



FACULTY OF LAW

UNIVERSITY OF THE WESTERN CAPE

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## Can stronger laws and regulations safeguard children's rights by preventing child marriages?

MAXINE SMITH, CEMARA  
MATTHEWS, JODEEN JULIUS, ROBEN  
DE WET & NTANDOKAZI  
MAMPINTSHA

*LLB students, Faculty of Law, University of  
the Western Cape, Bellville, South Africa*

### Abstract

*Child marriage refers to the union of two individuals, one or both of whom are under the age of 18. The minimum age for boys which is 14, and for girls, 12, is inconsistent with the right to equality. Despite the South African Constitution's emphasis on cultural rights, child marriage infringes on the basic rights of minors, which include the right to education, health, equality, privacy, freedom, and security. Child marriages often result in forced cohabitation, early pregnancy, and increased risk of rape. The prohibition of child marriages is crucial to safeguarding the well-being and dignity of children. Efforts to abolish child marriages must address cultural sensitivities while prioritising the rights and protection of minors. This article examines the effectiveness of current laws in safeguarding children's rights and argues for the abolition of child marriage. The Recognition of Customary Marriages Act and the Marriages Act allow for child marriages with parental or ministerial consent, perpetuating this harmful practice.*

*Through analysis of case law, the article highlights the devastating consequences of child marriage, including sexual assault and deprivation of education. The article recommends strengthening existing laws, setting a suitable minimum age for marriage, and conducting awareness campaigns to educate communities about the harmfulness of child marriage. Ultimately, this article asserts that the abolition of child marriages is crucial for upholding the principles, spirit and purport of the Bill of Rights contained in the Constitution. By prioritising children's rights and well-being, South Africa can work towards eradicating this harmful practice and ensuring a brighter future for its children.*

**Keywords:** child marriages; basic rights; minimum age; South African Constitution; safeguarding; abolition; minors; deprivation\*

## **1 INTRODUCTION**

Child marriage remains a pervasive human rights violation. This study evaluates the efficacy of current laws and responses to child marriage in South Africa and asserts the need for stricter laws and coordinated initiatives to safeguard children's rights. The aim of this article is to argue for the abolition of child marriages. References to the Constitution of the Republic of South Africa, 1996 ("Constitution"), legislation, journal articles, and case law pertaining to child marriage are harnessed in order to substantiate this position.

## **2 WHAT IS CHILD MARRIAGE?**

A child marriage is defined as any official or informal union or marriage in which one or more of the parties is under the age of 18.<sup>1</sup> If one or both parties have not given their complete, free, and informed consent to the union, it is a type of forced marriage.<sup>2</sup> For boys, the minimum age is 14, and for girls, it is 12.<sup>3</sup> Unless the marriage is approved by the court, girls under the age of 15 and boys under the age of 18 must obtain the Minister of Home Affairs' approval, in addition to their guardian's consent, before getting married.<sup>4</sup>

## **3 THE CONSTITUTION'S EMPHASIS ON CULTURAL RIGHTS.**

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<sup>1</sup> Kruger H, Skelton A & Carnelley M *et al.* (eds) *The law of persons in South Africa* 2<sup>nd</sup> ed (2018) at 7.

<sup>2</sup> Mwambene L "Recent legal responses to child marriage in Southern Africa: The case of Zimbabwe, South Africa and Malawi" (2018) 18 *African Human Rights Law Journal* 528.

<sup>3</sup> Kruger *et al.* (2018) at 7.

<sup>4</sup> Kruger *et al.* (2018) at 7.

Section 31 of the Constitution guarantees members of cultural, religious, and linguistic communities the freedom to practise their religion, enjoy their culture, and speak in their native tongue.<sup>5</sup> It also allows for the formation and maintenance of linguistic, cultural, and religious groups in addition to other civil society organisations.<sup>6</sup> This is recognised in section 211(3), which also permits the courts to apply customary law “subject to the Constitution and any legislation that deals with customary law specifically”.<sup>7</sup>

The rights contained in the Bill of Rights of the Constitution may only be restricted by laws of general application if such restrictions are reasonable and justified in a society that values equality, human dignity, and freedom, according to section 36.<sup>8</sup> It is necessary to take into account the type of right, the purpose of the restriction, its scope, the connection between the restriction, its objective, and less restrictive techniques.<sup>9</sup> No law may restrict any of the rights enshrined in the Bill of Rights, with the exception of that which is specified in subsection (1) or in any other section of the Constitution.<sup>10</sup> Based on section 36, which emphasises the conditions that must be met before a right can be limited, this section also highlights the significance of the values of human dignity, equality, and freedom.

