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SCHOOL OF LAW

TITLE:
ADDRESSING CHILD MARRIAGES THROUGH LAW REFORM: A CASE STUDY OF ZIMBABWE

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A Dissertation submitted to the School of Law in partial fulfilment of the requirements of the degree Master in Child Care and Protection Law.

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4 DECEMBER 2015
Declaration

By submitting this dissertation, I declare that the entire work contained herein is my own work, except for instances indicated otherwise, that I am the author thereof, and that the work, in its entirety or in part, has not been previously submitted in this or similar form at this University or any other for the purposes of obtaining an academic qualification. This paper is an original piece of work.

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<th>Description</th>
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<tr>
<td>AIC</td>
<td>African Initiated Church</td>
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<td>AU</td>
<td>African Union</td>
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<td>CEDAW</td>
<td>Convention on the Elimination of all Forms of Discrimination against Women</td>
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<td>CMA</td>
<td>Customary Marriages Act</td>
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<td>CRC</td>
<td>United Nations Convention on the Rights of the Child</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>HIV</td>
<td>Human Immunodeficiency Virus</td>
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<tr>
<td>RAU</td>
<td>Research and Advocacy Unit</td>
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<td>RCMA</td>
<td>Recognition of Customary Marriages Act</td>
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<td>SADC</td>
<td>Southern African Development Community</td>
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CHAPTER ONE: INTRODUCTION AND CONTEXT OF THE RESEARCH

1.1 Background

Child-related issues have gained much recognition, resulting in intensified international development of child protection laws, policies and strategies. This has led to the enactment of international conventions and regional charters that provide standards for child protection of both the male and female child.

Since the new millennium, child marriages have become a huge challenge in the development of the girl child.\(^1\) Research shows that over 60 million marriages worldwide involve girls who are under the age of 18 years.\(^2\) A recent study in Zimbabwe revealed that about 31 per cent of girls are married before the age of 18.\(^3\) Statistics further show that 39 per cent of the currently married women in rural Zimbabwe (between the ages of 20-49 years) were married before they reached the age of 18 and in urban areas it amounts to about 21 per cent.\(^4\) According to the 2015 Multiple Indicator Africa Scorecard, on Girls and Women’s Reproductive Health, Family Planning and Human Development, about 30 per cent Zimbabwean girls are being forced into early and child marriages.\(^5\) In 2013, Zimbabwe ranked number 21 among the countries with the highest number of underage married girls, a higher ranking than position 27 in 2012. This indicates a massive increase in child marriages in Zimbabwe.

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According to the Joint General Recommendation/General Comment No 31 of the United Nations Committee on the Elimination of Discrimination against Women and No 18 of the Committee on the Rights of the Child on Harmful Practices, child marriages frequently coincide with early pregnancies and early childbirth, which usually result in higher than the average maternal morbidity and mortality rates. Research shows that pregnancy-related deaths are the leading cause of mortality for 15-19 year-old girls worldwide. Usually, infant mortality among the children of very young mothers is higher (sometimes twice as much) than those of older mothers. Research also shows that victims of child marriages are prone to various health risks from infectious diseases such as HIV and sexually transmitted diseases. Further associated with child marriages are reproductive health problems such as obstetric fistulas in youthful deliveries and mental health issues such as psychological trauma and depression.

The aforementioned indicates that young girls who are in child marriages suffer from the most serious physical, sexual and psychological trauma, and this is mainly due to them being immature mentally and physically. In Zimbabwe, mortality statistics show that the age categories of 10-15 and 16-20 usually have high rates of mortality due to haemorrhaging at birth and the lack of skilled medical personnel to assist at childbirth. Such harmful effects associated with child marriages

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7 Ibid 7.
8 This includes both married and unmarried females.
10 Ibid.
hence highlight a critical need to regulate child marriages in Zimbabwe. Despite the above effects, not much action against child marriages in Zimbabwe has been taken and where it has, it has not been adequate as statistics reveal that girl children continue to be exposed to child marriages.

The rights of Zimbabwean children are protected at domestic, regional and international levels. At international level the United Nations Convention on the Rights of Children; 1989\(^\text{16}\) defines a child as ‘every human being below the age of 18 years unless under the law applicable to the child majority is attained earlier.’\(^\text{17}\) This makes any marriage with someone below the age of 18 a violation. On the regional level, the African Charter on the Rights and Welfare of the Child, 1990,\(^\text{18}\) (hereafter, the African Charter), is an instrument through which African states committed themselves to uphold and protect the rights of children on the African continent. The African Charter defines a child in articles 2 as ‘every human being below the age of 18 years.’ The SADC Protocol on Gender and Development 2008\(^\text{19}\) deals with emerging gender issues. In Article 8 of this Protocol, no children under the age of 18 must be married and in those cases where they are, it must be in their best interest.\(^\text{20}\) In other words, all these Conventions set 18 years as the minimum age of marriage.

Gumbonzvanda correctly states that, ‘Child marriage is a human rights and a development issue.’\(^\text{21}\) This statement highlights that child marriages are more than just a harmful practice but goes even to the core of human rights and physical development of the girl children. Gumbonzvanda further states that child marriage ‘is abuse and it is often rape. By calling it marriage, we are sanitizing, and giving a cloak of legality, with social and moral acceptability, to this crime and harmful practice. This is child sexual abuse and exploitation.’\(^\text{22}\)

\(^\text{17}\) Ibid art 1.
\(^\text{19}\) South African Development Community (SADC), Protocol on Gender and Development 2008.
\(^\text{20}\) Ibid art 8.
\(^\text{22}\)Ibid.
Against this background, it will be argued that there is a great need to urgently eradicate and prevent child marriages in Zimbabwe.

1.2 Research problem and literature review

Research to date on child marriages in Zimbabwe has not yet produced legislative proposals prohibiting child marriages. Only a few researchers have called for the amendment of current marriage laws to render 18 years the age of marriage for both girls and boys as a means to curb the practice of child marriages.

Two victims of child marriages recently took the Zimbabwean government to the Constitutional Court challenging child marriages in the unreported case of Loveness Mudzuru and Ruvimbo Tsopodzi v The Minister of Justice, Legal and Parliamentary Affairs, the Minister of Women’s Affairs, Gender and Community Development and the Attorney-General.23 The applicants were both aged 15 when they were married.24 They sought an increase in the legally marriageable age for girls to be increased from 16 years to 18,25 bringing it in line with that for boys as it is suggested that the current provisions are discriminatory on the basis of gender.26 ‘The applicants argued that the Constitution has made 18 the marriageable age for both girls and boys.’27 Existing laws such as the Marriage Act28 and the Customary Marriages Act29 are hence unconstitutional, to the extent that they do not provide for proper protections against child marriage,30 which they are ‘obliged to provide by under the Constitution and its international commitments.’31 The judgment in this matter is yet to be handed down, and it remains to be seen how the judiciary will decide this

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23 Loveness Mudzuru and Ruvimbo Tsopodzi v The Minister of Justice, Legal and Parliamentary Affairs, the Minister of Women’s Affairs, Gender and Community Development and the Attorney-General (CC), unreported case, case no CCZ 79/2014 (14th January 2015), 2 available at http://www.veritaszim.net/sites/veritas_d/files/Mudzuru%20%26%20Another%20v%20Minister%20of%20Justice%20%26%20Attorney%20General.pdf, accessed on 5 March 2015.
25 Ibid.
26 Ibid.
27 Note 23 above, paragraph 110.
31 Ibid.
constitutional challenge. Although this case will be a landmark decision in the fight against child marriages, it only focuses on amending existing legislation and removing the discrimination in the legislation. It does not seek to call for a child marriage banning statute that addresses child marriages. This research aims to provide such a recommendation.

1.2.1 Factors that encourage child marriages

Child marriage has not been defined internationally or officially. Generally, child marriage occurs when one or both of the spouses are below the age of 18 years. For the purposes of this research, child marriages will be deemed as the marriage of minors below 18 years of age, and as marriages concluded without consent of girl children below the age of 18. The term child marriage will also be used to mean early marriage and forced marriage for the purpose of this research. Child marriage almost exclusively affects girls who are most vulnerable to the practice. This paper will focus on the female child, as statistics show her to be more disproportionally affected by child marriages than the male child.

A preliminary review of literature shows macro and micro forces that have aggravated child marriages. Child marriages arise from an array of sources: economic, social, political and religious reasons. Walker states that the economic context in which early marriage exists in Africa is that of household poverty and vulnerability. Marrying girl children off before they are 18 years is a huge financial relief for poor families who see child marriage as relieving them from

34 FRA (note 32 above) 45.
36 It has been noted that “Young children, rarely consent freely or understand the long-term implications of marriage”.
37 Ibid.
the responsibility of taking care of those children. Currently, Zimbabwe has been facing many economic hardships. Its economy is ranked 176th worldwide in the Index of Economic Freedom. It ranked last out of 46 countries in the Sub-Saharan Africa region and is the third-least free country rated in the 2014 Index. This shows that Zimbabwe presently remains characterized by heavy economic instability, which has greatly increased the rates of child marriages. The impact of hyperinflation over the years has crippled the country’s entrepreneurial capacity, which in turn undermines the country’s economic potential. Without an intact economic foundation, child marriage becomes a source of poverty alleviation.

Another factor that has led to an increase in child marriages in Zimbabwe is the religious doctrines in African Initiated Churches (hereafter AIC). Francis Machingura has noted that child marriages are practised within the AIC churches. The members of AIC churches believe in prophecies in which they are told about their future, and are warned of any future dangers. All female members of the Johane Masowe church (an African Initiated Church in Zimbabwe) are expected to pass a ceremonial virginity examination. Because virginity is a symbol of purity, men marry young girl children before they are deflowered. In addition, the church has a strong belief in Mweya Mutsvene (Holy Spirit) which is seen as sacred, and plays a central role in the spiritual life, beliefs, and faith of the apostolic religious community. When a prophecy is given pertaining to marriage of a young child, it will be accepted without question as being from the spirit. This denomination

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40 Ibid.
42 Ibid.
43 Ibid.
44 Lazarus Sauti ‘Child marriages defy Zimbabwe’s new Constitution’ 2 June 2014, available at http://lazarussauti.wordpress.com/2014/06/02/child-marriages-defy-zimbabwes-new-constitution/, accessed on 7 November 2014. [*“Most apostolic churches in Zimbabwe encourage polygamous marriages and recent research indicates that the Johane Masowe sect is one of the worst perpetrators of child marriages to the extent that 21 percent of the married women in the church were under the age of 18”. [this hence increases child marriages in Zimbabwe]*
48 Ibid.
has been identified as encouraging child marriages.\textsuperscript{50}

In addition, Togarasei highlights although in the context of Botswana, how the AIC holds to an extremely patriarchal interpretation of the Bible.\textsuperscript{51} The biblical verse that the man is the head of the family\textsuperscript{52} is also very influential in the AIC’s doctrine.\textsuperscript{53} Biblical ‘teachings on the headship of men’\textsuperscript{54} are used to emphasize this position where Christ’s headship of the church is compared to a man’s headship over his family. Such teachings promote discriminatory paternalism.\textsuperscript{55} Such headship is considered to entail ‘decision making, provision, authority and unquestioned belief in the man’s decisions…’\textsuperscript{56} Hence in the AIC churches, most often the girl children will have no say over the decisions regarding their early marriage even when they do not want to be married. If the father consents to the marriage, they are obliged to obey him. It is the aim of this research to recommend that this problem be addressed.

The question that remains is what are the effects of lack of legislation concerning child marriages and to what extent this lack herein has impacted Zimbabwean girl child rights. To be able to answer this question, the following research questions will be addressed in the dissertation.

1.3 \textit{Research questions}

The research questions that will be answered by this dissertation are as follows:

1. What is the current legal framework applicable to child marriages in Zimbabwe?
2. Is such a legal framework compliant with international human rights and domestic constitutional standards?

\textsuperscript{50} Elsa Buchanan ‘Child marriage in Africa: ‘We have a crisis on our hands’’ 12 December 2015 available at http://www.ibtimes.co.uk/child-marriage-africa-we-have-crisis-our-hands-1532750 , accessed on 25 February 2016.
\textsuperscript{51} L Togarasei ‘Christianity and hegemonic Masculinity: Transforming Botswana Hegemonic Masculinity using the Jesus of Luke’ 2013 112 \textit{Scriptura} 3.
\textsuperscript{52} (note 11 in this article mentions that “Because what I say about Botswana men is to a large extent true of most African men, especially in sub-Saharan Africa, Botswana and Africa are sometimes used interchangeably in this article” this is the same view point taken in this research. ).
\textsuperscript{54} O Dodo (note 46 above) 6.
\textsuperscript{55} Ibid, 6 (Ephesians 5:22, King James Bible).
\textsuperscript{56} Ibid.
3. What can Zimbabwe learn from foreign jurisdictions that have banned child marriages?
4. How, if at all, will inclusion of adequate punitive measures in the domestic Zimbabwean legislation help to end child marriages?

