



COLLEGE OF LAW AND MANAGEMENT STUDIES
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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Acknowledgements

Firstly I thank God, who made it possible for me to do this dissertation. If it was not for his sufficient grace, I would not have completed this dissertation.

Secondly I would like to thank my mother Pastor F Salijeni for the financial, emotional, moral and spiritual support. Without your help mama, I would not have pursued this master's degree or completed it.

Thirdly, I would like to thank my supervisor Miss Carol Anne Epstein for your patience, guidance and assistance in the writing of my dissertation.

Lastly I would like to thank all my friends, relatives and well-wishers that stood by me and encouraged me during the course of writing my dissertation.

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List of Acronyms

AIC	African Initiated Church
AU	African Union
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CMA	Customary Marriages Act
CRC	United Nations Convention on the Rights of the Child
ICCPR	International Covenant on Civil and Political Rights
HIV	Human Immunodeficiency Virus
RAU	Research and Advocacy Unit
RCMA	Recognition of Customary Marriages Act
SADC	Southern African Development Community
Sabinet	Southern African Bibliographic Information Network
UN	United Nations
UNICEF	United Nations Children's Fund
UNHCR	United Nations High Commissioner for Refugees
UK	United Kingdom

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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.

¹N.M Nour 'Child marriage: A Silent Health and Human Rights Issue' (2009) 2 (1) *Rev Obstet Gynecol* 51.

² UNICEF 'Progress for Children: A World Fit for Children Statistical Review' 2007 New York: UNICEF 45, available at http://www.unicef.org/publications/files/Progress_for_Children_No_6_revised.pdf, accessed on 23 January 2015.

³UNFPA 'Child Marriage Country Profile: Zimbabwe' 2012, available at <http://www.girlsnotbrides.org/reports-and-publications/unfpa-child-marriage-country-profile-zimbabwe/>, accessed on 18 October 2014.

⁴ 'Some facts about Marriage in Zimbabwe' available at <http://baobabtales.wordpress.com/2010/03/06/some-facts-about-marriage-in-zimbabwe/>, accessed on 11 April 2015.

⁵ 'Africa Girls & Women Reproductive Health, Family Planning & Human Development Scorecard-Fn.pdf 2013', available at <http://www.afri-dev.info/wp-content/uploads/2015/07/2013-Africa-Girls-Women-Reproductive-Health-Family-Planning-Human-Development-Scorecard-Fn.pdf>, accessed on 26 March 30, 2015.

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,⁶ child marriages frequently coincide with early pregnancies and early childbirth, which usually result in higher than the average maternal morbidity and mortality rates.⁷ Research shows that pregnancy-related deaths are the leading cause of mortality for 15-19 year-old girls⁸ worldwide.⁹ Usually, infant mortality among the children of very young mothers is higher (sometimes twice as much) than those of older mothers.¹⁰ Research also shows that victims of child marriages are prone to various health risks from infectious diseases such as HIV and sexually transmitted diseases.¹¹ Further associated with child marriages are reproductive health problems such as obstetric fistulas¹² 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,¹³ and this is mainly due to them being immature mentally and physically.¹⁴ 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.¹⁵ Such harmful effects associated with child marriages

⁶ United Nations Convention on the Elimination of All Forms of Discrimination against Women, Joint General Recommendation/General Comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on Harmful Practices, 2014 CEDAW/C/GC/31-CRC/C/GC/18, (hereafter General Comment 31).

⁷ Ibid 7.

⁸ This includes both married and unmarried females.

⁹ C S Christiansen, S Gibbs, and V Chandra-Mouli 'Preventing Early Pregnancy and Pregnancy-Related Mortality and Morbidity in Adolescents in Developing Countries: The Place of Interventions in the Pre-pregnancy Period' 2013 *Journal of Pregnancy* 1.

¹⁰ Ibid.

¹¹ P McIntyre and World Health Organisation 2006 'Pregnant Adolescent: Delivering on Global Promises of Hope. Geneva: World Health Organisation' 9, available at

http://www.who.int/maternal_child_adolescent/documents/9241593784/en/, accessed on 14 January 2015.

