The aftermath of *Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & Others*: Legal mechanisms as tools against child marriage in Zimbabwe

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Abstract

This article examines the recent ruling of *Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & Others* regarding the harmful practice of child marriage and the impact of the role of the courts and other legal instruments as mechanisms to curb the vice in Zimbabwe. Despite the variety of international, regional and domestic laws protecting children, child marriage remains a recurring practice in Zimbabwe. This article therefore examines the practice of child marriage, which is often done under the pretext of culture and religion, and considers the question of whether the landmark ruling and legal instruments imposing obligations on Zimbabwe have had an impact inter alia on the protection of child rights against harmful practices and, more importantly, in combating the scourge. On the one hand, the article finds that legal means play a very important role in combating the vice. On the other, it also finds that there is no single strategy to combat the recurring practice of child marriage in the country. Hence it is paramount that any strategy which seeks to deal with the harmful practice of child marriage must include both legal and non-legal mechanisms. This is because the harmful practice is reinforced by deep multifaceted and interrelated factors beyond the merely legal inconsistencies that existed in the legislative framework.

Keywords: child marriage; children; Zimbabwe; constitution; legal mechanisms

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Introduction

The United Nations Children's Fund lists Zimbabwe among 41 countries with a high rate of child marriage (UNICEF State of the World's Children 2017). There is no single comprehensive study on the exact prevalence and causes of child marriage in the country. Overall, Zimbabwe has about a 32 per cent prevalence of child marriage (UNICEF State of the World's Children 2017). It suffices to state that the number could be high because, to date, the exact figures of the scourge have been difficult to gauge as many child marriages go unregistered (Sibanda 2011). Despite a number of initiatives and campaigns to end the harmful practice in this southern African country through different platforms, the scourge of child marriage remains rampant in most parts of Zimbabwe (Sibanda 2011). The Constitutional Court declared the practice of child marriage unlawful in the *Mudzuru* case, a practice which is often concluded under the pretext of culture and religion. The question remains, however, whether the landmark ruling which established a new precedent that outlaws child marriage and the legal instruments imposing obligations on Zimbabwe have had an impact inter alia on the protection of child rights against harmful practices and, more importantly, in combating the scourge. Thus, through desktop and jurisprudential research, and a literature review, this article seeks to analyse the implications of the legal mechanisms as means to curbing child marriage in Zimbabwe.

The article proceeds as follows: part one provides a general overview of child marriage, highlighting the main drivers of child marriage in the country. In part two the article discusses how deeply entrenched cultural and religious practices and the inconsistencies and weak legislative framework before the 2013 Constitution have significantly contributed to the practice of child marriage in Zimbabwe. Part three provides a brief discussion of the consequences of child marriage and its effect on realising the fundamental human rights of the child. Part four analyses the landmark ruling of the *Mudzuru* case, a decision that resulted from the generous, substantive and purposive interpretation of section 78(1), read together with section 81(1) of the 2013 Zimbabwean Constitution, which sets 18 years as the minimum age for marriage. In part four too, the article highlights the effect of the decision on ending child marriage in Zimbabwe. Part five unpacks the legal mechanisms that form part of the effort to combat child marriage in Zimbabwe. The last section concludes the article.

Child marriage in Zimbabwe: An overview

The Zimbabwe Multiple Cluster Indicator 2014 established that Mashonaland Central leads the way with a staggering 50% of child marriages out of all marriages in the province, Mashonaland West 42%, Masvingo 39%, Mashonaland East 36%, Midlands 31%, Manicaland 30%, Matebeleland North 27%, Harare 19%, Matebeleland South 18% and Bulawayo 10% (UNICEF, Zimbabwe: Multiple Cluster Indicator 2014). Child marriages are reinforced by an array of reasons and have serious consequences for the

rights and well-being of children. The significance of this discussion mirrors the need for a comprehensive legal framework that may be used to curb the vice in Zimbabwe, thus allowing many children to access and enjoy their fundamental rights as entrenched in the 2013 Constitution.

There are common root causes of child marriage globally, although a number of these causes differ slightly in different jurisdictions due to various factors: a colonial background, economy, religion, politics and culture. These causes are, however, complex, multifaceted and interrelated and continue to fuel the practice worldwide, despite vast international, regional and domestic initiatives to halt it (Zimbabwe AU Campaign 2015). The causes include, but are not limited to, harmful cultural and religious practices, acute poverty, a lack of awareness and a poor understanding of child rights, economic pressures, neglect, ignorance, political instability, lenient sentences given in cases regarded as statutory rape or consensual sex with a minor, HIV/Aids gender intersections, poor access to education or a lack of it, high levels of unemployment, teenage pregnancies and weaknesses in legal and policy actions (Zimbabwe Parliament Hansard, August 2016).

With specific reference to Zimbabwe, the following factors are arguably the main causes that perpetuate the harmful practice of child marriage. They include: cultural practices such as lobola (bride price) (OHCHR, Fact Sheet No 23, 1979);[1] *Kuripa Ngozi* (homicide bride) (Padmini Murthy and Clyde Langford 2010; Hanzi 2006, 31);[2] *Chimutsa mapfiwa* (wife inheritance);[3] and *Kuzvarira* (betrothal).[4] In addition, gender inequality and discrimination, religious practices (mainly those of the Apostolic faith sects), acute poverty as a result of economic decay, and inconsistencies and

1 In *Hosho v Hasisi* [2015] ZWHHC 491-15 (HH), the court acknowledged the significant role played by the payment of *lobolo* in the "African" society, especially under unofficial customary laws where most marriages are unregistered. The court held that:
The continued payment of *roora/lobolo* for women in Zimbabwe, regardless of legislative inroads, bears testimony to the existence of a marriage. Its continued existence is about a way of life and a distinct sense of "African" identity – it is an unspoken resistance to what is often perceived as cultural imperialism from the rapid westernisation of African societies. What is therefore fundamental where an unregistered customary marriage is averred, is proof of the existence of a recognisable customary union.