1.3.1 Research problems and objectives: Broader issues to be investigated

The broader issue is to address the effects of lack of uniform enforceable legislative provisions in the existing statutes and to ascertain the extent to which this has impacted girl child rights in Zimbabwe. Secondly, the aim is to address other factors mentioned above that have allowed child marriages to continue in Zimbabwe and to provide a bottom-up approach to prevent child marriages.

1.4 Research Aims

The aim of this research is to provide commentary for drafting of new legislation for the elimination of child marriages in Zimbabwe. For the Zimbabwean community, chastity and purity are valued societal morals for girl children and for some, early marriage is a realistic method of keeping the child safe from the lures of modern-day sexual activities. Furthermore, for some it is a better form of financial assistance in the current economic hard times. Despite the prevalence of information and campaigns calling for the end of child marriages, it has proven difficult to end especially since the present laws allow the practice to take place under the guise of consent given by the parent or guardian. Hence, this research aims to highlight the differences in marriageable ages allowed for formalizing marriages in Zimbabwe and to highlight the importance of enacting new legislation that prohibits child marriage in order to end this harmful practice.

Secondly, the aim is to amend legislation that is already in existence to expressly state 18 as the age of marriage.

1.5 Research outline

In order to achieve the aims stated above, the dissertation will analyse the Marriage Act, and the Customary Marriage Act and analyse them against the constitutional stipulations on marriage.

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57 Zimbabwe: Marriage Act (note 28 above).
58 Zimbabwe: Customary Marriages Act (note 29 above).
and equality in Zimbabwe. This will be done in order to establish whether the provisions in these statutes are constitutional or whether they need to be amended, considering that section 78 of the Constitution\textsuperscript{59} cites 18 years as the minimum age for marriage. The international legal framework that deals with child marriages and discrimination will be used to show where the Zimbabwean marriage laws need transformation and where it must incorporate policies that protect girl children from child marriages.

1.6 Research methodology

This research has been largely based on primary and secondary sources. The review will include searches of electronic academic databases for current literature and online platforms such as Sabinet, Google Scholar and Ebsco Host as well as websites such as UNICEF, girlsnotbrides.org. Research reports and peer-reviewed academic journals will be used. Grey literature such as newspaper articles, unpublished research reports and papers, and commentaries will be gathered from the web, and reviewed. Reference lists of the aforementioned journal articles will also be consulted for further relevant literature.

The research will also incorporate a comparative study, which involves two countries: India and South Africa. India has successfully promulgated a law that bans child marriages. It is the aim of this research to show that Zimbabwe could also incorporate some of the legislative provisions in India’s Prohibition of Child Marriages Act 6 of 2007, adapting the provisions to local needs. Indian legislation will be significant in that most of its child marriages take place because of poverty and religion, which are similar to Zimbabwe’s religious, cultural, and poverty-driven child marriages. Additionally, in analysis of the legislation in Zimbabwe, South Africa will be used as a point of reference as it has progressive legislation that promotes and protects the rights of the child. What will be assessed is the approach to the marriage requirements as per South Africa’s Recognition of Customary Marriages Act\textsuperscript{60} and the Children’s Act, 38 of 2005,\textsuperscript{61} which has detailed child rights. The dissertation will further look at the United Kingdom’s Forced Marriage (Civil Protection)

\textsuperscript{59} Constitution of Zimbabwe Amendment (No. 20) Act, 2013.
\textsuperscript{60} No. 120 of 1998 (hereafter RCMA).
\textsuperscript{61} Hereafter SA Children’s Act.
Act\textsuperscript{62} that was enacted to prevent forced marriages. This will be done to show whether criminal sanctioned legislation is the appropriate measure that can be adopted to prevent child marriages.

\subsection*{1.7 Conclusion}

Based on the above, it can be seen that child marriages have been ongoing and continue to be detrimental for the girl child’s development. Existing research reveals laws and policies present in Zimbabwe that regulates marriage. Current research on child marriage has mainly examined the prevalence, effects and reported reasons for the practice of child marriages. Considering the negative effects that a child marriage has on the development of the child, there has been little analysis on how the differences in child marriageable ages in existing legislation encourage the practice of child marriages to continue. Research has not as much focused and explored how lack of prohibition and punitive measures on those who practice child marriages, lack of a comprehensive legal and policy framework dealing with child marriages has contributed to the silent exploitation of the Zimbabwean girl child.

An analytical and holistic approach need therefore be adopted, which will look at the legal framework and the legislative inconsistencies that have failed to eliminate child marriages in Zimbabwe. This research incorporates a comparative analysis of foreign legislation, which will influence the recommendations made at the end of the study in terms of proposed legislative reform on child marriages in Zimbabwe.

\footnote{\textsuperscript{62}Forced Marriage (Civil Protection) [UK] Act (2007).}
2 CHAPTER 2: INTERNATIONAL LEGAL FRAMEWORK

2.1 Introduction

Children’s rights are protected at domestic, regional and international levels. At all of these levels, national governments are urged to combat the practice of child marriage. Literature shows that international laws set the foundation that state parties must follow in their own domestic laws and policies. Burris views international laws as important tools in preventing child marriages. Gaffney-Rhys further asserts that these international and regional instruments are bench markers for the ‘normative standard’ that state parties must adhere to in their internal policies and laws. Thus, international conventions and regional treaties are vital in the protection of the girl child from child marriages. The standards they set are significant in curbing child marriages as these create accountability on signatory states that fail to take measures to prevent child marriages.

This chapter examines the international and regional framework that addresses child marriages. This is done to determine the legality of child marriages from the international and regional perspective. The chapter will begin by looking at international and regional treaties that directly and indirectly address child marriages. Secondly, the chapter analyses the strengths and weaknesses of the international and regional framework to consider whether they adequately address the issue of child marriages. Finally, the chapter will provide recommendations to deal with identified gaps in the international and regional legal framework and some conclusions.

64 Ibid 367.
66 Gaffney-Rhys (note 63 above) 367.
2.2 INTERNATIONAL TREATIES


The United Nations Convention on the Rights of the Child, 1989\(^68\) is ‘considered as the most successful international document in history’\(^69\) which focuses on children’s rights. It has also been described as an important treaty to discuss in relation to child marriages as it places a ‘comprehensive duty on the state to ensure the rights of children and protect them from all forms of abuse, exploitation and violence.’\(^70\) Achan-Okiria contends that this duty implies that a state becomes accountable if it fails to respond and act on the requirements of the CRC to prevent child abuse through child marriages.\(^71\)

A number of provisions in the CRC apply to child marriage, although there is no direct and specific provision dealing with the prohibition of child marriage.\(^72\) Child marriage is connected to other rights such as the right to protection from all forms of abuse.\(^73\) The CRC prohibits state parties from extending validity to a marriage between persons who have not attained their majority, although it allows exceptions in certain instances.\(^74\) In the context of the CRC, ‘a child means every human being below the age of 18, unless under the law applicable to the child, majority is attained earlier.’\(^75\) The exception that the age of majority may be attained earlier in the CRC and lack of a minimum age of marriage has been criticised by writers as implying that the CRC did not intend to prohibit child marriages in respect of persons under the age of 18 years.\(^76\)

The CRC provides for the ‘best interest of the child principle’\(^77\) which can be interpreted to mean that a child should be protected from all activities including child marriages that are harmful to

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\(^{68}\) CRC 9 (note 16 above).

\(^{69}\) Burris (note 65 above) 156.


\(^{71}\) Ibid.


\(^{73}\) CRC (note 16 above) art 34.

\(^{74}\) Ibid art 1 ‘For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.’

\(^{75}\) Ibid.

\(^{76}\) Gaffney-Rhys (note 63 above) 364.

\(^{77}\) CRC art 3(1).
her. The best interest of the child also means the well-being of the child which is determined by a number of things such as age, child’s maturity level, the child’s environment and experiences. The United Nations Higher Commission for Refugees guidelines state that according to the CRC in article 3, ‘the best interests must be a primary (but not the sole) consideration for all other actions affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies.’ This requirement can be interpreted to mean that governments have obligations to consider the ‘best interest’ of the child in child marriage cases. Bunting quotes Lai and Ralph, who are of the view that it is against the best interest of minors if the parents give them in marriage before they are mature. To promote a child’s best interest, parents and governments are responsible for protecting children’s health, education, development and well-being to the best of their capacities.

State parties to the CRC are obliged ‘to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.’ Moreover, the CRC provides for the right of the child to be protected from all forms of violence, including physical, sexual or psychological violence and requires state parties to ensure that no child be subjected to torture or other cruel, inhuman or degrading treatments or punishment. The CRC applies the four general principles of the Convention regarding the issue of harmful practices, namely: protection from discrimination, ensuring the best interests of the child, upholding the right to life, survival and development and the right of the child to be heard. Despite these provisions, girl children in Zimbabwe continue to face abuse and sexual exploitation through child marriages. Since Zimbabwe is a signatory to the CRC, it has an obligation to protect children from child marriages.

79 Ibid 15.
81 CRC (note 16 above) art 24 (3).
82 Ibid art 19.
83 Ibid art 37 (a).
84 Ibid art 2.
85 Ibid art 3 (1).
86 Ibid art 6.
87 Ibid art 12.
88 S Gwavuya ‘Birth registration in Zimbabwe, can we do more’ available at http://www.unicef.org/zimbabwe/media_15175.html, accessed on 13 August 2015.
According to UN General Comment 31, the constructive prevention and elimination of harmful practices towards children require the setting up of a ‘well-defined, rights-based and locally-relevant holistic strategy, which includes supportive legal and policy measures, including social measures that are combined with a commensurate political commitment and accountability at all levels.’ 89 This means that the state is obliged to prohibit and prevent child marriages through legislative means as well as social measures to be taken. Child marriage falls within the ambit of harmful cultural practices and hence Zimbabwe must take appropriate measures to eradicate it.

2.2.2 United Nations Convention on the Elimination of All Forms of Discrimination against Women

The United Nations Convention on the Elimination of All Forms of Discrimination against Women90 (hereafter CEDAW) is an international treaty that focuses on the rights of women.91 Equality Now is of the view that CEDAW is the clearest and most elaborate Convention in specifically dealing with addressing child marriages.92 This view has been accepted by Achan-Okiria who further describes it as a Convention that expressly and directly prohibits child marriages.93 Zimbabwe is a signatory and has ratified CEDAW.94

In terms of article 1, states are bound to abolish discrimination in every area of women’s lives, including the family setting95, which is included in the ‘social category’ included in the provision. In article 2, CEDAW states that:

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

89 CEDAW General Comment (note 6 above) paragraph 32, 10.
90 Ibid.
91 R De Silva-de-Alwis (note 67 above 8).
93 Achan-Okiria (note 70 above) 33.
95 R De Silva-de-Alwis (note 67 above) 9.
(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

The above section carries policy measures that highlight areas where discrimination against women can be prevented. The Convention in article 2 (f), it requires state parties to prevent discrimination on women through legislative measures that will change existing laws and practices. The section highlights hence the need to repeal legislation, customs and regulations that are discriminatory to women. A detailed discussion will follow in Chapter 3, which focuses on Zimbabwean domestic laws and the differences in ages of marriage for boys and girls embedded therein.

CEDAW addresses child marriages by stating that ‘the betrothal and marriage of a child shall have no legal effect.’ This is a significant stipulation that seeks to protect from child marriages. In addition, the Convention goes further in stating that ‘...all necessary action, including legislation


96 CEDAW Article 16 (2).
shall be taken to specify a minimum age for marriage." However, the Convention does not give a definition of a child.

However, despite its clear stipulations, some writers have noticed some weaknesses in CEDAW. Achan-Okiria asserts that the Convention addresses problems that women face on issues of equality and choices on who they marry. She concludes that CEDAW is more focused on giving adult woman more power in terms of marital decision making rather than in ending child marriages per se. Gaffney-Rhys contends that the Convention does not define a child and as such makes it difficult to determine with certainty what ages its protection extends to. Gaffney-Rhys further notes that CEDAW does not prescribe a minimum age that is appropriate for marriage despite obliging states to determine such an age in article 16 (2). Okiria further asserts that CEDAW only addresses child marriages to a small extent, and the ban on child marriages seems to have been ‘an afterthought.’

Lastly, the Convention, despite seemingly prohibiting child marriages, does not have an enforcement mechanism. Brunnee states that international law is ‘state-centred in fundamental respects,’ meaning that enforcement has been left in the hands of state signatories who have to incorporate the Convention into their domestic legislation. Leaving enforcement in the hands of the state may be risky, as states sometimes do not promulgate laws to effect such enforcement. This then brings a lower success rate in terms of prevention of child marriages.

