

## Chapter 6

# Harmful practices

## 6.1 ISSUE ANALYSIS

### 6.1.1 Defining harmful practices

**Harmful practices** are defined in the Maputo Protocol as ‘all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity’ (Art. 1). Harmful practices include a wide range of practices, including child marriage, female genital mutilation (FGM), widow inheritance (levirate), sororate,<sup>1</sup> breast ironing,<sup>2</sup> force-feeding of women and girls, son preference, girls’ as well as boys’ initiation rites, child abduction, lips plates, *trokosi*,<sup>3</sup> widowhood rites, acid attacks, stoning, honour killings, witchcraft rituals and virginity tests.

Harmful practices constitute a form of discrimination that disproportionately affects women and girls, and often amounts to GVAW. They are often based on cultural or socio-conventional norms, and deeply rooted in gender inequalities and discriminatory values. Harmful practices are those practices conducted for non-therapeutic purposes.<sup>i</sup>

For this report, we focus on child marriage and FGM, given their high prevalence in African countries. In certain contexts, they are strongly related. Moreover, child marriage and FGM are linked to other harmful practices, including force-feeding, widow inheritance and virginity tests.

**Child marriage** refers to marriages ‘where at least one of the parties is below 18 years of age’ (African Common Position on the AU Campaign to End Child Marriage in Africa 2015).<sup>ii</sup> It has been defined as ‘a marriage in which either one of the parties, or both, is or was under the age of 18 at the time of union’ (Joint General Comment ACHPR and ACERWC on Ending Child Marriage, Point 6). Child marriage is to be distinguished from forced<sup>4</sup> and early marriage, as these do not necessarily or always involve children. Yet child marriage is a form of forced marriage, because legally a child does not have the ability to give full and free consent to marriage. For this reason, ‘Betrothal and the marriage of a child shall have no legal effect.’<sup>iii</sup> Although child marriage affects both boys and girls, it is less common for boys.<sup>iv</sup> This report looks at the issue mainly from girls and women’s perspective.

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<sup>1</sup> Sororate is a marriage in which a husband engages in sexual relations or marriage with the sister of his wife, usually after her death or her being infertile.

<sup>2</sup> Breast ironing, also called ‘breast flattening’, involves the use of an object to massage, pound or press the developing breasts of adolescent girls in order to make them stop growing or to flatten them. It is common in Cameroon and also practised in other parts of West Africa

<sup>3</sup> *Trokosi* is a practice in which virgin girls are sent to shrines to serve as slaves to the gods and the priest, in order to pay for the crimes committed by a relative. *Trokosi* is practised in Benin, Ghana and Togo.

<sup>4</sup> Forced marriages are marriages in which one of the parties is not permitted to end it or leave. They may include child marriages, exchange or trade-off marriages, servile marriages and levirate marriages (in which a widow is forced to marry a relative of her deceased husband). In some cases, forced marriages occur after a woman or girl has been raped, and the marriage (often with consent of the victim’s family) then allows the rapist to escape criminal sanctions. Forced marriages can be prominent in contexts of migration, as well as during or after armed conflict.

**Female genital mutilation** concerns ‘the practice of partially or wholly removing the external female genitalia or otherwise injuring the female genital organs for non-medical and non-health related reasons’.<sup>v</sup> This includes all interventions of partial or total cutting or injury of a woman’s external genitalia or sexual organs for non-therapeutic reasons.<sup>vi</sup> The World Health Organization (WHO) has classified FGM into four major types,<sup>5</sup> with the extent of genital tissue cutting increasing from Type I to III.<sup>vii</sup> FGM is recognised globally as a human right’s violation and it involves specific violence against women’s physical integrity, affecting other rights such as those to life, dignity, equality and freedom of torture, among others.<sup>6,viii</sup>

FGM can be of Type I, II, III or IV. The first three types differ as to whether the clitoris and/or the inner labia has been cut off, and whether the wound has been sewn or not (infibulation). Type IV refers to all other harmful practices, which include pricking, piercing, pulling, cutting, scraping and burning of female genitalia.<sup>ix</sup> All four types of FGM represent a direct risk to women’s health. FGM has long-lasting effects on the reproductive organs of girls and women,<sup>x</sup> and can result in serious complications such as bleeding, incomplete healing and infections such as HIV, among other health risks, and psychological traumas and even death.<sup>xi</sup>

#### Box 6.1. Harmful practices, child marriage and female genital mutilation defined

*Harmful practices* are ‘all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity’ (Maputo Protocol, Art. 1).

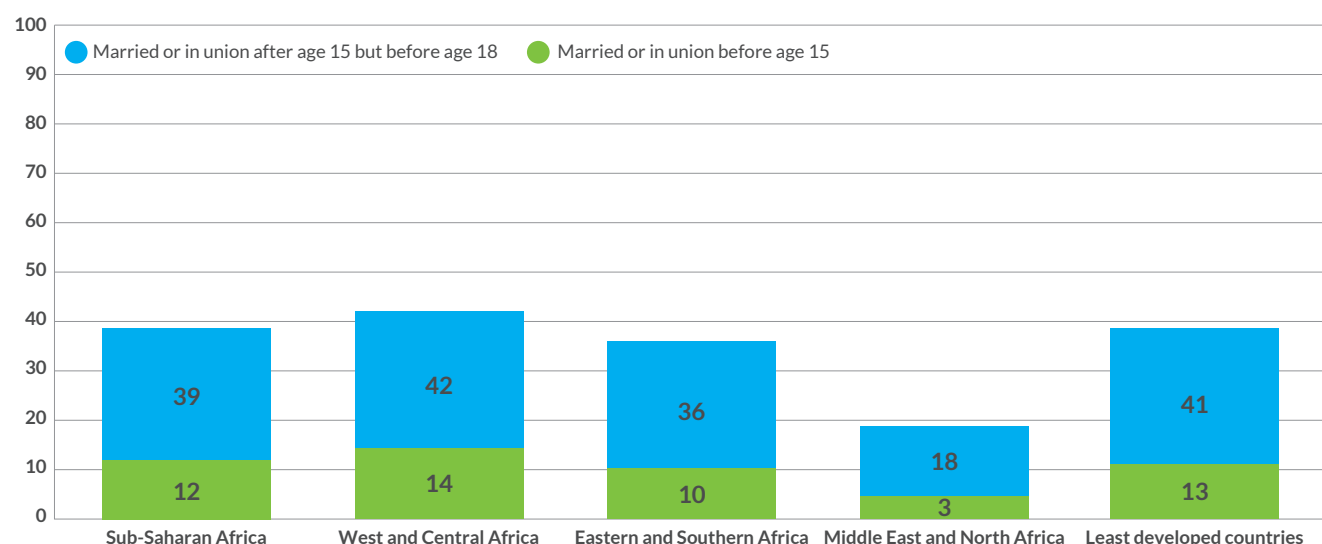
Child marriage refers to ‘a marriage in which either one of the parties, or both, is or was under the age of 18 at the time of union’ (Joint General Comment ACHPR and ACERWC on Ending Child Marriage, Point 6).

FGM concerns ‘the practice of partially or wholly removing the external female genitalia or otherwise injuring the female genital organs for non-medical and non-health related reasons’ (Committees on CEDAW and CRC Joint General Recommendation No. 31/General Comment No. 18 on Harmful Practices 2014, Point 19 (Part VI.A.19, p. 6)).

### 6.1.2 Prevalence of child marriage

Child marriage is practised in many regions in the world.<sup>xii</sup> However, rates in the African region are the highest, as Figure 6.1 shows, with 39% of women and girls in Sub-Saharan Africa married before 18 years old. Prevalence of child marriage is highest in West and Central Africa, where 15% of the girls are married before the age of 15 and 42% by the time they turn 18. Prevalence rates in East and Southern Africa are only slightly lower, with respectively 12% and 39% of women and girls married.<sup>xiii</sup>

Figure 6.1. Percentage of women and girls married before the age of 15 and 18<sup>xiv</sup>



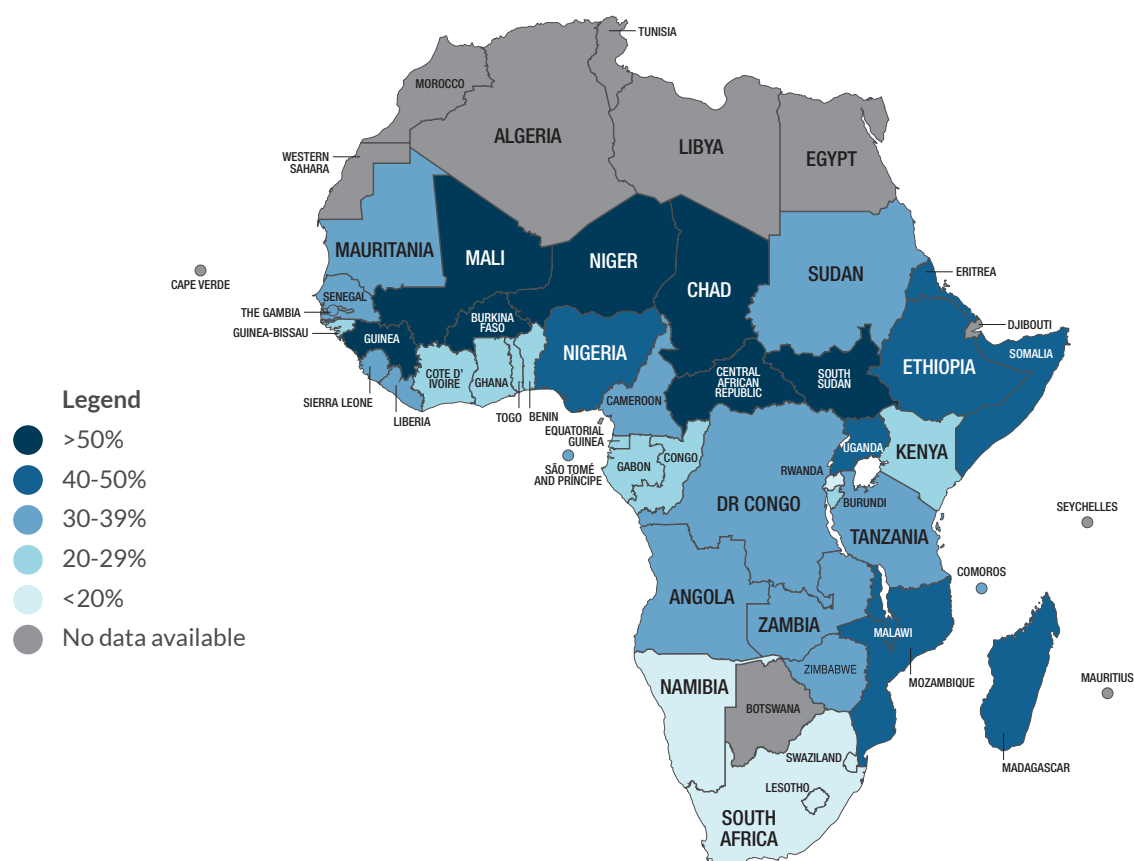
Source: Data from UNICEF global databases 2018, based on DHS, MICS and other nationally representative surveys, 2008–16.

5 Type I: partial or total removal of the clitoris and/or prepuce (clitoridectomy); Type II (excision) – partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora; Type III (infibulation) – narrowing of the vaginal orifice with creation of a covering seal by cutting and appositioning the labia minora and/or the labia majora, with or without excision of the clitoris; Type IV – all other harmful procedures to the female genitalia for non-medical purposes (e.g., pricking, piercing, incising, scraping and cauterisation).

6 This report uses the term FGM, rather than female circumcision or female genital cutting, as ‘FGM’ is the terminology used in the Maputo Protocol. For discussion on different terms, see Banda, F. (2005). *Women, Law and Human Rights: An African Perspective*. Portland, OR: Hart Publishing (pp. 207–46).

Country specific data indicates that Niger has the highest prevalence of child marriage, with 76%, and Tunisia and Algeria the lowest, with 2% and 3%, respectively. As Figure 6.2 shows, in seven countries over 50% of the women and girls are married when they turn 18: these are Burkina Faso, CAR, Chad, Guinea, Mali, Niger and South Sudan. In as many as 20 countries, child marriage prevalence lies between 30% and 50% of women and girls (at age 18).<sup>xv</sup>

Figure 6.2. Percentage of women aged 20–24 years who were first married or in union before age of 18<sup>xvi</sup>



Child marriage is slowly declining, particularly in Northern Africa. Yet in countries such as Burkina Faso the prevalence has been 50–52% for the past 30 years.<sup>xvii</sup> If the current trend continues, by 2050 Africa will become the region with the largest number of child marriages in the world.<sup>xviii</sup> When looking at West and Central Africa, where child marriage continues to be a common practice, some countries have shown great declines in child marriage (see Figure 6.3).<sup>xix</sup>

Figure 6.3. Percentage of women aged 20–24 years married or in union before age of 18, around 1990 to around 2015, and the decline in percentage<sup>xx</sup>

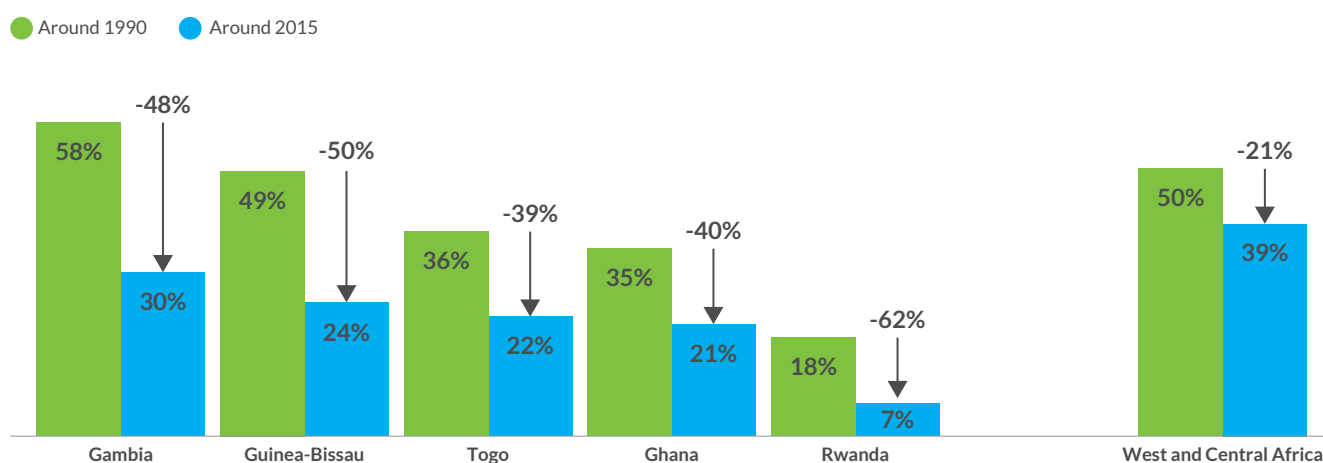
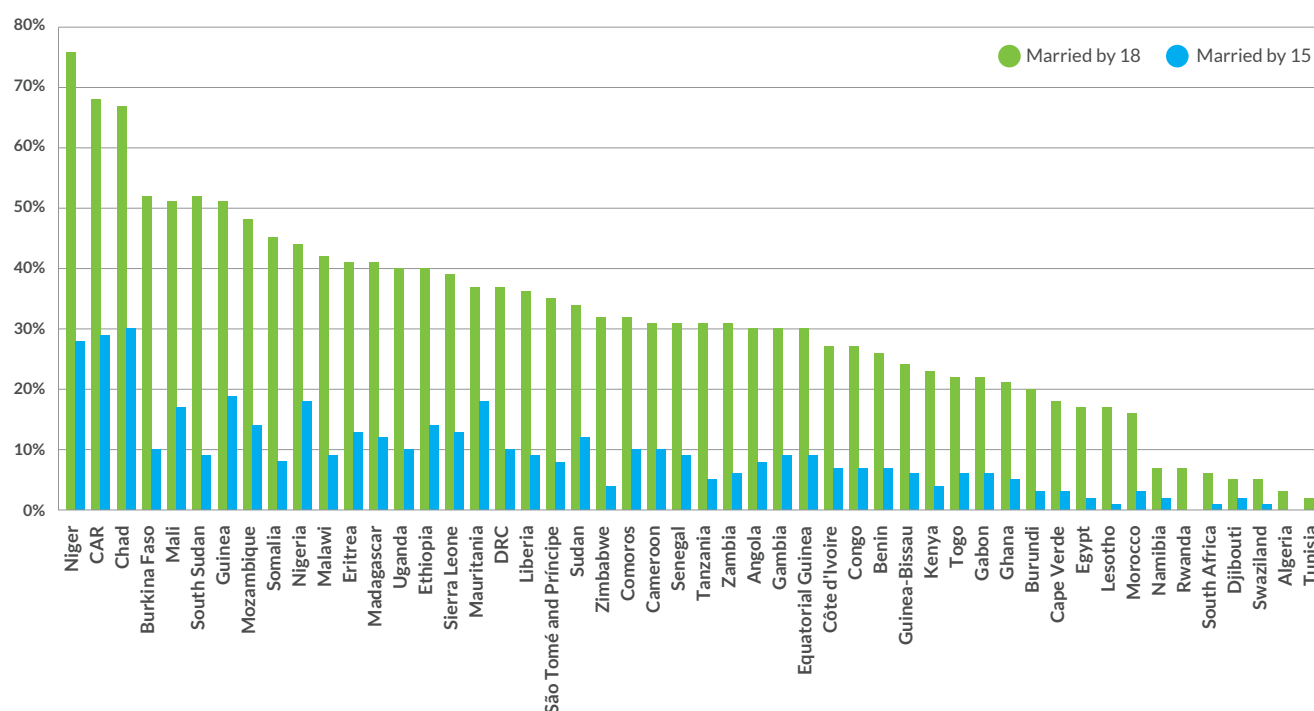


Figure 6.4. Percentage of women aged 20–24 years who were first married or in union before ages 15 and 18<sup>xxi</sup>

### 6.1.3 Causes and consequences of child marriage

Child marriages are often deeply entrenched in cultural, religious and social norms of unequal gendered power relations. They are an expression of **societal control and regulation** of women's sexuality and reproductive functions and reinforce gender power hierarchies by placing girls in subordinate positions. Girls and women married as children often lack control over resources and information, and risk being exposed to violence or physical and mental abuse of power.

Reasons for the practice by families and communities include a desire to preserve the 'purity' of girls and/or to protect them from violence. Families with limited resources and few options may want to ensure girls will be provided for, to receive the price or gift given to the bride's family or to release themselves from the burden of having to provide for a family member.<sup>7</sup> Women and girls living in rural areas, or in households with low incomes and levels of education, and those who are disabled, refugees or victims of conflict, can be more vulnerable to child marriage. In settings of conflict and insecurity, child marriage may be seen as a mechanism of protection against sexual violence and even of economic protection.<sup>xxii</sup> Similarly, parents of refugee girls may opt for early marriages to protect them from any danger they may be exposed to, for example in refugee camps.<sup>xxiii</sup>

Weak **birth and marriage registration** systems contribute to the continued practice of child marriage. Birth certificates are key to verifying the age of the person to be married. Marriage registration systems make sure that authorities check that those marrying are the legal age to be married. In many countries these systems are not very well regulated, and in others they do not even exist. But, even when birth certification and marriage registration systems are in place, they may not be used or accessed, owing to a lack of resources or of awareness among people of the existence of these systems. Also, customary or other religious marriages may ignore these requirements since these certificates are provided and required under formal laws.<sup>xxiv</sup> **Plural legal systems** further contribute to the practice of child marriage. Customary or religious laws may indicate a different age of marriage, and also have different requirements regarding consent. Enforcement of formal law can also be difficult in communities and areas where formal institutions are weak and where religious or traditional systems take a prominent place in life. Plurality of the law is discussed more in-depth at the end of this section.

<sup>7</sup> The publication *Protecting the Girl Child* by Equality Now (2014) presents stories and profiles of girls and women in child marriages, and in addition gives insights into the national and societal context in which these take place and strategies to end child marriage and protect the rights of the girl child.