¹² 'Prevention and Recognition of Obstetric Fistula Training Package Module 6: Obstetric Fistula – Definition, Causes and Contributing Factors, and Impact on Affected Women', available at

http://www.fistulacare.org/pages/pdf/Training/Module_6_Obstetric_fistula_causes_and_factors_Fistula_Care.pdf, accessed on 17 June 2015.

¹³ T Hampton 'Child Marriage Threatens Girls' Health' (2010) 304 (5), *JAMA: Journal of the American Medical Association*, 509.

¹⁴ UNFPA, 'Marrying Too Young: End Child Marriage', 2012 New York available at

<http://www.unfpa.org/sites/default/files/pub-pdf/MarryingTooYoung.pdf>, accessed on 23 April 2015.

¹⁵ C Mlambo, C Chinamo and T Zingwe 'An Investigation of the Causes of Maternal Mortality in Zimbabwe' (2013) 4 (14) *Mediterranean Journal of Social Sciences* 615.

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; 1989¹⁶ 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.’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, 1990,¹⁸ (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 2008¹⁹ 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.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.’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.’²²

¹⁶ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p 3, hereafter the CRC.

¹⁷ Ibid art 1.

¹⁸ Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

¹⁹ South African Development Community (SADC), Protocol on Gender and Development 2008.

²⁰ Ibid art 8.

²¹ N Gumbonzvanda ‘Child Marriage is a Crime, A Rights Violation and a Development Issue’ UN 68th Assembly Panel Discussion, 5 September 2014 New York, available at <http://www.nyaladzani.com/?p=430>, accessed on 9 October 2014.

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

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%202%20Ors%20-%20Applicants%27%20Heads%20of%20Argument.pdf, accessed on 5 March 2015.

²⁴Emma Batha 'Child brides take Zimbabwe Government to Court over Marriage Laws' *Reuters* 28 March 2015, available at <http://www.reuters.com/article/2015/03/24/us-zimbabwe-childmarriage-idUSKBN0MK2E820150324>, accessed on 20 April 2015.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷Note 23 above, paragraph 110.

²⁸ Zimbabwe: Marriage Act [Zimbabwe], Chapter 5:11, Act 22 of 2001.

²⁹Zimbabwe: Customary Marriages Act [Zimbabwe], Chapter 5:07, Act 6 of 1997.

³⁰Zanele Mhlaba 'Girls not brides' 14 January 2015, available at <http://www.indunamag.com/read/girls-not-bride/13/2/2015>, accessed at 7 April 2015.

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.³² Generally, child marriage occurs when one or both of the spouses are below the age of 18 years.³³ 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 18.³⁴ The term child marriage will also be used to mean early marriage and forced marriage³⁵ for the purpose of this research. Child marriage almost exclusively affects girls who are most vulnerable to the practice.³⁶ This paper will focus on the female child, as statistics show her to be more disproportionately affected by child marriages than the male child.³⁷

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 religious³⁸ reasons. Walker states that the economic context in which early marriage exists in Africa is that of household poverty and vulnerability.³⁹ 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

³² FRA European Union Agency for Fundamental Rights ‘Addressing Forced Marriage in the EU: Legal Provisions and Promising Practices’ 2014 45, available at <http://fra.europa.eu/en/publication/2014/addressing-forced-marriage-eu-legal-provisions-and-promising-practices>, accessed at 20 April 2015.

³³ UNFPA ‘Child Marriage Country Profile: Zimbabwe’ 2012, available at <http://www.girlsnotbrides.org/reports-and-publications/unfpa-child-marriage-country-profile-zimbabwe/>, accessed on 18 October 2014.

³⁴FRA (note 32 above) 45.

³⁵World Vision ‘Exploring the links: Female Genital Mutilation/Cutting and Early Marriage’, UK 2014 7, available at http://9bb63f6dda0f744fa444-9471a7fca5768cc513a2e3c4a260910b.r43.cf3.rackcdn.com/files/4814/0068/7160/Exploring_the_links_FGM_cutting_and_early_marriage.pdf, accessed on 5 January 2015.

It has been noted that “Young children, rarely consent freely or understand the long-term implications of marriage”.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Research and Advocacy Unit ‘Let Them Grow First: Early Marriage in Goromonzi, Zimbabwe’ 2014 8, available at [http://www.researchandadvocacyunit.org/system/files/Let%20them%20Grow%20First%20-%20Early%20Marriage%20Report%20\(2\).pdf](http://www.researchandadvocacyunit.org/system/files/Let%20them%20Grow%20First%20-%20Early%20Marriage%20Report%20(2).pdf), accessed on 23 November 2014.