When these values are combined with the rights violations associated with child marriages, it may be deemed appropriate to restrict customary laws regarding child marriages.

#### **4 LEGISLATION ON MINIMUM-AGE REQUIREMENTS FOR MARRIAGE**

Despite global trends that call for an 18-year-old minimum marriage age, child marriage is still permitted in South Africa.<sup>11</sup> According to the Children’s Act 38 of 2005, it is illegal to give out or engage children who are younger than the legal minimum age for a lawful marriage.<sup>12</sup> The Recognition of Customary Marriages Act 120 of 1998 (“RCMA”), in section 3(a), states that in order for a customary marriage to be valid, the prospective spouses must both be over the age of 18 and give their consent to be married in accordance with customary law.<sup>13</sup>

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<sup>5</sup> Section 31(1)(a) of the Constitution of the Republic of South Africa, 1996 (hereafter “Constitution”).

<sup>6</sup> Section 31(1)(b) of the Constitution.

<sup>7</sup> Section 211(3) of the Constitution.

<sup>8</sup> Section 36(1) of the Constitution.

<sup>9</sup> Section 36(1)(a)-(e) of the Constitution.

<sup>10</sup> Section 36(2) of the Constitution.

<sup>11</sup> Kruger *et al.* (2018) at 7.

<sup>12</sup> See section 12(2)(a) of the Children’s Act 38 of 2005, which states: “A child below the age set by the law for a valid marriage may not be given out in marriage or engagement.”

<sup>13</sup> Section 3(a) of the RCMA.

Additionally, section 3(b) requires consent from both parents or, in the event that one of the prospective spouses is a minor, the minor's legal guardian; if consent from either parent or guardian cannot be obtained, section 25 of the Marriage Act 25 of 1961 applies.<sup>14</sup>

## 5 THE INFRINGEMENT OF RIGHTS IN CHILD MARRIAGES

In regard to child marriage, there is no justification for the age difference between girls and boys, which violates the equality principle in the Bill of Rights in the Constitution.<sup>15</sup> However, the unwarranted distinction made between boys and girls in the legislation regarding minor marriages is not the only issue.<sup>16</sup>

The right to education is often violated in cases of child marriage, as the latter results in the termination of a child's education, denying him or her the opportunity of reaching their full potential.<sup>17</sup> Child brides frequently have little to no privacy since they are compelled to marry before they are emotionally, psychologically, or physically prepared. As a result, their right to privacy is violated.<sup>18</sup> Many times marriage is forced, subjecting child brides to physical, emotional and sexual violence, as a consequence of which their right to freedom and security of a person is also infringed.<sup>19</sup>

An article by Mwambene focuses on how child marriage in Southern Africa, particularly in Zimbabwe, South Africa, and Malawi, violates children's rights and is often driven by harmful cultural practices. Although these countries have made legal reforms (such as court rulings and constitutional amendments) to set the minimum age of marriage at 18, enforcement remains weak. Traditional practices like *ukuthwala* and puberty-based marriages persist due to poverty, poor education, and gaps in law enforcement. The article emphasizes that legal change alone is not enough; social, cultural, and economic efforts are also needed to truly protect children.<sup>20</sup>

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<sup>14</sup> Section 3(b) of the RCMA.

<sup>15</sup> See section 9(2) of the Constitution, which states: "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

<sup>16</sup> Kruger *et al.* (2018) at 7.

<sup>17</sup> Section 29 of the Constitution.

<sup>18</sup> Section 14 of the Constitution.

<sup>19</sup> See section 12(1)(c) of the Constitution, which states: "Everyone has the right to freedom and security of the person, which includes the right to be free from all form of violence from either public or private sources."