Lack of **education** is an important factor contributing to child marriage. Girls with no education or who are out of school are more susceptible.<sup>xxxv</sup> Six out of ten child brides in Malawi are reported to have had no formal education.<sup>xxxvi</sup> In Mozambique, lack of access to education is directly correlated with child marriage: 57.2% of women who never went to school are reported to be married by age 18.<sup>xxxvii</sup> The opposite relation has also been observed, for instance in Amhara (Ethiopia), where the ‘mean age of girls at marriage is rising as more girls are staying in school longer’.<sup>xxxviii</sup>

On the other hand, lack of education is also often a consequence of child marriage. The pressure to become a ‘wife’ can stop girls going to school, and girls who marry early often have no access to education. Early pregnancy can further constrain girls from going to school or force them to drop out. Child marriage may even be a contributing factor in perpetuating early marriage and low education of girls across generations, as mothers who marry early and have no access to education may be more ready to reproduce this practice with any daughters they may have.<sup>xxxix</sup>

Child marriage also affects the rights of girls to **health**, sexual and reproductive rights, integrity and education, among others. Girl brides are often socially isolated and cut off from their native family, friends and other sources of support.<sup>xxx</sup> Girl brides are at risk of malnutrition, slavery, domestic violence, sexual violence and other types of GVAW.<sup>xxxi</sup> Many girl brides marry older men, who often have more sexual experience and have had more sexual partners. This can expose girls to HIV and other STIs. The age difference undermines their power to negotiate condom use and limits their access to information on their SRHR or to contraception methods. This in turn increases the possibilities of early pregnancies as well as of maternal morbidity and mortality.<sup>xxxii</sup> Complications in early pregnancy and childbirth are the leading cause of death in girls aged 15–19 years old in low- and middle-income countries.<sup>xxxiii</sup> Table 6.1 shows the child marriage prevalence rates against selected health indicators in 10 countries of study with some of the highest child marriage rates in the region. Countries with high levels of child marriage also have high rates of maternal deaths and high adolescent birth rates.

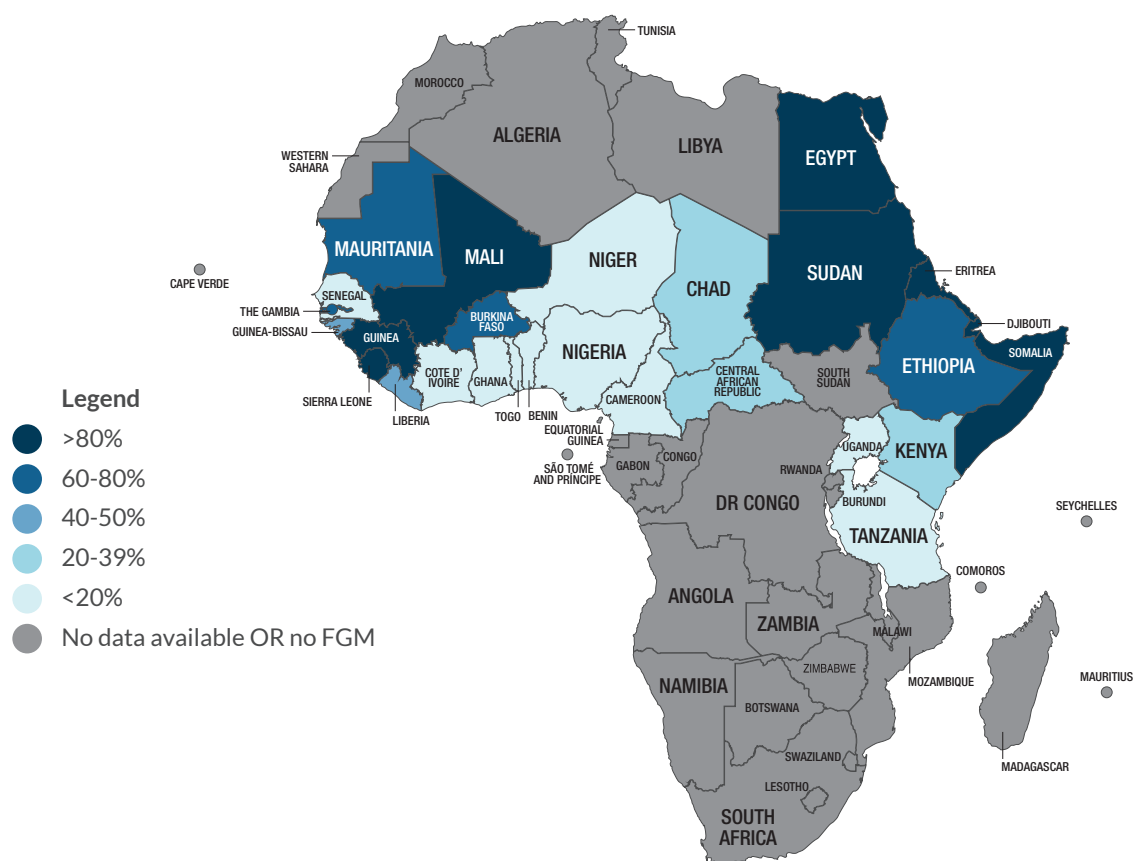
**Table 6.1. Child marriage prevalence rates against selected health indicators in the 10 countries studied**<sup>xxxiv</sup>

| Country      | Total population (millions) 2014 | Prevalence of child marriage (% married by 18) | Maternal mortality ratio (deaths per 100,000) 2013 | Adolescent birth rate per 1,000 (women aged 15–19) 2012 |
|--------------|----------------------------------|--|--|---|
| Mali         | 15.8                             | 55   | 550  | 172   |
| Mozambique   | 26.5                             | 52   | 480  | 166   |
| Malawi       | 16.8                             | 50   | 510  | 157   |
| Uganda       | 38.8                             | 46   | 360  | 146   |
| DRC          | 69.4                             | 39   | 730  | 135   |
| Cameroon     | 22.8                             | 36   | 590  | 128   |
| The Gambia   | 1.9                              | 36   | 430  | 88  |
| Kenya        | 45.5                             | 34   | 400  | 106   |
| Mauritania   | 4.0                              | 35   | 320  | 88  |
| South Africa | 53.1                             | 6  | 140  | 54  |

### 6.1.4 Prevalence of female genital mutilation

FGM is concentrated in 27 African countries from the Horn of Africa to the Atlantic coast.<sup>xxxv</sup> The highest prevalence rates are Somalia (98%) and Guinea (97%). Prevalence in the following eight countries is higher than 80%: Djibouti, Egypt, Eritrea, Guinea, Mali, Sierra Leone, Somalia and Sudan. In a few countries—Cameroon, Ghana, Niger, Togo and Uganda—rates are under 5%. Whereas the map (see map in Figure 6.5) does not provide data on prevalence in Southern Africa, and FGM may not have been practised there in earlier days, it may currently be practised among migrant communities in those countries.

It is important to take into account the large subnational variations in FGM prevalence, as national-level data can mask large differences between regions within countries. Rates of practice can vary considerably between regions and ethnic groups within a country, and this variation is observed in countries with low, moderate or high levels of FGM prevalence (see Table 6.2 below).<sup>xxxvi</sup> There are also strong variations in the age at which girls are cut (see Table 6.3).<sup>xxxvii</sup> In Eritrea, Ghana, Mali, Mauritania, Nigeria and Senegal, over 75% of the girls experiencing FGM are cut before their fifth birthday. At least 80% of girls experiencing FGM in CAR, Chad, Egypt and Somalia are cut between the ages of five and fourteen years. In some settings, girls are being cut at younger ages, before they go to school or are old enough and more sensitised on the consequences of FGM, and thus might resist the practice.

Figure 6.5. Map of percentage of girls and women aged 15–49 years who have undergone FGM in Africa<sup>xxxviii</sup>Table 6.2. Variation in FGM in regions within countries<sup>xxxix</sup>

| Country                            | Range of FGM prevalence in subnational regions |
|------------------------------------|--|
| Tanzania (low 10%)                 | 0–71%  |
| Senegal (moderately low 23%)       | 1–92%  |
| Burkina Faso (moderately high 76%) | 55–90%   |
| Guinea (high 97%)                  | 88–100%  |

Table 6.3. Age at which girls are cut<sup>xl</sup>

| Age at cutting | Countries  |
|----------------|--|
| Under 5 years  | Nigeria, Mali, Eritrea, Ghana, Mauritania, Senegal (>75% girls cut)<br>Ethiopia, Niger, Burkina Faso, Cote d'Ivoire, Tanzania (>50% girls cut) |
| 5 – 9 years    | Somalia, Togo, Chad, Djibouti, Guinea, Benin<br>Guinea-Bissau, Sierra Leone, Kenya, CAR, Guinea-Bissau, Burkina Faso                           |
| 10 – 14 years  | Central African Republic; also in Kenya, Guinea-Bissau, Sierra Leone   |

### 6.1.5 Harmful practices, social norms and legal pluralism

Child marriage and FGM are highly **interrelated** as the latter is often practised as a 'rite of passage' to be married or initiation to womanhood.<sup>xlii</sup> Most countries where FGM is practised also have a high rate of child marriage.<sup>xliii</sup> In Kenya, for example, within the Maasai community girls are under high pressure to marry early and face the risk of undergoing FGM as a rite of passage.<sup>xliii</sup> In many African countries, practices such as FGM and force-feeding, among others, are conducted as a way to 'prepare' girls for marriage and motherhood.

The practice of FGM and child marriage is critically affected by the existence of **plural legal systems**. Many countries in Africa know a plurality of laws, and this may affect people's rights negatively if these are in conflict with national law, and when the relations and potential contradictions between codified and customary law are not or weakly regulated. The fact that harmful practices are embedded in cultural and religious practices and/or norms regulated by customary or religious laws makes the way in which formal laws, such as constitutions and international treaties, recognise customary law and articulate how the two are related a critical concern.<sup>8</sup> Enforcement of formal law, and non-discrimination principles or provisions on age of marriage or harmful practice can be hard to enforce where formal institutions may be weak or non-existent and customary and religious laws rule people's behaviour, especially in rural areas. Law enforcement is even more challenging when it is regarded as a private matter in which the law should not interfere, and as a result people prefer to deal with these affairs internally with relatives or with a more familiar institution such as customary or religious authorities.<sup>xliv</sup> In order for human rights, equality before the law and non-discrimination to be respected and realised, it is imperative that constitutions and codified law provide that the right to practise culture and traditional or cultural practices is limited to the extent they infringe on other constitutional rights.

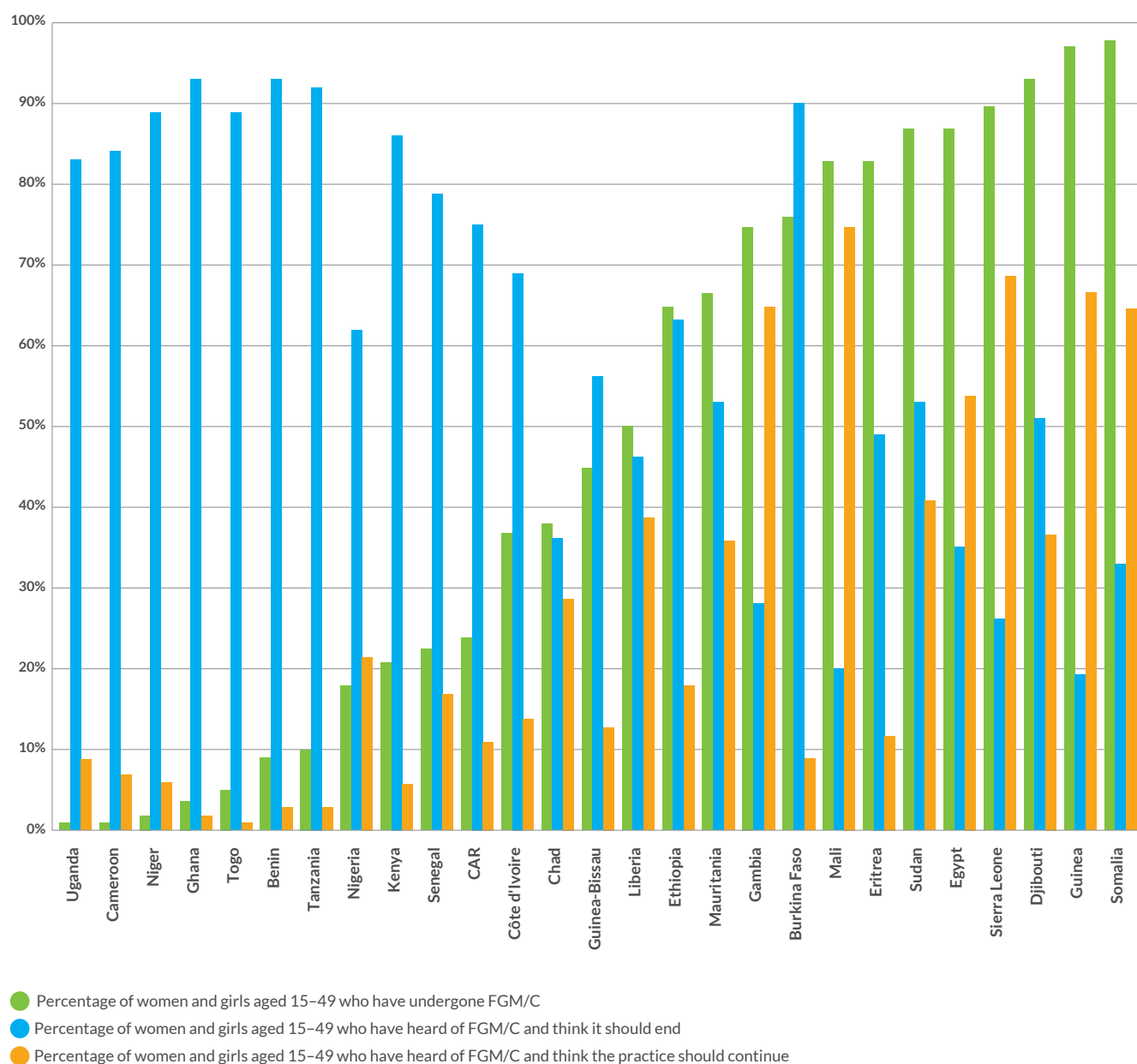
The intersections between child marriage, FGM and other harmful practices underline how they affect the dignity and integrity of women and girls, and that these different practices share the same structural causes. **Gender inequality**, poverty, limited education of girls and social, religious and cultural norms are key such causes. They work in a vicious cycle between causes, results and exacerbating factors of girls and women's vulnerability to discrimination and violence. Like child marriage, FGM is a practice by means of which women and girls' sexuality and reproductive functions are controlled and regulated. FGM also serves to deny women and girls sexual pleasure. It puts girls in subordinate positions where they lack control over their body and sexuality, and it perpetuates and reinforces male domination and patriarchal hierarchies. Like child marriage, FGM is strongly affected by cultural, religious<sup>9</sup> and social norms of gender unequal relations and female subordination. These norms affect the position of a person in the community and defying them can imply facing social stigma, isolation, dishonour and ostracism. FGM, and harmful practices more broadly, are both manifestations of these gender norms and reinforce them.

The **attitudes** of women and girls towards FGM vary between countries. More than half of the female population in Egypt, The Gambia, Guinea, Mali, Sierra Leone and Somalia think the practice should continue. Interestingly, though, in two-thirds of the countries where FGM is concentrated, the majority of girls and women think it should end (see Figure 6.7). In most countries, girls aged 15–19 years are less supportive of the continuation of the practice than women aged 45–49 years. When comparing women's and girls' attitudes to prevalence rates, 'In almost all countries, the percentage of girls and women who support the practice is substantially lower than the percentage of girls and women who have been cut, even in countries where FGM/C [female genital mutilation/cutting] is universal' (p. 53). The largest discrepancies are noted in Burkina Faso (9% in favour of the practice and 76% of girls and women having been cut), as well as in Djibouti, Egypt, Eritrea, Ethiopia, Somalia and Sudan.<sup>xlv</sup>

8 There are three basic constitutional models in which African states have responded to the presence of codified and customary law: (1) a strong cultural relativist model (allowing customary law to exist unfettered by formal law), (2) a weak cultural relativist model (recognising customary law but not addressing explicitly the hierarchies between formal and customary law, and (3) the universalist model (recognising customary law and the right to culture, but making these subject to non-discrimination and equality before the law). For a detailed and insightful reflection on customary law in post-colonial African states, see Banda, F. (2005). *Women, Law and Human Rights: An African Perspective*. Portland, OR: Hart Publishing (pp. 13–41 and 247–296). Banda also points to the extent to which culture, cultural identity and customary law have been reified, and undifferentiated and homogenised notions of African culture or African values are being constructed in the debates and legal frameworks around plural legalism. Related to this is also the extent to which the evolving and dynamic nature of pre-colonial customary law is recognised, as well as problematic constructions of binary notions of a unified African culture versus a monolithic West in an increasingly globalised and interconnected world. Banda quotes M. Chanock (in Na'im, A. 2002. *Cultural Transformation and Human Rights in Africa*), saying: 'in the representation of culture the voices of the elite overwhelm others' with 'assertions of culture... privileging some voices and patterns of acts, and ignoring and marginalising others' (p. 252 in Banda 2005).

9 Often these cultural and religious practices are more cultural practices veiled in religious terms, especially when the religious texts, scriptures or authorities do not provide a ground for harmful practices such as child marriage or FGM. FGM is not in the Bible or the Quran, but in many communities it is justified under a religious veil.

Figure 6.6. Percentage of women and girls aged 15–49 who have heard of FGM and think it should end



Source: UNICEF. (2013). *Female Genital Mutilation and Cutting. A Statistical Overview and Exploration of the Dynamics of Change*. New York: UNICEF.



## 6.2 CONTINENTAL AND REGIONAL POLICY FRAMEWORKS

**Child marriage** and **FGM** are specific forms of discrimination against women and girls. Art. 2 of the Maputo Protocol requires state parties to 'combat all forms of discrimination against women'. It especially states that state parties 'shall enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women' (Art. 2, sub 1, b). This section first discusses the normative framework on harmful practices, and two subsequent sections focus on FGM and child marriage, respectively.

### 6.2.1 Harmful practices and the right to positive culture

Art. 5 of the Maputo Protocol explicitly speaks to the elimination of **harmful practices**, by prohibiting and condemning 'all forms of harmful practices which negatively affect the human rights of women and which are contrary to international standards'. This underlines how the commitment to eliminate harmful practices is linked not only to promoting the health and well-being of women but also to women's human rights. The definition articulates the negative effect of harmful practices on women and girls' right to life, health, dignity, education and physical integrity.<sup>xlvi</sup>

Another important provision in relation to harmful practices is in Art. 17 of the Maputo Protocol. This provides that 'women shall have the right to live in a **positive cultural context**' (Art. 17.1). The ACHPR (1981) speaks about duty of individuals 'to preserve and strengthen positive African cultural values' (Art. 29.7). This has to be read 'as being compatible with the rest of the Charter, especially its provisions on non-discrimination, and where women are concerned, the injunction in article 18(3) that the state has the obligation to eliminate "every discrimination against women"'.<sup>xlvii</sup> The Maputo Protocol makes this holistic interpretation of positive cultural context clear by referring in its Preamble to 'the preservation of African values based on the principles of equality, peace, freedom, dignity justice, solidarity and democracy'.<sup>xlviii</sup> Furthermore, the Maputo Protocol is cognisant of the male domination and often absent or weak participation of women in customary law and cultural institutions, and how this affects women and girls' representation and their rights and concerns in plural legal systems. It articulates women's right 'to participate in all levels in the determination of cultural policies' and that state should take all appropriate measures to enhance this participation (Arts 17.1 and 17.2).

Of at least equal value, are the provisions in the Maputo Protocol regarding women's and girls' socio-economic rights and their right to participate in political decision-making. Whereas the relations between harmful practices, ideas and perspectives on what constitutes culture and African values, and women's and girls' human rights has drawn a lot of attention, it has also been pointed out that there is a need to take a broader perspective and acknowledge how the violations of women's and girls' socio-economic rights and to their participation in decision-making are 'chief impediments to the enjoyment of rights by women'.<sup>xlix</sup> This underlines the importance of these rights article in the Maputo Protocol, including amongst others, Article 9 on the right to participate in political and decision-making processes, Article 12 on right to education and training, and Article 13 on economic and social welfare rights. Article 14 on health and reproductive rights obviously also has a major significance here, and is at the heart of chapters 7 and 8.

### 6.2.2 Female genital mutilation

**FGM** is explicitly articulated under the elimination of harmful practices. The Maputo Protocol prohibits 'all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital cutting and all other practices in order to eradicate them' (Art. 5.a). This means that the medicalisation of FGM is not permitted under the Maputo Protocol provisions, nor are types of FGM falling under Type IV (pricking).

The ACRWC grounds the elimination of harmful practices in the need to protect and promote the welfare, dignity, normal growth and development of the child. It especially emphasises health and non-discrimination on the grounds of sex or other statuses as reasons to eliminate harmful practices (Art. 21). The AYC relates the elimination of traditional practices to the physical integrity and dignity of women (Art. 20) and to welfare and dignity, emphasising health, life and discrimination on the grounds of age, gender or other status (Art. 25).