³⁹J Walker ‘Early Marriage in Africa – Trends, Harmful Effects and Interventions’ (2012) 16 (2), *African Journal of Reproductive Health June (Special Edition)* 233.

the responsibility of taking care of those children.⁴⁰ Currently, Zimbabwe has been facing many economic hardships. Its economy is ranked 176th worldwide in the Index of Economic Freedom.⁴¹ 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.⁴² 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.⁴³ 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).⁴⁴ Francis Machingura has noted that child marriages are practised within the AIC churches.⁴⁵ The members of AIC churches believe in prophecies in which they are told about their future, and are warned of any future dangers.⁴⁶ All female members of the Johane Masowe church (an African Initiated Church in Zimbabwe) are expected to pass a ceremonial virginity examination.⁴⁷ Because virginity is a symbol of purity, men marry young girl children before they are deflowered.⁴⁸ 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.⁴⁹ 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

⁴⁰Ibid.

⁴¹Index of Economic Freedom 2014 461, available at

<http://www.heritage.org/index/pdf/2014/countries/zimbabwe.pdf>, accessed on 23 Nov 2014.

⁴²Ibid.

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]

⁴⁵F Machingura 'A Diet of Wives as the Lifestyle of the Vapostori Sects: The Polygamy Debate in the Face of HIV and AIDS in Zimbabwe.' (2011) 5 (2) *Africana*, 196.

⁴⁶ O Dodo, G Richard, Banda and G Dodo 'African Initiated Churches, Pivotal in Peace-Building: A Case of the Johane Masowe Chishanu,' (2014) 16 (12) *Journal of Religion and Society* 7.

⁴⁷Ibid 196.

⁴⁸ Ibid.

⁴⁹B Maguranyanga 'Apostolic Religion, Health and utilization of Maternal and Child Health Services in Zimbabwe.' 2011 Collaborating Centre for Operational Research and Evaluation (CCORE), UNICEF: Harare, 4, available at www.unicef.org/zimbabwe/ZIM_resources_apostolicreligion.pdf, accessed on 16 September 2014.

has been identified as encouraging child marriages.⁵⁰

In addition, Togarasei highlights although in the context of Botswana, how the AIC holds to an extremely patriarchal interpretation of the Bible.⁵¹ The biblical verse that the man is the head of the family⁵² is also very influential in the AIC's doctrine.⁵³ Biblical 'teachings on the headship of men'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.⁵⁵ Such headship is considered to entail 'decision making, provision, authority and unquestioned belief in the man's decisions....'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 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?

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.

⁵¹L Togarasei 'Christianity and hegemonic Masculinity: Transforming Botswana Hegemonic Masculinity using the Jesus of Luke' 2013 112 *Scriptura* 3.

(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.).

⁵² Ephesians 5:22, King James Bible available at <http://biblehub.com/kjv/ephesians/5.htm>, accessed on 22 April 2015.

⁵³ O Dodo (note 46 above) 6.

⁵⁴ Ibid, 6 (Ephesians 5:22, King James Bible).

⁵⁵ Ibid.

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,⁵⁷ and the Customary Marriage Act⁵⁸ and analyse them against the constitutional stipulations on marriage

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 Constitution⁵⁹ 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 Act⁶⁰ and the Children's Act, 38 of 2005,⁶¹ which has detailed child rights. The dissertation will further look at the United Kingdom's Forced Marriage (Civil Protection)

⁵⁹ Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

⁶⁰ No. 120 of 1998 (hereafter RCMA).

⁶¹ Hereafter SA Children's Act.

Act⁶² 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.

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.

⁶²Forced 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.⁶³ Literature shows that international laws set the foundation that state parties must follow in their own domestic laws and policies.⁶⁴ Burris views international laws as important tools in preventing child marriages.⁶⁵ 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.⁶⁶ 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.⁶⁷

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.

⁶³ R Gaffney-Rhys 'International Law as an Instrument to Combat Child Marriages' (2011) 15 (3) *International Journal of Human Rights* 359.

⁶⁴ *Ibid* 367.