However, despite the above weaknesses of the Convention, one cannot take away from the valuable foundation it sets down in affording protection to girl children from child marriages.

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97 Ibid.
98 Achan-Okiria (note 70 above) 34.
99 Ibid.
100 Gaffney-Rhys (note 63 above) 364.
101 Ibid 363.
102 Achan - Okiria (note 70 above) 34.
104 Ibid 34.
2.2.3  *International Convention on Civil and Political Rights*

The International Convention on Civil and Political Rights\(^\text{105}\) has a committee that monitors the domestic implementation of the treaty’s provisions.\(^\text{106}\) The ICCPR indirectly addresses child marriage in article 23 (3) which states ‘no marriage shall be entered into without the free and full consent of the intending spouses.’\(^\text{107}\) However, it seems that article 23 (3) covers general marriages and is not directly focused on child marriages. The ICCPR’s weakness lies in the fact that it does not define what free and full consent entails. When dealing with child marriages, the issue of consent needs to be viewed from the position taken by Equality Now, which reveals that consent in child marriages needs to be considered in relation to societal norms, cultural values, family and parental influences.\(^\text{108}\) Equality Now then concludes that consent should not be the basis for allowing a child to be married as usually the consent may be given because of influences from family and society.\(^\text{109}\)

2.2.4  *United Nations General Convention on Consent to Marriage Minimum Age for Marriage and Registration of Marriage (hereafter The Marriage Convention)*\(^\text{110}\)

The Marriage Convention ‘proposes some admirable goals’\(^\text{111}\) about child marriages. In the preamble, though this is not binding\(^\text{112}\) the Convention states that:

Reaffirming that all States, including those which have or assume responsibility for the administration of Non-Self-Governing and Trust Territories until their achievement of independence, should take all appropriate measures with a view to abolishing such customs, ancient laws and practices by ensuring, inter alia, complete freedom in the choice of a spouse, eliminating completely child marriages and the betrothal of young girls before the age of puberty, establishing appropriate penalties where necessary and establishing a civil or other register in which all

\(^{105}\) International Convention on Civil and Political Rights, 1966 hereafter the ICCPR.
\(^{106}\) Ibid 158.
\(^{107}\) Ibid.
\(^{108}\) Equality Now (note 92 above) 13.
\(^{109}\) Ibid.
\(^{110}\) UN General Assembly, Convention on Consent to Marriage, Minimum Age for Marriage and registration of marriage GA Resolution 1763 A (XVII) 7 November 1962.
\(^{111}\) Achan – Okiria (note 70 above) 30.
\(^{112}\) Ibid 32.
marriages will be recorded.

Article 2 further also requires the state to ‘take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.’ The Convention requires consent but, it does not define what this consent entails\(^{113}\) and this aspect, in a sense, weakens the Convention. As mentioned above, children are vulnerable and their consent is easily influenced. In addition, the Convention does not stipulate the minimum permissible age for marriage,\(^{114}\) leaving this as a grey area.

### 2.3 Regional Instruments

#### 2.3.1 African Charter on the Rights and Welfare of the Child, 1990

On a regional level, the African Charter on the Rights and Welfare of the Child, 1990,\(^{115}\) is the pre-eminent regional instrument through which African states committed themselves to uphold and protect the rights of children on the African continent. This charter is explicit\(^{116}\) and has direct and specific provisions concerning child marriage.\(^{117}\) In article 2 the African Children’s Charter states that a child is ‘every human being below the age of 18 years.’ Article 21 of the African Children’s Charter stipulates the right of children to be protected against harmful social and cultural practices. Since child marriage is harmful, it falls within the Charter’s ambit. The African Charter in article 21 (2) ‘unequivocally’ sets the minimum age of marriage at eighteen\(^{118}\) and does not allow any exceptions for marriage below this age either based on religious beliefs nor any other cultural practice.\(^{119}\) It furthermore does not allow the taking place of early child marriage based upon the consent of a local authority, parents or guardians of the child.\(^{120}\) The Charter also

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\(^{113}\) Ibid.
\(^{114}\) Ibid.
\(^{115}\) Organization of African Unity (OAU) (note 18 above).
\(^{116}\) Gaffney-Rhys (note 63 above) 365.
\(^{117}\) Achan – Okiria (note 70 above) 38.
\(^{118}\) The African Children’s Charter prohibits ‘Child marriage and the betrothal of girls’ and boys’ with ‘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.’
\(^{119}\) R De Silva-de-Alwis (note 67 above) 15.
\(^{120}\) Ibid 16.
stipulates that the legally permissible marriageable age is 18 years of age.\footnote{Organization of African Unity (OAU) (note 18 above) art 2.} This indicates its strong and relevant stance on the issue of child marriage.

One of the noted setbacks of the African Children’s Charter is that only a few states are party to it\footnote{Achan - Okiria (note 70 above) 39.} meaning only a few have obligations under it. However, of the few Zimbabwe is a signatory and hence it has an obligation under the Charter. Gaffney-Rhys asserts that most African countries have been in violation of the African Charter\footnote{Gaffney-Rhys (note 63 above) 365.} with respect to child marriages. From this, Gaffney-Rhys deduces that setting 18 years as the minimum in an African context might be ‘a step too far’ as many African countries seem to favour 15 years.\footnote{Ibid.} However, despite these loopholes, the stance taken by the African Children’s Charter seems the strongest and most concrete instrument in the fight against child marriages and its harmful effects. Writers have concluded that it is ‘fruitful to develop agreed standards at a regional level where there is greater cultural, economic and political similarity between states’\footnote{N Lowe and G Douglas, Bromley's Family Law Oxford University Press, 11th edition (2015), 23.} and this is what the African Children’s Charter seeks to do by setting an age limit of 18 years.

### 2.3.2 SADC Protocol on Gender and Development 2008

The main objective of the SADC Protocol on Gender and Development 2008\footnote{South African Development Community (SADC) Protocol on Gender and Development 2008, available at http://www.sadc.int/files/8713/5292/8364/Protocol_on_Gender_and_Development_2008.pdf, accessed on 20 October 2015.} is to deal with emerging gender issues. In Article 8 of this Protocol, children below the age of 18 may not be allowed to marry and in those cases where they are allowed to do so, it must be in their best interest.\footnote{Ibid art 8.} The question then arises as to when child marriages are in the best interest of the child? Article 11 also calls upon all state parties to adopt laws that eliminate all forms of discrimination against the girl child within the family, community and nationally.\footnote{Ibid art 8 (2) (a).} In addition, the Protocol ensures that girls are not prejudiced and are protected from economic exploitation.\footnote{Ibid art 11 (1) (2).}
2.4 The AU Optional Protocol on the Rights of Women in Africa

The AU Optional Protocol on the Rights of Women in Africa\textsuperscript{130} also protects young girls and women from harmful practices, which are defined as attitudes or practices that negatively affect other fundamental rights.\textsuperscript{131} Article 6 of the Protocol sets 18 years as the minimum age of marriage for women\textsuperscript{132} and requires the consent of the parties to be married.\textsuperscript{133}

Drawing from the above, although Zimbabwe is a party to these regional and international instruments, the rate of child marriages in Zimbabwe has alarmingly increased in the last decade and there has been no domestic legal framework established or amendment of existing laws to deal with this problem.

2.5 Arguments highlighted on International Legal Framework

Some writers are of the view that stipulating 18 years as the age appropriate for marriage in the international and regional instruments is not appropriate. The argument is that societies have different cultural, family and social realities that determine and define who a child is. Gaffney-Rhys concedes that looking at the high rates in child marriage in Africa, setting the global age as 15 will be more ‘realistic’ and there is the likelihood of gaining more support in African jurisdictions.\textsuperscript{134}

Further, Bunting who is of the view that ‘having one age of majority is untenable’,\textsuperscript{135} suggests that states should be given the right to set a minimum age, even one below 18 years with the responsibility of demonstrating that no negative effects will befall the female child.\textsuperscript{136} She argues that ‘the interests of the girl child and in particular the girl “child bride” will not be better secured through a uniform minimum marriage age but rather contends that if the international legal norms can be sufficiently flexible to adapt to the changing contexts in which the marriage of minor girls takes place then international law may have a role in changing the practice of early marriage.’\textsuperscript{137}

\textsuperscript{131} Ibid art 5.
\textsuperscript{132} Ibid art 6 (b).
\textsuperscript{133} Ibid art 6 (a).
\textsuperscript{134} Gaffney-Rhys (note 63 above) 365.
\textsuperscript{135} A Bunting (note 80 above) 111.
\textsuperscript{136} Ibid.
\textsuperscript{137} Ibid.
However, in response to this argument, Patricia Okiria is of the view that this would defeat the purpose of the Conventions, as it will only increase child marriages rather than curb them.\textsuperscript{138} Gaffney notes that setting 15 as the minimum age will not delay child marriage\textsuperscript{139} concluding overall that although 18 years may not get wide support, it is the ‘logical step for the international community to take.’\textsuperscript{140} A valid argument raised by Bunting is also that although the international conventions have called for laws setting a minimum age for marriage, the conventions do not have the means to enforce them.\textsuperscript{141} International institutions have limited enforcement mechanisms.\textsuperscript{142} International laws are realized and work more effectively when ‘states consent to law-making through formal sources of international law, notably treaty or custom.’\textsuperscript{143} Enforcement is paramount in ending child marriages and without it, the stipulations in the international conventions may not be successfully implemented.

### 2.6 Conclusion

The international legal framework forms the backbone and foundation for the protection of children in child marriages. As highlighted above, these international conventions have the potential to create legal obligations and hence are a very important and relevant source when it comes to protection of girl children from child marriages. The international and regional legal framework sets the threshold for the protection of the girl child. Ratification of a treaty gives an explicit impression that the practice is unacceptable and needs to be abolished. Despite some of the imperfections of the above mentioned treaties, it is safe to conclude that without them, the prohibition of child marriage will not have any recognition. Thus, in the interest of safeguarding Zimbabwean girl children’s rights against the dire consequences of child marriage, the international and regional framework is a very relevant starting point in preventing child marriages.

\textsuperscript{138} Achan – Okiria (note 70 above 18).
\textsuperscript{139} Gaffney-Rhys (note 63 above 368).
\textsuperscript{140} Ibid.
\textsuperscript{141} A Bunting and S E Merry (note 72 above 324).
\textsuperscript{142} Brunnee (note 103 above 5).
\textsuperscript{143} Ibid 6.
3  CHAPTER 3: DOMESTIC LAWS REGULATING MARRIAGES IN ZIMBABWE

3.1  Introduction

International standards, such as those discussed in chapter two, set the foundation for children’s rights, which include regulating when children can be married. It becomes the responsibility of each individual state to draft legislation, regulations, and policies to further develop these standards and to provide stronger protections from child marriages. It has been held that international legal standards and norms have the capacity to influence Africa’s legislative processes immensely.\(^ {144}\) Ratification of an international treaty is evidence of a commitment to achieve its aims. This commitment should be realised by the introduction of new legislation or amendment of existing legislation accordingly.\(^ {145}\)

The minimum age set for marriage by most international and regional conventions, as discussed in chapter 2 is 18 years. African countries have taken three different legal approaches as far as child marriages are concerned.\(^ {146}\) Some countries criminalize early or child marriages and others ban or invalidate marriage that is below the legally prescribed minimum age of marriage. Other countries just prescribe a minimum age of marriage but they do not expressly criminalize or ban child marriages.\(^ {147}\) The increase in child marriages in Africa has been largely attributed to the fact that civil laws exist side by side with personal laws and this usually allows early child marriages to take place.\(^ {148}\) Furthermore, countries have set the minimum marriageable age as required by the conventions but allowed lower marriage age limits for both girls and boys\(^ {149}\) in cases where parental or guardian consent is given. This has allowed child right violations through marriage to

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\(^ {145}\) R Gaffney-Rhys (note 63 above) 367.


\(^ {147}\) Ibid.

\(^ {148}\) R Gaffney-Rhys (note 63 above) 365.

\(^ {149}\) V Odala (note 146 above).
continue. Most often, ‘parental consent may be abused in the sense that it may unnecessarily be
given simply because a girl is pregnant and the family would like to avoid the embarrassment of
an unmarried daughter falling pregnant...’\textsuperscript{150}

This chapter will firstly explore the three types of marriages that are recognized in Zimbabwe.
This will be followed by the general provisions relating to marriage in Zimbabwean national
legislation, which include the Constitution,\textsuperscript{151} Marriages Act,\textsuperscript{152} Customary Marriages Act\textsuperscript{153} and
the Children’s Act.\textsuperscript{154} In comparison, there will be a short analysis of the South African
Recognition of Customary Marriages Act\textsuperscript{155} and the Children’s Act.\textsuperscript{156} Particular attention will be
given to the issue of the marriageable age that is stipulated in the above-mentioned legislation.
Lastly, an examination on the shortcomings that exist in the Acts in relation to the age of marriage
will be conducted.