<sup>20</sup> Mwambene L "Recent legal responses to child marriage in Southern Africa: The case of Zimbabwe, South Africa and Malawi" (2018) 18 *African Human Rights Law Journal* 528-529.

A study in Africa, focusing on countries such as Malawi, Tanzania, Zimbabwe and South Africa,<sup>21</sup> has explored child marriage in which the parents of the female child give her away to the prospective husband.<sup>22</sup> This is a form of abduction marriage where the girl is taken by the husband-to-be without her consent.<sup>23</sup> The study confirmed that the rights of the female child are violated by this kind of conduct since, most of the time, she is forced into marriage without her consent.<sup>24</sup> Moreover, due to their underdeveloped bodies, child brides are more likely to experience pregnancy and childbirth complications, endangering their lives as well as their children's and impacting on the right to health.<sup>25</sup> Child marriage is a grave violation of a child's rights, especially given that section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter pertaining to the child.<sup>26</sup> Furthermore, section 2 emphasises that the Constitution is the Republic's ultimate law; that any action or inaction that conflicts with it is void; and that all duties imposed by it must be carried out.<sup>27</sup>

By focusing on this particular study, the discussion recognizes a revolutionary effort that set the groundwork for ongoing legal and social reforms related to child marriage in the region. It also provides a direct and explicit example of how deep-rooted cultural practices can clash with constitutional and human rights protections. Even though more recent studies may offer updated data, the 2011 study remains relevant because it captures the deeply rooted societal and cultural norms that continue to impact the prevalence of child marriage today. Consequently, its inclusion in this discussion helps to contextualise legal developments and underlines the enduring need for legal, social, and cultural interventions to safeguard the rights of children.

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<sup>21</sup> Rembe S, Chabaya O, Wadesango N & Muhuro P "Child and forced marriage as violation of women's rights, and responses by member states in Southern African Development Community" (2011) 25(1) *Agenda: Empowering Women for Gender Equity* 65.

<sup>22</sup> Rembe *et al.* (2011).

<sup>23</sup> Rembe *et al.* (2011).

<sup>24</sup> Rembe *et al.* (2011).

<sup>25</sup> Rembe *et al.* (2011).

<sup>26</sup> See section 28(2) of the Constitution, which states: "A child's best interest are of paramount importance in every matter concerning the child."

<sup>27</sup> See section 2 of the Constitution, which states: "The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligation imposed by it must be fulfilled."

An article by Mapumulo highlights the story of a young South African girl, Lindelwa Sibisi (not her real name), who was abducted and forced into marriage under the customary practice known as *ukuthwala*. Taken by her husband-to-be without her consent, she was effectively kidnapped, married, and made a mother while still a child. After suffering physical abuse, including a severe beating, when she resisted, Lindelwa ultimately fled and returned home in a taxi, burdened with a newborn. The narrative highlights the stark reality of child brides and how they are uprooted from their homes, subjected to violence, coerced into early motherhood, and left to navigate unsafe circumstances without support. The story emphasizes the profound violation of her rights to autonomy, bodily integrity, safety, and education that result from such forced, non-consensual unions.<sup>28</sup>

## **6 THE PROHIBITION OF CHILD MARRIAGE: A COMPARATIVE PERSPECTIVE**

Bangladesh has proposed legislation to lower the age of marriage for girls to 16, while Malawi adopted a new law setting the minimum age at 18.<sup>29</sup> Furthermore, in 2006, India passed the Prohibition of Children Marriages Act.<sup>30</sup> Under the Act, the term “child” refers to “any individual who, in the case of a male, has not reached the age of 21, and in the case of a female, has not reached the age of 18”.<sup>31</sup> Any male over the age of 18 who enters into a child marriage faces a harsh two-year prison sentence, a fine of up to one lakh rupees, or both.<sup>32</sup> Furthermore, any person who encourages or allows child marriages to be solemnised such as parents, guardians or any person responsible for the child, may also be punished with the same sentence.<sup>33</sup>