2 *Kuripa Ngozi* (homicide bride) is a practice in which a young girl, normally a virgin who has reached puberty stage, is given as compensation for the death of a person caused by her family. In essence, the girl child is married off to the deceased's family before she reaches the age of 18.

3 *Chimutsa mapfiwa* (wife inheritance) is a cultural practice which demands that when a married woman dies or cannot give birth (ie is barren), her younger sister, normally at puberty stage (ie a child), takes her place and has intercourse with the elder sister's husband. See Hanzi (2006).

4 *Kuzvarira* (betrothal) is a practice where young girls are married to older men. It is practised among the Shona groupings.

contradictions in the legal framework have been classified as some of the major drivers of child marriage in the country (Hanzi 2006).

Regarding the legal insufficiencies, it is worth noting that Zimbabwe has enacted child-sensitive laws, including the recent constitutional developments. For instance, the 2013 Constitution entrenches fundamental human rights and freedoms, including a comprehensive child's rights clause (Constitution 2013, section 81). Nonetheless, enforcement remains problematic mainly because practices such as child marriage are deeply rooted in culture and religion and, as such, it is seen as acceptable among certain groups. The Committee on Elimination of Discrimination against Women (CEDAW), in its concluding observations on Zimbabwe in 2012, stressed the importance of culture in society but recognised the persistence of harmful practices, notions, patriarchal attitudes and deeply rooted stereotypes (CEDAW Concluding Observation on Zimbabwe 2012). In particular, the Committee expressed concern over Zimbabwe's failure to deal with polygamy, bride price (*lobolo*) and, in certain regions, virginity testing (CEDAW Concluding Observations on Zimbabwe 2012). This occurs because such customs and practices perpetuate discrimination against women and girls and are reflected in the disadvantageous and unequal status of women in many areas, including education, public life and decision-making, and in the persistence of violence against women (CEDAW Concluding Observations on Zimbabwe 2012).

To date, similar concerns remain (Hansard 2016). There are also debates in the parliament of Zimbabwe about the need to craft specific legislation criminalising the practice of child marriage, including specific penalties upon the conviction of parents for receiving *lobolo* on behalf of any person below the age of 18 (*The Herald*, 23 October 2017). To any person who receives *lobolo* for a child, such a proposition will act as a deterring factor and possibly curb the practice. While this is a positive move by parliament so far, a Child Marriages Bill is yet to be crafted. In the part that follows, this article unpacks the inconsistencies that predate the 2013 Constitution.

Inconsistencies and Weak Legislative Framework before the 2013 Constitution

The weaknesses in the legal and policy framework before the 2013 Constitution, some of which have resulted from the continued application of customary law (Hansard 2016; Sibanda 2011; Plan International Report 2016) alongside civil law, have arguably contributed to the scourge of child marriage in Zimbabwe (Plan International Report 2016). This is because, on the one hand, the minimum age of marriage in civil marriage laws was discriminatory and, on the other, customary marriage laws did not provide for a minimum age.[5] Before the enactment of the 2013 Constitution, Zimbabwe's legal

[5] The law has since been corrected in this regard with the coming into force of the 2013 Constitution and the landmark ruling in the *Mudzuru* case.

system did not have a definition of a child that was compatible with acceptable international human-rights standards. Zimbabwean laws provided a number of definitions of a child, or none: for example, the now repealed 1980 Lancaster House Constitution did not define a child.

A number of statutes defined a child in different ways and this rendered children susceptible and vulnerable to harmful practices such as child marriage. For instance, the Children's Act of 1971, as amended, defined a child as a person under the age of 16 years and a young person as anyone above the age of 16 but below the age of 18. In the same Act, a minor is defined as anyone below the age of 18 years. This definition was problematic in that it allowed for persons below the age of 18 but above the age of 16 to be married off before they reached the acceptable age of majority (18 years) and, arguably, this legal lacuna may be one of the reasons for the high incidence of child marriage (Sibanda 2011). The Children's Act, which is yet to be in aligned with the 2013 Constitution, further defines a legal guardian to include a husband of a minor spouse, and this may arguably be an indication that the Act tacitly permitted and acknowledged child marriage (Children's Act 1971, section 2; *The Herald*, 23 October 2017).

In addition, the two marriage laws in Zimbabwe – namely, the Marriages Act (Chapter 5:11, 1964) and the Customary Marriages Act (Chapter 5:07, 1 January 1951) – permitted children to be married with or without the consent of a third party, usually a court of law or parents or the Minister of Justice, Legal and Parliamentary Affairs. Sections 20 and 21 of the Marriages Act permitted marriages of minors by written consent of their legal guardians, and if such consent could not be obtained for any reason, a judge of the High Court granted such consent to the marriage. Under the Marriages Act, in particular section 22, this practice has since been successfully challenged in the Constitutional Court, which provided that

> no boy under the age of eighteen years and no girl under the age of sixteen years shall be capable of contracting a valid marriage except with the written permission of the Minister, which he may grant in any particular case in which he considers such marriage desirable: Provided that—
>
> (i) such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all other requirements of this Act;
>
> (ii) such permission shall not be necessary if by reason of any such other requirement the consent of a judge is necessary and has been granted;
>
> (2) if any person referred to in subsection (1) who was not capable of contracting a valid marriage without the written permission of the Minister in terms of this Act, contracted a marriage without such permission and the Minister considers such marriage to be

desirable and in the interests of the parties concerned, he may, if such marriage was in every other respect solemnized in accordance with this Act and there was no other lawful impediment thereto, direct in writing that it shall for all purposes be a valid marriage; and

(3) if the Minister so directs, it shall be deemed that he granted written permission to such marriage prior to the solemnization thereof.