⁶⁵ C Burris 'Why Domestic Laws Institutions are Failing Child Brides: A Comparative Analysis of India and USA Approaches to the Institution of child marriages' 2014 *Tulane Journal of International and Comparative Law* 153.

⁶⁶ Gaffney-Rhys (note 63 above) 367.

⁶⁷ R De Silva-de-Alwis 'Child Marriage and the Law: Legislative Reform Initiative Paper Series United Nations Children's Fund (UNICEF)', New York 2008 6, available at [http://www.unicef.org/.../files/Child_Marriage_and_the_Law_\(1\).pdf](http://www.unicef.org/.../files/Child_Marriage_and_the_Law_(1).pdf), accessed on 15 November 2014.

2.2 *INTERNATIONAL TREATIES*

2.2.1 *United Nations Convention on the Rights of the Child, 1989*

The United Nations Convention on the Rights of the Child, 1989⁶⁸ 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

⁶⁸ CRC 9 (note 16 above).

⁶⁹Burris (note 65 above) 156.

⁷⁰P Achan – Okiria *The Internal Displacement Crisis in Africa: Implementation of National and International Law on the Child Marriage Phenomenon in Uganda* (unpublished LLM thesis, University of Pretoria, 2007) 30.

⁷¹ Ibid.

⁷²A Bunting and S E Merry ‘Global Regulation and Local Political Struggles: Early Marriage in Northern Nigeria’, 2004 prepared for the Social Science Research Council: Globalization, Youth and the Law Research Group 327.

⁷³CRC (note 16 above) art 34.

⁷⁴ Ibid art1 ‘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.⁷⁸ 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.'⁷⁹ 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.⁸⁰ 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.'⁸¹ Moreover, the CRC provides for the right of the child to be protected from all forms of violence, including physical, sexual or psychological⁸² violence and requires state parties to ensure that no child be subjected to torture or other cruel, inhuman or degrading treatments or punishment.⁸³ The CRC applies the four general principles of the Convention regarding the issue of harmful practices, namely: protection from discrimination,⁸⁴ ensuring the best interests of the child,⁸⁵ upholding the right to life, survival and development⁸⁶ and the right of the child to be heard.⁸⁷ 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,⁸⁸ it has an obligation to protect children from child marriages.

⁷⁸UNHCR *Guidelines on Determining the Best Interests of the Child* 2008, 14.

⁷⁹Ibid 15.

⁸⁰Annie Bunting, *Particularity of Rights, Diversity of Contexts: Women, International Human Rights and the Case of Early Marriage* (unpublished Doctoral Thesis, University of Toronto Faculty of Law 1999) 145.

⁸¹ CRC (note 16 above) art 24 (3).

⁸² Ibid art 19.

⁸³Ibid art 37 (a).

⁸⁴Ibid art 2.

⁸⁵Ibid art 3 (1).

⁸⁶Ibid art 6.

⁸⁷ Ibid art 12.

⁸⁸S 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).

⁹² Equality Now ‘Protecting the Girl Child, Using the Law to End Child, Early and Forced Marriage and Related Human Rights Violations’ 2014 13, available at http://www.equalitynow.org/sites/default/files/Protecting_the_Girl_Child.pdf, accessed on 15 June 2015.

⁹³ Achan-Okiria (note 70 above) 33.

⁹⁴ Convention on the Elimination of all Forms of Discrimination against Women available at <https://treaties.un.org/pages/showDetails.aspx?objid=080000028000309d>, accessed on 25 February 2016.

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.’⁹⁶ 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.’⁹⁷ 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.⁹⁸ 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.⁹⁹ 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.¹⁰⁰ 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).¹⁰¹ 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.’¹⁰²

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,’¹⁰³ meaning that enforcement has been left in the hands of state signatories who have to incorporate the Convention into their domestic legislation.¹⁰⁴ 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.

⁹⁷Ibid.

⁹⁸ Achan-Okiria (note 70 above) 34.

⁹⁹Ibid.

¹⁰⁰ Gaffney-Rhys (note 63 above) 364.

¹⁰¹ Ibid 363.

¹⁰² Achan - Okiria (note 70 above) 34.

¹⁰³ J Brunnee ‘Enforcement Mechanisms in International law and International Environmental Law’ 2005 3, available at http://www.law.utoronto.ca/documents/brunnee/brunneeenforcementmechanismsint_llaw.pdf, accessed on 17 June 2015.