3.2 \textit{The Legal System in Zimbabwe}

Zimbabwe has a dual legal system\textsuperscript{157} with various sources of law.\textsuperscript{158} This entails the existence of
more than one legal system that can be used in any given situation leading to differing
interpretations.\textsuperscript{159} A notable problem with such a system is that the people tend to draw from all
systems, using one or the other depending on what works to their advantage.\textsuperscript{160} It has been said
that plural and dual legal systems usually allow harmful cultural practices to flourish.\textsuperscript{161}

\begin{itemize}
\item \textsuperscript{150} Ibid.
\item \textsuperscript{151} Constitution of Zimbabwe Amendment (note 59 above).
\item \textsuperscript{152} Zimbabwe: Marriage Act (note 28 above).
\item \textsuperscript{153}Zimbabwe: Customary Marriages Act (note 30 above).
\item \textsuperscript{154}Zimbabwe: Children’s Act (note 30 above).
\item \textsuperscript{155}RCMA (note 60 above).
\item \textsuperscript{156}SA Children’s Act (note 61 above).
\item \textsuperscript{157}Research and Advocacy Unit “Zimbabwes Dual Legal System” June 20 2013, available at
\texttt{http://researchandadvocacyunit.wordpress.com/2013/06/20/zimbabwes-dual-legal-system}, accessed on 18
September 2015.
\item \textsuperscript{158}O Saki and T Chiware ‘The Law in Zimbabwe’ 2007, available at
\item \textsuperscript{159}Plan International ‘Protecting Children from Harmful Practices in Plural Legal Systems’ 2012 17, available at
\texttt{http://srsg.violenceagainstchildren.org/sites/default/files/publications_final/SRSG_Plan_harmful_practices_report_}
\item \textsuperscript{160} Ibid.
\item \textsuperscript{161}Ibid.
\end{itemize}
### 3.2.1 Types of marriages in Zimbabwe

Marriage is the ‘betrothal or union between two people, recognised under civil law, religious law or customary rites.’\(^{162}\) Such is accepted as binding on the parties and their respective families.\(^{163}\) Zimbabwe recognizes three forms of marriages which have been defined by statute as

1. ‘a marriage solemnized under the Zimbabwean Marriage Act’\(^{164}\)
2. ‘the Zimbabwean Customary Marriages Act’\(^{165}\)
3. ‘an unregistered customary law marriage.’\(^{166}\)

Socially, marriage is considered as a means of building a family.\(^{167}\)

### 3.2.2 Recognised Marriages in Zimbabwe

The first form of marriage is a monogamous one entered\(^{168}\) into in terms of the Marriage Act.\(^{169}\) This is a marriage usually officiated by a minister or magistrate.\(^{170}\) Secondly, there is the customary marriage (potentially polygamous) which is a marriage between Africans done according to African customs.\(^{171}\) This type of marriage can be either registered or unregistered. The registered customary marriage is entered into in terms of the Customary Marriages Act\(^{172}\) and such a marriage is legally valid for all purposes.\(^{173}\) Another recognised marriage is the unregistered customary marriage. ‘Unregistered customary law marriage’ means a marriage celebrated according to

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\(^{163}\) Ibid.

\(^{164}\) Zimbabwe: Customary Marriages Act (note 30 above).

\(^{165}\) Ibid.

\(^{166}\) Zimbabwe: Criminal Law (Codification and Reform) Act 23 of 2004 Chapter 9:23, section 2 (1).


\(^{169}\) Zimbabwe: Customary Marriages Act (note 30 above).


\(^{171}\) Zimbabwe: Customary Marriages Act (note 30 above) section 2.

\(^{172}\) S Chirawu (note 170 above) 9.

customary law but not solemnized in terms of the Customary Marriages Act. This marriage is regarded as a valid marriage by the society and is awarded recognition in cases of guardianship, status of the children, custody and inheritance. It is not legally recognized although it is the most common form of marital union in the country.

3.2.3 Other types of marriages

3.2.3.1 Kuripangozi or homicide bride

This kind of marriage is one where a girl child is given in marriage for the purposes of appeasing the spirit of a deceased person whose death has been caused by the girl child’s family. The child becomes compensation for loss of the deceased person.

Kuzvarira/ betrothal

This is pledging of a child into marriage even before they are born. A family that is in financial need receives financial help from another financially stable family in exchange for a child bride. This transaction will be a form of debt bondage.

3.3 Zimbabwean Legislation that has a bearing on Child Marriage

3.3.1 Constitution of Zimbabwe Amendment (No. 20) Act, 2013

The Constitution of Zimbabwe is the ‘highest law of the land and any practice, custom or conduct that is inconsistent with it will be invalid.’ The South African case of S v Makwanyane emphasises the point that the Constitution is the highest law in South Africa.

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174 Zimbabwe: Criminal Law (Codification and Reform) (note 167 above) section 2 (1).
175 Section 3 (5) of the Zimbabwe Customary Marriages Act.
176 S Ndlovu–Bhebhe (note 168 above).
178 R Hanzi (note 167 above) 33.
179 Ibid.
180 (Hereafter the Constitution).
181 Section 2.
182 1995 (3) SA 391 (CC).
183 Ibid paragraph 7.
and this is the same position in regards to the Zimbabwean Constitution. The Constitution becomes the parent Act of every piece of legislation in Zimbabwe.\textsuperscript{184}

The Constitution defines marriage as a consensual union between a man and a woman, both of whom have reached eighteen years of age.\textsuperscript{185} This sets eighteen years as the minimum marriageable age at law in Zimbabwe. Because the Constitution is supreme, marriage to a person under the age of 18 will be in contravention and hence unlawful.\textsuperscript{186} Section 78 (1) and (2) further affirms the required age of marriage of parties. It states, ‘Every person who has attained the age of eighteen years has the right to found a family and no person may be compelled to enter into marriage against their will.’\textsuperscript{187} Two key requirements come out of the section. These are that 18 years is the age to start a family and the legally permissible age for independent consent. Usually, in child marriages, the child does not consent and this means that the marriage is entered into against their will. The issue of consent however will not be covered in this dissertation. Further, the Constitution defines a child as ‘every boy and girl under the age of eighteen years.’\textsuperscript{188} This directly states the age of childhood, which means that marriage, cannot be concluded with a party that is below eighteen years and hence is a child.

Section 19 of the Constitution reads:

(1) The State must adopt policies and measures to ensure that in matters relating to children, the best interests of the children concerned are paramount.
(2) The State must adopt reasonable policies and measures, within the limits of the resources available to it, to ensure that children—
(a) enjoy family or parental care, or appropriate care when removed from the family environment;
(b) have shelter and basic nutrition, health care and social services;
(c) are protected from maltreatment, neglect or any form of abuse; and
(d) have access to appropriate education and training.
(3) The State must take appropriate legislative and other measures—

\textsuperscript{184}O Saki and T Chiware (note 158 above).
\textsuperscript{185}Constitution of Zimbabwe (note 58 above) section 78.
\textsuperscript{186}Research and Advocacy Unit, (note 38 above) 5.
\textsuperscript{187}Constitution of Zimbabwe (note 59 above) section 78.
\textsuperscript{188}Section 81 (1).
(a) to protect children from exploitative labour practices; and
(b) to ensure that children are not required or permitted to perform work or provide services that
(i) are inappropriate for the children’s age; or
(ii) place at risk the children’s well-being, education, physical or mental health or spiritual, moral or social development.

Section 19 (1) requires policies and measures to be adopted that ensure that the ‘best interest of the child are paramount in all matters concerning that child’ and this interpreted means that if laws do not enhance the best interest of the child, then new child protective policies must be adopted. The Research Advocacy Unit\(^\text{189}\) states that the ‘best interest of the child’ is an evaluating standard used when dealing with child protection issues and parents and the state have the responsibility to pursue them, to protect and improve the well-being of their children.\(^\text{190}\)

Section 19 (2) requires that the state must within its available resources adopt measures that will protect the child from maltreatment, exploitation and abuse which is a consequence of child marriage. So in cases where the state has the resources, it must see to it that the child has protection from any form of exploitation. However, the wording in the section is limiting as any child protection measures to be adopted rely on availability of resources. With an economy that is currently not very strong, it will be a while until child marriage rights will be given much attention and this is to the disadvantage of girl children in Zimbabwe. It is suggested that the state needs to make resources available and provide funding for the ending of child marriages.

The rights of children are further protected by section 81 of the Constitution. Of relevance are subsections (1) (a), (e) and (2). Section 81 (1) (a) affirms the need for equal treatment and that the child is one below the age of eighteen years. Section 81 (1) (e) states that the child is to ‘be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse.’\(^\text{191}\) Section 17 (3) further emphasise this need for protection from ‘economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form

\(^{189}\)Hereafter RAU.


\(^{191}\) Constitution.
of abuse’ making it paramount to address child marriage showing that these sections are relevant to child marriages which is a form of sexual exploitation.192

Further, in section 26

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;
(b) children are not pledged in marriage;
(c) there is equality of rights and obligations of spouses during marriage and at its dissolution; and
(d) in the event of dissolution of a marriage, whether through death or divorce, provision is made for the necessary protection of any children and spouses.

This section deals with pledging of children into marriage a practice present in Zimbabwe. Pledging has added to the increases in child marriage and such a section is a relevant child marriage curbing measure.

The practice of child marriages has been viewed by some as a cultural or tradition issue.193 The family is the custodian of culture, but it has allowed the child to be abused in the guise of upholding culture.194 Section 63 of the Constitution deals with language and culture and states that:

Every person has the right—
(a) to use the language of their choice; and
(b) to participate in the cultural life of their choice; but no person exercising these rights may do so in a way that is inconsistent with this Chapter.

Child marriage has been viewed as a cultural practice.195 The above section shows that everyone is entitled to practice their culture, which might mean they can be allowed to practise child marriages. However, subsection 63 (b) shows that the right to culture is not absolute and hence can be limited in certain circumstance. Child marriages are detrimental to the girl child and opens

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192 N Gumbonzvanda (note 21 above).
193 Ibid.
194 R Hanzi (note 167 above) 20.
her to sexual exploitation as per section 63 (b). Because of such traits, child marriage practice becomes inconsistent with the Constitution. Further, the Constitution stipulates that, ‘the State and all institutions and agencies of government at every level must promote and preserve cultural values and practices which enhance the dignity, well-being and equality of Zimbabweans.’\textsuperscript{196} This means that all cultural practices including child marriages which do not enhance the well-being of the child must be eliminated.