Section 22 of the Marriages Act permitted girls at the age of 16 years and older and boys 18 years and older to be married.[6] This discrepancy and unjustified discrimination between girls and boys within the legislative framework means that child marriage will probably continue to hinder the protection, promotion and realisation of child rights in Zimbabwe, despite international commitments the state undertook upon acceding to a number of treaties.[7] For example, article 8 of the SADC Protocol on Gender and Development stipulates that all marriage laws must ensure that no person below the age of 18 is married. In effect, the SADC Protocol prohibits child marriage. The African Charter on the Rights and Welfare of the Child, 1990 (ACRWC) further mandates state parties, including Zimbabwe, to adopt appropriate measures to eliminate discriminatory harmful practices, such as child marriage, which are prejudicial to the life and rights of the child (ACRWC, Article 21). The same instrument expressly provides that child marriage with or without justification must be prohibited (ACRWC, Article 21).

Worsening the situation is the Customary Marriages Act. This is because both statutory (constitutional) laws and customary laws continue to apply side by side. In essence, Zimbabwe has a mixed or plural legal system, namely, civil law and customary law (Constitution 2013, section 46). Odala (2013, 4) avers that the prevalence of plural legal systems pertaining to marriage has also led to the scourge of child marriage as many communities, especially those in the remote areas of the country, opt for the traditional

6 Section 22 of the Marriages Act, which prohibits marriage of persons under certain ages, provides that:
(1) No boy under the age of eighteen years and no girl under the age of sixteen years shall be capable of contracting a valid marriage except with the written permission of the Minister, which he may grant in any particular case in which he considers such marriage desirable: Provided that—
(i) such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all other requirements of this Act;
(ii) such permission shall not be necessary if by reason of any such other requirement the consent of a judge is necessary and has been granted. This section has since been declared unconstitutional by the Constitutional Court in the *Mudzuru* case. See also sections 20 and 21 of the Marriages Act which also allow marriages of minors by written consent of their legal guardians. If the consent of the legal guardian(s) cannot be obtained for whatever reason, a Judge of the High Court may grant consent to the marriage.

7 For example, the 1989 Convention on the Rights of the Child, the 1990 African Charter on the Rights and Welfare of the Child and the 1979 Convention on the Elimination of all Forms of Discrimination Against Women.

systems which relate more to them and their communities. The same is attributed to the high prevalence of child marriage in many rural communities in Zimbabwe (Zimbabwe Multiple Cluster Indicator 2014; Hansard 2016; UNICEF State of the World's Children 2016). For example, Mashonaland Central and Mashonaland West provinces, which are largely rural, have an above 45 per cent incidence of child marriage (Zimbabwe Multiple Cluster Indicator 2014). In principle, customary law continues to apply alongside civil law, provided customary law is consistent with the constitutional provisions, particularly the Bill of Rights (Constitution 2013, section 46).

The Customary Marriages Act regulates marriages between Africans. The Act, however, does not provide for a minimum marriageable age at all and is likely to continue fuelling the scourge of child marriage by allowing children to be married in customary marriages (Marriages Act, sections 20 and 21; Matrimonial Causes Act, section 8). This is because the Customary Marriages Act has yet to be amended to meet the demands of the 2013 Constitution.

Perhaps because of the feeble provisions in the two marriage statutes, other child-related legislative texts contained even weaker provisions that *prima facie* recognised and acknowledged child marriage (Vogelstein 2013; *Herald*, 27 February 2017). For instance, the Maintenance Act in section 11 read with the Matrimonial Causes Act stipulates that the maintenance of a child shall cease to exist once a child marries. This means that these Acts of Parliament recognised and permitted child marriage. Accordingly, the weak provisions in the legislative texts, including the Children's Act and the marriage laws, together with their insufficient implementation and enforcement, resulted in child marriage being practised with impunity (Sibanda 2011; Olaborede 2016). The next section of this article analyses the implications of child marriage.

Consequences of Child Marriage on realising Human Rights

The negative consequences of child marriage to children's lives, their choices, interests and fundamental rights cannot be overemphasised. Child marriage has been classified as a harmful practice (Joint General Recommendation No 31, 2014) and it therefore presents with a plethora of ramifications and disparities to children, their lives, well-being and inherent dignity, and more so their rights (Toebes 1999; OHCHR 2015). Significantly, child marriage effectively ends children's childhood (ICWC, May 2014) and the smooth transition to adulthood, subsequently hindering the realisation of their rights. The scourge seriously impairs children's right to education, minimises their economic opportunities and a fair chance in life and increases their vulnerability to domestic violence (Varia 2016; Human Rights Watch, 9 December 2015; Joint General Recommendation No 31, 2014). The Southern African Development Community in 2016 adopted a regional legal instrument to help fight the vice. In its preamble, the Model Law recognises the dire consequences of the practice of child marriage (SADC Model Law 2016). It expressly states that

> recognizing that child marriage constitutes a serious threat to multiple aspects of the physical and psychological health of women and girls, including their sexual and reproductive health, significantly increasing the risk of early, frequent and unintended pregnancy, maternal and newborn mortality and morbidity, obstetric fistula and sexually transmitted infections, as well as HIV/AIDS and increasing vulnerability to all forms of violence, and that every girl and woman at risk of or affected by these practices must have equal access to quality services such as education, counselling, shelter and other social services, psychological, sexual and reproductive healthcare services and medical care.

According to Girls Not Brides, a global partnership to end child marriage around the world, child marriage endangers the personal development and well-being of victims (Girls Not Brides February 2015). While it truncates the childhood of many children, the vice seriously inhibits children from enjoying their fundamental rights. Although married at an early age, children, especially girls, face many challenges that inhibit them from realising their rights. Rights that are directly affected include the right to education, access to the highest attainable standard of health, parental and family care, recreation, play and leisure, and the right to be free from maltreatment and sexual exploitation. Over and above these, child marriage has been held to be the cause of a serious, negative economic impact.