¹⁰⁴ Ibid 34.

2.2.3 International Convention on Civil and Political Rights

The International Convention on Civil and Political Rights¹⁰⁵ has a committee that monitors the domestic implementation of the treaty's provisions.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.'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.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.¹⁰⁹

2.2.4 United Nations General Convention on Consent to Marriage Minimum Age for Marriage and Registration of Marriage (hereafter The Marriage Convention)¹¹⁰

The Marriage Convention 'proposes some admirable goals'¹¹¹ about child marriages. In the preamble, though this is not binding¹¹² 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

¹⁰⁵International Convention on Civil and Political Rights, 1966 hereafter the ICCPR.

¹⁰⁶ Ibid 158.

¹⁰⁷ Ibid.

¹⁰⁸ Equality Now (note 92 above) 13.

¹⁰⁹ Ibid.

¹¹⁰UN 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 entails¹¹³ 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 explicit¹¹⁶ 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 eighteen¹¹⁸ 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

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.¹²¹ 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 it¹²² 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 Charter¹²³ 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.¹²⁴ 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'¹²⁵ 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 2008¹²⁶ 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.¹²⁷ 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.¹²⁸ In addition, the Protocol ensures that girls are not prejudiced and are protected from economic exploitation.¹²⁹

¹²¹Organization of African Unity (OAU) (note 18 above) art 2.

¹²² Achan - Okiria (note 70 above) 39.

¹²³ Gaffney-Rhys (note 63 above) 365.

¹²⁴ Ibid.

¹²⁵ N Lowe and G Douglas, *Bromley's Family Law* Oxford University Press, 11th edition (2015), 23.

¹²⁶ 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.

¹²⁷ Ibid art 8.

¹²⁸ Ibid art 8 (2) (a).

¹²⁹ 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 Africa¹³⁰ also protects young girls and women from harmful practices, which are defined as attitudes or practices that negatively affect other fundamental rights.¹³¹ Article 6 of the Protocol sets 18 years as the minimum age of marriage for women¹³² and requires the consent of the parties to be married.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.¹³⁴

Further, Bunting who is of the view that ‘having one age of majority is untenable’,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.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.’¹³⁷

¹³⁰ African Union Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, 11 July 2003.

¹³¹ Ibid art 5.

¹³² Ibid art 6 (b).

¹³³ Ibid art 6 (a).

¹³⁴ Gaffney-Rhys (note 63 above) 365.

¹³⁵ A Bunting (note 80 above) 111.

¹³⁶ Ibid.

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.¹³⁸ Gaffney notes that setting 15 as the minimum age will not delay child marriage¹³⁹ concluding overall that although 18 years may not get wide support, it is the ‘logical step for the international community to take.’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.¹⁴¹ International institutions have limited enforcement mechanisms.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.’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.

¹³⁸ Achan – Okiria (note 70 above 18).

¹³⁹Gaffney-Rhys (note 63 above 368).

¹⁴⁰ Ibid.

¹⁴¹ A Bunting and S E Merry (note 72 above 324).

¹⁴² Brunnee (note 103 above 5).

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 boys¹⁴⁹ in cases where parental or guardian consent is given. This has allowed child right violations through marriage to

¹⁴⁴ ACPF 'The African Report on Child Wellbeing: Towards Greater Accountability to Africa's children.' 2013 Addis Ababa: The African Child Policy Forum (ACPF) 31, available at <http://a-dtap.awepa.org/wp-content/uploads/2013/12/ARCW2013-English.pdf>, accessed on 3 February 2015.

¹⁴⁵ R Gaffney-Rhys (note 63 above) 367.

¹⁴⁶ V Odala 'Why is it Important for Countries to Have a Minimum Legal Age of Marriage?' (2013), available at <http://www.girlsnotbrides.org/wp-content/uploads/2013/06/ACPF-Importance-of-min-age-of-marriage-legislation-May-2013.pdf>, accessed on 23 June 2015.