In terms of the international women's rights frameworks, DEVAW (1993) explicitly speaks to FGM in its Art. 2 on violence against women. In fact, it specifically mentions 'female genital mutilation and other harmful practices to women' in its definition of violence against women (Art. 2a). In 2014, the CEDAW Committee and the Committee on the Rights of the Child adopted a Joint General Recommendation/Comment on harmful practices.<sup>10</sup> This links harmful practices to violence and to discrimination against women and girls. It offers an articulate understanding of harmful practices, as 'persistent practices and forms of behaviour that are grounded in discrimination on the basis of, among other things, sex, gender and age, in addition to multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering' (Part V.15, p. 5). Four criteria determine whether to regard practices as harmful (Part V.16, pp. 5–6):

1. They constitute a denial of the dignity or integrity of the individual, and a violation of human rights and fundamental freedoms.
2. They constitute discrimination against women or children and result in negative consequences for them as individuals or groups.
3. They are traditional, re-emerging or emerging practices that are prescribed and/or kept in place by social norms that perpetuate male dominance and inequality of women and children.
4. They are imposed on women and children by family and/or community members or society at large, regardless of whether the victim provides or is able to provide full, free and informed consent.

FGM is one of the four forms of harmful practices in the Joint General Recommendation/General Comment. The second one is child or forced marriage.<sup>11</sup> The ACHPR Guidelines on Combating Sexual Violence and its Consequences, discussed in greater detail in Chapter 4, include FGM in their definition of sexual violence.

#### Elimination of harmful practices (Maputo Protocol, Art. 5)

States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

- a. creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;
- b. prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them;
- c. provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;
- d. protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.

The significance of the Maputo Protocol's provisions lie not only in the unequivocal determination to prohibit and eradicate harmful practices, but also in the comprehensive articulation of the **obligations of states** in this.<sup>1</sup> Art. 5 provides for four strategies to eliminate harmful practices:

1. *Prohibiting* harmful practices and FGM, through legislative measures backed by sanctions (Art. 5b);
2. Going beyond prohibition and prevention by calling for *support and rehabilitation* services to victims of harmful practices (Art. 5c);
3. Requiring states parties to *protect* women who are at risk of being subjected to such practices, abuse and violence (Art. 5d);
4. Calling for further prevention through public *awareness-raising* (Art. 5a).<sup>ii</sup>

The need for awareness-raising is also underscored in Art. 2 of the Maputo Protocol, which points to the need for a change in social and cultural practices, to engage with social and cultural norms, attitudes, beliefs and practices, in order to combat all forms of GVAW, including harmful practices. Art. 2.2. provides that 'States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.'

<sup>10</sup> This acknowledges that the issue of harmful practices was less known at the time the two conventions were drafted and adopted. Yet both conventions include provisions that oblige states to prevent and eliminate harmful practices. Joint General Recommendation No. 31/General Comment No. 18 'should be read in conjunction with the relevant general recommendations and general comments issued by the Committees', more specifically CEDAW General Recommendation No. 19 (violence against women), CRC General Comment No. 8 (the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment) and CRC General Comment No. 13 (the right of the child to freedom from all forms of violence). 'The content of CEDAW General Recommendation No. 14 on female circumcision is updated by the present joint general recommendation/general comment' (Part II.5, p. 2).

<sup>11</sup> Joint General Recommendation No. 31/General Comment No. 18 addresses four specific forms of harmful practices: FGM, child and/or forced marriage, polygamy and 'crimes committed in the name of so-called honour'.

### 6.2.3 Child marriage

As mentioned above, the CEDAW Committee/Committee on the Rights of the Child Joint General Recommendation No. 31/ General Comment No. 18 articulates child and forced marriage as one of the four forms of harmful practices. The ACRWC (1990) explicitly addresses child marriage in the context of harmful social and cultural practices: 'Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory' (Art. 21, sub 2).

Child marriage is also prohibited under the Maputo Protocol, which states that women and men shall enjoy equal rights and are regarded as equal partners in marriage. It specifies, among other things, that marriage cannot take place 'without the free and full **consent** of both parties' (Art. 6a) and that 'the minimum age of marriage for women shall be **18 years**' (Art. 6b). The equal rights of women and men in marriage, and the right to full and free consent of intending spouses is in line with the UDHR<sup>12</sup> and CEDAW.<sup>13</sup> The Maputo Protocol is more specific in the minimum age of marriage: whereas the UDHR speaks of 'full age' and CEDAW of a minimum age, the Maputo Protocol explicitly articulates that marriage under the age of 18 shall have no legal effect. The provision that every marriage shall be recorded and **registered** is also of significance for child marriage, as it implies that unregistered marriages are not valid.<sup>iii</sup>

#### Marriage and child marriage (Maputo Protocol, Art. 6)

States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:

- a. no marriage shall take place without the free and full consent of both parties;
- b. the minimum age of marriage for women shall be 18 years;
- c. every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised;

In 2017, a **Joint General Comment from the ACHPR and ACERWC** was adopted regarding ending child marriage.<sup>iiii</sup> This aims to 'elaborate on the nature of State Party obligations that arise from Article 6(b) of the Maputo Protocol and Article 21(2) of the African Children's Charter, both of which prohibit child marriage'. The Joint General Comment is further positioned against the adoption of the *African Common Position on the AU Campaign to End Child Marriage in Africa*. The ACHPR and the AU Special Rapporteur on the Rights of Women, in collaboration with the Centre for Human Rights, also published a 'Report on Child Marriage in Africa'.<sup>lv</sup> The scope of the Joint General Comment includes 'children in child marriages, children at risk of child marriage, and women who were married before the age of 18'.

The Joint General Comment provides guidance on the normative content of the Maputo Protocol and ACRWC (the 'African Children's Charter'), and articulates the obligations for state parties. It starts with providing the principles underlying and guiding its interpretation:

1. *The best interests of the child*: This should be given primary consideration in actions concerning the child. Child marriage curtails 'the enjoyment of children's human rights' and has negative physical, psychological, economic and social consequences. This principle cannot be used as a justification of a marriage of a child in any circumstance (p. 5).
2. *Freedom from discrimination*: The right to freedom from discrimination based on sex and gender is a fundamental basis for the interpretation of other provisions. 'Child marriage is a manifestation of gender inequality and constitutes discrimination based on sex and gender', and should hence be eliminated (p. 5).
3. *Rights to survival, development and protection*: The African Children's Charter enshrines the right to survival, development and protection of each child. Child marriage poses 'a considerable threat to the survival and development of women and children, especially girls, children with disabilities, migrant children, children who are refugees and children in child-headed households' (p. 6).
4. *Participation*: A child has the right to communicate and express their views and opinions, and also these views must be heard and taken into consideration. These rights are violated when children are married or betrothed without their personal, full and free consent. It is in the best interests of the child to not tolerate exceptions of the minimum marriageable age of marriage at 18.

<sup>12</sup> The UDHR (1948) provides that 'men and women of *full age*, without any limitation due to race, nationality or religion, have the right to marry and found a family. They are entitled to *equal rights* as to marriage, during marriage and at its dissolution' (Art. 16.1) and that 'marriage shall be entered into only with *free and full consent of the intending spouses*' (Art. 16.2) (emphasis ours).

<sup>13</sup> CEDAW 1979 provides that 'States Parties shall take all appropriate measures to eliminate discrimination against women in all matters related to marriage and family relations and in particular, ensure on the basis of equality of men and women' (Art. 16, sub 1). This includes 'the *same right* to enter marriage' (Art. 16.1a), and 'the *same right* to freely choose a spouse and to enter into marriage *only with free and full consent*' (Art. 16.1b). It also provides that 'the betrothal and the marriage of a child shall have no legal effect, and all necessary action shall be taken to specify a *minimum age for marriage*, and to make the registration of marriages in an official registry compulsory' (Art. 16, sub 2) (emphasis ours).

In addition to these four guiding principles, the Joint General Comment underlines that women's and children's rights are interrelated, and that this calls for a simultaneous consideration of the Maputo Protocol and the ACWRC. The core terms are defined in Box 6.2.

#### Box 6.2. Definitions of child, marriage and consent

**Child** means 'a human being aged below 18 years of age, even if majority is attained earlier under national law' (African Children's Charter, Art. 2).

**Marriage** means 'formal and informal unions between men and women recognised under any system of law, custom, society or religion' (Joint General Comment, p. 3).

**Betrothal** means 'an engagement or a promise to marry. It can also refer to the act of promising or offering a child or young person in marriage, whether by a parent, guardian or family elder' (Joint General Comment, p. 4).

**Free and full consent** in the context of marriage entails 'non-coercive agreement to the marriage with full understanding of the consequences of giving consent' (Joint General Comment, p. 4).<sup>14</sup> Full consent implies total consent of the person consenting, and cannot be supplemented or cured with the addition of parental consent given on behalf of a child. The Commission and Committee recognise that older children may have the capacity. However, despite the evolving capacities of older children to make decisions about their lives and the fact that they may have the capacity to consent to sex, medical treatment and other acts, the language of the Maputo Protocol and the African Children's Charter clearly stipulates that children under the age of 18 are not capable of giving full and free consent to a marriage.

The normative framework regarding child marriage provided by the African Children's Charter and the Maputo Protocol is that:

- Child marriage and the betrothal of girls and boys is **prohibited**.
- The legal age of marriage is **18 years** and effective action, including legislation, shall be taken to specify this.
- Registration of all marriages in an official registry is mandatory.
- **No exceptions** can be made to the legal age of marriage at 18 for betrothal and marriage, as the Africa Children's Charter defines a child as every human being below the age of 18 years.
- The prohibition of marriage under the age of 18 **applies to all marriages**, under all forms of law, as the African Children's Charter does not make a distinction between forms of law (civil, customary or religious).
- No marriage shall take place without the **full and free consent** of both parties.
- Women and men enjoy equal rights in marriage, and are regarded as equal partners.

The Joint General Comment provides guidance on the obligations of states in ending child marriage (summarised in Table 6.4 below). A notable obligation in the legislative measures is that 'Legislative measures that prohibit child marriage must take precedence over customary, religious, traditional or sub-national laws.' This means that 'States Parties with plural legal systems must take care to ensure that prohibition is not rendered ineffectual by the existence of customary, religious or traditional laws that allow, condone or support child marriage' (Joint General Comment, p. 9). In addition to this, 'States Parties are encouraged to promote the participation of parents, particularly fathers, religious leaders and community leaders in ending child marriage' under 'other measures'.

<sup>14</sup> The requirement of free and full consent is recognised in several international human rights instruments, including in Art. 16(2) of the UDHR and Joint General Recommendation No.31 of the CEDAW Committee/General Comment No.18 of the Committee on the Rights of the Child.

**Table 6.4. State obligations on ending child marriage**

*The Joint General Comment from the ACHPR and ACERWC provides an extensive explanation of the three sets of state obligations on ending child marriage.*

|                               |  |
|-------------------------------|--|
| <b>Legislative measures</b>   | Ensure prohibition of marriage under the age of 18, without exception  |
|                               | Ensure personal, full and free consent to marry  |
|                               | Undertake constitutional reform  |
| <b>Institutional measures</b> | Implement verification procedures (birth registration, age verification and marriage registration)   |
|                               | Ensure full enforcement of laws, penalties and sanctions   |
|                               | Around education:<br>Including retention in school (including pregnant girls), and ensuring sanitary facilities and reduction of exposure to violence  |
|                               | Ensure access to and uptake of health services:<br>Including access to comprehensive SRHR, to SRH services without third party consent; developing and implementing comprehensive sexuality education and information programmes with age-appropriate information; authorising medical abortion as provided in Maputo Protocol |
|                               | Promote access to justice:<br>Awareness-raising about the law, toll-free helplines, free legal aid; specialised police units and training of prosecutors, magistrates and judges; provide for appropriate remedies   |
|                               | Provide redress and support for those already married  |
|                               | Capacity-building and training (of government officials, teachers, health providers, police, judicial officers, religious, community and traditional leaders, etc.)  |
|                               | Data collection  |
|                               | Resource allocation and budgeting  |
| <b>Other measures</b>         | Address the root causes of child marriage:<br>Including poverty, all forms of harmful practices, gender inequality and discrimination.   |
|                               | Develop and implement national action plans and early warning programmes   |
|                               | Promote the role of men and traditional and religious leaders  |
|                               | Develop and implement special measures to prevent child marriage among children at higher risk   |
|                               | Reparation of victims  |
|                               | Awareness and public information campaigns   |

## 6.3 NATIONAL LEGAL AND POLICY FRAMEWORKS

This section looks at the legal and policy frameworks at the national level regarding harmful practices, in particular child marriage and FGM. It tracks the extent to which the commitments in the Maputo Protocol and important related documents are being implemented at the national level. Is the legal age of marriage guaranteed at 18 years, and does this apply to religious and customary marriages as well? Can parents, guardians or other third parties provide consent to allow for a marriage under the legal minimum age? What are the provisions on harmful practices, and in particular FGM? And do countries have an action plan or programmatic response to end either of these practices?

We have formulated seven legal and policy indicators to capture progress and gaps regarding child marriage and FGM in the country's legal and policy frameworks. These are explained in Table 6.5. The first four relate to child marriage and the latter three concern FGM. This section then discusses trends, gaps and contestations on these indicators, first for the continent as a whole and then region by region. The final section of the chapter proceeds to presenting case studies that complement the tables and narrative analysis on the national legal and policy frameworks.

**Table 6.5. Harmful practices: Legal and policy indicators**

| Name/description of indicator  | Codes | Explanation of the indicator codes   |
|--|-------|--|
| Indicator 1 – Legal age of marriage set at 18                          | Yes   | Legal age of marriage is set at 18   |
|  | Yes*  | Legal age of marriage is set at 18 and guaranteed in the Constitution  |
|  | No    | Legal age of marriage not guaranteed at 18   |
|  | M     | Missing data; information could not be found   |
| Indicator 2 – Full and free consent is guaranteed                      | Yes   | This means there are no exceptions (i.e. consent of parents or other third parties) to the legal age of marriage   |
|  | No    | This means marriage under the legal age of marriage is allowed when parents or other third parties provide consent (footnote gives explanation on exception)                                   |
|  | M     | Missing data; information could not be found   |
| Indicator 3 – Legal age of marriage applies to all marriages           | Yes   | This means the legal age of marriage applies to formal, customary, religious and all other marriages, and that this is explicitly stated in the law  |
|  | No    | This means the legal age of marriage does not apply to all marriages, and customary, religious or other marriages are exempted (footnote gives explanation on the exemption)                   |
|  | M     | Missing data; could not find a specific indication that the legal age of marriage applies to all marriages or not  |
| Indicator 4 – Action/strategic plan or campaign to end child marriage  | Yes   | Plan or campaign in place (either national initiative, or part of AU campaign to end child marriage)   |
|  | No    | Plan or campaign not in place  |
|  | M     | Missing data; information could not be found   |
| Indicator 5 – Constitutional provisions to eliminate harmful practices | Yes   | When Constitution provides for elimination of harmful practices (footnote added when provisions are formulated in broader terms)   |
|  | No    | Constitution does not have provisions regarding the elimination of harmful practices   |
| Indicator 6 – Legal provisions regarding elimination of FGM            | Yes   | Yes, the law prohibits FGM   |
|  | HP    | There is a legal provisions that prohibits harmful practices, that could be applied/does apply to FGM  |
|  | No    | There are no legal provisions that prohibit harmful practices or FGM (footnotes can indicate further qualifications regarding specifications under which they allow or prohibit FGM, i.e. age) |
|  | M     | Missing data; information could not be found   |
| Indicator 7 – Programmatic response or action plan to end FGM          | Yes   | Programmatic response or action plan to end FGM is in place  |
|  | No    | There is no programmatic response or action plan to end FGM  |
|  | M     | Missing data; information could not be found   |

Table 6.6 and 6.7 present an overview of legal and policy frameworks regarding child marriage and FGM respectively. For an explanation of the regional units used here, see section 1.6.3 in chapter 1). Please note that the total for the continent has been recalculated, as some countries are included in more than one region.<sup>15</sup> The main trends regarding the legal and policy frameworks regarding **child marriage** are that eight in ten countries sets the legal age of marriage at 18. But there are legal loopholes in 34 of the 45 that have the legal age of marriage at 18, in the sense of not having guaranteed full and free consent, and that the legal age of marriage applies to customary and religious marriages as well. In total, full and free consent of the marrying parties is not guaranteed in a total of 36 African countries. The legal age of marriage does not apply to customary and religious marriages in 12 countries, and in another 17 countries this is not clear due to missing data. The nine countries where the legal age at marriage is lower than 18<sup>16</sup>, also all nine do not guarantee explicitly full and free consent.

Table 6.6 also shows that a total of 33 countries have launched national plans to end child marriage, and most prominently in Western Africa, and in only half of the countries in Southern, Central and Northern Africa. Seven of the nine countries that do not have 18 as the legal age of marriage, however do have a campaign to end child marriage. Launching a campaign to end child marriage does not directly translate in post-launch activities. According to a 2016 report, about three out of five of the countries that had had the launch, had progressed into establishing a coordination mechanism and/or developing a national plan and/or started implementing activities. Two out of five had not (yet) progressed beyond the launch itself.<sup>17</sup>

**Table 6.6. Continental and regional overview of legal and policy indicators, Child marriage**

| Harmful practices – child marriage      | INDICATORS                  |   |   |   |    |   |  |    |    |  |   |    |
|---|-----------------------------|---|---|---|----|---|--|----|----|--|---|----|
|   | Legal age at marriage at 18 |   |   | Full and free consent (with-out exceptions) |    |   | Legal age of marriage applies to all marriages |    |    | Action/strategic plan/campaign to end child marriage |   |    |
|   | Y                           | N | M | Y   | N  | M | Y  | N  | M  | Y  | N | M  |
| Western (15)                            | 10                          | 5 | 0 | 3   | 10 | 2 | 7  | 5  | 3  | 14   | 0 | 1  |
| Eastern (11)                            | 9                           | 2 | 0 | 5   | 6  | 0 | 10   | 1  | 0  | 5  | 6 | 0  |
| Central (11)                            | 9                           | 2 | 0 | 4   | 6  | 1 | 4  | 3  | 4  | 5  | 4 | 2  |
| Southern (16)                           | 14                          | 2 | 0 | 3   | 13 | 0 | 7  | 4  | 5  | 7  | 2 | 7  |
| Northern (7)                            | 6                           | 0 | 1 | 2   | 4  | 1 | 1  | 0  | 6  | 3  | 0 | 4  |
| Country total (55—without duplications) | 45                          | 9 | 1 | 15  | 36 | 4 | 26   | 12 | 17 | 33   | 9 | 13 |

The overview of national legal and policy frameworks regarding **FGM** is presented in Table 6.7. The main trends emerging are that less than one in five countries has a constitutional provision eliminating harmful practices. Among the many countries that lack a constitutional provision on the elimination of harmful practices, several have a provisions that recognise customary law and indicate it cannot contradict the Constitution (e.g. Angola, Namibia, South Africa).

About three out of five countries has a statutory law prohibiting FGM specifically; another seven countries (in the Southern region) have statutory law that prohibits harmful practices, without explicitly addressing FGM. Of these seven, Malawi and Swaziland also have a constitutional provisions, whereas Namibia, Botswana, Lesotho, Mauritius and Zimbabwe do not. Thirteen countries do not have a legal provision prohibiting FGM, or otherwise harmful practices; these countries also lack a constitutional provision on the latter.<sup>17</sup> On the positive side, eight countries have both a constitutional provision and a statutory law provision; five of them also have a programmatic response to end the practice.<sup>18</sup>

About half, that is 27 countries have a programmatic response or action to end FGM. Almost all countries in the Western region, and two-thirds in Eastern region countries. There is only one Southern country with a programmatic response, which might be a reflection of the low prevalence of FGM in that region. Three countries have a programmatic response, but no legal or constitutional provisions regarding harmful practices or FGM.<sup>19</sup>

<sup>15</sup> A few countries are part of more than one region used as an analytical unit here. For the 'total' of the continent, these duplications should be counted only once. (Angola and DRC are in both Central and Southern regional unit, Rwanda and Burundi are in both Eastern and Central, and Tanzania is in both Eastern and Southern regional unit of analysis).

<sup>16</sup> Angola, Burkina Faso, Gabon, Guinea Bissau, Mali, Niger, Senegal, Sudan and Tanzania.

<sup>17</sup> Algeria, Angola, Burundi, Cabo Verde, Comoros, Liberia, Libya, Mali, Morocco, Mozambique, Rwanda, Sao Tome & Principe, Seychelles, Sierra Leone, Tunisia. (missing data on legal prohibiting of FGM for Angola and Tunisia).

<sup>18</sup> Ghana, Ethiopia, Sudan, Somalia and Uganda score positively on all three indicators; South-Sudan, Malawi and Swaziland have both a constitutional and statutory law provision.

<sup>19</sup> Liberia, Mali and Sierra Leone.



Subsequent sections of this chapter discuss regional and national details in terms of trends, gaps and key contestations in the national legal and policy frameworks on harmful practices. In different regions, countries have also undertaken institutional reform, most visibly in the establishment of a National Committee on eliminating harmful practices more broadly, or child marriage or FGM specifically. Contestations across the regions relate to contradictions between codified and customary law. With respect to FGM, medicalisation of FGM is a worrisome trend that is not aligned with full prohibition and elimination of harmful practices and FGM in particular. There are also attempts of pro-FGM campaigners and actors to allow for FGM when women give consent (e.g. in Kenya and Sierra Leone); these are also counter to the Maputo Protocol provisions, and actually undermine its implementation. The realisation of women's and girls' rights regarding harmful practices and FGM is further constrained by weak enforcement of the law, resulting in little prosecution of perpetrators.