An Analysis of *Mudzuru & Another v the Minister of Justice, Legal and Parliamentary Affairs*

In 2016, the Constitutional Court of Zimbabwe (CCZ) was faced with the task of interpreting the marriage statutes in the light of the constitutional developments. The provisions in question included the children's clause (Constitution 2013, section 81), the marriage clause (Constitution, section 78), the supremacy clause (Constitution 2013, section 2) and the interpretive clause (Constitution 2013, section 46). In the landmark case of *Mudzuru & Another*, which outlawed child marriage in Zimbabwe, two young women aged 19 and 18 years, albeit not children at the time of the proceedings, were nevertheless, generally speaking, victims of the harmful practice of child marriage. They approached the Constitutional Court of Zimbabwe (CCZ) in terms of section 85(1) of the 2013 Constitution. In essence, they instituted legal proceedings challenging the widespread practice of child marriage in various provinces in the southern African country.

Section 85 is an enforcement provision of fundamental rights established by the Constitution to allow wide *locus standi* to persons seeking relief for themselves, in the public interest, in class actions and otherwise.[8] Section 85(1) confers standing on a

[8] Section 85(1) provides that: "Any of the following persons, namely– (*a*) any person acting in their own interests; any person acting on behalf of another person who cannot act for themselves; any person acting as a member, or in the interests, of a group or class of persons; any person acting in the public

broad range of persons who allege that a fundamental right in the Bill of Rights has been infringed or threatened to approach a competent court for relief.[9]

Such a broad approach – especially public-interest litigation and class action – is an efficient tool for ensuring the proper enforcement of all rights, including child rights, because children are unable to seek judicial remedies of their own accord (Sloth-Nielsen & Hove 2015, 15; Okeke 2013, 210; *Mudzuru* 2016; *Ferreira v Levin NO & Others*). It is for this reason that the two young women in the *Mudzuru case* approached the CCZ seeking an interpretation of section 78(1) – the marriage provision as read with the children's rights clause enunciated in section 81(1) of the Constitution. They argued that the fundamental rights of children, particularly the girl child, were infringed by the Marriage Act and the Customary Marriages Act.

In the *Mudzuru* case – which was acknowledged the world over as one of the leading cases against the practice of child marriage – the applicants' cause of action was that the fundamental rights of children, in particular of girls to equal treatment before the law and not to be subjected to any form of marriage, violated the provisions of the 2013 Constitution by setting the age of marriage for girls below the age permitted by the section 78 read with section 81 of the Constitution.[10] In addition, the applicants also challenged the constitutionality of the Customary Marriages Act in so far as it did not provide for a minimum age of 18 for marriages contracted under customary law. The CCZ (*Mudzuru* 2016) therefore held that

> the effect of s 78(1) as read with s 81(1) of the Constitution is very clear. A child cannot found a family. There are no provisions in the Constitution for exceptional circumstances. It is an absolute prohibition in line with the provisions of Article 21(2) of the ACRWC. The prohibition affects any kind of marriage whether based on civil, customary or religious law. The purpose of s 78(1) as read with s 81(1) of the Constitution is to ensure that social practices such as early marriages that subject children to exploitation and abuse are arrested. As a result, a child has acquired a right to be protected from any form of marriage.

While striking section 22(1) of the Marriages Act, the CCZ emphasised that any law, practice or custom sanctioning a person under 18 years of age to marry or to be married

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interest; any association acting in the interests of its members; is entitled to approach the court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation."

9 These include any person acting in their own interest, any person acting on behalf of another person who cannot act for themselves, any person acting as a member or in the interests of other persons, any person acting in the public interest and any association acting in the interests of its members.

10 Both provisions stipulate that a person below the age of 18 is a child and therefore does not have a right to marry.

is inconsistent with the provisions of section 78(1) of the Constitution and therefore invalid to the extent of the inconsistency. Noteworthy is the CCZ's further acknowledgement of the significant role played by the principle of constitutionalism. This is because constitutionalism demands that all laws be consistent with the supreme law in order to enjoy the legitimacy necessary for their force and effect (*Mudzuru* 2016).

The challenge facing Zimbabwe, however, is that the impugned provisions of the marriage laws remain on the statute books. Perhaps this may be because the CCZ did not prescribe a time limit in which the legislature is to expunge the provisions of the marriage laws and fulfil its constitutional mandate. It follows, therefore, that the unreasonable delay by parliament in aligning the invalidated laws with the constitutional provisions will in all likelihood minimise the effect of the landmark ruling, leaving a plethora of children susceptible to the risk of child marriage. The next section examines the legal tools that can be used to curb and subsequently eradicate child marriage.

Legal Mechanisms as Instruments to combat the Practice in Zimbabwe

The Need for Full Implementation and Enforcement of the 2013 Constitution and for Constitutional Reform and Awareness

Zimbabwe has recognised the detrimental consequences of the harmful practice of child marriage. In fact, child marriage is viewed as a human-rights issue and has been broadly dealt with in a number of domestic instruments. The 2013 Constitution protects children from child marriage in sections 19, 26, 78, 80 and 81. In this regard, section 26 is significant in protecting children. It provides that:

> the State must take appropriate measures to ensure that– a. no marriage is entered into without the free and full consent of the intending spouses; and most significantly that children are not pledged in marriage.

This implies that anyone below 18 years and therefore a child cannot meaningfully enter into a valid marriage. In fact, section 78(1) of the 2013 Constitution prescribes 18 years as the age to enjoy the right to family formulation after the intending parties have freely and voluntarily chosen to exercise this right. This position has been confirmed by the highest court in the land when it held that:

> section 78(1) of the Constitution was enacted for the purpose of complying with the obligations Zimbabwe had undertaken under Article 21(2) of the ACRWC to specify by legislation eighteen years as the minimum age for marriage and abolish child marriage (*Mudzuru* 2016).

As such, the commitment of the legal framework to ending child marriage is evidenced in the 2013 Constitution and the landmark *Mudzuru* ruling of the CCZ in 2016.