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...’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,¹⁵¹ Marriages Act,¹⁵² Customary Marriages Act¹⁵³ and the Children’s Act.¹⁵⁴ In comparison, there will be a short analysis of the South African Recognition of Customary Marriages Act¹⁵⁵ and the Children’s Act.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 The Legal System in Zimbabwe

Zimbabwe has a dual legal system¹⁵⁷ with various sources of law.¹⁵⁸ This entails the existence of more than one legal system that can be used in any given situation leading to differing interpretations.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.¹⁶⁰ It has been said that plural and dual legal systems usually allow harmful cultural practices to flourish.¹⁶¹

¹⁵⁰ Ibid.

¹⁵¹ Constitution of Zimbabwe Amendment (note 59 above).

¹⁵² Zimbabwe: Marriage Act (note 28 above).

¹⁵³ Zimbabwe: Customary Marriages Act (note 30 above).

¹⁵⁴ Zimbabwe: Children’s Act (note 30 above).

¹⁵⁵ RCMA (note 60 above).

¹⁵⁶ SA Children’s Act (note 61 above).

¹⁵⁷ Research and Advocacy Unit “Zimbabwe’s Dual Legal System” June 20 2013, available at <http://researchandadvocacyunit.wordpress.com/2013/06/20/zimbabwes-dual-legal-system>, accessed on 18 September 2015.

¹⁵⁸ O Saki and T Chiware ‘The Law in Zimbabwe’ 2007, available at <http://www.nyulawglobal.org/globalex/Zimbabwe.html>, accessed on 22 September 2015.

¹⁵⁹ Plan International ‘Protecting Children from Harmful Practices in Plural Legal Systems’ 2012 17, available at http://srsg.violenceagainstchildren.org/sites/default/files/publications_final/SRSG_Plan_harmful_practices_report_final.pdf, accessed on 21 September 2015.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

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 or
2. ‘the Zimbabwean Customary Marriages Act’¹⁶⁵ or
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 entered¹⁶⁸ 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 Act¹⁷² 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

¹⁶²Human Rights Watch ‘I’ve Never Experienced Happiness, Child Marriage in Malawi’ 2014 glossary ii available at http://www.hrw.org/sites/default/files/reports/malawi0314_ForUpload.pdf, accessed on 18 August 2015.

¹⁶³Ibid.

¹⁶⁴Zimbabwe: Customary Marriages Act (note 30 above).

¹⁶⁵Ibid.

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

¹⁶⁷ R Hanzi *Sexual Abuse and Exploitation of the Girl Child through Cultural Practices in Zimbabwe: a Human Rights Perspective* (unpublished Master’s thesis, University of Pretoria, 2006) 29.

¹⁶⁸S Ndlovu–Bhebhe ‘Harmonize Marriage Laws before changing Marriage Certificates’ 2012 *BUWA* 15, available at <http://www.oasisa.org/sites>, accessed 17 June 2015.

¹⁶⁹Zimbabwe: Customary Marriages Act (note 30 above).

¹⁷⁰ S Chirawu ‘Till Death Do us part: Marriage, HIV or AIDS and the Law in Zimbabwe’ 9, available at <http://law.bepress.com/cgi/viewcontent.cgi?article=6451&context=expresso>, accessed on 9 July 2015.

¹⁷¹ Zimbabwe: Customary Marriages Act (note 30 above) section 2.

¹⁷² S Chirawu (note 170 above) 9.

¹⁷³The Center for Reproductive Rights ‘Woman of the World Laws and Policies Affecting their Reproductive lives’ 2003 141, available at <http://www.reproductiverights.org/sites/default/files/documents/WOWAA08.pdf>, accessed on 7 April 2015.

customary law but not solemnized in terms of the Customary Marriages Act.¹⁷⁴ 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.¹⁷⁵ It is not legally recognized although it is the most common form of marital union in the country.¹⁷⁶

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.¹⁷⁷ 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.¹⁷⁸ 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.¹⁷⁹

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 Zimbabwe¹⁸⁰ is the 'highest law of the land and any practice, custom or conduct that is inconsistent with it will be invalid.'¹⁸¹ The South African case of *S v Makwanyane*¹⁸² emphasises the point that the Constitution is the highest law in South Africa¹⁸³

¹⁷⁴Zimbabwe: Criminal Law (Codification and Reform) (note 167 above) section 2 (1).

¹⁷⁵ Section 3 (5) of the Zimbabwe Customary Marriages Act.

¹⁷⁶S Ndlovu–Bhebhe (note 168 above).