**Table 6.7. Continental and regional overview of legal and policy indicators, FGM**

| Harmful practices – FGM                    | INDICATORS   |    |   |                                  |    |    |   |   |    |    |
|--|--|----|---|----------------------------------|----|----|---|---|----|----|
|  | Constitutional provision eliminating harmful practices |    |   | Legal provisions prohibiting FGM |    |    |   | Programmatic response or action plan to end FGM |    |    |
|  | Y  | N  | M | Y                                | HP | N  | M | Y   | N  | M  |
| Western (15)                               | 1  | 14 | 0 | 11                               | 0  | 4  | 0 | 14  | 1  | 0  |
| Eastern (11)                               | 5  | 6  | 0 | 9                                | 0  | 2  | 0 | 8   | 3  | 0  |
| Central (11)                               | 0  | 11 | 0 | 7                                | 0  | 3  | 1 | 3   | 4  | 4  |
| Southern (16)                              | 2  | 14 | 0 | 5                                | 7  | 3  | 1 | 1   | 1  | 14 |
| Northern (7)                               | 0  | 6  | 1 | 2                                | 0  | 3  | 2 | 2   | 3  | 2  |
| Country total<br>(55—without duplications) | 8  | 46 | 1 | 32                               | 7  | 13 | 3 | 27  | 10 | 18 |



### 6.3.1 Western region

#### Trends, gaps and contestations

The legal and policy frameworks of the states in the Western region show many similarities; only a few countries have a different profile. With respect to child marriage, Cape Verde, The Gambia, Guinea, Sierra Leone and Togo have three positive scores on the four indicators. Almost half of the countries in the region meet only two of the four legal and policy indicators regarding child marriage. Liberia stands out as having in place all legal provisions on child marriage in line with the Maputo Protocol, and also an action plan to end child marriage.

With respect to the indicators on harmful practices and FGM, ten of the fifteen states legally prohibit FGM and have a programmatic response to end the practice, but lack a constitutional provision to eliminate harmful practices. Liberia, Mali and Sierra Leone have a programmatic response to end FGM but all lack legal or constitutional provisions on harmful practices or FGM. Ghana stands out as having the strongest profile of three positive scores. Cape Verde, on the other hand, scores negatively on all three.

**Table 6.8. Key legal and policy indicators in Western Africa, Harmful practices**

| Country       | INDICATORS                  |                                       |                          |  |  |                                  |   |
|---------------|-----------------------------|---------------------------------------|--------------------------|--|--|----------------------------------|---|
|               | Legal age at marriage at 18 | No exceptions (full and free consent) | Applies to all marriages | Action/strategic plan/campaign to end child marriage | Constitutional provision eliminating harmful practices | Legal provisions prohibiting FGM | Programmatic response or action plan to end FGM |
| Benin         | Yes                         | No <sup>20</sup>                      | -                        | Yes  | No   | Yes                              | Yes   |
| Burkina Faso  | No <sup>21</sup>            | No <sup>22</sup>                      | No <sup>23</sup>         | Yes  | No   | Yes                              | Yes   |
| Cape Verde    | Yes                         | Yes                                   | Yes                      | -  | No   | No                               | No  |
| Côte d'Ivoire | Yes                         | No <sup>24</sup>                      | -                        | Yes  | No   | Yes                              | Yes   |
| The Gambia    | Yes                         | Yes                                   | No <sup>25</sup>         | Yes  | No   | Yes                              | Yes   |
| Ghana         | Yes                         | No <sup>26</sup>                      | No <sup>27</sup>         | Yes  | Yes  | Yes                              | Yes   |
| Guinea        | Yes                         | No <sup>28</sup>                      | Yes <sup>29</sup>        | Yes  | No   | Yes                              | Yes   |
| Guinea Bissau | No <sup>30</sup>            | No <sup>31</sup>                      | Yes                      | Yes  | No   | Yes                              | Yes   |
| Liberia       | Yes                         | Yes <sup>32</sup>                     | Yes                      | Yes  | No   | No                               | Yes   |
| Mali          | No <sup>33</sup>            | No <sup>34</sup>                      | No <sup>35</sup>         | Yes  | No   | No <sup>36</sup>                 | Yes   |
| Nigeria       | Yes                         | -                                     | No <sup>37</sup>         | Yes  | No   | Yes                              | Yes   |
| Niger         | No <sup>38</sup>            | No <sup>39</sup>                      | Yes                      | Yes  | No   | Yes                              | Yes   |
| Senegal       | No <sup>40</sup>            | -                                     | -                        | Yes  | No <sup>41</sup>                                       | Yes                              | Yes   |
| Sierra Leone  | Yes                         | No <sup>42</sup>                      | Yes                      | Yes  | No   | No <sup>43</sup>                 | Yes   |
| Togo          | Yes                         | No <sup>44</sup>                      | Yes                      | Yes  | No   | Yes                              | Yes   |

<sup>20</sup> Law No. 2002-07 of 24 August 2004 on the Code of Persons and the Family (Loi n°2002-07 du 24 August 2004 portant Code des personnes et de la famille) states the following: A minor under 18 years old cannot marry without the consent of the person exercising parental authority over them. This consent must include the identity of the two future spouses. The consent should be given either by the statement made to an officer of civil status or to a notary, prior to the marriage and it is valid even if it is given during the celebration (Art. 120).

<sup>21</sup> The law set the legal age for girls to marry is 17 and 21 for boys; however, this is not enforced since most marriages take place in traditional and religious ceremonies.

<sup>22</sup> Marriage can take place for girls under 15 and boys under 18 'if a court awards special dispensation, although this is rarely used as many marriages are conducted in traditional ceremonies' ([www.amnesty.org/en/press-releases/2016/04/burkina-faso-forced-early-marriage-facts/](http://www.amnesty.org/en/press-releases/2016/04/burkina-faso-forced-early-marriage-facts/)).

<sup>23</sup> The legal age of marriage applies only to marriages registered by the state, not to traditional and religious ones ([www.amnesty.org/en/latest/news/2016/04/burkina-faso-forced-and-early-marriage-puts-thousands-of-girls-at-risk/](http://www.amnesty.org/en/latest/news/2016/04/burkina-faso-forced-and-early-marriage-puts-thousands-of-girls-at-risk/)).

<sup>24</sup> 'Article 1 of the Civil Code provides the minimum age of marriage at 18 for women and 21 for men. The court can, however, make exceptions for serious (unspecified) reasons'. A girl can marry under the age of 18 and a boy under 21 with the parental consent ([www.girlsnotbrides.org/child-marriage/cote-divoire/](http://www.girlsnotbrides.org/child-marriage/cote-divoire/)).

<sup>25</sup> Though the law set the marriage age at 18, under customary law girls can marry between the ages of 12 and 17.

<sup>26</sup> The minimum age of marriage is set at 18 for both girls and boys; however, they can marry with parental consent at 16.

<sup>27</sup> Under customary law, marriage can still take place under the age of 18 years.

<sup>28</sup> Art. 268 of the Guinean Children Code 2008 stipulates: 'Nevertheless, the President of the Republic, on report of the Minister of Justice, may, by Decree, grant exemptions on age for compelling reasons. The application is made to the Public Prosecutor or the President of the Tribunal which is forwarded to the Attorney General. An expedition of this Order is then attached to the marriage certificate.'

<sup>29</sup> Though the minimum age of marriage is set at 18 for both boys and girls, most marriages under 18 take place under religious and traditional ceremonies.

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**Constitutional provisions:** Ghana is one of the few countries where FGM is prohibited under the Constitution: Art. 26(2) provides that 'All customary practices which dehumanise or are injurious to the physical and mental wellbeing of a person are prohibited.' The Ghanaian Constitution goes even further in its Art. 39(2) to condemn any traditional practices that are detrimental to the health and safety of the person. In 1994, Ghana amended its Criminal Code to make FGM a criminal offence under Art. 69A. No other states in the Western region have provisions in their Constitution regarding harmful practices. Senegal's Constitution explicitly prohibits and punishes forced marriage and defines it as a violation of personal freedom (Art. 18).

**Statutory law and policy responses on child marriage:** Western Africa is home to countries with the highest percentage of child marriage, and most countries are parties to international and regional human rights instruments<sup>42</sup> that explicitly set the minimum age for marriage at 18. This legal requirement is met by two-thirds of the countries. In five countries, however, marriage is allowed under the age of 18: Niger (15 years), Guinea Bissau (16 years), Mali (16 years), Senegal (16 years) and Burkina Faso (17 years). In almost two-thirds of the states, full and free consent is not guaranteed, and exemptions to the legal age of marriage are allowed by consent of parents, courts, the minister of justice or the president. The legal age of marriage applies to customary, religious and traditional marriages in only eight of the fifteen countries in the region.

Momentum around ending child marriage has gained ground across the region, and Burkina Faso,<sup>43</sup> The Gambia,<sup>44</sup> Ghana<sup>45</sup> and Togo,<sup>46</sup> among other countries, have taken affirmative measures, such as putting in place national action plans or strategies. Burkina Faso, The Gambia, Ghana, Liberia, Mali, Niger, Nigeria, Senegal and Sierra Leone have launched national campaigns as part of and in line with the AU Campaign to End Child Marriage. Burkina Faso, Ghana, Liberia, Niger and Sierra Leone have only launched the campaign whereas The Gambia, Nigeria and Senegal have taken further steps towards implementation by establishing a coordination mechanism and national action plan (Nigeria) or, in addition, initiating implementing activities (The Gambia, Mali and Senegal).<sup>47</sup>

The government of Togo, in partnership with NGOs, has engaged in a range of actions to prevent early marriage, particularly through awareness-raising among community and religious leaders. Multiple initiatives have focused on helping girls stay in school. Messages broadcast through mass media, particularly local radio, have stressed avoiding early marriage and the importance of educating girls. With the exception of Cape Verde and Togo, all countries have launched a national campaign as part of the AU Campaign to End Child Marriage.

<sup>30</sup> Art. 1649 of the Child Code allows marriage under 16 years to take place with consent of parents or guardians.

<sup>31</sup> Although the law sets the minimum age of marriage at 18, girls can marry under 18 with the consent of a parent or guardian.

<sup>32</sup> With the adoption of the Children's Act in 2011, the provision on parental consent to marriage under 18 was repealed. Section 4: No person or society shall subject a child to any of the following practices: (a) Marrying any person when she or he is still under the age of 18. Section 3: Child shall mean any person below the age of 18 years. Section 16.15: Subjecting a Child to Harmful Practices: A person commits a felony of second degree if she or he subjects a child to any of the following practices: (a) Facilitating the marriage to any person when she or he is still under the age of 18.

<sup>33</sup> The legal age to marry is set at 16 for girls and 18 for boys; however, marriage can take place under customary and sharia for girls under 16.

<sup>34</sup> In some cases, a marriage can take place at 15 with the authorisation of a judge and the consent of the parents ([www.genderindex.org/country/mali/#\\_ftnref](http://www.genderindex.org/country/mali/#_ftnref)). Under customary and sharia law, it is possible for a girl to marry under the age of 16.

<sup>35</sup> Under customary and sharia law, it is possible for a girl to marry under the age of 16.

<sup>36</sup> Circular No. 99-0019 was issued in 1999, prohibiting FGM in hospitals.

<sup>37</sup> Marriage can take place under civil, customary and sharia law and each varies across the state. The marriage age varies from 18 years for girls in southern Nigeria to 12–15 in northern Nigeria.

<sup>38</sup> The law sets the minimum marriage age at 15 for girls and 18 for boys; however, a law has been initiated to bring the marriage age for girls to 18 but no information is available proving that it has been adopted.

<sup>39</sup> Under Art. 111 of the Family Code 1973, 'A marriage can only be contracted between a man over 18 years and a woman over 16 years unless granted exemption of age for a serious reason by the President of the Regional court after investigation.'

<sup>40</sup> The minimum age is set at 16 for girls and 18 for boys under Art. 111 of the Family Code 1973.

<sup>41</sup> Art. 18 of the 2001 Constitution: Forced marriage is a violation of personal freedom. It shall be forbidden and punished according to conditions laid down by law.

<sup>42</sup> UNCRC (1989), ACRWC (1990), CEDAW (1979), the Maputo Protocol (2003).

<sup>43</sup> Action Plan for the Eradication of Child Marriage (2004–06, 2008–10, 2016–25).

<sup>44</sup> 2016–20 Child Protection Strategy.

<sup>45</sup> National Strategic Framework on Ending Child Marriage (2017–26).

<sup>46</sup> National Programme against Child Marriage and Teenage Pregnancy (2014).

**Statutory law and policy responses on FGM:** Despite the alarming prevalence of FGM in Western Africa, the fight against the practice is gaining ground and two-thirds of the countries have enacted laws and policies banning FGM. Cape Verde, Liberia, Mali and Sierra Leone do not have legal provisions prohibiting FGM. The government of Sierra Leone did issue a ban on the practice during the 2014–15 Ebola outbreak, in order to stop the virus from spreading. Mali has no legislation expressly criminalising FGM but in 1999 the government issued a directive<sup>47</sup> that prohibits the practice in hospitals.<sup>lvii</sup> Moreover, a national action plan to end FGM (2008–11) has been adopted, which is supposed to pave the way for a law on FGM. This latter has not yet materialised, however.

The Gambia and Nigeria are the two most recent countries to outlaw FGM, in 2015. The greatest progress in addressing harmful practices in Nigeria has been seen in the passage of the Violence against Persons Prohibition Act in 2015. This aims 'to eliminate all forms of violence against persons, provide maximum protection and effective remedies for victims and punishments of offenders.'<sup>lviii</sup> Regarding FGM, the Act states that the act on a girl or woman is prohibited, and articulates the punishments for those who perform the practice on others.<sup>lix</sup>

**Institutional reform:** In Cote d'Ivoire, a 'Social Centre' has been put in place to deal with child marriage cases. This works in collaboration with families in order to find solutions. Guinea-Bissau has a National Committee to End Traditional Harmful Practices; in 2014, this prosecuted six people for practising FGM, with three out of the six convicted for up to three years' imprisonment.<sup>lx</sup> Burkina Faso established a National Committee for the Elimination of FGM in 1990 and in 2009 241 people were convicted for practising FGM.<sup>lxi</sup> Furthermore, in 2012, the Government of Burkina Faso made considerable steps by 'including modules on FGM in the curriculum of the National School of the Gendarmerie, the National School of the Financial Authorities, and the National Social Welfare Training Institute'.<sup>lxii</sup> The Ministry of Health of The Gambia has added FGM into the curriculum of the nursing school. Ghana established a Unit on Ending Child Marriage in 2014.

### Key gaps and contestations

A first gap relates to the small amount of countries with **constitutional** provisions to eliminate harmful practices. This stands in contrast with the relatively high number with constitutional provisions in the Eastern region. Second, countries where the legal age of marriage is set **below 18** do not correspond to the Maputo Protocol's provisions. A third gap relates to loopholes where either full and free **consent** is not guaranteed or the age of marriage does not apply to **customary and religious marriages**. A fourth gap concerns the countries where **FGM is not outlawed**.

A critical contestation relates to the **FGM age of consent** in Sierra Leone. Sierra Leone is one of the few countries in Western Africa where FGM is not prohibited, and the debate around FGM has proven very contentious. A clause on FGM was removed from the final version of the 2007 National Child Rights Act, and Parliament then decided it would not prohibit FGM; instead, it was agreed to put in place an age of consent. This means that a girl under 18 years cannot be cut but, when she reaches 18, she can make a free and informed decision as to whether she wants to undergo FGM.

Another contestation relates to the **medicalisation of FGM**. There is a growing trend across Western Africa for FGM to be carried out by medical professional such as nurses and midwives in health facilities. Parents are using medicalised FGM to prove their daughters have been cut, and the perception is that, since it is taking place in a hospital, the risks are minimised. This undermines the progress made so far towards elimination, as it actually tends to institutionalise FGM.

Another gap with respect to the eradication of FGM is the **lack of law enforcement**, despite FGM being an offence in most countries. Laws against the perpetrators of FGM are rarely enforced, because most cases take place in remote area where legal awareness tends to be low and traditional customs often prevail over the legal system. Weak law enforcement can be the result of a lack of political will or of resources. In Ghana, there is a strong will to enforce the law on FGM and the police are willing and have cooperated to stop the practice happening, but their **ability** to respond in remote communities in a timely or effective manner is severely limited. In January 2016, three women were tried and sentenced for performing FGM in the region of Kankan in Guinea.

Lack of law enforcement and cultural tolerance are undermining progress on both child marriage and FGM. Although most countries have laws and policies in place against FGM and child marriage, which are progressively reducing both practices, there is still a long way to go before both practices are completely eradicated. Governments in Western Africa must take concrete actions to put into practice national, regional and continent legislation and policies to end child marriage and FGM.

<sup>47</sup> Ministry of Health Circular Letter N° 0019 MSPAS-SG (7 January 1999).

### 6.3.2 Eastern region

#### Trends, gaps and contestations

The legal and policy frameworks of the countries in Eastern Africa show positive signs on many fronts, but also some notable gaps and weak spots. With respect to child marriage, Eritrea and Kenya score positively on all four legal and policy indicators. Rwanda and South Sudan also live up to the legal requirements of the Maputo Protocol regarding child marriage, but lack an action or strategic plan. The country with the weakest legal and policy frameworks regarding child marriage in the Eastern region is Tanzania, closely followed by Somalia, Sudan and Uganda.

Looking at FGM and harmful practices, Ethiopia, Somalia, Sudan and Uganda have the strongest profile on the three indicators; Burundi and Rwanda score lowest. The profiles of Djibouti, Eritrea, Kenya and Tanzania are more mixed: they lack a constitutional provision on harmful practices but score positively on FGM legal provisions and policies. South Sudan has constitutional and legal provisions on harmful practices and FGM in place but lacks a programmatic response towards FGM.

**Table 6.9. Key legal and policy indicators in Eastern Africa, Harmful practices**

| Country     | INDICATORS                  |                                       |                          |  |  |                                  |   |
|-------------|-----------------------------|---------------------------------------|--------------------------|--|--|----------------------------------|---|
|             | Legal age at marriage at 18 | No exceptions (full and free consent) | Applies to all marriages | Action/ strategic plan/ campaign to end child marriage | Constitutional provision eliminating harmful practices | Legal provisions prohibiting FGM | Programmatic response or action plan to end FGM |
| Burundi     | Yes                         | Yes                                   | Yes                      | No   | No   | No                               | No  |
| Djibouti    | Yes                         | No <sup>48</sup>                      | Yes                      | No   | No   | Yes                              | Yes   |
| Eritrea     | Yes                         | Yes                                   | Yes                      | Yes  | No   | Yes                              | Yes   |
| Ethiopia    | Yes                         | No <sup>49</sup>                      | Yes                      | Yes  | Yes  | Yes                              | Yes   |
| Kenya       | Yes                         | Yes                                   | Yes                      | Yes  | No <sup>50</sup>                                       | Yes                              | Yes   |
| Rwanda      | Yes <sup>51</sup>           | Yes                                   | Yes                      | No   | No   | No                               | No  |
| Somalia     | Yes                         | No <sup>52</sup>                      | Yes                      | No   | Yes  | Yes                              | Yes   |
| South Sudan | Yes                         | Yes                                   | Yes                      | No   | Yes  | Yes                              | No  |
| Sudan       | No                          | No <sup>53</sup>                      | Yes                      | Yes  | Yes  | Yes                              | Yes   |
| Tanzania    | No <sup>54</sup>            | No <sup>55</sup>                      | Yes                      | No   | No   | Yes                              | Yes   |
| Uganda      | Yes*                        | No <sup>56</sup>                      | No <sup>57</sup>         | Yes  | Yes  | Yes                              | Yes   |

#### Trends in legal, policy and institutional reform

**Constitutional provisions:** Five states in the Eastern region have constitutional provisions that explicitly outline the state's obligations with respect to harmful practices, child marriage and/or FGM. These are Ethiopia, Somalia, South Sudan, Sudan and Uganda.

In Ethiopia, Art. 34(2) of the 1995 Constitution states that marriage shall be entered into with the free and full consent of intending spouses. A possible clawback to this provision is contained in Art. 34(5), which states that the Constitution does not preclude the application of *religious or customary laws* in matters linked to family and personal law, with the consent of the parties.

<sup>48</sup> Family Code 2002: 'Minors can marry with the consent of a judge or the authorization of guardians'.

<sup>49</sup> Constitution of Ethiopia 1995: Art. 34(5) states that the Constitution does not preclude the application of religious or customary laws in matters linked to family and personal law, with the consent of the parties.

<sup>50</sup> Article 53 and 55 of the Kenyan Constitution protects children and youth from harmful practices. Because this prohibition is not explicitly related to all ages, Kenya has a negative score in this table.