Moreover, Chapter 4 of the Constitution provides for the protection and promotion of fundamental rights and freedoms and the government must ensure that these are protected and fully promoted in order to ensure their actual realisation. The Constitution expressly prohibits child marriage and directs the state to ensure the vice is effectively eradicated. The legal strategy to end child marriage, therefore, must be premised on the 2013 Constitution, particularly the Bill of Rights and the directives of state policy formally known as the "national objectives". This is because after years of inconsistencies and contradictions regarding the age of the child, and the minimum age of marriage in the broadly formulated legislative framework which arguably have been a major obstacle to combating the vice, the Constitution settles the matter in line with the international and regional legal framework. In section 81, the Constitution expressly defines a child as any person below the age of 18 years. Whereas the Constitution does not define child marriage, it prescribes 18 years as the correct age for any person (whether male or female) to enter into marriage and this position must be enforced (Constitution 2013, section 78).

There is substantial evidence in the literature that customs and traditional and religious practices are the major factors that perpetuate the vice (Sibanda 2011; Plan International Report 2016). In this regard, it is recommended that, in accordance with section 2 as read with section 80 of the Constitution, the government must implement all judicial, administrative, legislative and other available practical measures to ensure that all laws, customs, traditions, cultural practices and conduct that infringe the rights of women (and children, especially the girl child) are void to the extent of the infringement. Such a command by the Constitution must accordingly be the basis for the legal mechanisms to curb the scourge as it addresses the underlying drivers that fuel the practice. While the 2013 Constitution strives to ensure that all laws, including customary laws, are consistent with the Bill of Rights, child marriage will continue to be sustained by customary laws and religious practices if the constitutional provisions are not diligently enforced.

Section 78(1) and (2) of the Constitution calls for the right to marriage and family formation, and expressly criminalises child and forced marriages. This seems to indicate a genuine commitment to combating child and forced marriages, because the decision whether to marry or not and whom to marry is one of the most important decisions an individual can make, mainly because it is a lifetime commitment and cannot easily be nullified or terminated.

However, even though section 78 of the Constitution prohibits the forced marriage of any person, including children, it uses discretionary language and stipulates that no one "may" be compelled to marry against their will. It therefore leaves the provision susceptible to potential abuse and manipulation by interpreters of the law. To combat the forced marriage of anyone, including children, the present authors recommend that,

for the proper protection of children against child marriages, which in the majority of cases also doubles as forced marriages, the word "may" in the marriage provision should be replaced with the word "must", which is peremptory in nature.[11] In this regard, it is imperative that section 78(2) of the Constitution be amended to read as follows: that no person "must" be compelled to enter any marriage against their will.

Furthermore, the fact that child marriage remains rampant in Zimbabwe is largely due to the fact that the 2013 Constitution is not widely publicised, especially in the rural areas of the country. This lacuna exists despite the fact that section 7 calls for the promotion of public awareness of all the provisions of the Constitution, especially the fundamental rights. It is important, therefore, that in the quest to protect all rights, including child rights, the government must promptly sensitise the public to the Constitution in general and to fundamental rights in particular. Section 7 of the Constitution in fact directs the state to promote public awareness of the supreme law, in particular by translating it into all the official languages[12] recognised in the Constitution. As at May 2018, the government, through the Minister of Justice, Legal and Parliamentary Affairs, reported that it had completed the translation process of the Constitution into the following official languages: Shona, IsiNdebele, TshiVenda, Toga, Nambya, Shangani, sign language, Koisan, Ndau, Kalanga, Tswana, Kalanga and Chibarwe. This is a positive step, and the government must ensure that copies are freely available at no cost in all the provinces.[13]

As an intervention, it is recommended that awareness of the Constitution and all consequent amendments to all legislation and the enforcement of these laws be widely publicised and form the foundation for the national plan of action fashioned to end child marriage. In addition, it is recommended that the Constitution be taught in schools as part of the curriculum. Integrating the Bill of Rights into the education curriculum will ensure that children who are often subjected to the harmful practice of child marriage are equipped with and sensitised to their fundamental rights enshrined in the Constitution. In fact, it is argued that such a curriculum should be extended to include the members of the security services, judicial authorities, members of the civil service,

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11 It is recommended that the National Assembly, which doubles as the constitutional assembly, consider amending the language used in section 78. The Constitution, in section 78, stipulates that no person "may" be compelled to enter into marriage. Suffice it to submit that the language used in the section appears not to be peremptory and as such the National Assembly, which is endowed with powers to amend the Constitution, must consider strengthening this provision by using peremptory words such as "must" and "should". This will ensure that such provisions are not abused in the courts where informed consent is the bone of contention.

12 The following languages, namely, Chewa, Chibarwe, English, Kalanga, Koisan, Nambya, Ndau, Ndebele, Shangani, Shona, sign language, Sotho, Tonga, Tswana, Venda and Xhosa, are the officially recognised languages of Zimbabwe.

13 This initiative can be implemented through the members of the National Assembly representing different constituencies.

law-enforcement officials and all public institutions which are likely to be at the forefront of protecting and promoting child rights.

Such a constitutional mandate to sensitise the public to constitutional norms is crucial in the strategy to combat and prevent child marriage, in that it has the potential to inculcate and reinforce constitutionalism in general and respect for human rights in particular in all segments of society. The constitutional principles and imperatives in the 2013 Constitution provide strong protection for children against the harmful practice of child marriage but their power is dependent upon diligent enforcement and implementation by those in power.