3.3.2 \textit{Marriage Act [Zimbabwe], Chapter 5:11, Act 22 of 2001}

Bunting states that in most countries there is a disparity between the age of marriage for boys and girls where the former will be two years or older than girls.\textsuperscript{197} The Zimbabwean Marriage Act\textsuperscript{198} has such a disparity. It stipulates the minimum marriageable age for girls at sixteen (16) and eighteen (18) for boys.\textsuperscript{199} The Act allows the marriage of a minor if the legal guardian consents in writing.\textsuperscript{200} It also prohibits girls below the age of 16 and boys below age of 18 from contracting a valid marriage except if written permission is given by the Minister of Legal and Parliamentary Affairs.\textsuperscript{201} The Minister may allow a marriage in any particular case if he considers such marriage ‘desirable.’\textsuperscript{202} Section 22 (2) of the Act uses the word ‘desirable’ as a reason for the Minister to grant permission for the marriage. Desirable is defined as ‘wished for as being an attractive, useful, or necessary course of action.’\textsuperscript{203} Looking at the consequences of early marriages as mentioned in the first chapter, marriage of a minor child that has not matured physically and emotionally is not desirable. By allowing girls to get married before they reach the legal age of majority, the Act has made it possible for the girls to be exposed to the potential harm of early child marriages.\textsuperscript{204}

\begin{thebibliography}{99}
\bibitem{196} Section 16.
\bibitem{197} A Bunting (note 80 above) 126.
\bibitem{198} Zimbabwe: Marriage Act (note 28 above).
\bibitem{199} Ibid section 22.
\bibitem{200} Ibid section 20 (2).
\bibitem{201} Ibid Section 1: this refers to the Minister of Justice, Legal and Parliamentary Affairs or any other Minister.
\bibitem{204} M Sibanda (note 190 above) 6.
\end{thebibliography}
Section 22 (1) of the Act hence compromises the fundamental rights of the girl child. Further, it violates the state’s constitutional obligation to set the age of marriage for both girls and boys at 18 years because of its discriminatory nature.\textsuperscript{205} It can however be alleged that the reason for the differentiation in the ages may be biological and not discriminatory. The consequences of child marriages do not support the above notion, as there is no evidence to show that girls alone are biological ready to get married at the age of 16. Girls are frequently the affected underage party in child marriages; hence drafters of legislation should promote equality in marriageable ages by ensuring that the minimum age is the same for both males and females.\textsuperscript{206}

Section 56 of the Constitution deals with discrimination. The section reads:

(1) All persons are equal before the law and have the right to equal protection and benefit of the law.
(2) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
(3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.
(4) A person is treated in a discriminatory manner for the purpose of subsection (3) if—
   (a) they are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected; or
   (b) other people are accorded directly or indirectly a privilege or advantage which they are not accorded.
(5) Discrimination on any of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

Section 56 (3) contains a broad variety of factors that are unfairly discriminatory and these include gender and age. Subsection 5 states that discrimination on any of the grounds is unfair unless it

can show it is ‘fair, reasonable and justifiable.’ It is argued that for child marriages, there cannot be any justification that can be raised as to the fairness and reasonableness of having different ages for concluding a marriage. Section 56 (3) of the Constitution makes it clear that no one shall be discriminated on the basis of age and sex, something which section 22 does. In a democratic society, this is unjustifiable as general unfair discrimination and unfair biological discrimination. Mutyabi drawing from the context of the Human Rights Committee General Comment 18 highlights that there exists a duty on the state to prevent discrimination based on sex. She further asserts that discrimination will only be allowed if it is ‘reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Convention.’ Another valid point made by Mutyabi is that ‘early marriages cannot be justified as ‘reasonable and objective’ because they foster inferiority of women and lead to the violation of girls’ rights as stipulated in the international human rights conventions.’ Such differences in age reflected in the Marriage Act are not reasonable or objective and have the same effect for girl children in Zimbabwe. Therefore, there is a need to amend the Act to bring it in line with international laws and the Constitution and to remove all elements of unfair discrimination.

3.4 Customary Marriages Act 1951

The Customary Marriages Act 1951, regulating customary marriages contains no provision for a minimum age for marriage. Most child marriages take place in terms of customary law practices. The main reason behind this is that customary marriages do not specify a marriageable age. Lack of a minimum age has therefore made the Act vulnerable to abuse.

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207 Section (5) Discrimination on any of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.
209 R Mutyaba (note 205 above) 341.
210 Ibid.
211 Ibid.
212 Zimbabwe: Customary Marriages Act (note 29 above).
213 M Sibanda (note 190 above) 3.
215 M Sibanda (note 190 above) 7.
Religious and traditional groups take advantage of this Act to marry off children. RAU\textsuperscript{216} states that in culture, what defines readiness for marriage is the physical attributes of the child and not their age.\textsuperscript{217} Therefore, without any age regulation, the child that develops physically quickly will succumb to early marriage.

The Customary Marriages Act has not been amended to take into account current social and legal changes since independence.\textsuperscript{218} The Act continues to require that the bride’s guardian should consent to her marriage, even if she is over the age of 18. This needs to be amended by inserting an age of marriage for the parties to consent to the marriage. An example will be given in the following chapters on the South African Customary Act\textsuperscript{219} which has set an age requirement for the parties engaging in marriage.

\section*{3.5 \textit{The Children's Act 1972}}

The Children’s Act 1972\textsuperscript{220} (herein after the Zimbabwe Children Act) dealing with child-related issues, defines a child as ‘a person under the age of sixteen years including an infant.’\textsuperscript{221} A minor is defined as ‘a person below the age of eighteen’\textsuperscript{222} and a young person as ‘a person who has attained the age of sixteen years but has not attained the age of eighteen years.’\textsuperscript{223} These different age categories are provided for in the same Act and they make interpretation of who a child is very difficult especially in relation to the marriageable age of a child. The Zimbabwe Children’s Act preamble aims ‘to make provision for the protection, welfare and supervision of children and juveniles’\textsuperscript{224} and there is a critical need for it to set strong standards and minimum age requirements for marriage that will protect the child from the harm attached to child marriage.

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{216}]Ibid.
\item[\textsuperscript{217}]Research and Advocacy Unit (note 38 above) 5.
\item[\textsuperscript{219}]RCMA (note 59 above).
\item[\textsuperscript{220}]Zimbabwe: Children's Act .
\item[\textsuperscript{221}]Ibid section 6.
\item[\textsuperscript{222}]Ibid section 2.
\item[\textsuperscript{223}]Ibid.
\item[\textsuperscript{224}]Ibid preamble.
\end{itemize}
\end{footnotesize}
In addition, the Act fails to deal with any harmful, social and cultural practises that may be detrimental to the child’s health. Having sections dedicated to the harmful practices that a child may be faced with is a powerful tool in addressing child marriages. The South African Children’s Act 38 of 2005 contains sections that deal with harmful, social and cultural practices that may affect the child. The Act will be discussed in the following chapter to show what Zimbabwe may include in its legislation.

3.6 Shortcomings evident in current Zimbabwean Legislation

An analysis of the above legislation reveals that the existing statutes in Zimbabwe vary in the way they define the minimum age of marriage. ‘The law of Zimbabwe, whether statute, common law or customary law, does not provide the protection against child marriage and its associated abuses which the country is obliged to provide by under the Constitution and its international commitments.’ Subsidiary laws are not in aligned to the Constitution, which is the highest law of the land.

As seen above, one of the main challenges that affect the enforcement of a minimum age of marriage has been the existence of different minimum ages for marriage in various statues on the issue of marriage. As a result, the society tends to utilise traditional legal systems that usually allow child marriages to take place. Allowing different laws to stipulate different ages of marriage to creates uncertainty and allows the state to condone such harmful practices.

International and regional Conventions are relevant in fighting child marriages but they will be of no greater value if the state does not align existing domestic legislation and policies with the provisions of these international treaties and their minimum standards. The state has the duty of

225 Calls to repeal laws abetting child marriage in Zimbabwe intensify’ (note 221 above).  
226 Research and Advocacy Unit (note 38 above) 5.  
227 V Odala (note 146 above).  
228 Ibid.  
230 V Odala (note 146 above).
‘changing customary practices that are inconsistent with international and regional human rights standards.’ Law reform has the potential of reviewing local traditions and customs so that they align with international standards. Mutyaba states that it is important that all legislation that allows child marriages to take place must be nullified or amended. This can be done through new legislation or amending existing legislation to ensure that the age of marriage is 18 years for both sexes. The recommendation hence is that all statutes in Zimbabwe must align to the Constitution and must reflect 18 years as the minimum age for marriage.

3.7 Conclusions

Overall, it can be seen that the existing policies and laws in Zimbabwe, which have a bearing on marriages, appear to be in conflict with each other in terms of the minimum age for marriage. It also appears that some of the domestic laws do not reflect the provisions of the international and regional treaties in terms of the minimum marriage age. The Marriage Act (Zimbabwe) discriminates against girls by stipulating a lower age of marriage than that of boys and the Customary Marriage Act does not even stipulate any age requirements whatsoever. The Children’s Act (Zimbabwe) has a grey area in terms of definitions of the child, minor and young person. There is need to expressly prohibit child marriages in these statutes by reflecting in their content a uniform minimum age of marriage, alternatively inserting one where there is none and bringing them all in line with the Constitution of Zimbabwe. New legislation and amendment of existing legislation will significantly assist in ending child marriages in Zimbabwe.

231 M Sibanda (note 190 above) 6.
232 Ibid 17.
233 R Mutyaba (note 205 above) 350.
234 Ibid.
 CHAPTER 4: PROHIBITING CHILD MARRIAGE THROUGH LEGISLATION: ANALYSIS OF INDIAN AND SOUTH AFRICAN LEGISLATION

4.1 Introduction

Child marriages in India have been practiced for a long time, mostly in the rural areas. Most of India’s children are married before puberty. The number of child brides in India constitutes one third of child brides in the world, amounting to a total of about 23 million child brides. Indian child marriages are the result of a number of reasons that include poverty, culture, religion, gender inequality and financial issues such as dowry.

To address the longstanding challenge of child marriage, India in 1929 enacted the Child Marriages Restraint Act, of 1929. This Act, created room for punishment of males above 18 years of age who entered into a marriage with a child. However, the Act was not effective because it was solely aimed at ‘upon the people to exercise restraints and avoid solemnizing child marriages’ and not totally ban child marriages. Thus, the Act was a regulatory law that did not have any ‘deterrent value.’

To deal with this anomaly, a new Act was enacted, the Prohibition of Child Marriages Act, 2006 (hereafter PCMA). This Act aimed to reduce child marriages by changing the minimum age of marriage for females to 18 years and that of males to 21 years. This change was an attempt to end child marriage using a more detailed piece of legislation.

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236 Ibid.
238 C Burris (note 65 above) 160.
239 Ibid.
241 Ibid.
Research has shown that legislation is an effective means of introducing social change.\textsuperscript{243} This chapter seeks to highlight the effects of standing legislation on child marriages. Firstly, the reasons why child marriages exist in India will be interrogated, followed by an analysis of the PCMA as legislation that targets child marriages, highlighting its strength and weaknesses. This will be done, to show the effectiveness of a new standing legislation that deals directly with child marriages and the need to adopt similar legislative measures in Zimbabwe as a means to end child marriages. Lastly, the chapter will look at the statistical evidence to see if from the promulgation of the PCMA a reduction in child marriages has been evidenced in India.

\textit{4.1.1 Basis of using India as a comparative case study}

India is one of the few countries that has promulgated legislation that directly deals with child marriages. India has been chosen as a comparative study country because, its family law is ‘pluralistic in nature.’\textsuperscript{244} This means it has many sources of law that include Hindu law, Buddhist law, Islamic laws and tribal laws, among others, which celebrate child marriages.\textsuperscript{245} This is similar to the pluralistic nature of Zimbabwean laws as mentioned in Chapter Three of this paper, making it a suitable comparative study. Like Zimbabwe, India is also a party to CEDAW and the CRC and other treaties that consider child marriage as a violation.\textsuperscript{246} Further, India is relevant because it has incorporated its international obligations into a national legal instrument.\textsuperscript{247} Lastly, Indian legislation is significant in that its child marriages result from poverty, views on chastity and purity and religion which are similar to Zimbabwe’s religious, cultural and poverty driven child marriages. The provisions of the PCMA will be discussed below.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{243} D Francavilla “Interacting Legal Orders and Child Marriages in India” 2011 (2) 19 American University \textit{Gender Social Policy and the law Journal}, 543.
\item \textsuperscript{244} Ibid 532.
\item \textsuperscript{245} C Burris (note 65 above) 153.
\item \textsuperscript{246} Ibid 158.
\end{itemize}
\end{footnotesize}
4.2 Reasons why child marriages exist in India

In India, child marriage is defined as marriage with a male below the age of 21 or a female below the age of 18.\textsuperscript{248} Child marriages in India have been the result of gender inequality,\textsuperscript{249} poverty,\textsuperscript{250} lack of education, dowry among others. Also child marriages have flourished in disadvantaged communities that still have religious,\textsuperscript{251} customary and cultural practices.\textsuperscript{252}

4.2.1 Socio-Economic

India has been affected by poverty, with the high cost of living affecting every poor household. Child marriages become a means of income for those economically disadvantaged that are receiving the child bride.\textsuperscript{253} Also, child marriages in India exist because there has been continual ‘patriarchal relations that encourage and facilitate gender inequalities and cultural perspectives that encourage the phenomenon to thrive.’\textsuperscript{254} As well, younger brides are desirable because it has been alleged that the younger they are the high likelihood that their chastity is still intact.\textsuperscript{255}

4.2.2 Poverty

Similar to Zimbabwe, poverty has been a significant reason for the existence of child marriages in India. High food prices in India affect poor families. Child malnutrition is as high as 80 per cent in the country.\textsuperscript{256} Such high levels of poverty push parents to marry off their children as a means of cutting down family expense by reducing the number of persons to feed.\textsuperscript{257} As noted in Chapter

\begin{itemize}
\item \textsuperscript{248} ‘Draft National Plan of Action to Prevent Child Marriages in India’ available http://wcd.nic.in/childwelfare/draftmarriage.pdf, accessed on 12 September 2015.
\item \textsuperscript{250} ‘Child marriage around the world: India’ available at http://www.girlsnobrides.org/child-marriage/india, accessed on 01 October 2015.
\item \textsuperscript{251} S Tomkinson (note 249 above).
\item \textsuperscript{253} Ibid.
\item \textsuperscript{254} Ibid 6.
\item \textsuperscript{255} Ibid.
\item \textsuperscript{256} M Blakeman ‘Childhood Malnutrition in India’ available at https://www.worldfoodprize.org/documents/filelibrary/images/youth_programs/research_papers/2005_papers/NiagaraDistrictHighSchool_E2524280296E6.pdf, accessed on 8 September 2015.
\item \textsuperscript{257} A Abbhi (note 252 above) 12.
\end{itemize}
two, this reason is similar to the Zimbabwean situation, making India a relevant comparative case study.