<sup>51</sup> 21 years of age. A woman may enter marriage at 18–20 years with the permission of, *inter alia*, the minister of justice.

<sup>52</sup> Family Code No. 23/75 1975: One may marry at 16 if a guardian consents. A court may grant an exemption on age if necessary.

<sup>53</sup> Marriage of Non Muslims Act 1926: Age of marriage for a girl is 13 and a boy 15. Consent is required for marriage in writing from a father, a mother if the father is dead or a guardian if both parents are deceased.

<sup>54</sup> Girls can marry at 15, boys at 18. In July 2016, the Constitutional Court ruled that marriage under the age of 18 was illegal, and stated that Sections 13 and 17 of the Marriage Act were unconstitutional (see Case study 11 on Tanzania in this chapter on the High Court decision, and the appeal).

<sup>55</sup> Law of Marriage Act 1971: Third party consent is utilised to override minimum age of marriage requirements.

<sup>56</sup> Marriage Act (Cap 251) requires consent for parties who have not attained 21 years of age.

<sup>57</sup> Customary Marriage (Registration) Act (Cap 248) finds marriages of girls 16 years of age valid.

Art. 15(4) of the 2012 Provisional Constitution of Somalia indicates that *female circumcision* is a cruel and degrading practice and is tantamount to torture. The circumcision of girls is prohibited. Art. 31(1) stipulates that the state shall strive to eliminate emerging and existent cultural practices that negatively affect society.

Art. 16(4)(b) of the Transitional Constitution of South Sudan places an obligation on the state to enact laws that combat *harmful customs and traditions* that undermine the dignity and status of women. Further, Art. 17(1)(g) states that 'Every Child has the right not be subjected to negative and harmful cultural practices which affect his or her health, welfare and dignity.'

The 2005 Interim National Constitution of the Republic of Sudan stipulates in Art. 32(2) that the state shall combat harmful practices that undermine the dignity and status of women.

With respect to the age of marriage, Art. 31 of Uganda's 1995 Constitution states that the *age of marriage* is 18. This is, however, contra-indicated in other national laws, such as the Customary Marriage, which validates the marriage of a 16-year-old girl.

All other states—Burundi, Djibouti, Eritrea, Kenya, Rwanda and Tanzania—have provisions that may be used to address harmful practices. These focus on the principles of non-discrimination and equality before the law, torture, inhuman and degrading treatment, the right to liberty and security of the person, consent to marriage unions and the right to choose one's spouse and respect of international instruments such as the Maputo Protocol, CEDAW and the UNCRC, which have provisions that prohibit harmful practices and outline state obligations thereto.

**Statutory law and policy responses on child marriage:** All the states in the Eastern region have laws that outline the age of marriage. In the majority of the countries, the legal *age of marriage* is set at 18 (Burundi, Djibouti, Eritrea, Ethiopia, Kenya, Somalia, South Sudan and Uganda). Two countries do not guarantee 18 as the minimum age of marriage. In Tanzania, it is 14/15 years for girls and in Sudan it is 13 (non-Muslims) and 10 (Muslims). The consent of parents or guardians is required. Rwanda stands out for its higher age of marriage, at 21 years of age; a woman may enter into a marriage between 18 and 20 years with the permission of, *inter alia*, the minister of justice.

In all but one country, the minimum age of marriage applies to formal as well as *customary and religious marriage*. In Uganda, customary marriages with a girl of 16 years can be considered valid. In half of the countries in the region, the *full and free consent* of the woman entering a marriage is not guaranteed; Djibouti, Ethiopia, Somalia, Sudan, Tanzania and Uganda allow parents, guardians or other third parties to provide consent to a marriage.

Five states have launched a national *campaign* to end child marriage: Eritrea, Ethiopia, Kenya, Sudan and Uganda. These national campaigns are part of and in line with the AU Campaign to End Child Marriage. In this campaign, the AU provides key policy guidance on highlighting the harms and redress mechanisms needed to tackle child marriage in Africa. Of these countries, Ethiopia has established a coordination mechanism for implementation of the campaign. Uganda has gone several steps further by establishing a coordination mechanism and a national plan and through organisation of campaign implementation activities.<sup>lxiii</sup>

Kenya has a specific policy that outlines how to address FGM and child marriage with respect to adolescents. Beyond this, all other states have gender development plans that broadly outline their commitment to address GVAW. This can provide a basis for policy responses on child marriage, as well as FGM, if these are considered acts of GVAW. Unfortunately, there is no guarantee that this is the case, in the absence of explicit references to the same.

**Statutory law and policy frameworks on FGM:** Nine states have statutory laws that specifically prohibit FGM: Djibouti, Eritrea, Ethiopia, Kenya, Rwanda, South Sudan, Sudan, Tanzania and Uganda. In certain instances, this is linked to the advancement of other rights issues. For instance, in Tanzania it is linked to addressing GVAW and the right to education in the context of the 2016 Education Act and the 1998 Sexual Offences (Special Provisions) Act, respectively. Burundi and Rwanda do not prohibit FGM, and also lack constitutional provision to eliminate harmful practices. All countries that prohibit FGM also have a programmatic response to end the practice; the only exception here is South Sudan.

**Institutional reform:** With regard to institutional measures, commendable strides can be observed in at least four countries. Djibouti has a National Committee for the Total Abandonment of All Forms of Excision, established in 2009. In the same year, Ethiopia established a National Committee on the Eradication of Harmful Traditional Practices. Kenya established the Anti-FGM Board in 2012; two years later (2014) it established the Office of the Director of Public Prosecutions Anti-FGM and the Child Marriage Prosecution Unit.

## Key gaps and contestations

Key gaps with respect to child marriage relate to discrepancies in the **minimum age** of marriage. Two states do not see 18 as the minimum age, as outlined in the Maputo Protocol. In these two countries, Sudan and Tanzania, there is also a difference for girls and boys: boys have a later minimum age of marriage. A second key gap concerns **contradictions** in legal provisions regarding the age of marriage (Uganda). A third relates to provisions where third parties, such as parents, guardians, the minister of justice or others can **consent** to a marriage union. This can be utilised to override general minimum age of marriage requirements.

A fourth gap is the **lack of comprehensive policies and strategies to address child marriage**. In most of the states reviewed, there is an absence of clear laws and policies that specifically outline the steps states should take to address the issue of child marriage. Taking normative guidance from the Joint General Comment on Child Marriage (ACHPR and ACEWRC), as well as developing strategies in line with the AU Campaign to End Child Marriage, can resolve this policy gap.

A fifth gap is that half of the countries do **not outlaw harmful practices**, and some lack legal provisions prohibiting FGM. Retrogressive trends are also emerging with respect particularly to FGM. A critical issue undermining the elimination of FGM relates to arguments for the **medicalisation of FGM**, which are gaining root. Initial advocacy against FGM pointed to the crudeness of the methods used, among other harms. Medicalisation is in part a way to respond to this criticism by sanitising the FGM process. However, this approach fails to take into account other, non-medical, harms such as the assault on women and girls' bodily integrity, dignity and equality, and is therefore at odds with the Maputo Protocol.

Another worrisome issue is the trend, for instance in Kenya, towards convicting victims and/or survivors of FGM. This **penalises victims**, especially when they are sentenced to prison terms and/or fines for failure to report FGM. Conviction of the victim also goes against the spirit and intention of the Prohibition of FGM Act 2011, as it was intended to protect and not further victimise victims of FGM. This trend is now the subject of court litigation towards establishing a more protective legal stance for victims.

Claims that adult women allegedly **consensually engage in FGM** also work against the prohibition of FGM. Pro-FGM campaigners are intentionally misrepresenting well-established human rights and constitutional principles that forbid FGM by arguing that adult women can 'consensually' engage in FGM. In Kenya, this has been vigorously challenged in court by state and non-state actors; a determination on the matter is anticipated in 2018/19.



### 6.3.3 Central region

#### Trends, gaps and challenges

**Child marriage:** Child marriage is a critical concern for the Central region, especially in countries such as CAR and Chad, which have the highest prevalence rates not only the region but also on the African continent, but also for Angola, Cameroon, DRC, Equatorial Guinea and Gabon. National legal frameworks show progress as well as weak spots and gaps in the Central region. In nine countries, the legal age of marriage is set at 18. In Burundi and Rwanda, all three requirements for prohibiting child marriage are met. The minimum age of marriage is set at 18 years, and there are no exceptions to this. This also counts for Chad, which in addition to this also has an action plan in place for ending child marriage. In six other countries (Cameroon, CAR, Congo Republic, DRC, Equatorial Guinea and São Tomé and Príncipe), the legal framework has loopholes. The law in CAR sets the age of marriage at 18, but allows for exceptions by allowing third-party consent to a marriage.

The minimum age of marriage is not guaranteed at 18 in Angola and Gabon, whose legal and policy framework also scores low on the other indicators. Of the nine countries that do have the legal age of marriage set at eighteen, five have an action plan or campaign in place. Gabon's legal age of marriage is not set at 18, yet the country does have an action plan to end child marriage. Cameroon has a similarly contradictory legal and policy framework, with an action plan to end child marriage but no strong legal provisions on child marriage that would be in line with the Maputo Protocol.

**FGM:** With respect to FGM, seven out of eleven countries have legal provisions to prohibit FGM, but only three have a programmatic response to actually end the practice. These seven include Chad and CAR, where FGM prevalence rates are relatively high, at 38% and 24%, respectively. There are no legal provisions that prohibit FGM in Burundi, Rwanda and São Tomé and Príncipe.

None of the countries has provisions in their constitutions to eliminate harmful practices. Burundi, Rwanda and São Tomé and Príncipe do not score positively on any of these three indicators related to FGM and harmful practices.

**Table 6.10. Key legal and policy indicators in Central Africa, Harmful practices**

| Country               | INDICATORS                  |                                       |                          |  |  |                                  |   |
|-----------------------|-----------------------------|---------------------------------------|--------------------------|--|--|----------------------------------|---|
|                       | Legal age at marriage at 18 | No exceptions (full and free consent) | Applies to all marriages | Action/ strategic plan/ campaign to end child marriage | Constitutional provision eliminating harmful practices | Legal provisions prohibiting FGM | Programmatic response or action plan to end FGM |
| Angola                | No                          | No <sup>58</sup>                      | -                        | -  | No <sup>62</sup>                                       | -                                | -   |
| Burundi               | Yes                         | Yes                                   | Yes                      | No   | No   | No                               | No  |
| Cameroon              | Yes <sup>59</sup>           | No <sup>64</sup>                      | -                        | Yes  | No   | Yes                              | Yes   |
| CAR                   | Yes                         | No <sup>65</sup>                      | -                        | No   | No   | Yes                              | Yes   |
| Chad                  | Yes <sup>66</sup>           | Yes                                   | Yes <sup>67</sup>        | Yes  | No   | Yes                              | Yes   |
| Congo Republic        | Yes <sup>68</sup>           | No <sup>69</sup>                      | No <sup>70</sup>         | -  | No   | Yes                              | -   |
| DRC                   | Yes <sup>71</sup>           | No <sup>72</sup>                      | No <sup>73</sup>         | Yes <sup>74</sup>                                      | No   | Yes <sup>75</sup>                | -   |
| Equatorial Guinea     | Yes                         | Yes                                   | No <sup>76</sup>         | Yes <sup>77</sup>                                      | No <sup>78</sup>                                       | Yes                              | No  |
| Gabon                 | No                          | -                                     | -                        | Yes  | No <sup>79</sup>                                       | Yes                              | -   |
| Rwanda                | Yes <sup>80</sup>           | Yes                                   | Yes                      | No   | No   | No                               | No  |
| São Tomé and Príncipe | Yes                         | No <sup>81</sup>                      | Yes <sup>82</sup>        | No <sup>83</sup>                                       | No   | No                               | No  |

<sup>58</sup> There are exceptions; boys may marry at 16 and girls at 15 with the permission of a person endowed with authority over them, or where it seems to be in the best interests of the child seeking marriage.

<sup>59</sup> Art.7 prohibits customs that are contrary to the Constitution and the rights of women.

<sup>60</sup> There is incoherence in the legal age of marriage. The new Penal Code prohibits marriages under the age of 18 for women but the Civil Code of 1981 still allows marriages for girls above age 15.

<sup>61</sup> Le chef de l'Etat a le droit d'autoriser pour motif grave un mariage avant l'âge de puberté légale' (Code Civil Art. 52, ordonnance 29).

<sup>62</sup> The legal minimum age for civil marriage is 18, but marriage at 13 may be permitted if approved by a court and/or if the girl is pregnant. It is also legal with parents' consent.

<sup>63</sup> 'En vertu de l'article 144 du Code civil, l'âge minimum du mariage pour les femmes est de 15 ans'. The Penal Code 2017 criminalises marriages with girls and boys who have not reached the legal age of marriage. The legal age of marriage is not defined in the Penal Code. The ordinance to ban child marriage (2015) defines the minimum age of 18.

<sup>64</sup> The ordinance to ban child marriage (2015) criminalises civil, religious and traditional child marriage (Art. 5).

<sup>65</sup> Code de la Famille (Art. 128): 21 years for males, 18 years for females

<sup>66</sup> Exemptions: the Public Prosecutor of the People's Court or the District may grant waivers of age for serious reasons (Code of the Congolese Family, Art. 128).

### Trends in legal, policy and institutional reform

**Constitutional provisions:** None of the states in the region have provisions in their Constitution regarding harmful practices or child marriage. All states, however, have provisions that may be utilized to address harmful practices. These focus on the principles of non-discrimination and equality before the law, torture, inhuman and degrading treatment, the obligation of the state to protect women, youth and families, the right to liberty and security of the person, the right to physical integrity.

Most constitutions provide for the right to culture, cultural patrimony, respect of cultural identity, traditional values, religion and belief, and the need to protect national culture (Burundi, Cameroon, Congo Republic, Gabon, Rwanda) or recognise customary law or authority (Chad, DRC). Although constitutions do not explicitly ban harmful practices or FGM, they allow cultural, religious and customary practices *within the boundaries of the law*. They prohibit practices leading to personal harm and manipulation, the strengthening of inequality (Chad) and threats to national security, public order or morality (Congo Republic, DRC). Also, customary legal frameworks need to be verified against the Constitution (Chad) or should not be inconsistent with the Constitution or violate human rights (Rwanda). Only Angola has a provision specifically relating to women's rights in that it prohibits customs that are contrary to the rights of women.

**Statutory law and policy responses on child marriage:** The majority of countries in the region have adopted **18 years as the legal age of marriage**; some differentiate between girls and boys, with girls able to marry at a younger age (18) than boys (21) (e.g. Congo Republic and Rwanda). At least five states (Angola, Cameroon, CAR, Congo and São Tomé and Príncipe) allow girls to be married before 18 if their parents or judicial bodies give their consent. The CAR family code has an additional provision that marriage at age 13 is allowed if the girl is pregnant.

The penal codes of most countries have provisions on early, child or forced marriages. The Penal Code of Gabon, for example, penalises customary early marriage and forced marriage of girls under the age of 15 without their consent. Not all forms of forced marriage are prohibited. For example, the Penal Code of Congo Republic allows marriage between abductors and abducted minors under age 18 in the case of bride kidnapping. Abduction must have been free of violence and fraud and marriage can only be prosecuted after annulment by qualified people.

The strengthening of **civil registration systems** is a crucial strategy to prevent child marriage. Most countries in the region have recently strengthened their legal and policy frameworks for systematic birth registration. Countries like São Tomé and Príncipe (2009), Chad (2013), Angola (2015), CAR (2016), DRC (2016) and Rwanda (2016) have introduced specific birth registration acts or strategies. Most countries have penalties in the case of failure to register, or for late registration, such as Burundi.<sup>lv</sup> Proof of age or the presentation of a birth certificate is required for marriage registration in most countries, and its absence penalised in some (e.g. DRC). It is expected that such birth certificates will provide legal protection against child marriage.

Cameroon, Chad, DRC, Equatorial Guinea and Gabon have launched **national campaigns to end child marriage, of which all, except** those of Equatorial Guinea and Gabon, are part of and in line with the AU Campaign to End Child Marriage. Cameroon and DRC have launched the AU campaign, with Cameroon also establishing a coordination mechanism. Chad has taken most measures towards implementation of the campaign, by establishing a coordination mechanism and a national plan and initiating implementing activities. In Chad, the campaign is combined with strategies to fight FGM. In CAR, forced and early marriage has been on the government's agenda in the context of harmful practices performed by, or ordered by, armed forces.<sup>lv</sup>

<sup>67</sup> The Family Code provides the possibility of pre-marriage (engagement) that includes cohabitation before official marriage.

<sup>68</sup> Loi 10 Janvier 2009 Portant Protection de l'Enfant (Art. 49).

<sup>69</sup> The Family Code 2016 stipulates that mandated representatives can give consent after approval by a judge (Art. 351) and that marriage can only take place after payment of the brideprice.

<sup>70</sup> The Family Code 2016 stipulates that 'La célébration du mariage en famille se déroule conformément aux coutumes des parties, pour autant que ces coutumes soient conformes à la loi, à l'ordre public et aux bonnes mœurs'.

<sup>71</sup> [www.girlsnotbrides.org/african-union-extends-campaign-to-end-child-marriage-until-2017/](http://www.girlsnotbrides.org/african-union-extends-campaign-to-end-child-marriage-until-2017/)

<sup>72</sup> Code on Child Protection 2009, Art. 153.

<sup>73</sup> Art. 22(2) of the Constitution states that the state protects all types of marriage celebrated according to law. The 'law' is not further defined. There is a law on customary marriages but it does not refer to age of marriage; this is supposed to be under review.

<sup>74</sup> The campaign is mentioned in the 'Report on the Status of Child Marriage in Africa and the Evaluation of the AU Campaign to End Child Marriage' (Department for Social Affairs, AUC. 2016).

<sup>75</sup> Art. 23(1) of the Constitution provides for the protection of people from their conception onwards and promotion by the state of the normal development of youth and the protection of their moral, mental and physical integrity, as well as his life within the home.

<sup>76</sup> Arts 1(16) and 1(17) of the Constitution have provisions that state that *all* children have the right to physical and moral development and that youth should be protected from exploitation and moral, intellectual and physical neglect.

<sup>77</sup> 21 years of age. A woman may enter into a marriage between 18 and 20 years with the permission of, among others, the Minister of Justice.

<sup>78</sup> In specific circumstances, family law allows girls under 14 and boys under 16 to marry. The law does not explicitly mention consent but demands that this be a free and voluntary decision.

<sup>79</sup> There is no specific information on other types of marriages.

<sup>80</sup> In 2016 a National Policy on Child Protection was approved but nothing specific on early marriage.



**Statutory law and policy frameworks on FGM:** Most countries, except for Burundi, Rwanda and São Tomé and Príncipe, have **legislation prohibiting FGM**. Gabon has enacted a specific law prohibiting FGM and has an additional reproductive health act that prohibits the practice. Chad has a reproductive health act that prohibits any cruel, inhuman or degrading treatment of the body, in particular of reproductive organs. CAR has a violence against women act that includes an article prohibiting FGM. Penal codes in Cameroon, CAR, Chad and Gabon strengthen such provisions by prohibiting FGM. Some penal codes have broader provisions: Congo Republic addresses violence resulting in mutilation and DRC prohibits 'barbaric practices'. Cameroon also has provisions on **other types of harmful practices** such as witchcraft, breast-ironing and organ enlargement.

CAR and Chad are the two countries in the region with the highest percentage of girls and women aged 15–49 years who have undergone FGM (respectively, 38% and 24%). In Cameroon, the practice is prevalent in some regions. Cameroon and Chad have a national action plan to fight harmful practices including FGM and child marriage and CAR has a national GVAW action plan as well as a national policy on reproductive health that addresses FGM. In Chad, women's rights organisations have organised campaigns against FGM since 1988.

**Institutional reform:** Cameroon, CAR and Chad have established national committees against harmful traditional practices and violence against women and girls. At the subnational level, Cameroon proposes to install local committees to fight FGM. The government collaborates with Muslim leaders to address early and forced marriage and FGM.

Apart from child marriage and FGM, governments and civil society address other harmful practices in their legal and policy frameworks and programmes. An example is the initiative in north-western Cameroon of Interfaith Vision Foundation to address legal pluralism with regard to harmful practices, in particular against widows. The Foundation has supported the set-up of widows' groups and, together with traditional authorities, has introduced a 'charter ending wife inheritance and degrading widowhood', used by different villages to arbitrate cases of violation of widows' rights.<sup>lxvi</sup>

### Key gaps and contestations

A first gap is that none of the states (except for Angola) in the region has explicit **constitutional provisions on harmful practices or FGM**—this is even more the case than in any of the other regions. Also, a lack of provisions to indicate that constitutions or international law prevail over other laws, such as customary law, reduces legal guarantees against harmful practices. Constitutions that stipulate that citizens have the obligation to reinforce cultural values (e.g. Burundi) have the same effect. Only Angola's Constitution explicitly prohibits customs that are contrary to the Constitution and the rights of women.