In addition, the government, through the relevant ministries and departments in collaboration with development partners, institutions of higher learning, schools, faith-based organisations and civil society organisations, must also consider using all platforms, such as the mass media, seminars and guest lectures in institutions of learning to promote the 2013 Constitution and inform the public about human rights, including child rights and the dangers posed by early marriage in realising these rights. This can be achieved through seminars, lectures and the mass media, such as national radio stations and television, music, drama, and social platforms such as WhatsApp, Facebook, Twitter[14] and Instagram. With the wave of technology growing rapidly, most people are becoming more and more connected to these platforms; therefore, the government must take advantage of the and utilise them with the intention of educating people about the impact of child marriage on children, their rights, and the development of the country at large.

Legislative Reform

Parliament has a number of functions, ranging from holding the government to account and representing their constituencies to approving budgets. One of its key functions, however, is to enact new laws, and amend or repeal existing ones with a view to aligning these pieces of legislative with the 2013 Constitution. Currently in Zimbabwe, parliament has not fulfilled this obligation with regard to the protection of children against child marriage and thus there is no specific legislation or even provision within the law that expressly prohibits child marriage. This is said, mindful of the express constitutional provisions which outlaw the harmful practice of child marriage in the country. The National Assembly however, tabled a General Laws Amendment Act of 2016 which is meant to amend all existing laws in line with the Constitution. Although this is a positive step towards the harmonisation of laws, the General Laws Amendment is silent on the minimum age of marriage, child rights and all other marriage-related

[14] For example, United Nations agencies such as UNICEF, WHO and UNFPA and the UN goodwill ambassador are already using these social media platforms to stimulate discussions on how to eliminate the vice of child marriage.

issues. To this extent, it is debatable whether little legislative amendments as per the General Laws Amendment Act will constitute sufficient compliance with the provisions of the 2013 Constitution. It is recommended, therefore, that what is needed is a strong, comprehensive overhaul of all laws relevant to child rights and marriage issues. In essence, it is recommended that the Marriages Act as read with the Customary Marriages Act must be aligned with the *Grundnorm* of the 2013 Constitution, in particular the Bill of Rights. These laws must expressly state the minimum age of marriage and expressly require free and informed consent as a foundation of any form of marriage. The government must furthermore ensure that it expands the provisions of the Children's Act as the main law that addresses all child rights in line with the Constitution.

Perhaps the Marriage Bill 2019 recently approved by the cabinet can address this lacuna. This Bill was proposed by the Zimbabwean government in 2017. The main thrust of this Bill is to align all marriage laws with the 2013 Constitution. In fact, the Bill seeks to repeal and suppress the current defective Customary Marriages Act and the Marriage Act and this would mean that there will be only one Act of Parliament governing marriages in Zimbabwe. This a welcome step by the government to achieve gender equality and further combat the recurring problem of child marriage. Specifically, section 3 of the Bill prohibits the practice without any exceptions. It provides that:

> (1) No person under the age of eighteen may contract a marriage …;
>
> (2) For the avoidance of any doubt, child marriages are prohibited and under no circumstance shall any person contract, solemnise, promote, permit, allow or coerce or aid or abet the contracting, solemnizing, promotion, permitting, allowing or coercion of the marriage, unregistered customary law marriage, civil partnership, pledging, promise in marriage or betrothal of a child.

While, to date, there has been no specific statute that prohibits child marriage in Zimbabwe, a number of legislative provisions that protect children from betrothal, pledging, domestic violence, early sexual intercourse, coerced sexual intercourse and forced marriage do exist. These laws include the Domestic Violence Act,[15] the Criminal Law Codification Act,[16] the Sexual Offences Act[17] and the Children's Act.[18] The main

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15 See, for example, s 3 of the Domestic Violence Act [Chapter 5:16] (24 of 2006), which defines domestic violence to include unlawful acts or abuse derive from customary practices, such as, child and forced marriage.

16 See, for example, ss 61–76 of the Criminal Law (Codification and Reform) Act [Chapter 9:23], which prohibits various forms of sexual violence.

17 See, for example, Part II of the Sexual Offences Act [Chapter 9:21], which prohibits extra-marital sexual offences with young persons.

18 See, for example, Part III (ss 7–11) of the Children's Act [Chapter 5:06], which provides for the prevention of neglect and ill-treatment and exploitation of children and young persons.

challenge, however, is that although these legislative texts tacitly and *prima facie* provide protection of children from the underlying drivers of the vice, they operate alongside other laws which appear to be contradictory in relation to the age of marriage and the definition of the child.

A number of the provisions in the Marriages Act, Customary Marriages Act and Children's Act and related laws have been outlawed by the coming into existence of the Constitution, because it provides that where any law, custom, conduct, religion is inconsistent with any provisions of the Constitution, the Constitution must prevail (Constitution 2013, section 2). This position has been confirmed by the CCZ in the *Mudzuru* case: sections 20 and 22 of the Marriages Act, which permitted child marriages, were expressly declared unconstitutional to the extent of their inconsistency with constitutional provisions.[19] It is trite to submit that while these laws have been outlawed and declared illegal by the apex court, they remain on the statute books five years after the 2013 Constitution was instituted. As stated above, perhaps this may be because the CCZ did not prescribe a time limit in which the legislature is to expunge the unconstitutional provisions of the marriage laws.

Therefore, it is imperative to recommend that for effective protection of child rights against child marriage in Zimbabwe, legislators and policy-makers must, where necessary, urgently review and harmonise legislation with international human rights law in general and the 2013 Constitution in particular, especially the Bill of Rights (Constitution 2013, Chapter 4). In the process of harmonising the laws, the government must further ensure that it amends all ancillary laws that may have a direct external relationship with the provisions prohibiting child marriage. This will ensure consistency and harmony in the legal framework. In fact, it will ensure that all the ambiguity or contradictions in the statutes relative to children and their welfare and any other ancillary pieces of legislation identified above are eliminated; it should further assist in the holistic and correct interpretation and application of the law.