¹⁷⁷ B Rwezaura 'Competing Images of Childhood in the Social and Legal Systems of Contemporary Sub Saharan Africa' 1998 12 *International Journal of Law, Family and Policy*, 254.

¹⁷⁸R Hanzi (note 167 above) 33.

¹⁷⁹Ibid.

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.¹⁸⁴

The Constitution defines marriage as a consensual union between a man and a woman, both of whom have reached eighteen years of age.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.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.’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.’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—

¹⁸⁴O Saki and T Chiware (note 158 above).

¹⁸⁵ Constitution of Zimbabwe (note 58 above) section 78.

¹⁸⁶ Research and Advocacy Unit, (note 38 above) 5.

¹⁸⁷ Constitution of Zimbabwe (note 59 above) section 78.

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 Unit¹⁸⁹ 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.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.'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

¹⁸⁹Hereafter RAU.

¹⁹⁰ M Sibanda 'Married Too Soon: Child Marriage in Zimbabwe', 2011 Research Advocate Unit, 11 available at http://archive.kubatana.net/docs/chiyou/rau_child_marriage_111030.pdf, accessed on 13 December 2014.

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

¹⁹²N Gumbonzvanda (note 21 above).

¹⁹³ Ibid.

¹⁹⁴R Hanzi (note 167 above) 20.

¹⁹⁵ M Verveer 'Targeting Girls in the Name of Tradition: Child Marriage' 2010 available at <http://www.state.gov/s/gwi/rls/rem/2010/144989.htm>, accessed on 25 February 2016

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.’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 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.¹⁹⁷ The Zimbabwean Marriage Act¹⁹⁸ has such a disparity. It stipulates the minimum marriageable age for girls at sixteen (16) and eighteen (18) for boys.¹⁹⁹ The Act allows the marriage of a minor if the legal guardian consents in writing.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.²⁰¹ The Minister may allow a marriage in any particular case if he considers such marriage ‘desirable.’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.’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.²⁰⁴

¹⁹⁶ Section 16.

¹⁹⁷ A Bunting (note 80 above) 126.

¹⁹⁸ Zimbabwe: Marriage Act (note 28 above).

¹⁹⁹ Ibid section 22.

²⁰⁰ Ibid section 20 (2).

²⁰¹ Ibid Section 1: this refers to the Minister of Justice, Legal and Parliamentary Affairs or any other Minister.

²⁰² E Mapuranga ‘Child Marriages in a Country where a Dual Legal System Exists: The Case Study of Zimbabwe’ (2012) Seventh CSO Forum presentation, available at http://www.csoforum.info/.../Child-Marriage_Justice-for-Children-Trust.Zimbabwe.pptx, accessed on 12 February 2015.

²⁰³ Oxford Dictionaries Online available at <http://www.oxforddictionaries.com/definition/english/desirable>, accessed on 22 October 2015.

²⁰⁴ M Sibanda (note 190 above) 6.

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.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.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

²⁰⁵R Mutyaba 'Early Marriage: A Violation of Girls' Fundamental Human Rights in Africa' (2011) 19 *International Journal of Children's Rights*, 344.

²⁰⁶ 'Establishing a Minimum Age of Marriage', available at <http://www.endvawnow.org/en/articles/616-establishing-a-minimum-age-for-marriage.html>, accessed on 20 October 2015.

can show it is ‘fair, reasonable and justifiable.’²⁰⁷ 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 18²⁰⁸ highlights that there exists a duty on the state to prevent discrimination based on sex.²⁰⁹ 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.’²¹⁰ 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.’²¹¹ 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 1951,²¹² regulating customary marriages contains no provision for a minimum age for marriage. Most child marriages take place in terms of customary law practices.²¹³ The main reason behind this is that customary marriages do not specify a marriageable age²¹⁴ Lack of a minimum age has therefore made the Act vulnerable to abuse.²¹⁵

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.

²⁰⁸ Human Rights Committee, *General Comment No. 18, Non-Discrimination* (37th Sess., 1989), para. 1, U.N. Doc. CCPR/C/21/Rev.1/Add.10, available at <https://www1.umn.edu/humanrts/gencomm/hrcom18.htm>, accessed on 18 August 2015.

²⁰⁹R Mutyaba (note 205 above) 341.