A second gap is that, although states have increased the minimum age of marriage, most have **one or more exceptions to this minimum age**. As a consequence, even rigorous enforcement of existing laws is unlikely to eliminate child marriage. Also, there is inconsistency in legislation regarding the minimum age of marriage. For example, in Cameroon and Chad, the penal codes have recently been updated to align with international conventions, but the civil codes are outdated and still allow marriage of girls from age 15.

Third, there are some gaps or **inconsistencies in legislation**. For example, Chad, does not have provisions against the medicalization of FGM, creating loopholes that could encourage health professionals to perform the practice.

Fourth, despite the clarity in statutory laws with respect to child marriage and FGM, such as reproductive health acts and penal codes, observers report a **lack of enforcement**. For example, in Chad, the Reproductive Health Act of 2002 is not yet accompanied by an application decree, which means the judiciary and the police cannot use the provisions in the Act. Insufficient budget allocations, inadequate capacity-building efforts and a lack of community programmes to address social norms can hinder the prevention of harmful practices and the acceleration of their abandonment.<sup>lxvii</sup>

### 6.3.4 Southern region

#### Trends, gaps and challenges

With respect to the legal and policy frameworks on child marriage of the countries in Southern Africa, the Revised SADC Protocol on Gender and Development reinforces 18 as the legal age of marriage and provides for the full and free consent of both parties entering a union, with no exceptions (Art. 8.2).

Malawi and Zimbabwe stand out with positive scores on each of the four legal and policy indicators regarding child marriage. Botswana, DRC, Lesotho, Madagascar, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland and Zambia all have a legal age of marriage set at 18, but also all have loopholes, either by allowing for third-party consent or for not applying the minimum age to customary and religious marriages. Comoros lives up to the legal requirements of the Maputo Protocol regarding child marriage but lacks an action or strategic plan. Tanzania has the weakest legal and policy framework, as it scores positively only on the indicator that the legal age of marriage applies to all marriages. Angola's legal and policy framework also does not look strong, with a legal age of marriage below 18, a lack of guarantees on full and free consent and missing data on the other two indicators.

Given that FGM is not commonly practised in most countries in the region, the legal and policy frameworks on this differ from those of other regions. Tanzania is the only country that has both legal provisions and a programmatic response to end FGM. Malawi and Swaziland have relatively stronger profiles, with both constitutional and legal provisions against harmful practices. Angola's Constitution prohibits customs contrary to women's rights. Most other countries lack a constitutional provision but do have statutory law regarding harmful practices. Comoros, Mozambique and Seychelles score negatively on both indicators.

**Table 6.11. Key legal and policy indicators in Southern Africa, Harmful practices**

| Country      | INDICATORS                  |                                       |                          |  |  |                                  |   |
|--------------|-----------------------------|---------------------------------------|--------------------------|--|--|----------------------------------|---|
|              | Legal age at marriage at 18 | No exceptions (full and free consent) | Applies to all marriages | Action/ strategic plan/ campaign to end child marriage | Constitutional provision eliminating harmful practices | Legal provisions prohibiting FGM | Programmatic response or action plan to end FGM |
| Angola       | No <sup>81</sup>            | No <sup>82</sup>                      | -                        | -  | No <sup>83</sup>                                       | -                                | -   |
| Botswana     | Yes <sup>84</sup>           | No <sup>85</sup>                      | Yes <sup>86</sup>        | -  | No   | HP                               | -   |
| Comoros      | Yes                         | Yes                                   | Yes                      | No   | No   | No                               | No  |
| DRC          | Yes <sup>87</sup>           | No <sup>88</sup>                      | No <sup>89</sup>         | Yes <sup>90</sup>                                      | No   | Yes <sup>91</sup>                | -   |
| Lesotho      | Yes <sup>92</sup>           | No <sup>93</sup>                      | No <sup>94</sup>         | Yes <sup>95</sup>                                      | No   | HP                               | -   |
| Madagascar   | Yes                         | No <sup>96</sup>                      | No <sup>97</sup>         | Yes  | No   | Yes <sup>98</sup>                | -   |
| Malawi       | Yes                         | Yes                                   | Yes                      | Yes  | Yes <sup>99</sup>                                      | HP                               | -   |
| Mauritius    | Yes                         | No <sup>100</sup>                     | - <sup>101</sup>         | -  | No   | HP                               | -   |
| Mozambique   | Yes                         | No <sup>102</sup>                     | -                        | Yes  | No   | No                               | -   |
| Namibia      | Yes                         | No <sup>103</sup>                     | Yes                      | -  | No <sup>104</sup>                                      | HP                               | -   |
| Seychelles   | Yes                         | No <sup>105</sup>                     | -                        | -  | No   | No                               | -   |
| South Africa | Yes                         | No                                    | Yes                      | -  | No <sup>106</sup>                                      | Yes                              | -   |
| Swaziland    | Yes <sup>107</sup>          | No <sup>108</sup>                     | -                        | -  | Yes <sup>109</sup>                                     | HP                               | -   |
| Tanzania     | No <sup>110</sup>           | No <sup>111</sup>                     | Yes                      | No   | No   | Yes                              | Yes   |
| Zambia       | Yes <sup>112</sup>          | No <sup>113</sup>                     | No                       | Yes  | No   | Yes                              | -   |
| Zimbabwe     | Yes                         | Yes <sup>114</sup>                    | Yes                      | Yes  | No   | HP                               | -   |

<sup>81</sup> The legal age is 16.

<sup>82</sup> There are exceptions: boys may marry at 16 and girls at 15 with the permission of a person endowed with authority over them, or where it seems to be in the best interests of the child seeking marriage.

<sup>83</sup> Art. 7 prohibits customs that are contrary to the Constitution and the rights of women. The provision says the validity and legal force of custom that does not contradict the Constitution or threaten human dignity shall be recognised.

<sup>84</sup> The minimum age of marriage is set at 21.

<sup>85</sup> Parental consent can lower the age of marriage for children, allowing them to marry.

<sup>86</sup> Chapter 29:01 of the Marriage Act provides that 'No insane person who is incapable of giving consent to a marriage and no person below the age of 18 years may marry.' It also provides that 'No minor or person below the age of 21 years not being a widower or widow may marry without the consent in writing of his or her parents or guardians.'

<sup>87</sup> Loi 10 janvier 2009 Portant Protection de l'Enfant (Art. 49).

### Trends in legal, policy and institutional reform

**Constitutional provisions:** Countries in the Southern region have progressed in terms of integrating gender equality and women's rights norms in their legal frameworks. By 2017, 10 countries had reviewed their constitutions to harmonise these with the SADC Protocol on Gender and Development 2016: Angola, DRC, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Zambia and Zimbabwe.<sup>115</sup> Since 2005, Angola (2010), Botswana (2006), Malawi (2017), Mozambique (2007), Namibia (2014), Seychelles (2011), Swaziland (2006), Zambia (2009) and Zimbabwe (2013) have successively undertaken constitutional amendments with a bearing on gender equality. These amendments include provisions on freedom from forced marriage, prohibition of harmful cultural practices, rights of the (girl) child and women's rights and the age of marriage.

Angola and Swaziland have specific provisions in their Constitutions that prohibit or invalidate customs or practices that violate women's rights or discriminate against women. Swaziland's Constitution states that women have the 'right to refuse to undergo or uphold any customary practice to which her conscience is opposed, and that interpretation of customary law in a manner that is consistent with the constitution'. Angola, Namibia and South Africa have constitutional provisions regarding the recognition of customary law, and note that this cannot contradict the Constitution, or in South Africa's case the Equality Clause.

Botswana, South Africa and Swaziland have amended their constitutions to provide gender equality, non-discrimination, protection of bodily integrity and security of person, as well as protection against inhuman and degrading treatment; such provisions provide a strong basis for advocacy for combating harmful practices.

**Statutory law and policy responses on child marriage:** As a result of intensive efforts at country level, incidence of child marriage has declined in several countries in the Southern region. Legal and constitutional reforms in raising the minimum marriage age for girls and boys to 18 years have contributed to these recent declines. In 14 countries, the minimum age of marriage is now 18 years. In four of these (Botswana, Lesotho, Swaziland and Zambia), the legal age of marriage is actually 21 years. Angola and Tanzania's minimum age is under 18: it is allowed at 16 and 15 years, respectively.

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- 88 The Family Code 2016 stipulates that mandated representatives can give consent after approval by a judge (Art. 351) and that marriage can only take place after payment of the brideprice.
  - 89 The Family Code 2016 stipulates that: 'La célébration du mariage en famille se déroule conformément aux coutumes des parties, pour autant que ces coutumes soient conformes à la loi, à l'ordre public et aux bonnes mœurs.
  - 90 [www.girlsnotbrides.org/african-union-extends-campaign-to-end-child-marriage-until-2017/](http://www.girlsnotbrides.org/african-union-extends-campaign-to-end-child-marriage-until-2017/)
  - 91 Code on Child Protection 2009, Art. 153.
  - 92 The minimum age of marriage is set at 21.
  - 93 Parental consent to a marriage where children are below 18 is permitted.
  - 94 Under customary practice, the age of marriage is upon attaining puberty.
  - 95 Contained in the National Multisectoral Child Protection Strategy 2014/15–18/19.
  - 96 There can be an exception if parents obtain a waiver from a local official.
  - 97 Under customary marriage, there is no age limit.
  - 98 Code of déontologie médicale Art. 39 states that no mutilating intervention can be performed without informing the applicant and without his or her consent.
  - 99 The Constitution invalidates customs or practices that discriminate against women.
  - 100 With parental consent, minimum age limits can be waived.
  - 101 There seems to be only one type of marriage in Mauritius (civil), but this could not be fully established.
  - 102 Marriage can occur before attaining the age of 18 with parental consent in exceptional circumstances.
  - 103 Consent for persons to marry before attaining 18 years may be granted by a public official.
  - 104 The Constitution recognises customary law only to the extent that it does not conflict with the Constitution.
  - 105 Marriage can take place before 18 years under grave circumstances when sought by parents.
  - 106 The Constitution provides that customary law shall not be applied where it contradicts the Equality Clause.
  - 107 Marriage is set at 21 years of age. A woman may enter into a marriage between 18 and 20 years with the permission of, *inter alia*, the minister of justice.
  - 108 With parental consent, marriage can take place before the age of 18.
  - 109 The Constitution states that a woman has the right to refuse to undergo or uphold any customary practice to which her conscience is opposed, and that interpretation of customary law must be carried out in a manner that is consistent with the Constitution.
  - 110 Girls can marry at 15, boys at 18. In July 2016, the Constitutional Court ruled that marriage under the age of 18 was illegal, and stated that Sections 13 and 17 of the Marriage Act were unconstitutional (see also Case study 11 on Tanzania in this chapter on the High Court decision, and the appeal to it).
  - 111 Law of Marriage Act 1971: third-party consent is utilised to override minimum age of marriage requirements.
  - 112 Marriage is set at 21 years of age.
  - 113 Marriage can take place at 16 years if parents give consent.
  - 114 A Constitutional Application Judgement determined that, with effect from 20 January 2016, no male or female may enter into any marriage, including an unregistered customary law union or any other union, including one arising out of religion or religious rite, before attaining the age of 18 years.
  - 115 This does not refer to Comoros, which joined SADC in 2017.

The positive picture regarding 18 being the minimum age of marriage in most Southern countries is set off by many legal framework loopholes. Full and free consent is guaranteed in only three countries: Comoros, Malawi and Zimbabwe. In all other countries, exemptions are allowed when parents, and in a few cases public officials, give consent for marriage of a girl before the age of 18. Such anomalies are driven by customs and traditions that view girls as marriageable from a very young age. To compound this, in only six countries does the legal age of marriage at 18 apply to all marriages. As a result, in many countries there is space under customary law to marry off girls who attain puberty. Such contradictions between customary and codified law continue to undermine women's enjoyment of their rights. This is critical because countries practise legal pluralism, with statutory law alongside or co-existing with customary, and in some instances religious, laws. In four countries, it could not be established whether the legal age of marriage applied to customary and religious marriages or not.

The SADC model law, while non-binding, is a positive development, particularly given that it was a consensus initiative aimed at distilling best practices and positive standards across the region. Its emphasis on a minimum age of 18 for marriage age is laudable, and already countries like Zimbabwe and Malawi have moved to undertake the necessary legal and constitutional reforms to comply with this. Civil society actors are using this model law to lobby governments to adopt its standards (see also Case study 9 in this chapter).

Gains are being made in addressing child marriages in Malawi and momentum is gathering in South Africa, Zambia and Zimbabwe. The SADC Gender Protocol is accredited with having 'triggered a revolution with court judgments in the region in favour of women and children in the area of marriage and family laws'.<sup>lxviii</sup> In Zimbabwe, the Constitutional Court has declared all forms of marriage of girls below 18 years unconstitutional, as well as laws that allow for underage marriages. Malawi has followed by raising the age of marriage to a minimum of 18 years, and other countries in the region are being lobbied to follow suit. However, these changes are taking place after long drawn-out legal battles or prolonged periods of vigorous lobbying and debate, often challenged by a strong backlash from conservative forces.

Lesotho, Malawi, Mozambique and Zambia have initiated campaigns to end child marriage. Countries that have launched campaigns as part of and in line with the AU Campaign to End Child Marriage include DRC, Madagascar and Zimbabwe. DRC has only launched the campaign, whereas Madagascar and Zimbabwe have progressed towards implementation.<sup>lxix</sup>

**Statutory law and policy responses on harmful practices:** As FGM is not commonly practised in the Southern region, except for among migrant groups in some countries, the indicators regarding legal provisions prohibiting FGM and a programmatic response to the same effect may not be most relevant here. Child as well as forced marriage, including marriage by abduction, is, however, a prominent harmful practice in the region. Other harmful practices identified in the region include accusations of witchcraft against old women, widowhood rituals (including widow inheritance and widow cleansing through sexual assaults), dry sex, abduction, claims for dowry refunds, property dispossession and virginity testing. Son preference and taboos around sexual and reproductive rights are still a powerful tradition, resulting in neglect, deprivation and discriminatory treatment of girls to the detriment of their physical and mental health, and can include prohibition of contraceptive use.

In Southern Africa, harmful cultural practices are based on stereotypes of the inferior status of women. Such patterns of discrimination reinforce practices that drive women into situations that compromise their autonomy and bodily integrity, often under coercive, dangerous and violent circumstances. These cultural practices, which exist in different forms, 'wear down the physical and psychological health and integrity of individuals, especially women and girls'.<sup>lxx</sup> Many of them cause extreme forms of physical and psychosocial pain and others subject women and girls to inhuman and degrading treatment that exposes them to HIV and AIDS. The SADC Gender Protocol refers to the various forms of harmful practices in the region, albeit about the girl and boy child.

As mentioned above, two countries have constitutional provisions regarding the elimination of harmful practices. Five have legal provisions in statutory law that are specific about the prohibition of FGM: DRC, Madagascar, South Africa, Tanzania and Zambia. Of those five, Tanzania is the only country that also has a programmatic response to end FGM. Seven countries have provisions in statutory law on harmful practices: Botswana, Lesotho, Malawi, Mauritius, Namibia, Swaziland and Zimbabwe, often reflected in laws on the rights of the child or on sexual violence. Comoros, Mozambique and Seychelles lack any constitutional or legal provision regarding harmful practices.

The role of traditional authorities in averting harmful practices such as child marriage is critical, as traditional authority structures are well established in the majority of the countries in the Southern region. Champions in key leadership institutions in countries like Malawi and Zambia have integrated human rights standards within their spheres of influence and become essential drivers of change in combating harmful traditional practices. In Zimbabwe, a constitutional amendment requires traditional leaders to comply with the Constitution (Art. 6), which harbours well for integrating human rights with cultural norms.

More countries are addressing the structural causes of harmful practices and looking at the role of culture and tradition *vis-à-vis* their human rights obligations under various international and regional women's rights frameworks. The Law Commission of Zimbabwe and the National Gender Machinery are working to harmonise customary laws to ensure conformity with constitutional standards in order to eliminate contradictions that may create ambiguity in the application of the law.<sup>lxxi</sup>

The South African Law Reform Commission in 2014 undertook a study on the appropriateness of the laws on *ukuthwala* (a tradition that allows a man to abduct a woman he wishes to marry, even if he has not proposed love) and the impact on the girl child.<sup>boxii</sup> This stated that, as a customary practice, *ukuthwala* is tantamount to forced marriage, child marriage and violence against women and young girls, and constitutes a gross violation of the rights of women and girl children that can in no way be justified. The Commission concluded that constitutional recognition of cultural diversity should not be used as an excuse for or to sanction the violation of the rights and liberties of women and children. Later on, the Commission annexed to the report a Draft Prohibition Of Forced Marriages and Child Marriages Bill.<sup>boxiii</sup> Pronouncements from critical institutions endowed with reformatory mandates have the propensity to eventually transform the *status quo* of harmful cultural practices.

### Key gaps and contestations

The key gaps in the legal and policy frameworks relate to **exemptions to the legal age** of marriage, when parents can provide consent for marriage before the age of 18, and **customary and religious marriages** not falling under the minimum age of marriage. With respect to **harmful practices**, the majority of the countries have legal provisions regarding their elimination, but three do not.

One key contestation is that, while half of the states in the Southern region have either a constitutional or a statutory law provision on harmful practices or FGM, almost all constitutions provide for the **right to practise one's own culture**. Harmful practices are contentious in that, while some view them as human rights violations, others claim them as cherished cultural norms and rituals. Even where laws are in place, they may not be adhered to by all women and men in communities or religious and cultural institutions. In the area of personal status law, these contradictions and contestations often do not resolve themselves in favour of women's rights, particularly with regard to marriage, divorce and inheritance rights, property rights, SRHR and parental rights.

### 6.3.5 Northern region

#### Trends, gaps and challenges

The legal and policy frameworks with respect to child marriage and FGM seem relatively weak in the Northern region. With respect to child marriage, all countries have a legal age of marriage of 18, but four countries (Egypt, Mauritania, Morocco and Tunisia) do not guarantee full and free consent. For the other two (Algeria and Libya), full and free consent is guaranteed in the law but it is not clear whether this applies to all marriages. The latter point is actually not clear for five of the six countries.

Regarding FGM, none of the countries in the Northern region has a constitutional provision to eliminate harmful practices. Three countries also lack legal provisions and a programmatic response on FGM; for Tunisia this data is missing. Only Egypt and Mauritania have a legal ban on FGM and also have a programmatic response to end the practice.

**Table 6.12. Key legal and policy indicators in Northern Africa, Harmful practices**

| Country        | Indicators                  |                                       |                          |  |  |                                  |   |
|----------------|-----------------------------|---------------------------------------|--------------------------|--|--|----------------------------------|---|
|                | Legal age at marriage at 18 | No exceptions (full and free consent) | Applies to all marriages | Action/ strategic plan/ campaign to end child marriage | Constitutional provision eliminating harmful practices | Legal provisions prohibiting FGM | Programmatic response or action plan to end FGM |
| Algeria        | Yes <sup>119</sup>          | Yes <sup>120</sup>                    | -                        | -  | No   | No                               | No  |
| Libya          | Yes <sup>121</sup>          | Yes <sup>122</sup>                    | -                        | -  | No   | No                               | No  |
| Egypt          | Yes                         | No <sup>123</sup>                     | -                        | Yes  | No   | Yes                              | Yes   |
| Tunisia        | Yes                         | No <sup>124</sup>                     | -                        | -  | No   | -                                | -   |
| Mauritania     | Yes                         | No <sup>125</sup>                     | -                        | Yes  | No   | Yes <sup>126</sup>               | Yes   |
| Morocco        | Yes <sup>127</sup>          | No <sup>128</sup>                     | Yes <sup>129</sup>       | -  | No   | No                               | No  |
| Western Sahara | -                           | -                                     | -                        | Yes  | -  | -                                | -   |

<sup>116</sup> The age of marriage is 18 for females, 21 for males.

<sup>117</sup> Courts have the discretion to lower the age of marriage. There are exceptions: boys may marry at 16 and girls at 15 with the permission of a person endowed with authority over them, or where it seems to be in the best interests of the child seeking marriage.

<sup>118</sup> Art. 6 of Act No. 10 of 1984, regulating marriage and divorce and their consequences, sets eligibility for marriage at 20 years.

<sup>119</sup> This allows for judicial discretion whereby a court may, with the consent of the guardian, authorise marriage before attainment of majority age.

<sup>120</sup> Various limitations: the Civil Code limits the ability of a woman to enter into a marriage, requiring that she has the consent of a male guardian. An inter-faith marriage between a Muslim woman and a non-Muslim man is also restricted. 'Le chef de l'Etat a le droit d'autoriser pour motif grave un mariage avant l'âge de puberté légale' (Code Civil Art. 52, ordonnance 29).

<sup>121</sup> While Tunisia's Personal Status Code sets equal marriage conditions for both men and women, a 1973 administrative directive forbids the registration of a marriage of a Muslim woman to a non-Muslim man. It includes no such restriction on Muslim men.