4.2.3 Dowry

This is ‘a gift in cash or kind given to the prospective husband and his relatives by the wife and her relatives in connection with marriage.’\(^{258}\) Although this practice has been prohibited by the Dowry Prohibition Act,\(^{259}\) with dowry prohibition officers appointed to manage the practice, it still exists.\(^{260}\) This means that this legislative measure has been ineffective. Girl children are still married early because this allows the parents to pay lower amounts for the required dowry.

4.2.4 Gender inequality

Indian society regards sons as more valuable, as the family name carriers and economically as providers for the family\(^{261}\) than daughters. This is because they are regarded as the ones that ensure the continuation of the lineage and family name.\(^{262}\) In addition, women’s sexuality in India is still diffused.\(^{263}\) The Indian community also believes that child marriage will protect the girl child from unwanted male attention and it reduces sexual promiscuity.\(^{264}\) As in the case of Zimbabwe, conservative notions of virginity and chastity play a vital role here.

4.2.5 The Pluralistic nature of Indian family law

India’s family law is ‘pluralistic in nature’\(^{265}\) with many sources of law which include Hindu law, Buddhist law, Islamic laws and tribal laws among others. All of these celebrate child marriages.\(^{266}\) Burris states that the above mentioned personal laws usually ‘carry more weight’ than state laws


\(^{259}\) 1961.

\(^{260}\) A Bassu (note 258 above) 8.

\(^{261}\) S Tomkinson (note 249 above).

\(^{262}\) Ibid.

\(^{263}\) D Francavilla (note 243 above) 541.

\(^{264}\) S Deb (note 242 above 12).

\(^{265}\) D Francavilla (note 243 above) 532.

\(^{266}\) C Burris (note 65 above) 159.
among the citizens of India\textsuperscript{267} in cases of application and use. Further, Burris highlights that this has created a huge barrier to the enforcement of domestic legislation.\textsuperscript{268}

### 4.3 Legislation in India on Child Marriages

India enacted the Child Marriages Restraint Act, 1929\textsuperscript{269} (hereafter the Restraint Act) which aimed to eliminate the ‘dangers to life and the health of a female child’\textsuperscript{270} in marriages. Initially it raised the age for marriage to 14 years which was later amended and increased in 1978 to 18 years.\textsuperscript{271} This Act created room for punishment of males above 18 years of age who contract a marriage with a child.\textsuperscript{272} But more importantly, the Act punished those that officiated the child marriage.\textsuperscript{273} The Act punished a guardian who promoted a child marriage with imprisonment of up to three months or payment of a fine.\textsuperscript{274} The Act prescribed punishment for the solemnisation of a child marriage or for those that promoted and permitted such to take place.\textsuperscript{275} It has been held that the Act was a ‘perfunctory gesture’\textsuperscript{276} and as the name suggests, it did not bring ‘drastic changes’ but only acted to restrain such marriages.\textsuperscript{277} Further, the Act was ‘regulatory’, with no preventative measure hence it did not succeed in curbing child marriages.\textsuperscript{278}

Because of the weakness of the aforementioned Act, child marriages remained prevalent in India. In 2006, India enacted the Prohibition of Child Marriage Act 2006, because child marriages were still high and the Restraint Act had failed to ‘eradicate or effectively prevent’\textsuperscript{279} child marriages. The PCMA was aimed at amending existing laws in force in relating to child marriages and was also directed at prohibiting solemnisation of child marriages.\textsuperscript{280} The PCMA has been seen as more

\textsuperscript{267}Ibid.
\textsuperscript{268}Ibid 160.
\textsuperscript{269}India: Child Marriages Restraint Act, 1929.
\textsuperscript{270}S Deb (note 242 above) 19.
\textsuperscript{271}Ibid.
\textsuperscript{272}India: The Prohibition of Child Marriage Act, No. 6 of 2007, section 3.
\textsuperscript{273}Ibid section 5.
\textsuperscript{274}Ibid section 6.
\textsuperscript{275}D Bharti (note 235 above) 26.
\textsuperscript{277}D Bharti(note 235 above) 26.
\textsuperscript{278}Ibid.
\textsuperscript{279}S Deb (note 242 above) 21.
\textsuperscript{280}Ibid.
progressive as it directly prohibits rather than restrain child marriages.\textsuperscript{281} PCMA is a ‘territorial law’ which means that it applies to all Indians\textsuperscript{282} and it is a uniform piece of legislation that applies to all Indian communities.\textsuperscript{283}

\textit{4.3.1 Relevant Provisions in the Prohibition Act of 2006.}

(i) The Act allows a petition to be filed for annulling a child marriage at the choice of either party to the child marriage.\textsuperscript{284} The child marriage will be voidable at the option of either party to the marriage.\textsuperscript{285}

(ii) The Act deals with issues of custody, maintenance\textsuperscript{286} and legitimacy\textsuperscript{287} of the children born out of the child marriage.

(iii) Punitive measures are found in section 9, 10 and 11 of the Act which allows for punishment of the adult male marrying a child and also lays down punishment for solemnization of a child marriage.\textsuperscript{288} The Act further makes the offence of ‘permitting and or solemnizing’ a child marriage ‘unbailable.’\textsuperscript{289} The sections reads as follows;

\begin{itemize}
  \item \textbf{9. Punishment for male adult marrying a child.-}
    
    Whoever, being a male adult above eighteen years of age, contracts a child marriage shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both.
  
  \item \textbf{10. Punishment for solemnizing a child marriage. –}
    
    Whoever performs, conducts, directs or abets any child marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which
\end{itemize}

\textsuperscript{282} D Francavilla (note 243 above) 541.
\textsuperscript{283} P Sarkar (note 237 above).
\textsuperscript{284} Either party means the male or female party to the child marriage.
\textsuperscript{285} Section 3.
\textsuperscript{286} India: PCMA section 5.
\textsuperscript{287} Ibid section 6.
\textsuperscript{288} Ibid section 9, 10 and 11.
\textsuperscript{289} Ibid section 15.
may extend to one lakh rupees unless he proves that he had reasons to believe that the marriage was not a child marriage.

11. Punishment for promoting or permitting solemnization of child marriages-
(1) Where a child contracts a child marriage, any person having charge of the child, whether as parent or guardian or any other person or in any other capacity, lawful or unlawful, including any member of an organization or association of persons who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized, including attending or participating in a child marriage, shall be punishable with rigorous imprisonment which may extend to two years and shall also be liable to fine which may extend up to one lakh rupees: Provided that no woman shall be punishable with imprisonment.

(2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that where a minor child has contracted a marriage, the person having charge of such minor child has negligently failed to prevent the marriage from being solemnized.

(vii) Section 12 of the Act lays down provisions dealing with what circumstances will the child marriage ‘be deemed void’. 290
(ix) Section 16291 provides for appointment of child marriage prohibition officers by the government.
(x) In section 13, Act gives judicial officers in districts the power to ‘injunct’ to prevent child marriage taking place.292

From the above, it can be seen that the PCMA has stringent penalties for individuals that violate the Act by either ‘solemnizing, promoting or permitting’ child marriages to take place. It includes

290 India: PCMA, section 22.
291 Section 16. Child Marriage Prohibition Officers.-
(1) The State Government shall, by notification in the Official Gazette, appoint for the whole State, or such part thereof as may be specified in that notification, an officer or officers to be known as the Child Marriage Prohibition Officer having jurisdiction over the area or areas specified in the notification.
292 Section 13. Power of court to issue injunction prohibiting child marriages. – (1) Notwithstanding anything to the contrary contained in this Act, if, on an application of the Child Marriage Prohibition Officer or on receipt of information through a complaint or otherwise from any person, a Judicial Magistrate of the first class or a Metropolitan Magistrate is satisfied that a child marriage in contravention of this Act has been arranged or is about to be solemnized, such Magistrate shall issue an injunction against any person including a member of an organization or an association of persons prohibiting such.
not only the party to the marriage in its prosecutions, but those that have facilitated the marriage as well. In respect of Zimbabwe, having legislation with such provisions will be vital in preventing child marriages. The broad coverage of penalties in section 9, 10 and 11 of the Act, will also cover child marriages that are usually hidden within AIC’s as the broad requirements give room to include even their religious leaders that permit child marriages to take place in the church.

Punishment is allowed in the Act and with male offenders usually getting up to two years imprisonment and females are at most fined.\(^{293}\) Those that solemnize and negligently facilitate for child marriages are liable for ‘imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees unless he proves that he had reasons to believe that the marriage was not a child marriage.’\(^{294}\) The inclusion of negligence in assisting child marriages renders the Act much stronger as it covers all forms of how child marriages come about. The penalty sections of the Act are valuable, and as Odala views it, criminal sanctions may be a good way of deterring child marriages.\(^{295}\) Although the penalties in the Act are relevant, they will need to be implemented with additional social techniques and policies to deal with the problem of child marriages effectively.

Another very relevant feature that the Act incorporates is that of child marriage prohibition officers whose duty it is to look into child marriages within the state.\(^{296}\) The Act lists the duties of the child marriage prohibition officers as follows: ‘an advisory position to those that are about to solemnize a child marriage; to educate the community on child marriages; to compile and keep records and statistics on child marriages and to monitor progress on prevention of child marriages.’\(^{297}\) This is an innovation, something that Zimbabwe can adopt as a means of prevention of child marriages.

\(^{293}\) C Burris (note 65 above) 161.
\(^{294}\) India: PCMA section 10.
\(^{295}\) V Odala (note 146 above).
\(^{296}\) India: PCMA section 16 (3).
\(^{297}\) Ibid section 16.
The Act also creates a statutory duty to create awareness\textsuperscript{298} on the adverse consequences that child marriages carry\textsuperscript{299} a vital strategy to prevent child marriages. Although much of the effectiveness of this section relies on resources and budget allocations, it is a strong provision that can be adopted and adapted to local needs. If it is adopted, there is need to research into the budgetary and financial issues that are related herewith, something this paper does not cover.

4.4 Limitations in the Prohibition of Child Marriages Act

Despite celebrating the Indian legislation as a welcome move to prevent child marriages, research has shown many limitations existent in the Act and has called for the amendment of the PCMA.\textsuperscript{300} It has been held that there is need to amendment the PCMA to completely prohibit child marriages.\textsuperscript{301} Child marriages in India are considered to be merely voidable and not illegal.\textsuperscript{302} This is an obstacle against fully promoting child rights in India. Child marriages in the Act are deemed to be voidable at the instance of either party to the marriage.\textsuperscript{303} A child that was party to a child marriage has the option within 2 years of reaching the age of majority to apply to have the marriage void. This makes child marriages legally valid unless nullified. It has been noted that as result of the wording in the Act, the ‘law does not result in deterrence despite enhancement of punishment’\textsuperscript{304} because child marriages are not expressly declared illegal.

Also, the Act only regards marriages that have taken place due to ‘abduction, threat, kidnapping, force or violation of an injunction order of court’\textsuperscript{305} to be void whilst others are only voidable at the instance of the minor.\textsuperscript{306} This creates discrimination on the basis of how the marriage came about, which is unfair as the harmful consequences of the marriage are still the same regardless of

\textsuperscript{298} Ibid section 16 (3) (d).
\textsuperscript{299} A Bassu (note 258 above) 2.
\textsuperscript{300} E G Thukral, B Ali, E Bild “Still Out of Focus State of India’s Children’ 2008 HAQ Centre for child rights, 230 available at https://books.google.co.za/books?id=mUjH-WNaqUAC&pg=PA132&lpg=PA132&dq=Still+out+of+focus+state+of+India%E2%80%99s+children&source=bl&ots=YGsKfXbrHn&sig=MWcfQC3Gx3sugYydH-25DkiAERw&hl=en&sa=X&ved=0CCEQ6AEwAWoVChMIIbPtzsLEyAIvgl4eCh2AOQ3q#v=onepage&q=Still%20out%20of%20focus%20state%20of%20India%20%E2%80%99s%20children&f=false, accessed on 22 September 2015.
\textsuperscript{301} Ibid 214.
\textsuperscript{302} A Abbhi, (note 252 above) 8.
\textsuperscript{303} India: PCMA section 3.
\textsuperscript{304} Child Marriage in India (note 258 above) 11.
\textsuperscript{305} Ibid.
\textsuperscript{306} Ibid.
the manner in which the marriage occurs. It has been held that because the PCMA does not recognize consent of a child, then all child marriages, despite the circumstances, must be regarded as void as the harmful effects of the marriage are the same.