This highlights significant shortcomings in South Africa’s legal system, which fails to adequately protect minors from early marriage. Conflicting child marriage laws cause confusion and inconsistencies. To address this, Southern African Development Community nations should prioritize legal reform, setting the marriage age at 18 without exceptions, and implement strong laws and policies that align with human rights commitments.<sup>34</sup> Regardless

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<sup>28</sup> Mapumulo Z City Press “Teen brides: A baby, a beating and a taxi ride home.” (2015) available at [https://www.news24.com/citypress/News/Teen-brides-A-baby-a-beating-and-a-taxi-ride-home-20150715?utm\\_source=chatgpt.com](https://www.news24.com/citypress/News/Teen-brides-A-baby-a-beating-and-a-taxi-ride-home-20150715?utm_source=chatgpt.com) (accessed 16 June 2025).

<sup>29</sup> Vaira N “Ending child marriage: Meeting the global development goals’ promise to girls” in Human Rights Watch *World report 2016: Events of 2015* Bristol: Bristol University Press (2016) 33.

<sup>30</sup> Gupta P “Child marriages and the law: Contemporary concerns” (2012) 47(43) *Economic and Political Weekly* 49.

<sup>31</sup> Section 2(a) of the Prohibition of Child Marriage Act of 2006.

<sup>32</sup> Section 9 of the Prohibition of Child Marriage Act of 2006.

<sup>33</sup> Section 11 of the Prohibition of Child Marriage Act of 2006.

<sup>34</sup> Srinivasan D “To End Child Marriage in Southern and Eastern Africa, Governments Need to Strengthen Laws and Implementation”. (2015) available at [https://equalitynow.org/news\\_and\\_insights/to-end-child-marriage-in-](https://equalitynow.org/news_and_insights/to-end-child-marriage-in-)

of whether a minor gives voluntary or coerced consent, it is established that a minor lacks the capacity to give informed consent.<sup>35</sup> Thus, child marriages should be prohibited entirely. Given the potential long-term consequences that early marriage has for children's well-being, it is crucial to ensure the Act's implementation so that every child in society has a free and nurturing upbringing.

Child marriage is prevalent in Zimbabwe, with one in every three girls married before the age of 18.<sup>36</sup> In South Africa, the Marriage Act allows girls to be married at 16 and boys at 18 years, while the Customary Marriage Act does not have a prescribed marriageable age.<sup>37</sup> The custom of *ukuthwala*, which entails the "staged" kidnapping of an unmarried woman or girl in order to perform a customary marriage, is widely carried out in the rural areas of KwaZulu-Natal and the Eastern Cape in South Africa.<sup>38</sup> The customary marriage age of puberty, usually well before 18 years, often leads to child marriage in South Africa. Both the RCMA and the Marriages Act 25 of 1961, which allows minors to marry with consent, may contribute to this issue.<sup>39</sup> In South Africa, 6 per cent of girls get married before the age of 18 and 1 per cent by the age of 15.<sup>40</sup> Statistics show that more than 91,000 South African girls aged 12–17 are married, divorced, widowed, or living with a partner.<sup>41</sup> These statistics highlight the necessity of criminalising and outlawing child marriage entirely, not just in South Africa but throughout the world.<sup>42</sup>

## 7 RAPE IN CHILD MARRIAGES

Child brides endure various forms of sexual abuse. This claim is supported by relevant case law. In *Mbhamali v State*, the appellant was a 32-year-old man who was married to a 14-year-old child (the complainant). They were in the same church, the Twelve Apostles Church, but

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southern-and-eastern-africa-governments-need-to-strengthen-laws-and-implementation/  
(accessed 16 June 2025).

<sup>35</sup> Section 18(3)(c)(i) of the Children's Act 38 of 2005. Informed consent is generally defined as permission granted in full knowledge of the possible consequences.

<sup>36</sup> Mwambene (2018) at 530.

<sup>37</sup> Marriage Act 25 of 1961.

<sup>38</sup> Mwambene (2018) at 532.

