/fifth wife to a tribe chief when she was only 12 years. She served as his slave/fifth wife for 9 years before she decided to leave, though with objections from her husband that she was his wife. She appealed to a local tribunal which found that there had been no marriage between them and that she was therefore free. She then married a man she freely chose, but her former master accused her of bigamy, and in a retrial, the national judge ruled in her master's favor, sentencing her to 6 months imprisonment. The ECOWAS Community Court of Justice established that:

“...recognizing the slave status of Mrs Hadijatou Mani Koraou without denouncing this situation is a form of acceptance, or at least, tolerance of this crime or offence. The national judge had the obligation to bring a criminal prosecution or punish this crime or offence as need be.”

“When failing to deal with a prohibited offence of its own volition and failing to take adequate measures to ensure punishment, the national judge did not assume its duty of protecting Hadijatou Mani Koraou's human rights and therefore, engaged the defendant's responsibility as the administrative authority's one when it declared: “listen, I cannot do anything, you must leave”.”

CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS

Most marriages in the Republic of the Niger are concluded under customary law which does not state a clear minimum age of marriage. Furthermore, there is a great deference to customary and local customs as we have seen in the government's reservations to several articles of CEDAW calling for the eradication of laws and customs negatively impacting the rights of women. We have also seen that this deference to customs guides the decisions and actions of some judges further upholding customary traditions that oppress women as was the case in *Hadijatou Mani Koraou v Republic of Niger*.

Away from customary law, statutory law does not offer adequate levels of protection either. We observed how the Civil Code legalizes child marriages by allowing girls as young as 15 years old to get married, with governmental approval for serious cause, and with parental or ascendants' consent even if one of them opposes such a marriage. Niger is the poorest country in the world, according to the latest UNDP HDI report. Such high levels of poverty together with the highest birth rate in the world, motivate families to marry off their daughters early in order to uplift their economic burden. Legal loopholes in the available laws and policies, together with deference to customs and a belief system influenced by patriarchal norms contribute to Niger's highest prevalence rate of child marriage in the world. This is further compounded by the lack of any existing action plan to eliminate the practice of child marriage.

By contrast, we see how Ethiopia and Kenya have put in place legal and policy protections against child marriage that cannot be interpreted as permitting underage marriages. Both countries' legal and policy frameworks set a minimum age of marriage in line with international and regional treaty obligations, emphasize the importance of consent, and what such consent comprises, underscore the equality of spouses in marriage, and criminalize child marriages. Furthermore, both countries recognize customary and religious marriages but only

to the extent that they conform to the principles of “free and full consent”, and “minimum marriage age of 18”. Of course, whether these provisions are always adequately enforced is another matter, but for now, it is important that such laws and policies do not give leeway and open interpretation of permitting child marriages. Lastly, both countries have adopted national action plans on eliminating the practice, unlike Niger.

Hence to answer the central question of this research, one of the factors that accounts for the highest prevalence rate of child marriage in Niger is the presence of a legal and policy framework that basically permits child marriages and the deference of courts and national judges to customary law which is more naturally understood and accepted by Nigeriens. We see that the dominance theory advanced by theorists such as Catherine Mackinnon is evident in the case of Niger since patriarchy shapes the legal framework which has further contributed to oppressing women and girls.

Hence this research recommends that the government of Niger:

- Raises the minimum age of marriage in the Civil Code to 18 for both girls and boys with or without parental consent.
- Clearly stipulates that exceptions to the minimum age of marriage should align with the CEDAW and CRC recommendation to be not more than 2 years, and with clearly legally established serious grounds by a judge.
- Withdraws its reservations to articles 2f, 16(1c), 16(1e) and 5a of the CEDAW
- Ratifies the Maputo Protocol without reservations.
- Criminalizes child marriage
- Adopts a robust action plan to eliminate child marriage in line with SDG 5

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