Furthermore, a look at the evidence in the Indian criminal records shows that only about 113 child marriages have been recorded to have taken place in India from the year 2006. Such a number in considering the number of years the Act has been in place, reflects weak enforcement methods and the inability to seriously treat child marriages as a crime in India. Also, Burris states that child marriage cases are rarely recorded with a guilty verdict because of high levels of corruption among state officials and magistrates.

It has further been held that the laws and policies in India have not been successful because there has been a lack of feminist law-making policy input when they were enacted. The legislation in India is not favourable for the females. In addition many states in India have not yet enforced the PCMA and this has further helped in making it ineffective.

Implementation and design of the Act has been labelled as very faulty. There is lack of implementation of the provisions in the Act and its policies as well as lack of translation from law to practice which has made the law ‘toothless and non-existent.’ An Act that cannot be fully implemented and enforced will not yield results. ‘Proper enforcement is what translates domestic legislation from words into action, and without it, child marriages will continue to plague

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307 Ibid.
308 Ibid.
310 Ibid.
311 C Burris (note 65 above) 161.
312 A Abbhi (note 252 above) 11.
313 Ibid.
314 A Bassu (note 258 above) 10.
315 ‘Child Marriage in India: (note 247 above) 3.
316 Ibid 11.
317 Ibid.
318 C Burris (note 65 above) 161.
Indian citizens. Deb is therefore of the view that the Act has merely discouraged child marriages and not banned them.

However, despite the loopholes or limitations, what India has incorporated into its legislation is a commendable mechanism that will greatly reduce child marriages if it is combined with other social techniques and effective implementation programmes. Zimbabwe can learn so much from the legislation in India. Adopting and adapting the legislation in India for Zimbabwe, improve the plight of girl children in child marriages. What has to be done is if such an Act is enacted, is to address all the above loopholes to get better results.

4.5 Statistics: Decrease in Child marriages

Statistics show that about 27 per cent of Indian women aged 20-24 years were married before they attained the age of 15. However there has been an increase in the age of first marriage of girl children. Statistics show that in 1992 to 1993 in rural areas child marriages was around 62.8 per cent. In the urban areas, it was 32.6 per cent and the total for both nationally was around 54.2 per cent. In 1998-1999 the rate of child marriages was 27.9 per cent in the urban areas and 58.6 per cent in the rural areas. The total combined percentage nationally was 50 per cent. For the years 2005-2006 a decline was evident with around 52.5 per cent in the rural areas and 28.2 per cent in the urban area. The total for both was 47.4 per cent. This has been seen as a slow decrease. Lastly, for the year 2008, the decrease in child marriages for both urban and rural areas moved to 43 per cent.

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319 Ibid 162.
320 S Deb (note 242 above) 32.
322 Ibid.
324 Ibid.
325 Ibid.
327 Ibid.
Despite facing criticism on the slow progress, it can be seen that there is statistical evidence of an 11.25 per cent decrease of child marriages in India. If such a decrease can be achieved in Zimbabwe, it will greatly reduce the percentage of child marriages that are currently taking place. For Zimbabwe to achieve a higher percentage of decreased child marriages, it will only have to address the above mentioned limitations of the PCMA as they apply in the Zimbabwean context.

4.5.1 Lessons learnt from South African Legislation.

4.5.2 South African Children’s Act

Section 12 of the South African Children’s Act regulates issues of social and harmful cultural practices in relation to the child. Section 12 (1) states that the child shall ‘not to be subjected to social, cultural and religious practices which are detrimental to his or her wellbeing.’ Some of the cultural practices recognised in the Act are: virginity testing, male circumcision and ukuthwala. Ukuthwala is a method of used to force the girl’s family to enter into marriage negotiations. The man and the girl usually would have consented to the marriage before the ukuthwala takes place.

The South African Children’s Act prohibits the giving out in either marriage or engagement of a child that is below the minimum age set by law for a valid marriage. Such a marriage will be regarded as void. Section 12 (2) (b) of the Act prohibits the giving away of a child below the minimum age, out in marriage or in engagement without her consent. Incorporating a section like this is vital in protecting the children from any harmful social or cultural practices as it directly deals with the problem. Amendment of such a nature in the Children’s Act will be a valuable contribution towards child protection in Zimbabwe.

328 ‘Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.’
330 Ibid.
331 Ibid.
333 A child.
4.5.3 Recognition of Customary Marriages Act No. 120 of 1998

The South African Customary Marriages Act\textsuperscript{335} is an act that regulates all customary marriages in South Africa. In Section 3 of the Act, it lists the requirements for a valid customary marriage. For a customary marriage entered into after the commencement of the Act to be valid it must fulfil the following:

(a) the prospective spouses
   (i) must be above the age of 18 years; and
   (ii) must both consent to be married to each other under customary law; and
(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

According to Mtshali the requirements of the section ‘clearly indicate that the practice of ‘ukuganisela’ (forced child marriage) is in contravention of the RCMA…’\textsuperscript{336} Having a similar section inserted into the Zimbabwean Customary Marriages Act will be beneficial in preventing child marriages in Zimbabwe. It will give a clear age requirement for the purposes of marriage.

4.6 Conclusion

The practice of child marriages in India is still a huge problem that needs the above limitations to be addressed by the state for further decrease in child marriages. It can be seen that the legislation has brought about a decrease in child marriages, though slow within the country. This is a positive result which cannot detract from the achievements of the Act. The inclusion of child prohibition officers is an innovation in the Act that allows for monitoring on the ground within the individual states. However, more needs to be done in terms of enforcement and implementation of the Act within the states of India. Such legislation will be a valuable asset to the ending of child marriages in Zimbabwe and what needs to be tackled are the above mentioned limitations to yield better

\textsuperscript{335}Ibid.
\textsuperscript{336}V Mtshali ‘(note 329 above 590)
results. It will be useful and commendable for Zimbabwe to amend its legislation to include age of marriage and other requirements for validity of marriage in the Customary Marriages Act. Further, it is valuable to invest in a harmful cultural practice that deals with child marriages section in the Children Act as a means to prevent them from taking place.
5  CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1  Introduction

Legislation provides a valuable foundation for protection of children from violence and harmful practices. Legislation becomes an expression of the states ‘accountability and commitment’ to realizing child rights. Legislation has been seen as a decisive contribution to the prevention of harmful practices and provides for an ‘indispensable underpinning for other measures to be taken in relation to abandoning harmful cultural practices.’ Drawing on the analysis developed in the former chapters, it is concluded that child marriages harm the girl child and hence states need to take measures to eliminate such marriages. In view of this harm and statistics mentioned in chapter one, legislation that completely bans child marriages is a first step in effectively ending child marriages. Law is a powerful regulatory force and as such Zimbabwe needs to enact such legislation and also to amend other existing legislation. The introduction of a clear ban in child marriages must be comprehensive and must be supported by detailed enforcement provisions to secure the maximum protection of the children from any harm. This is what the bill below seeks to achieve.

5.2  Recommendations

It is recommended that Zimbabwe does two things in relation to child marriages: enact legislation and standardize all laws that deal with marriages in Zimbabwe.

5.2.1  Enact legislation

In Zimbabwe, government is responsible for enactment of a bill into parliament. This dissertation has sought to recommend and propose the creation of legislation that deals with child

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337 Plan International (note 159 above) 9.
338 Ibid.
339 Ibid.
341 Ibid 266.
marriages on its own standing. The following is proposed not as the full and final bill, but as a proposal of what can be done in Zimbabwe.

5.3 ZIMBABWEAN CHILD MARRIAGES PROHIBITION BILL

ARRANGEMENT OF SECTIONS
PART I
PRELIMINARY
Section
1. Short title
2. Interpretation

PART II
ESSENTIAL ELEMENTS OF MARRIAGE
3. Capacity to enter into a valid marriage.

PART III
OFFENCES AND PENALTIES
4. Punishment for an adult marrying a child.
5. Punishment for solemnizing a child marriage.
6. Punishment for promoting, facilitating or permitting solemnization of child marriages.

PART IV
VOID MARRIAGES
7. Marriage of a minor child to be voidable.

PART V
ESTABLISHMENT OF PROHIBITION OFFICERS OFFICES

PART V
11. REGISTRATION OF MARRIAGES

PART VI
12. TRAINING OF STAKEHOLDERS

PART VII
13. POWER OF THE COURTS TO MAKE AN INJUNCTION

A Bill
Entitled
An act that addresses the issue of child marriages in Zimbabwe

ENACTED by the parliament of Zimbabwe as follows-

PART I: PRELIMINARY

Section 1: Short title
This Act may be cited as Zimbabwe Child Marriages Prohibition Act, 2015 and it shall come into operation on such day as shall be appointed by notice in the Gazette.\(^{343}\)

Section 2: Interpretation.-
In this Act, unless the context otherwise requires,-
(a) “Child” means a person who, is a male or female who, is below the age of eighteen years,\(^{344}\)

\(^{343}\) Malawi: Marriage, Divorce and Family Relations Bill, 2015 clause 5.
\(^{344}\) Ibid clause 6.
(b) “Child marriage” means a marriage to which either of the contracting parties is a child as per subsection (a)\textsuperscript{345} it also includes forced or early marriages;  
(c) “Contracting party”, in relation to a marriage, means either of the parties whose marriage is or is about to be thereby solemnized;\textsuperscript{346}  
(d) “Child Marriage Prohibition Officer” means the Child Marriage Prohibition Officer appointed as per part IV\textsuperscript{347} appointed by the Minister after consultation and election;  
(e) “Customary marriages” means a marriage celebrated in terms of customary law\textsuperscript{348} with parties above the age of 18 years;  
(f) “District court” means, a magistrate courts in Zimbabwe, having jurisdiction in respect of the matters dealt with in this Act;  
(g) “Minor” means a person under the age of full legal responsibility;  
(h) “Provinces” means the eight provinces in Zimbabwe and the two cities that have provincial status which include Midlands, Manicaland, Mashonaland Central, Mashonaland East, Mashonaland West, Matabeleland North, Matabeleland South, Harare and Bulawayo;\textsuperscript{349}  
(h) “Trafficked” means involuntarily taken outside or within Zimbabwe by the following means  
\begin{itemize}
  \item[i.] ‘Force, violence or threats  
  \item[ii.] Administering drugs to subdue the victim  
  \item[iii.] Abduction or detention  
  \item[iv.] Fraud, extortion and deceit  
  \item[v.] Abuse of power or trust over the victim\textsuperscript{350}  
  \item[vi.] Kidnapping  
  \item[vii.] The direct or indirect giving or receiving of payment to persons in authority or control of another person, to obtain consent.\textsuperscript{351}  
  \item[viii.] The direct or indirect giving or receiving of payments, rewards and compensation to immediate family members for the purpose of exploitation.\textsuperscript{352}
\end{itemize}

\textsuperscript{345} India: PCMA Section 1 (c).  
\textsuperscript{346} Ibid.  
\textsuperscript{347} Ibid.  
\textsuperscript{348} Malawi: Marriage Bill (note 345 above) clause 6.  
\textsuperscript{349} ‘Provinces of Zimbabwe’ available at \url{http://www.statoids.com/uzw.html}, accessed on 22 October 2015.  
\textsuperscript{351} South African Prevention and Combating of Trafficking in Persons Act 7 of 2013, section 4 (i).  
\textsuperscript{352} Ibid section 4 (j).
ix. Adoption of a child through legal or illegal means.\textsuperscript{353}

PART II: ESSENTIAL ELEMENTS OF MARRIAGE\textsuperscript{354}

3 (1) Subject to section 78 of the Constitution of Zimbabwe, two persons of the opposite sex who are not below the age of eighteen years, with a sound mind can legally marry.\textsuperscript{355}

(2) No child below the age of 18 shall be deemed as having the capacity to consent to a marriage.\textsuperscript{356}

(3) (1) any alleged consent given by a child below 18 years must be proven to be

a) ‘with adequate reason; and

b) not contrary to the interests of such minor.’\textsuperscript{357}

(4) Any marriage entered into with one party being a child, will be voidable at the instance of the child\textsuperscript{358} or any other legally interested party.