As was demonstrated in this study, one of the major drawbacks in the legal system is not only the lack of specific legislation prohibiting child marriage but also the weak enforcement of the current laws. This has been due to a number of factors, including a lack of awareness of the 2013 constitutional developments; a lack of awareness of the landmark ruling abolishing child marriages; a lack of knowledge regarding the fundamental rights of children; reluctance and fear to report cases of child marriage to law-enforcement officials, mainly owing to religious and cultural beliefs and social factors; a lack of evidence to prosecute perpetrators in cases where family members

[19] The government must speedily amend the marriage laws in relation to the minimum age of marriage and the need for consent as an intrinsic element of the right to marry. This will, in turn, operationalise the constitutional requirement of personal, free and informed consent as a fundamental basis for the right to enter into marriage.

withdraw cases; limited access to the justice system, particularly legal aid, the police, the courts due to distance, financing, and a lack of knowledge of these services; inadequate training of law-enforcement officials, especially in child protection cases in general; the handling of child marriage in particular; and corruption. It follows, therefore, that the government must not only harmonise the above statutes with the Constitution but must further ensure that these laws are enforced at all levels. As was argued in this article, the slow alignment and harmonisation of laws in line with the supreme law and the lack of enforcement of the landmark ruling seriously hinder the effectiveness of the legal framework and, as a consequence, child marriage remains rampant in the country.

Urgent Need to criminalise Child Marriage: The Need for Specific Legislation such as a "Prohibition of Child Marriages and Protection of Children already in Marriage Act"

Given the abovementioned enforcement problems and contradictions in the current legislative framework, it is clear that the legal effort to eradicate and combat child marriages will not easily succeed without the enactment of a specific Act of parliament prohibiting child marriages. This is said mindful of the fact that, given the same enforcement challenges, the new law may not be easily enforced and the need for a new Act may appear to be a step too far. Be that as it may, a number of countries battling the vice have enacted specific Acts of parliament forbidding and criminalising the scourge and, in some instances, there has been discernible success, mainly due to the fact that there is clear guidance for law-enforcement officials.[20]

As an intervention, therefore, it is vital that Zimbabwe strongly consider enacting specific, unambiguous legislation prohibiting child marriage which must contain strict criminal and (potentially civil) penalties applicable to anyone who officiates at, facilitates or participates in such marriages, including parents and legal guardians. De Silva De-Alwis (2007, 38) argues that legislating to regulate child marriage and treating it as a human-rights issue is significant for two main reasons: first, it emphasises the gravity of the matter as a public concern rather than a private family matter and, secondly, it is easy for individuals to hold the state accountable for failing to enforce such a law and to protect child rights.

In addition, it is important to acknowledge that, through enacting specific provisions, criminalising child marriage may potentially drive the vice underground. It is argued, furthermore, that the Constitution already prohibits child marriage and that an Act of Parliament will operationalise constitutional provisions. Proudman (2014, 1) also correctly asserts that any approach that is meant to counter forced (and child) marriages must consider criminalising such unions. Her reasoning is that a specific criminal

[20] For example, India has enacted the Prohibitions of Marriages Act of 2006.

offence will not only have a deterrent effect on perpetrators but will possibly also send a clear message to the public that child marriage is socially unacceptable and intolerable (Proudman 2014, 1). While concurring with Proudman (2014, 1), Sabbe et al (2014, 184) rightly opine that enacting specific criminal legislation must be supported by substantial education and awareness-raising among the public, civil servants, employees and victims as it might drive these practices underground. This might in turn serve to deter victims from seeking help when subjected to forced and child marriages, owing to the fear that their parents or relatives may be prosecuted (Proudman 2014, 1–6).

In criminalising the act of child marriage in an attempt to arrest the scourge, thereby ensuring that child rights are protected, it is submitted that specific legislative provisions criminalising child marriage will underscore a number of advantages; the law will probably change public opinion in particular, given that the vice is unconstitutional, illegal and unacceptable as it inhibits children's enjoyment of their rights. In addition, a specific Act of parliament criminalising the harmful practice has the strong potential to have a deterrent effect and send a clear signal to all sections of society that they must refrain from such a harmful practice. In addition, it will possibly provide clear guidance for public-sector employees in general, and the police, prosecutors and judicial officers in particular, and make it easier for individuals to hold the state accountable both domestically and internationally.[21] Finally, it will make it easier for any frontline agencies and relevant stakeholders to take action in child marriage-related cases.

It is recommended in this article accordingly that the challenges associated with the insufficiencies of the current laws should serve to convince the National Assembly to take the necessary steps to speedily fill the existing gaps in the law and strongly consider enacting strict legislation with precise and concise provisions that combat the vice. Such a law must ensure that it adequately incorporates the rich provisions of international, regional and sub-regional SADC law on eradicating child marriage and protecting children already in marriage. The express legal prohibition of child marriages will, if enacted, provide a strong foundation for preventing and addressing the vice, protect child rights and fight impunity. The drafters of such an Act of parliament must ensure that it provides for no exceptions upon parental consent or judicial or executive authorisation. The watchdog bodies must ensure that the National Assembly includes sufficiently all the salient issues pertaining to child marriage in Zimbabwe.

On the enactment of a new Act and the realigning the current statutes, it is recommended, however, that the government should not pursue such legal and policy reforms in isolation of awareness and education, but must consider substantial sensitisation of the public to all the legal developments. This is because it is necessary

[21] The government must be able to account to the Committee on the Rights of Child and the Committee of Experts on the Rights and Welfare of the Child regarding the measures they have taken to ensure the practical enjoyment of all child rights by children.

and important for any person to be aware of the law and be able to ensure that their conduct conforms to that law. Widespread and constant public awareness-raising of the legal measures will help with avoiding driving the vice underground, which may make it even more difficult to combat. In pursuing new legislation, moreover, the government; through the relevant ministries, must increase access to birth and marriage registration, especially in rural areas where the practice is rife. Marriage registration officers must be well trained so as to enable them to establish proof of age at marriage.