<sup>39</sup> Section 3(a) and (b) of the RCMA read with section 25 of the Marriage Act 25 of 1961 allows both boys and girls under 18 to get married provided they have the consent of a parent, guardian, or the Commissioner of Welfare or Minister of Home Affairs. In particular, section 3(a) of the RCMA provides that "if either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian must consent to the marriage". Section 3(b) states: "If the consent of the parent or legal guardians cannot be obtained, section 25 of the Marriage Act, 1961 applies." However, it is noteworthy that while all minors must obtain the consent of the Minister of Home Affairs in terms of the RCMA, girls above the age of 15 do not need ministerial consent in terms of section 26 of the Marriage Act. Arguably, this differentiation between minors concluding marriages under either the Marriage Act or the RCMA may be challenged on constitutional grounds.

<sup>40</sup> Mwambene (2018) at 533.

<sup>41</sup> Mwambene (2018) at 533.

<sup>42</sup> Rembe *et al.* (2011).

not necessarily the same branch.<sup>43</sup> Mrs Phakathi, the church leader, offered to look after the complainant and her two siblings since the father sometimes worked night shifts and the complainant would default on her TB medication.<sup>44</sup> The complainant was unwillingly subjected to sexual intercourse by the appellant. If she refused to comply, the appellant would threaten to harm her. She reported the rape incident to Mrs Phakathi, who side-lined it.<sup>45</sup>

The three main legal issues in the case were whether the appellant was aware of the complainant's age; whether she consented to the sexual intercourse; and if so, if her age warranted that the appellant be convicted of rape.<sup>46</sup> The court a quo convicted the appellant of rape and sentenced him to 18 years' imprisonment. Mrs Phakathi was convicted of failure to report a sexual assault offence against a child and was sentenced to three years' imprisonment.<sup>47</sup> The court rejected the marriage claim by the appellant as a defence on the grounds that there is no evidence of the parents' consent, which is a requirement under the RCMA. Thus, the court dismissed the appeal against the conviction.<sup>48</sup>

Another case, *Jezile v State and Others*, highlights the issues of rape, assault and school deprivation in child marriages. Here the appellant was a 28-year-old male who was in search of a wife, ideally a virgin younger than 18 years.<sup>49</sup> He was then betrothed to a 14-year-old (the complainant), who had just started Grade 7.<sup>50</sup> The complainant was deprived of her school education so that she could attend to household duties for the appellant.<sup>51</sup> The complainant was forcibly moved from her home in the Eastern Cape to Phillipi in the Western Cape to live with the appellant, his brother and his sister-in-law.<sup>52</sup> Sexual intercourse took place between the two on seven occasions without the complainant's consent. She even sustained an open wound to her leg during one of their arguments.<sup>53</sup>

Three legal issues were at stake in the case. The first was whether the complainant travelled willingly with the appellant from the Eastern Cape to Cape Town, or whether she was trafficked for purposes of exploitation or sexual abuse. The second was whether sexual intercourse took

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<sup>43</sup> *Mbhamali v State* 2021 (2) SACR 627 (KZD) para 6 (hereafter "*Mbhamali*").

<sup>44</sup> *Mbhamali* para 8.

<sup>45</sup> *Mbhamali* para 10.

<sup>46</sup> *Mbhamali* para 4.

<sup>47</sup> *Mbhamali* para 2.

<sup>48</sup> *Mbhamali* para 68.

<sup>49</sup> *Jezile v State and Others* (2015) (2) SACR 452 (WCC) para 5 (hereafter "*Jezile*").

<sup>50</sup> *Jezile* para 6.

<sup>51</sup> *Jezile* para 9.

<sup>52</sup> *Jezile* para 10.

<sup>53</sup> *Jezile* para 11.

place on at least three occasions and, if so, if this were with the complainant's consent (considering her age, she does not have the capacity to give consent to sex and therefore it may be a case of statutory rape). The third legal issue was whether the injury sustained was caused by the appellant.<sup>54</sup>

The appeal was successful in one regard, namely that it resulted in the overturning of the appellant's convictions for assault with intent to cause grievous bodily harm and common assault. However, the appeal was unsuccessful in all other respects, and the remaining convictions were upheld and confirmed.<sup>55</sup> The appellant was sentenced to 22 years direct imprisonment and his details would be included in the National Register for Sexual Offenders in accordance with section 50(2)(a) of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007.<sup>56</sup>

These cases demonstrate the additional degree to which child brides are violated by being sexually assaulted in child marriages, which is an egregious and inhumane practice. This strengthens our stance in favour of outlawing child marriages.