PART III OFFENCES AND PENALTIES\textsuperscript{359}

4. Punishment for an adult marrying a child

   (1) Whoever, being a male or female adult above eighteen years of age, contracts a child marriage with a minor shall be punishable with imprisonment up to five years or with a fine of up to US$1000.00 or with both.\textsuperscript{360}

5. Punishment for solemnizing a child marriage.-

\textsuperscript{353} Ibid section 4 (2).
\textsuperscript{354} Malawi: Marriage Bill, (note 346 above) Clauses 10 and 14.
\textsuperscript{355} Ibid clause 10.
\textsuperscript{356} R Mutyaba ’(note 205 above )350
\textsuperscript{357} South African case of Allcock v Allcock and Another 1969 (1) SA 427 (N), page 429: This provision was applied in a South Africa High Court in terms of section 25 (4) of the South African Marriages 25 of 1961. The parents in this case had refused to give consent for the child’s marriage.
\textsuperscript{358} India: PCMA section 3.
\textsuperscript{359} R Mutyaba (note 205 above) 350.
\textsuperscript{360} India: PCMA section 9.
(1) Whoever performs, conducts, facilitates, advises, attempts, condones\textsuperscript{361} encourages, directs or assists any child marriage shall be punishable with imprisonment which may extend to three years.\textsuperscript{362}

(2) The contravening parties shall be liable to a fine of up to US$1000. 00 unless he proves that he had reasonable and justifiable reasons to believe that one of the parties to the marriage was not a child.\textsuperscript{363}

6. Punishment for promoting or permitting solemnization of child marriages. –

(1) Where a child contracts a marriage, any person having charge of the child, whether as parent or guardian or religious leaders in Pentecostal churches, African Initiated churches, Catholic, traditional or Islamic,\textsuperscript{364} any other person or in any other capacity, lawful or unlawful, including any member of an organization or association of persons who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized, including attending or participating in a child marriage, shall be punishable with imprisonment which may extend to three years and shall also be liable to fine of up to US$1000.00.\textsuperscript{365}

(2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that where a minor child has contracted a marriage, the person having charge of such minor child has negligently failed to prevent the marriage from being solemnized.\textsuperscript{366}

(3) Notwithstanding anything, an offence punishable under this Act shall be ‘non-bailable.’\textsuperscript{367}

PART IV VOID MARRIAGES

7. Marriage of a minor child to be void in all circumstances.

‘(1) Where a child, being a minor-

(a) is taken or enticed out of the keeping of the lawful guardian; or

\textsuperscript{361} Plan International (note 159 above) 40.
\textsuperscript{362} India: PCMA section 10.
\textsuperscript{363} Ibid.
\textsuperscript{365} India: PCMA section 11.
\textsuperscript{366} Ibid.
\textsuperscript{367} Ibid section 15.
(b) by force, duress, compulsion, or by any deceitful means induced to go from any place; or 
(c) is sold or trafficked for the purpose of marriage; and made to go through a form of marriage or  
(d) for any other unlawful reason enters into a marriage, such marriage shall be null and void.  

PART V  
APPOINTMENT OF MARRIAGE PROHIBITION OFFICERS  

(1) The Minister of Health and Child Welfare shall, appoint, officers to be known as Child  
Marriage Prohibition Officer having jurisdiction over the provinces and districts in Zimbabwe.  
(2) Offices shall be set aside in municipal authority offices that will be designated for Child  
Marriage Prohibition Officers.  

(1) It shall be the duty of the Child Marriage Prohibition Officer-  
(a) to prevent solemnization of child marriages by taking necessary action;  
(b) to collect evidence for the effective prosecution of persons contravening the provisions  
of this Act;  
(c) to advise either individual cases or counsel the residents of the locality generally not to  
indulge in promoting, helping, aiding or allowing the solemnization of child marriages;  
(d) to create awareness of the evil which results from child marriages;  
(e) to sensitize the community on the issue of child marriages;  
(f) to furnish periodical returns and statistics as the State Government may direct; and  
(g) to discharge such other functions and duties as may be assigned to him by the State  
Government.  
(h) to investigate reports on child marriages within a reasonable time that may be required  
to prevent the child marriage.  

368 India: PCMA section 12.  
369 Children's Act (38/2005) Regulation 33076 Gazette no. 33076, Notice no. 261, 01 April 2010 (South Africa)  
section 37 (a).  
370 India: PCMA section 16 (3).  
371 Ibid.
(i) to develop and implement child protection plans.

10. Competencies of the Child Marriages Officers

(1) The Child Marriages Officers must possess;

(a) the ability to identify children being groomed and prepared for child marriages;
(b) the ability to write reports and notes;
(c) educational qualifications in child related issues;
(d) basic numeracy skills;
(e) detailed knowledge about child development; and
(f) the ability to assess age related developmental milestones
(g) any other relevant ability and knowledge that relates to child welfare.372

PART VI REGISTRATION OF MARRIAGES AND BIRTHS

11. (1) The Minister shall see to it that at all hospitals and clinics, a Registration of Births Office be opened in all maternity wards that will allow newly born children’s data and information to be captured into a national database on the day of birth.

(2) The Child Marriage Prohibition Officers must ascertain the age of the parties to the marriage before the marriage is solemnised by the marriage officer and must facilitate registration of the marriage after solemnisation.

PART VII TRAINING

12. This Act shall be accompanied by proper training of the judiciary, Child Marriage Prohibition Officers, and other relevant bodies and persons for effective implementation and enforcement of the provisions contained herein.373

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372Ibid (19) (2) (b).
PART VIII POWER OF THE COURTS TO MAKE AN INJUNCTION

13. The Family Court has the power to issue, after being approached by the Child Marriage Prohibition Officer (with sufficient evidence), an injunction to prevent a child marriage from taking place.  

5.4 Critique and Limitations of Elements in the Bill

Clauses 4 to 7 of the proposed bill carry criminal penalties. In the United Kingdom, there has been debate as to the value of and usefulness of criminalizing child marriages. From the debate, it has been highlighted that although legislation enables prosecution of child and forced marriages as a crime in its own right and as a separate offence, it is not effective. However, there is argument that making child marriages a separate crime will act as a deterrent as it sends a clear message of the illegality of such marriages. It has also been held that if there is a criminal sanction, this will encourage victims to report the crime. However, Gill and Anitha state that because of the possibility of family members being prosecuted or imprisoned victims may end up not reporting the child marriages. There is need to have thorough public and scholarly consultation on the issue of reporting those that have breached the Act, so that the law is not redundant.

It has been noted that it is difficult to satisfy the burden of proof needed to prosecute the conduct. In the United Kingdom legislation has been enacted that is civil in nature and this allows for forced marriage protection orders to be passed by family courts to protect those being forced into child marriages. The civil remedies in the Act are aimed at protection of the victim and not punishing the perpetrator. However, the Act still seems to have both civil and criminal remedies

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374 A Gill, (note 340 above) 262.
375 Ibid 260.
376 Ibid 261.
377 Equality Now (note 91 above) 19.
378 Ibid 19.
380 Ibid.
381 Forced Marriage (Civil Protection) [UK.] (note 61 above).
382 Ibid section 63.
384 Ibid 262.
as it makes provision for imprisonment of up to 2 years if a person fails to obey an order issued against them for the prevention of the child marriage. Thus, this validates the need for a criminal sanction. However, there is also a need to look into the advantages of including more protection of the victim alongside punishment of the perpetrator in the bill, so that the legislation will not only focus on criminal sanctions but also on the safety of girl children from the abuse of child marriages.

An evident limitation of the above proposed bill is that it does not mention a section on the burden of proof in terms of the crime. This is an area which needs further research. Another limitation notable in this research is that it does not focus on other means that can help end child marriages other than legislation. It has been held that for legislation to be effective, it has to be accompanied by other means such as social engagement education and awareness initiatives. In addition to the above, Bunting and Odala both believe that for child marriages to be addressed, the socio-economic conditions that allow girl children to be married early must be investigated and addressed. There is need to combine behavioural change mechanisms and the law as a means of tackling child marriages.

Another area that needs to be looked into is the issue of enforcement. Odala states that the enacted laws are not weak but there has been lack of national monitoring and enforcement mechanisms to ensure that the laws are effective and enforceable. Ray agrees to this notion in relation to the situation in India as he states that implementation has been the most problematic issue, hence to yield results, government needs to commit to implement the laws.

Clause 3(4) of the above proposed bill, deals with the voidability of the marriage entered into by a child. The above proposed bill has followed the route taken by India despite the highlighted criticisms on the issue of the voidness of the marriages. However, this paper has taken such a position on voidability mainly because child marriages ‘once solemnized and consummated makes

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385 For the Forced Marriage (Civil Protection) Act [UK] (note 61 above) section 63 H to 63 J.
386 A Gill (note 340 above) 265.
387 Plan International (note 163 above) 23.
388 Ibid 9.
389 A Bunting (note 79 above) 18.
390 Ibid 12.
391 V Odala (note 146 above).
392 D Ray (note 276 above) 16.
393 Ibid 10.
it very difficult, if not impossible, for girls to escape those marriages.\textsuperscript{394} Therefore, it is in keeping with the social reality of marriage and the consequences that flow from it that child marriages are not declared void.\textsuperscript{395}

Clause 13 of the above proposed bill targets the problems of lack of registration of births and marriages. Hanzi states that not all marriages in Zimbabwe are registered.\textsuperscript{396} Non-registration of marriages has been seen as one of the reasons why child marriages occur unnoticed.\textsuperscript{397} Compulsory registration of marriages will allow a child marriage to be easily detected as the age of the parties will be recorded, thus providing proof of underage marriages. Therefore there is need for provisions in the Act that will ensure that all marriages are registered, e.g. compulsory registration of marriages. The Act must allow for creation of registers that will be used to ascertain the age of the child before the marriage is concluded.\textsuperscript{398} Also, birth registration provides an official record of a child’s existence, nationality and age.\textsuperscript{399} Lack of birth registration will continue to make children vulnerable to child marriages.\textsuperscript{400} Thus there is need to make available easily accessible birth registration centres all over Zimbabwe.

Lastly, there is a need for future research to look at what can be done for the children that are already in these child marriages, something which this bill has not addressed. It hence is recommended that if this bill is promulgated in Zimbabwe, those dealing with it must look into remedies for those already party to child marriages and find the most appropriate solution to deal with them.

\section*{5.5 Standardize Existing Laws}

Secondly, this dissertation sought to challenge the existing Zimbabwean marriage\textsuperscript{401} legislation in regards to uniformity in the legally permissible marriageable age for girls and boys, and inclusion therein in cases where no age has been stipulated. Zimbabwe should increase the age in the

\begin{footnotesize}
\textsuperscript{394} Ibid.
\textsuperscript{395} ibid
\textsuperscript{396} R Hanzi (note 167 above) 6.
\textsuperscript{397} Child Marriage in India (note 247 above) 4.
\textsuperscript{398} Ibid.
\textsuperscript{399} Plan International (note 159 above) 26.
\textsuperscript{400} Ibid.
\textsuperscript{401} Zimbabwe: Marriage Act (note 28 above).
\end{footnotesize}
Marriage Act to 18 years for both boys and girls\textsuperscript{402} and eliminate existing gender based age discrimination existent herein.\textsuperscript{403} This will greatly assist in decreasing child marriages as the alignment of the minimum marriage age will cover the loophole that has legally allowed girls below 18 years to get married.

The Customary Marriages Act,\textsuperscript{404} which does not stipulate any age or requirements for the marriage of the parties marrying under customary law, also requires amendments, which can be effected along the lines of the applicable provisions in the South African RCMA.\textsuperscript{405} Lastly the Children’s Act\textsuperscript{406} must be amended to include provisions on harmful cultural practices similar to those in section 12 of the South African Children’s Act.\textsuperscript{407}

5.6 Conclusion

Drawing on the analysis from the foregoing research, it is clear that there is a body of international law that has a bearing on child marriages. Child marriages are still prevalent despite the international and regional laws and policies in place. It has been noted by existing research that the biggest challenge has been the existence of different levels of marriageable age legislation which has often led to the practice of child marriages going unnoticed. This has been true for Zimbabwe. This dissertation aimed to challenge the age of marriage in the Marriage Act and lack thereof in the Customary Marriages Act. It further showed how this has impacted child marriages in the country.

Legal reform is an important means of transformation, although its effectiveness may be minimal.\textsuperscript{408} This dissertation hence in turn suggested the enactment of a proposed bill that will address the issue of child marriages in Zimbabwe, as a first step that will need to be combined with other means not specifically dealt with in this paper, to end child marriages.

\textsuperscript{402}Equality now (note 92 above) 14.
\textsuperscript{403}Ibid.
\textsuperscript{404}Zimbabwe: Customary Marriages Act (note 29 above).
\textsuperscript{405}South Africa: Recognition of Customary Marriages Act (note 59 above).
\textsuperscript{406}Zimbabwe: Children’s Act (note 220 above).
\textsuperscript{407}South Africa: Children’s Act, (note 60 above).
\textsuperscript{408}A Gill (note 340 above) 264.
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