Role of the Courts/Judiciary

The courts, too, play a critical role in interpreting and applying the law. It is therefore imperative that as part of the legal tools employed to eradicate child marriage, the courts act as last resort in upholding the rights of the people. Section 162 of the 2013 Constitution vests judicial authority in the courts. The protection of human rights is generally everyone's duty, especially that of the three arms of government, namely, the executive, legislature and the judiciary. The judiciary is mandated to protect all rights in their daily functions: in particular, section 165 stipulates that the role of the courts is paramount and significant in safeguarding human rights and the rule of law. Most importantly, the courts are to exercise their judicial functions freely and without undue influence or any external force. This is because, on the one hand, the Constitution is explicit in section 165, declaring that the courts are impartial and independent and subject only to the Constitution. On the other hand, the courts must at all times respect and esteem their judicial office as a public trust and must strive to enhance their judicial independence at all times. This entails that, in interpreting child rights and indeed all rights, the courts must fully apply their minds and deliver credible judgments in line with the provisions of the Constitution. In fact, the government is obliged not only to protect the judicial organ and but also assist it in carrying out its functions effectively, particularly to ensure that all court orders are obeyed by everyone.

It has been noted above that currently there is no specific legislation that prohibits child marriage. As a result, it is recommended that the courts – particularly the Constitutional Court as the guardian of the Constitution and the High Court as the upper guardian of children – recognise their primary role as that of deepening constitutional democracy, upholding the protection of all human rights, including those of children, and entrenching the rule of law.[22] In fact, the CCZ is endowed with an obligation to ensure that it interprets all laws in line with the current Constitution, particularly the Bill of Rights (Constitution 2013, section 165). The Constitution provides for a plethora of rights, including a comprehensive child rights clause. However, the effectiveness of

[22] Section 3 of the Constitution provides that the rule of law, fundamental human rights and freedoms, the nation's diverse cultural, religious and traditional values, recognition of the inherent dignity and worth of each human being, recognition of the equality of all human beings, gender equality, and good governance shall be upheld.

these rights lies in their enforcement through an active and independent judiciary that is alive to the needs and contemporary challenges facing the public, such as the challenge of child marriage.[23]

The CCZ has already displayed its commitment to advancing child rights against child marriage. This is evident from the *Mudzuru* judgment, which attracted international attention. In that case, the CCZ emphatically reasoned that, as at May 2013, when the current Constitution took effect, any marriage under the age of 18 years is unconstitutional and unlawful. This it did by declaring a number of legislative provisions in the Marriages Act that permitted the practice of child marriage unlawful.

In addition, the *Zimnat Insurance Co Ltd v Chawanda* case is particularly important to the courts as it acknowledges the special role that the judiciary plays as an instrument of social change and transformation. The Supreme Court reasoned that

> [t]oday, the expectations among people all over the world and particularly in developing countries are rising and the judicial process has a vital role to play in moulding and developing the process of social change. The judiciary can and must operate the law to fulfil the necessary role of effecting such development. It sometimes happens that the goal of the social and economic change is reached more quickly through legal development by the judiciary than by the legislature. This is because judges have a certain amount of freedom of latitude in the process of interpretation and application of the law.

As a consequence, it suffices to submit that the protected rights, including child rights, present the judiciary with an important opportunity to reinstate its image as the true upholder and guardian of human rights on the continent. This is because under the legal approach to combating the habitually harmful practice of child marriage, the judiciary must adopt new ways of thinking and innovative ways of engaging with the 2013 Constitution, thus ensuring that all rights are promoted, protected and fulfilled.

Section 165(7) of the Constitution expressly mandates judges and all presiding officers to take reasonable measures to maintain and enhance their professional know-how, skills and qualities and, in particular, to keep abreast of developments in domestic and international law. This section is paramount to the role of the courts in protecting human rights.

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[23] The courts have already shown their commitment to upholding the rights of citizens. For example, in *Mawarire v Mugabe NO & Others* the CCZ held that certainly this Court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. This Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat, more so under the liberal post-2009 requirements.

In the case of *S v Chamakoga* discussed above, the High Court stressed a concern among the judicial officers and held that

> there is a perturbing and disturbing trend by judicial officers in Zimbabwe because they appear to disregard the demands of section 327(6) of the current Constitution which expressly requires all judicial officers to give due regard to reasonable and purposive interpretation of all legislation that is in line with international instruments that are binding on Zimbabwe.

To this end, it is vital that the courts avoid legal formalism and be forward-looking, positioning themselves as the true upholders of the Constitution (Ndlovu 2015), and that they safeguard all the constitutionally protected rights, especially those of vulnerable groups such as children.

Conclusion

This article examined the practice of child marriage in Zimbabwe. It highlights, in particular, the developments affecting and the transformation in the legislative frameworks, specifically the constitutional provisions relating to child marriage before and after the adoption of the 2013 Zimbabwean Constitution and its effect through the *Mudzuru* case. Most importantly, this article considered the question of dealing with the persistent practice of child marriage, despite the vast array of mechanisms within the human-rights legal frameworks. Although this article focuses on the legislative frameworks (such as legislative reforms, the criminalisation of child marriage through the specific legislation "Prohibition of Child Marriages and Protection of Children already in Marriage Act" etc) as part of efforts to address child marriage, the role of non-legal mechanisms, such as public awareness, sensitisation and education, in addressing child marriage, is not discussed fully. None the less, such non-legal mechanisms are vital in the pursuit of ending child marriage in Zimbabwe.

In summary, what is urgently needed is a holistic, multi-pronged approach involving a number of stakeholders and sub-approaches or strategies. This is due to the fact that, other than the apparent legal inconsistencies in the legal framework, there are wider social justice practices and behaviours that need to be addressed and, as such, legal and constitutional reform on its own will be insufficient in eliminating the vice. The authors therefore submit that there is no single strategy to end the practice of child marriage and that Zimbabwe must therefore consider adopting a multi-faceted strategy that comprises both legal and non-legal mechanisms.

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