## **8 SALRC'S ROLE IN SOUTH AFRICA'S RESPONSE TO CHILD MARRIAGE**

Child marriage is a significant issue in South Africa, causing extensive human rights violations such as sexual abuse and deprivation of education. The country is currently undergoing significant reforms to its marriage laws aimed at prohibiting child marriages. The South African Law Reform Commission (SALRC) has discussed the practice of *ukuthwala*, which infringes on a child's right to education, development, and personal safety.<sup>57</sup>

As the discussion highlights, victims of child marriage often face physical, emotional, and psychological trauma, which directly affronts their dignity and security. Child marriage deprives children of opportunities to advance educationally and economically, trapping them in cycles of poverty. Child brides are at a heightened risk of complications related to early pregnancies, leading to higher rates of maternal mortality and morbidity. They are also more vulnerable than others to sexually transmitted infections, including HIV/AIDS, due to limited power in negotiating safe sex. The restriction of education for child brides perpetuates poverty,

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<sup>54</sup> *Jezile* para 12.

<sup>55</sup> *Jezile* para 106.

<sup>56</sup> *Jezile* para 2.

<sup>57</sup> South African Law Reform Commission (SALRC) "The practice of *ukuthwala*" Revised Discussion Paper 138 (2015) available at <https://www.justice.gov.za/salrc/dpapers/dp132-ukuthwalarevised.pdf> (accessed 23 June 2025).

limiting girls' opportunities for economic independence and increasing their likelihood of remaining in abusive situations.<sup>58</sup>

In response, abolishing child marriage can be aligned with preserving cultural integrity while promoting children's rights. A multifaceted approach, including strengthening laws that clearly define the illegality of child marriage and increasing community awareness, can be powerful tools in protecting children. Traditional practices such as *ukuthwala* have been distorted into coercive acts violating human rights, highlighting the need to uphold the Constitution's requirement under section 28(2) that the child's best interests be paramount in all matters involving the child.<sup>59</sup> Therefore, abolishing child marriage is essential for a just and equitable society, as child marriage violates children's fundamental rights, limits their potential, and hinders societal development.

Many in South Africa favour strengthening existing laws to combat *ukuthwala*, arguing that current laws cover various offences. They believe that improving law enforcement, increasing arrest and prosecution rates, and imposing harsher sentences would be more effective than creating new laws, as demonstrated by the *Jezile v State and Others* case. The SALRC also expresses concern about potential conflicts between new legislation and cultural-rights protection.<sup>60</sup> They acknowledge the constitutional protection of cultural diversity and the legitimacy of *ukuthwala* as a prelude to customary marriage. Non-legislative measures, such as education, training, and awareness campaigns, are crucial in addressing underlying social and economic factors, such as poverty and parental complicity, that contribute to *ukuthwala* abuses.

## 9 CONCLUSION AND RECOMMENDATIONS

In conclusion, the article has discussed the effectiveness of South Africa's law in safeguarding children's rights regarding child marriage. Child marriage is a severe violation of children's rights that undermines dignity, education, and health, and particularly so for girls. Although the Constitution protects cultural rights, these cannot override the values of equality, freedom, and human dignity in the Bill of Rights. Current laws, including the RCMA and the Marriage Act, are insufficient and allow harmful practices to persist. Cases such as *Mbhamali* and *Jezile* demonstrate the devastating consequences of child marriage, including forced cohabitation,

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<sup>58</sup> SALRC (2015).

<sup>59</sup> See section 28(2) of the Constitution.

<sup>60</sup> SALRC "The practice of *ukuthwala*" Revised Discussion Paper 138 (2015) 26.

sexual violence, and deprivation of education. The SALRC highlights the need for systemic reforms to end abuses such as *ukuthwala*. Abolishing child marriage requires stricter laws, a minimum marriage age of 18, and community education to shift harmful cultural norms. Prioritising children's rights would help ensure their safety, development, and equitable future prospects in alignment with constitutional principles.

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