<sup>122</sup> The legal guardian of a girl under the age of 18 years can request local authorities allow the marriage to take place.

<sup>123</sup> A bill was approved by the Council of Ministers in 2016 that stipulates that the right to reproductive health is a universal right guaranteed to all throughout the course of their lives. It also prohibits all forms of violence against women, including FGM. No information is available on whether the bill has passed into law.

<sup>124</sup> The Moroccan Family Code 'Moudawana' raised the legal age of marriage to 18 years for both girls and boys in 2004; it was previously set at 15 for girls.

<sup>125</sup> Article 20 of the Family Code 'Moudawana' stipulates that 'The Family Affairs Judge in charge of marriage may authorize the marriage of a girl or boy below the legal age of marriage as stipulated in preceding Article 19, in a well-substantiated decision explaining the interest and reasons justifying the marriage, after having heard the parents of the minor who has not yet reached the age of capacity or his/her legal tutor, with the assistance of medical expertise or after having conducted a social enquiry.'

<sup>126</sup> If a judge has refused to authorise an underage marriage, the parents organise a traditional marriage ceremony, which consist of reading the 'Fatiha'—a verse of the Quran. Art. 22(2) of the Constitution avers that the state protects all types of marriage celebrated according to law. The 'law' is not further defined. There is a law on customary marriages but this does not refer to the age of marriage. This is supposed to be under review.



### *Trends in legal, policy and institutional reform*

**Constitutional provisions:** All of the states in the Northern region have constitutional provisions, which are considered essential in protecting women and girls from harmful practices. While none of the states reviewed has a constitutional provision eliminating harmful practices, most expressly proscribe violence. Algeria prohibits all forms of physical or psychological violence or indignity and Egypt guarantees the equality of women in all spheres and the protection of women from all forms of violence. Children (girls) are also protected from violence and sexual exploitation. Egypt additionally prohibits trafficking within its Constitution. Tunisia's Constitution also includes a commitment to eradicate GVAW. Morocco's Constitution prohibits incitement to violence. All the states reviewed also have provisions on equality and non-discrimination on the basis of sex or gender, which also provides a key foundation for women's protection from harmful practices.

**Statutory law and policy responses on child marriage:** All the states reviewed have laws that outline the age of marriage as 18. In four states reviewed, free and full consent to enter into marriage is burdened with several exceptions, with the most common being the consent of male guardians or parents playing a significant role. Three countries have initiated a programmatic response to child marriage: Egypt, Mauritania and Western Sahara. None of the countries has launched a campaign as part of or in line with the AU Campaign to End Child marriage.<sup>lxxiv</sup>

In 2004, Morocco adopted a new Family Code ('Moudawana'), which grants women considerable rights that did not exist in the previous Islamic-based family law. The reform of the Family Code gives women the right to divorce and also sets the minimum age of marriage for girls at 18 years (it had been 15). However, Art. 20 stipulates that a judge can authorise an underage marriage.<sup>127</sup> Even if a judge denies authorisation for an underage marriage, the parents can organise a traditional marriage ceremony, which consists of reading the 'Fatihah', a verse of the Quran, so the marriage can take place.<sup>lxxv</sup>

Morocco has also revised its Penal Code, in particular the contentious Art. 475(2), which allowed rapists to marry their victims to escape criminal charges.<sup>128</sup> This revision took place after protest sparked throughout the country in 2012, when a 16-year-old girl committed suicide after being forced to marry her rapist. Tunisia, in its newly passed law on GVAW, has also removed a controversial article that allowed rapists to escape punishment through marrying the victim. This provision had previously resulted in instances of child marriage sanctioned by law.

**Statutory law and policy responses on FGM:** Of the states reviewed, FGM is criminalised in Egypt and Mauritania. FGM is not a common practice in Morocco and Tunisia and this could explain the lack of laws and measures in this regard. Only Egypt and Mauritania seem to have programmatic responses with respect to FGM.

In Mauritania, the 2016–20 National Strategy on Reproductive Health sets FGM as a 'public health concern'.<sup>lxxvi</sup> Furthermore, the government has put the eradication of FGM in the country's Strategy on Accelerated Growth and Prosperity 2016–30.<sup>lxxvii</sup> The Government of Mauritania in partnership with CSOs and religious leaders has been advocating for the abandonment of FGM in hospitals and for educating health professionals on its damaging effect. Furthermore, the country has been raising awareness through the media and information campaigns. In 2010, the Iman of Nouakchott issued a *fatwa* (religious decree) against the practice of FGM and called for its total abandonment.<sup>lxxviii</sup>

<sup>127</sup> Art. 20 stipulates 'The Family Affairs Judge in charge of marriage may authorize the marriage of a girl or boy below the legal age of marriage as stipulated in preceding Article 19, in a well-substantiated decision explaining the interest and reasons justifying the marriage, after having heard the parents of the minor who has not yet reached the age of capacity or his/her legal tutor, with the assistance of medical expertise or after having conducted a social enquiry.'

<sup>128</sup> The controversial article stated that 'When a marriageable minor thus removed or divorced has married his kidnapper, he can only be prosecuted on the complaint of the persons having the right to request the annulment of the marriage and cannot be condemned until after this marriage annulment has been pronounced.'

## Key gaps and contestations

In most countries in the Middle East and North Africa, some cultural and religious practices embedded in the law are discriminatory to women. This leads to **inequality in marriage and inheritance rights based on cultural values**. In some instances, women and girls are subjected to virginity tests, which are conducted by a doctor at the request of the woman's family, prior to marriage, and may result in vaginal reconstruction if deemed necessary.<sup>boxix</sup> In Libya, in some instances virginity tests are utilised in court cases.<sup>boxx</sup> On inheritance, in Algeria succession laws are based on Sharia; women do not inherit equally on the same basis as men.<sup>129</sup> Similarly, in Tunisia, where there are any sons, the males inherit twice as much as the females. In most countries in the region, women's right to divorce is restricted as a result of cultural and religious norms (see also Chapter 5, Northern region).

These inequalities in marriage and inheritance laws also relate to marriage provisions directly relevant to child marriage. Loopholes exist that undermine the full and free consent of women and girls in marriage. In Mauritania, the legal age of marriage is set at 18 for girls; however, a marriage can take place if the guardian requests this from the local authorities. In Egypt, where the age of marriage is 18, the law merely prohibits but does not criminalise the practice of child marriage. As a result, child marriage is still frequently practised in the country. Religious and traditional beliefs and customs are reported as stalling the progress of ending child marriage.<sup>boxxi</sup>

In Algeria, a woman cannot marry without the permission of her **male guardian**; although she cannot be compelled to marry against her wish, the absence of a guardian renders any marriage invalid. In Libya, while forced marriages are forbidden, the practice of male guardianship in areas of a woman's personal status, both *de jure* and *de facto*, prevents women exercising their rights on the same basis as men. In Algeria, Egypt and Tunisia, a Muslim woman is not allowed to marry a non-Muslim man, whereas a Muslim man can marry a non-Muslim woman.

Another critical contestation relates to the **medicalisation of FGM**. Egypt has one of the highest rates of FGM, despite a law prohibiting the practice. Criminalisation of FGM has led to increased medicalisation of the process. In fact, the government inadvertently contributed to the initial trend of medicalisation, as its initial response to FGM in the 1990s was to permit only government medical doctors to perform FGM.<sup>boxxii</sup>

Another challenge relates to law enforcement. In Mauritania, FGM is widely practised, despite its criminalisation. **Lack of law enforcement** is a key issue in the fight against FGM in Mauritania. To date, religious leaders in Mauritania have issued several *fatwas* against FGM and although these ban FGM, they do not go further in terms of providing 'enforcement and sanctions' against the perpetrators, which means it is a common practice in the country.<sup>boxxiii</sup> Moreover, women's rights groups have raised issues regarding the Penal Protection Code for Children, claiming that the legislation is not enough to fight FGM, since Art. 12 criminalises FGM only if it 'causes harm'.<sup>boxxiv</sup>

<sup>129</sup> A daughter is entitled to half of her brother's share, and, where there is no brother, that of the share of male relatives. However, a woman is free to retain or dispose of her property as she wishes.



## 6.4 CASE STUDIES

The last section of this chapter presents seven case studies that document initiatives and strategies towards realising women and girls' rights with respect to child marriage and FGM. The case studies illustrate the wide prevalence of violations of the human rights of girls and young women on these issues, and also highlight the gaps and weaknesses in national legal and policy frameworks. The different case studies also point to the linkages between GVAW, in particular sexual violence and rape, and child marriage. They also highlight the importance of education and of keeping girls in schools, as part of strategies to end child marriage as well as FGM. Schools also come up as sites where girls not only get educated for a future but also are informed and gain awareness on SRHR issues.

The case studies capture a diverse range of strategies to realise women and girls' right and end child marriage and FGM. Two case studies concern initiatives at the regional level. One is the decision of the ACHPR on a complaint about the abduction, rape and forced marriage of a 13-year-old Ethiopian girl. The other presents the instrument of a model law, which SADC has used to facilitate and strengthen legal reform in the Southern region towards eliminating child marriage. Four other cases speak to national-level change processes, many of them involving legal reform on either FGM or child marriage. The cases from Malawi and Tanzania both underline the importance of broad mobilisation and cooperation between varied stakeholders in legal reform. In Malawi, this has included the engagement of traditional leaders and chiefs as well as youth activists in raising awareness and bringing about legal reform. The case study in Tanzania captures the collaborative efforts of a broad network of CSOs, including child rights' activists, and the case they brought to the High Court on discriminatory law with respect to child marriage. Youth champions are also key in Madagascar, where efforts are taken to end child marriage and violence against children, raising awareness in schools, with parents and in communities. The case study on faith-based approaches to ending FGM in West Pokot in Kenya focuses on the subnational and community level, and the role of local churches in raising awareness and triggering social norm change. Traditional and religious leaders are visible as change agents in this case study on West Pokot, the one in Malawi and also the one on FGM in Sierra Leone. The last case illustrates the controversies that surround the banning of FGM, and the different views that different groups may have on the desirability and feasibility of certain strategies to realise women and girls' rights in such highly polarised and politicised debates.

Several insights regarding strategies to realise women and girls' rights and end child marriage and FGM emerge from these seven case studies:

- **Loopholes and weaknesses in national legal frameworks** on child marriage and FGM undermine women and girls' human rights. Such loopholes and weaknesses, often related to plural legal systems and customary law and practices, need to be addressed.
- **Legal reform** comes about in response to different strategies—litigation in either national courts or the regional ACHPR, the utilisation of model law or national-level advocacy campaigns.
- Legal reform is important in itself, and contributes to social norm change. However, shifts in **societal perceptions and attitudes** require more focused effort from a range of actors.
- **Networks and coalitions of CSOs** play a central role in legal as well as social norm change. These include women's organisations and activists, youth champions and leaders and faith-based organisations.
- **Youth champions and leadership** are key in awareness-raising campaigns, in promoting legal reform and as well as empowering girls and boys and young women and men.
- The engagement of **traditional and religious leaders** can be critical to strategies to ending child marriage and FGM. Such leaders can play progressive roles, within communities, in traditional institutions and in relation to policy frameworks and society. In other cases, they may voice conservative perspectives and can resist strategies to realise women and girls' rights.

### Case study 8. Rape, abduction and forced marriage in Ethiopia: a girl pursues justice at the ACHPR

In 2003, a 13-year-old Ethiopian girl was abducted, raped and forced to marry her rapist. After a court sentencing, the abductors were released. Equality Now and the Ethiopian Lawyers Association filed a complaint at the ACHPR, which in 2016 issued a landmark decision on the failure of Ethiopia to fulfil its obligations as a state.

Ethiopia has a high rate of child marriage and is ranked 15th on the African continent in terms of child marriage prevalence. Two in every five Ethiopian girls are married before their eighteenth birthday, and about one in seven girls by the age of fifteen (see also Section 6.1 of this chapter). While child marriage rates have declined, from 60% many years ago to today's 40%, they are still very high. Child marriage is perpetuated by the common practice of marriage by abduction.

In 2002, a 13-year-old girl was abducted by several men, and raped by one of them. She managed to escape and her abductor was arrested, but while out on bail he abducted her again and forced her to sign a marriage certificate while holding her captive for over a month. Her abductors were eventually sentenced to 10 and 8 years of imprisonment, in 2003. Shortly after, however, they were released through an arbitrary appeals process.<sup>ixxxv</sup>

With support from Equality Now and the Ethiopian Women Lawyers Association (EWLA), the girl pursued all available local remedies, to no avail. In 2007, Equality Now and EWLA filed a complaint before the ACHPR against Ethiopia on behalf of the girl. They argued that Ethiopia's failure to punish the perpetrators was a violation of the African Charter on Human and Peoples' Rights. The case itself stalled, for various reasons, but eventually, in 2016, the ACHPR issued a landmark decision in favour of the girl.<sup>ixxxvi</sup> The ACHPR found that the Ethiopian state had failed to protect her and to prevent her abduction, rape and forced marriage, and also failed to ensure effective prosecution. The ACHPR awarded a significant monetary award of \$150,000. Moreover, it called for Ethiopia to undertake various long-term reforms, such as judicial training.

This case was trail-blazing, as one of only two cases filed before the ACHPR dealing exclusively with women and girls' rights. In addition, the case served to solidify the jurisprudence that the state can be held liable for the actions of both state and non-state actors. This accountability standard is vital to enhance the protection of women and girls from violence, harmful practices and other human rights violations that occur predominantly in the private or domestic sphere.

Aside from the case, Equality Now and EWLA's advocacy on the ground also contributed to reforming the law that allowed a rapist to escape criminal charges if he married his victim. The reformed law also introduced more severe penalties for rape. The advocacy conducted before and around the case also drew national as well as international attention, which in turn may have contributed to reducing child marriage rates in Ethiopia.

## Case study 9. SADC adopts model law on child marriage

The SADC model law on child marriage is a regional initiative to facilitate and strengthen legal reform towards its eradication. The model law, among other things, addresses the contradictions in legal frameworks in the region, which are the result of legal pluralism. The drafting and adoption of the SADC model law involved working on the legislative process at regional level and taking inputs from key stakeholders in civil society and the development arena, at both national and regional levels.

Across Africa, 125 million girls and women alive today were married before their 18th birthday. An estimated one in four young women in Southern Africa aged 20–24 years is married or in union before the age of 18 years.<sup>lxxxvii</sup> Child marriages are largely driven by high poverty levels, gender inequity, traditions and religion, and limited educational opportunities for girls.<sup>lxxxviii</sup>

In Southern Africa, while there have been attempts in some countries to reform the legal framework around child marriage, there are still disparate laws around marriage, with some countries setting 18 as the minimum age, while others allow girls as young as 14 to marry. Legal pluralism means some countries provide exceptions to the minimum age of marriage on parental consent or authorisation of the court or other authority. Other countries allow customary or religious laws to dictate lower ages of marriage than that stated in formal or statutory laws.<sup>lxxxix</sup> Under such legal regimes, parents follow the line of least resistance in marrying off children without facing legal sanctions. It is these contradictions that led to regional leaders and stakeholders to consider developing a law that would serve as a guide on how to harmonise legal positions with a view to eradicating child marriage.

On 3 June 2016, the SADC-PF at its 39th Plenary Assembly meeting in Swaziland adopted a Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage. The Plenary Assembly comprises representatives of all the member states' national legislatures and is thus the highest decision-making body. The model law is non-binding in nature. It has great value addition for the region as it tackles the contradictions flowing from legal pluralism that are evident in the various laws across the region.

Efforts to undertake and develop a Model Law commenced in 2014. The 35th SADC-PF Plenary Assembly, held in Mauritius in June 2014, called upon the region to undertake concerted efforts to eradicate child marriages. This led to the SADC-PF, the Association of European Parliamentarians with Africa (AWEPA) and Plan 18+ Zambia Sub-Regional Group convening a Regional Dialogue on Child Marriages in 2015 in Johannesburg, South Africa. The outcome of this dialogue was a Six Step Road Map on the development of a model law with the necessary reference information. It was hoped that, just like with the SADC Model Law on HIV, a Model Law on Child Marriage would serve as a reference document to facilitate countries to develop their own child marriage-related laws. The model law serves as 'a specific, evidence-based document that our Members of Parliament and other stakeholders can use when they advocate for the rights of the region's girls and boys... useful to Parliamentary legal drafters as they draft Acts of Parliament.'<sup>xc</sup>

Thereafter, the SADC-PF mobilised financial and technical resources to develop a SADC Model Law on Child Marriage in June 2015.<sup>xci</sup> SADC consultations were held at regional and national level with key stakeholders in government, civil society, traditional institutions and human rights commissions as well as those affected by child marriage.<sup>xcii</sup> Organisations like Plan International (Southern Region) undertook advocacy strategies to share the SADC model law draft widely at the national level with parliamentarians, law reform institutions, cabinets, parliaments and traditional leaders, pushing the imperative to adopt and domesticate the law. The Southern African Litigation Centre funded the drafters to convene and to embark on work on the proposed model law.<sup>xciii</sup>

In March 2016, 30 representatives of civil society working to end child marriage in SADC countries reviewed the model law and provided insights into how to make it more responsive to the lived realities of women and girls in the region. The emphasis was on prevention and also mitigation of the effects of child marriage for those already in such unions. The civil society representatives provided concrete recommendations for the SADC-PF to consider. Legal drafters from the SADC member states convened in Johannesburg, South Africa, prior to the 39th session of the Plenary Assembly to address all inconsistencies in the draft model law and ensure its passage by national parliaments.<sup>xciv</sup> They hailed from Malawi, Mauritius, Mozambique, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe and met for five days to review the draft and ensure its conformity with the legal objective of eradicating child marriage.<sup>xcv</sup>

Various partners supported the development of the model law, including civil society actors actively combating child marriage as well as development partners. These included the UN Population Fund (UNFPA) East and Southern Africa Regional Office, the UN Development Programme (UNDP), Plan International's 18+ Ending Child Marriage in Southern Africa Programme, the Southern African Litigation Centre and Girls Not Brides.<sup>xcvi</sup>

## Case study 10. Malawi Ending Child Marriage Campaign: When elders and youth converge around common goals

This case study illustrates the sustained efforts by different sections of society, as well as the many steps involved, in bringing about and realising legal reforms that are critical to ending child marriage. Malawian youth activists advocated for the engagement of traditional and religious leaders, and also collected signatures to demand legal reform. The Malawian experience also highlights the key role of traditional institutions and individual traditional leaders in challenging and ending harmful practices, despite resistance from parents and even peer traditional leaders. These combined efforts point to the transformative power inherent in intergenerational and diverse but united collaboration by civil society, affected populations of young girls and boys and traditional authorities to reform laws and counter harmful social norms.

Malawi has one of the highest rates of child marriage in Africa and globally. According to the UNICEF database 2005–13, 12% of girls are married before the age of 15 and 50% before they are 18. Early marriage in Malawi has resulted in girls suffering from attendant problems of early pregnancy, high maternal mortality rates, violence, high school dropout and poverty.

In 2015, Malawi passed the Marriage, Divorce and Family Relations Act, raising the minimum age of marriage from 15 to 18 years for all forms of marital union: statutory, customary, religious and marriage by repute or permanent cohabitation. The passage of this law was an important milestone, but it was not in conformity with the Constitution, which contained a legal loophole that allowed children between 15 and 18 years to marry with parental consent. Further, the Constitution set the age of a child at 16 and the Penal Code Amendment Act (2011) set the age of sexual consent at 16. As such, there remained a legal conundrum with regard to age.

This led to several sustained lobbying and advocacy efforts to pressure the government into harmonising the Constitution to conform to Malawi's commitments under CEDAW, the UNCRC and the SADC Protocol on Gender and Development. Two unconventional campaign strategies from the not-so-usual quarters stand out in this regard.

Traditional authorities in Malawi are customary institutions that wield considerable influence in terms of personal status law, given that they are the vanguards of culture, tradition and values. In customary marriages, chiefs have influence: they can approve or annul a marriage under the various customary practices. Traditionally, customary institutions are seen as gatekeepers of conservative societal forces and practices rather than as allies in the human rights movement. In fact, with this in mind, Malawi's Stop Child Marriage campaign in 2011, led by Genet and Let Girls Lead, had trained around 200 girls in Chiradzulo district of southern Malawi to lobby 60 village chiefs to ratify and enact by-laws to stop early marriage and harmful sexual initiation practices.<sup>xvii</sup>

Thus it was significant in 2013 when the senior and paramount chiefs in Malawi, as considerable opinion leaders, adopted a declaration calling for the age of marriage to be set at 18 years. Chiefs had been noting with concern the negative effects of early or forced child marriage on girls' development. A number of progressive chiefs decided to take proactive sanctions against the practice, to discourage parents who, in circumstances of poverty or hardship, wanted to marry off their girls as a means of sustenance. In the words of one chief, 'What we do is that if a girl is married before 18 the parents on both sides pay a fine of a goat. We are encouraging the parents to send the girls back to school and we are developing bye laws at traditional authority level.'

In an encouraging move, many other chiefs have passed by-laws and are moving to sanction village heads who promote or in any way endorse child marriages and related rituals. Chief (Inkosi) Theresa Kachindamoto has been labelled 'The Terminator' by Al Jazeera for annulling 850 child marriages in three years and has banned the sexual initiation of girls, which is a necessary precursor to child marriage under customary law. She has striven to ensure that the children from these marriages are returned to school, as well as sanctioning village heads who allow customary child marriages to take place. It is reported that, to date, she has terminated a total of 2,549 child marriages. With other traditional leaders, she has also developed a model by-law for her region, aligned with national law, that seeks to outlaw all child marriages, harmful cultural practices and gender-related abuse.

According to UNICEF Malawi, she has accomplished this by engaging strategically with groups of mothers, peer educators, members of village development committees, faith-based leaders and NGOs, and has even set out to convince the couples themselves in a door-to-door campaign.<sup>xviii</sup> In the face of resistance from community members, she convinced 50 sub-chiefs to sign on to abolishing customary marriages involving children and to annul any such marriages within her jurisdiction, dismissing those who did not comply after agreeing to the measures.

Chief Kachindamoto recalls how seeing 14-year-old girls who already had two children compelled her into action. Today, besides annulling marriages, she spends time speaking with girls about their rights and future, and persuades their parents to be supportive. 'I try to convince them that if you educate your girl you will have everything in the future,' she said.<sup>xix</sup>

Malawian youth were not slack to advocate for their rights to have a childhood and not be married off prematurely. Youth-driven campaigns to end child marriage under the banner *Youth Engagements Advocates* were undertaken in partnership with Plan International Malawi. Memory Banda, a key 20-year-old figure in the youth-led campaign, was driven by the personal experience of her sister's suffering as a child wife at the age of 11 to engage government authorities on the issue. In September 2016, youth campaigners at a National Girls' Conference presented the first lady of Malawi with over 42,000 signatures from more than 30 countries worldwide,<sup>5</sup> seeking to address the issue of the constitutional loophole. Youth groups from all over the country presented similar petitions to the Ministry of Justice and Constitutional Affairs and the Ministry of Gender, Children and Social Welfare, as well as meeting with the paramount chiefs. In February 2017, Malawi amended its Constitution to remove the loophole allowing parental consent for children under 18 to marry, thus aligning it with the Marriage, Divorce and Family Relations Act.

## Case study 11. Ending child marriage in Tanzania

**The Tanzania Ending Child Marriage Network is a coalition of 35 CSOs that employs a range of strategies to end child marriage. One of the network's members undertook a court case to challenge the country's highly problematic legal provisions on the legal age of marriage for girls. The High Court of Tanzania ruled that the law should be reformed.**

Child marriage prevalence is high in Tanzania: almost two out of five girls in Tanzania are married before their 18th birthday.<sup>4</sup> On account of this, women and children rights advocates in Tanzania came together to work towards ending child marriage in the country. They formed the Tanzania Ending Child Marriage Network (TECMN), a coalition of 35 CSOs, launched on International Day of the Girl Child on 11 October 2012.

The coalition employs various strategies towards ending child marriage in Tanzania. First, it works on increasing awareness of the harmful impact of child marriage at the community, national and international levels. Second, it advocates for policy reforms; this has included litigation initiatives, as discussed below. Third, it undertakes resource mobilisation to support married girls and those who are at risk. Finally, it works towards strengthening learning and coordination between organisations working to end child marriage in Tanzania. This is critical to ensure the response to child marriage is effective and to eliminate duplication of efforts, usually rife among CSOs.

One of the critical challenges facing the effort is that the law (the Law of Marriage Act 1971) sets the marriage age for girls at 15 with parental consent and even 14 with court consent, while that for boys is set at 18. The law therefore expressly sanctions child marriage in contravention of various international and regional laws and standards to which Tanzania has acceded. On account of this, one member of the coalition, Msichana Initiative, an organisation that advocates for the rights of women and girls, undertook to challenge the impugned provisions of the law in Tanzania's courts. In a landmark decision, the High Court of Tanzania ruled in July 2016 that the Law of Marriage Act must be revised to eliminate inequality in the minimum age for marriage for boys and girls. The High Court directed the government to update its laws within a year. However, an appeal has since been filed, halting application of the decision as of the current time.

The potential impact of this decision is momentous, as prohibition of a harmful practice is a critical first step towards its eradication. Legal sanction of a harmful practice impedes advocacy efforts, as it influences societal perceptions, which are key in determining practice. Another noteworthy impact comes by way of the development of jurisprudence. The High Court, convinced by the petitioners' arguments, noted that Tanzania's law on child marriage was not in harmony with its obligations under the Maputo Protocol as well as the ACRWC. Two lessons can be drawn from this. The first is that lawyers have a duty to canvass their arguments, relying on the rich normative framework of human rights that exists beyond their borders. Second, judges and magistrates should similarly hold states to account on the basis of their existing obligations, which range from constitutional guarantees to international agreements that they have acceded to, such as the Maputo Protocol.

This illustration from Tanzania presents to women's rights advocates valuable lessons on the value of coalescing around major rights issues, such as through the use of coalitions. Also important is the lesson that pertinent rights contestations and obstacles should be tackled through legal means while at the same time maintaining strong advocacy strategies.

## Case study 12. Youth leadership in ending child marriage and violence against children in Madagascar

This case study looks at the work of the Young Women's Christian Association, in partnership with the national government in Madagascar and other stakeholders, to end child marriage and stop violence against children and girls. Youth champions play a key role in the awareness campaign in schools.

Madagascar launched its AU campaign to end child marriage in 2015. Child marriage is one of the major problems facing children, and its prevalence in the country is over 40%; this rate is higher in the south and south-west regions, where more than six out of ten girls enter into a union before reaching 18. Madagascar is committed to achieving the SDGs; ending child marriage is key to this.

In 2007, Madagascar adopted a law on the Rights and Protection of Children (Law No. 2007-023), whose Art. 1 provides for the protection of children from any form of abuse. In the same year, a law on Marriage and Matrimonial Regimes (Law No. 2007-022) was adopted, which sets the age of marriage at 18 for both sexes. However, marriages at a younger age are possible with authorisation from the Tribunal and if there are serious reasons. In 2014, another important law was adopted, on Combatting Trafficking in Human Beings; this repeals, amends and supplements earlier law.

Since 2017, a National Strategy for the Fight against Child of Marriage has been in place. This aligns with the priorities of the National Development Plan and is linked to SDG 3 (on good health and well-being for all, at all ages) and SDG 5 (achieving gender equality and empowering all women and girls). The strategy envisages Madagascar as a country where families and communities adopt lasting behaviour that repels the union/marriage of children. It seeks to reduce the prevalence of child marriage from 41.2% to 21.2% during the period 2018–24. The strategy has been developed over a long period of time, and with close consultation between the Ministry of Population, Social Protection and Promotion of Women, key sector ministries, technical and financial partners, civil society and UNICEF. Children themselves have been consulted in this process, during field trips and through surveys, and their recommendations are taken into account.

The National Strategy for the Fight against Child Marriage will strengthen several initiatives already in place, such as the Minimum Support Service Package for child victims of violence and exploitation. It also will continue to support the Child Protection Network, with different actors at national and subnational levels collaborating and coordinating their complementary work for a common goal: protection of the child. The strategy also strengthens 'vonjy centres', which offer free medical and psychosocial care as well as legal support to girl and boy victims of sexual violence.

The Young Women's Christian Association (YWCA) Madagascar is one of the few CSOs that has participated in the strategy and is involved in its implementation. YWCA has developed communication tools on child marriage to be used in the strategy and its engagement is closely linked to its *Stop Marriage of Children – Stop Violence* project, launched in 2015. This is a preventive awareness-raising and training campaign to save future generations from child marriage. The campaign encourages girls in primary schools, aged nine and over, to stay in school as long as possible and continue their studies. Education can function as a means of preventing child marriage, because the mere fact that a girl goes to school can reinforce the idea that she is still a child and not a woman or a wife. The awareness and training focus on the nature, causes and harmful effects of child marriage as well as other harmful practices and GVAW, and on access to SRH services and sex education. It also seeks to ease barriers to school attendance. The campaign focuses primarily on girls in schools, and also uses communication materials such as posters, banners and brochures.

Parents are also an important audience for the campaign, and they are sensitised on child marriage and supported to end the early marriage of girls. The campaign seeks to mobilise families and parents to become agents of change and take part in efforts to end child marriage. In addition, the campaign hopes to establish relations with traditional leaders and religious authorities. It plans to bring together mayors, community organisations, traditional authorities and religious leaders to make them aware of the legal provisions that set the age of marriage at 18. It also seeks to sensitise them to the harmful consequences of child marriage and to stimulate a change in behaviour.

Working in schools is a key element of the *Stop Marriage of Children – Stop Violence* campaign. SRH has been taught for a long time in Madagascar schools, in a way that is adapted to different age groups. The government works with UNFPA to advance access to SRH services. YWCA's engagement in this field focuses on SRHR as enshrined in the Maputo Protocol. Its work seeks to address the linkages between child marriage and GVAW. Very recently, YWCA entered into a partnership agreement with the Ministry of National Education. This partnership will be highly important in the campaign's work in schools and will enable YWCA to integrate its awareness-raising on child marriage and SRHR in the school curriculum, covering the entire country.



### Case study 13. Sierra Leone: mobilising chiefs and religious leaders to address FGM

Sierra Leone has ratified the Maputo Protocol, which prohibits FGM, but has not adopted a law to ban the practice. The country has a highly controversial provision that outlaws FGM before the age of 18 but after that requires consent of the girl or woman to being cut. The case study points to the strong controversies around FGM in Sierra Leone, and highlights the tough choices that anti-FGM activists make on what strategies to follow to promote change in a highly polarised society. It also illustrates the importance of social norm change and working with traditional leaders in order to change perceptions towards FGM. Anti-FGM campaigners are divided on whether an under-18 ban will have any lasting impact in terms of total abandonment of the practice, and do not see this as a desirable strategy to be followed elsewhere.

Sierra Leone is one of the countries in Africa where FGM is widely practised: almost nine in ten women between the ages of 15 and 49 have undergone the cut. Sierra Leone is also one of the few countries in West Africa that does not have a law prohibiting the practice, despite the fact that the country has ratified the Maputo Protocol, which prohibits all forms of FGM.

In Sierra Leone, FGM is carried out by the 'Bondo' secret society, also known as 'Sande', as part of the rites of passage for girls from childhood into womanhood. The Bondo is an exclusive women's secret society in Côte d'Ivoire, Guinea, Liberia and Sierra Leone, led by the Soweï, which is the name of the women leaders who are the guardians of the society. Girls are taken into the bushes for the rite of passage, where they are taught how to be a good wife, how to cook, how to take care of the house and how to respect the family in-laws.

FGM is a requirement for anyone who wants to be member of the Bondo. The Bondo is a powerful entity and an important part of Sierra Leonean society, and leaders are seen as the guardians of culture and tradition and respected by the community. They promote the well-being of the members of the society and serve as a platform for the social and political interests of women. One of their key roles is to advance and encourage solidarity between the Bondo and the 'Poro' (a secret society for men).

There is no law in Sierra Leone prohibiting FGM, and the practice is widely condoned and even supported by politicians and community members. Anti-FGM campaigners have faced many challenges over the years when trying to push the government to outlaw the practice. This is mainly because of the power of the Bondo over the community and politicians' fear of losing in elections if they are seen as supporters of a ban on FGM. Some politicians actually sponsor FGM initiation ceremonies in exchange for votes.<sup>cii</sup>

The debate around the ban of FGM is a very heated in Sierra Leone, which has put anti-FGM campaigners' lives and careers in danger over the years. The Bondo has argued for the continuation of FGM by claiming the right to defend their cultural practice, which has been around for decades. The debate has divided the country into those opposed to the abandonment of FGM and those opposed to its practice, on the basis that it violates the human rights of women and girls.

In 2007, a provision for FGM ban was removed from the Child Rights Act for fear of upsetting the traditional leaders in the country. The final law means does not outlaw FGM, but it introduced a clause on 'age of consent' to discourage parents from initiating girls under 18, indicating that girls should be at the age of consent for the initiation. This means that, after age 18, girls must give their consent if they are to be cut.<sup>ciii</sup> This provision has been fiercely criticised, within Sierra Leone but also on the continent and internationally.<sup>130</sup> It is argued that the age of consent will have little or no impact, as traditionally parents and guardians make decisions for their daughters, no matter their age.

The Advocacy Movement Network (AMNET), an anti-FGM campaign organisation based in Freetown, Sierra Leone, decided to promote the age of consent. AMNET aims to end all forms of violence against and social exclusion of the most vulnerable of the society through advocacy and engagement with policy-makers to adopt and enforce legislation to protect women, children and youths.<sup>civ</sup> Having witnessed the continued backlash against anti-FGM campaigners in the country and the hardening of the attitudes of those who supported the practice, AMNET chose to tackle the issue through a practical approach. Although the long-term goal is to put an end to the practice of FGM in Sierra Leone, the organisation's view is that real social change can only happen through a step-by-step process.<sup>cv</sup> AMNET believes that, through education, information and sensitisation, it may be possible to change people's attitude towards FGM and therefore end the practice. Hence, it promotes the 'age of consent' as a short-term goal to eventually lead to the total abandonment of the practice in the future.

<sup>130</sup> There have also been temporary bans of FGM in Sierra Leone, which have also been subject to criticism. During the Ebola crisis in West Africa in 2014, the Government passed a law to ban FGM to stop the spread of the virus. Furthermore, the Government recently temporary banned the practice during the planning of the March 2018 election in a bid to stop politicians buying votes through the financial support of initiation ceremonies (Voice of America. 2018. 'Seeking Fair Elections, Sierra Leone Bans FGM During Campaign Season'. [www.voanews.com/a/seeking-fair-elections-sierra-leone-bans-fgm-during-campaign-season/4240062.html](http://www.voanews.com/a/seeking-fair-elections-sierra-leone-bans-fgm-during-campaign-season/4240062.html)).



AMNET's campaign emphasises the need to sensitise the population and particularly the Paramount Chiefs by convincing them to sign a memorandum of understanding (MoU) with AMNET banning the practice of FGM for girls under the age of 18.<sup>cvi</sup> The MoU with the Paramount Chiefs allows them to work closely with the Bondo to ensure that no girl under 18 is cut. This is done through training to strengthen the capacity needs of their partners, and working with the Paramount Chiefs to report and investigate cases of girls being cut under 18 and other cases of child abuses. AMNET also collects data on the underage practice of FGM and child abuses, such as the date of the offence, the time, the perpetrator and the judgement, to ensure the child receives the protection needed.<sup>cvi</sup>

This case highlights how culture is used to justify harmful practices against women; it also shows the need to work with traditional leaders in order to change attitudes. To date, Sierra Leone is one of the very few countries in Africa and especially in West Africa with no legislation prohibiting FGM.

## Case study 14. Faith-based approach to tackling FGM in Kenya

An indigenous church in West Pokot in Kenya is actively engaged in a variety of strategies to change community perceptions and practices towards ending the practice of FGM. With community guidelines and forums, as well as a rescue school for girls under threat of FGM, the church seeks to prevent girls from undergoing FGM. Because of the link between FGM and child marriage, efforts to abandon FGM also contribute to a reduction in the rate of child marriage.

Kenya has enacted a comprehensive legislative framework including the Children's Act 2001 and the Prohibition of Female Genital Mutilation Act 2011. However, while the country has made significant progress,<sup>131</sup> total abandonment of the practice has not yet been realised, and it remains particularly ingrained in some communities. The Pokot community is one of these. One church in West Pokot is playing an active role in working towards the abandonment of FGM. The *Dini ya Roho Mafuta Pole Church* (Church of the Gentle Holy Spirit/Mafuta Pole) is an indigenous church under the umbrella of the Kenya Chapter of the Organisation of African Independent Churches (OAIC), which guides Mafuta Pole on various development issues including the FGM initiative in discussion.<sup>132</sup> OAIC has also brought on board a faith-based organisation, Faith to Action, to provide technical support to Mafuta Pole by way of development of organisational documents and content for community training sessions.

The change that Mafuta Pole wants to bring is in the perceptions of the community relating to FGM. The church has over 30,000 members within the county of West Pokot. With active agents of change within the community, the chances of community behaviour towards FGM changing are high. The initiative is targeted at community members, most of whom are congregants of the church. The church has in place various strategies to tackle FGM. One of these involved the development of guidelines known as Boma Guides. These give direction and provide guidance to the local churches, called Bomas, on how to cater to and advise the local community.<sup>133</sup> One of the provisions of this Boma Guide commits to the abandonment of FGM by the community. The Boma Guides also condemn child marriage. This is important, considering that in West Pokot and many other communities, once a girl undergoes FGM, she is considered fit for marriage. As such, tackling FGM will also reduce the incidence of child marriage.

The church strategies also seek to strengthen girls' education through encouraging school attendance and retention. The church has established a rescue school for girls who are under threat of FGM as well as for others who are in need. This initiative is locally supported: the church members contribute livestock, which are then sold to sponsor school fees for the girls in the school. Other initiatives, often led by youth, contribute to progress on the FGM initiative. The youth section of the church holds regular meetings during school holidays, thus targeting both school-going and non-school-going youth. During these retreats, young women are taught about health issues, including FGM and menstrual hygiene. Joint sessions with both young men and young women enable them to discuss FGM and can influence both genders' perceptions of the practice.

These strategies work collectively to provide security for girls and young women, removing them from a potentially harmful environment all the while educating them and building their capacity—all of which increases their chances of resisting the practice.<sup>134</sup> In terms of results, several church leaders note that their neighbours are beginning to emulate their actions by preventing their girls from undergoing FGM, and also by enrolling them in school. There is also an anticipated impact on child marriage.

The initiative has not been without difficulties. Mafuta Pole is an indigenous church, meaning it is built on both cultural and biblical values. Traditionally, women in Pokot have not enjoyed equal status, and their value, recognition and leadership have been muted. Members of the community who hold onto this traditional view are still against recognition of girls' value, including in education, health and inheritance, among other areas. Church leaders address these constraints by holding education community forums targeted at villagers on the elimination of FGM, relying on both health- and science-based and biblical arguments to change perceptions. For instance, before this initiative began, this area had one of the highest rates of fistula in Kenya. Older women who were mutilated and now suffer from fistula are thus used as change agents to demonstrate the harms of FGM. In addition, the church uses religious texts to work towards the total abandonment of FGM.

<sup>131</sup> National prevalence of FGM in Kenya stands at 21% (KDHS 2014) compared with 27% in 2008/09 and 32% in 2003 ([https://www.unicef.org/kenya/JIP\\_on\\_FGM\\_-\\_BRIEF.pdf](https://www.unicef.org/kenya/JIP_on_FGM_-_BRIEF.pdf)).

<sup>132</sup> African Independent Churches (AICs) were founded during the colonial period, and have developed indigenous forms of worship, theology and social organisation. They often see themselves as custodians of African values. AICs have played an ambivalent role in terms of advancing women and girls' rights. In some cases, they have tolerated FGM and other harmful practices as a way of resisting what they perceive as cultural imperialism. On the other hand, they are more gender-sensitised than missionary churches; women are very present in AICs and have made an invaluable contribution to the growth of the churches. The work of Mafuta Pole and the OAIC to fight FGM is a considerable shift towards the progressive promotion of women and girls' rights in the church and its communities.

<sup>133</sup> In its organogram, the headquarters of the church is known as Jerusalem, the mid-level as Zion and the smallest unit, represented by the local churches, as Boma.

<sup>134</sup> In addition to the specific strategies, the church itself also leads by example, as it adheres to the Kenyan Constitution's two-thirds rule of gender representation in its leadership and programmes. For example, among its leadership, five out of fifteen are women; out of eighty in a theology class offered by the church, thirty are women.

Another way the church addresses difficulties is that each Boma has a mechanism for resolving household conflicts. This is like a council that also has women elders. If a family comes to the mechanism with a conflict, its members rely on both scripture and culture to resolve it. Where resolution fails, the council rescues the child if the dispute is FGM-related. There are also consequences for errant members in this regard, ranging from being stripped of leadership roles and being de-flocked (excommunicated) from the church community, which affects status and trade, as most of the members of the community are members of the church. In this regard, the church has a positive and exacting influence on the community.

## Chapter 6

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- cvi** Voice of America. (2018). 'Seeking Fair Elections, Sierra Leone Bans FGM During Campaign Season'. [www.voanews.com/a/seeking-fair-elections-sierra-leone-bans-fgm-during-campaign-season/4240062.html](http://www.voanews.com/a/seeking-fair-elections-sierra-leone-bans-fgm-during-campaign-season/4240062.html)
- cvi i** AMNET. (2015). 'Age of Consent or Total Abandon? AMNET's Approach to Female Genital mutilation (FGM)'.