²¹⁰Ibid.

²¹¹Ibid.

²¹²Zimbabwe: Customary Marriages Act (note 29 above).

²¹³ M Sibanda (note 190 above) 3.

²¹⁴ N Otoo-Oyorty and S Pobi ‘Early Marriage and Poverty: Exploring Links and Key Policy Issues’ (2003) 11 (2) *Gender & Development Marriage* 43.

²¹⁵ M Sibanda (note 190 above) 7.

Religious and traditional groups take advantage of this Act to marry off children. RAU²¹⁶ states that in culture, what defines readiness for marriage is the physical attributes of the child and not their age.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.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 Act²¹⁹ which has set an age requirement for the parties engaging in marriage.

3.5 *The Children's Act 1972*

The Children's Act 1972²²⁰ (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.'²²¹ A minor is defined as 'a person below the age of eighteen'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.'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'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.

²¹⁶Ibid.

²¹⁷ Research and Advocacy Unit (note 38 above) 5.

²¹⁸Correspondent 'Calls to Repeal Laws Abetting Child Marriage in Zimbabwe Intensify' January 20 2015, available at <http://awcfs.org/kw/article/calls-to-repeal-laws-abetting-child-marriage-in-zimbabwe-intensify/>, accessed on 8 August 2015.

²¹⁹RCMA (note 59 above).

²²⁰Zimbabwe: Children's Act .

²²¹Ibid section 6.

²²² Ibid section 2.

²²³ Ibid.

²²⁴ Ibid preamble.

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 practises 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.'²²⁵ Subsidiary laws are not in aligned to the Constitution,²²⁶ 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.²²⁷ As a result, the society tends to utilise traditional legal systems that usually allow child marriages to take place.²²⁸ Allowing different laws to stipulate different ages of marriage to creates uncertainty and allows the state to condone such harmful practices.²²⁹

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.²³⁰ 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.

²²⁹ F Banda 'Project on a Mechanism to Address Laws that Discriminate against Women' Office of the High Commissioner for Human Rights –Women's Rights and Gender Unit 6 March 2008, 65 available at http://www.ohchr.org/Documents/Publications/laws_that_discriminate_against_women.pdf, accessed on 7 August 2015.

²³⁰ V Odala (note 146 above).

‘changing customary practices that are inconsistent with international and regional human rights standards.’²³¹ Law reform has the potential of reviewing local traditions and customs so that they align with international standards.²³² Mutyaba states that it is important that all legislation that allows child marriages to take place must be nullified or amended.²³³ This can be done through new legislation or amending existing legislation to ensure that the age of marriage is 18 years for both sexes.²³⁴ 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.

²³²Ibid 17.

²³³R Mutyaba (note 205 above) 350.

²³⁴Ibid.

4 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.²³⁵ Most of India's children are married before puberty.²³⁶ The number of child brides in India constitutes one third of child brides in the world,²³⁷ amounting to a total of about 23 million child brides.²³⁸ 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.²³⁹ However, the Act was not effective because it was solely aimed at 'upon the people to exercise restraints and avoid solemnizing child marriages'²⁴⁰ and not totally ban child marriages. Thus, the Act was a regulatory law that did not have any 'deterrent value.'²⁴¹ 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.²⁴² This change was an attempt to end child marriage using a more detailed piece of legislation.

²³⁵ D Bharti *Women and the Law* 2008, APH Publishing House 24 available at <https://books.google.co.za/books?id=7U36KQVBVIgC&pg=PR3&lpg=PR3&dq=D+Bharti+%E2%80%98women+and+the+law%E2%80%99&source=bl&ots=SNwGbiR8Sr&sig=q3rrLalHTuCuw-llpslGohPcz0I&hl=en&sa=X&ved=0CB8Q6AEwAmoVChMIqKqByajEyAIVAkWUCh2BcA7Q#v=onepage&q=D%20Bharti%20%E2%80%98women%20and%20the%20law%E2%80%99&f=false>, accessed on 22 August 2015.

²³⁶ Ibid.

²³⁷ P Sarkar 'Efficacy of the Prohibition of Child Marriage Act, 2006' available at <http://www.legalindia.com/efficacy-of-the-prohibition-of-child-marriage-act-2006/>, accessed on 22 August 2015.

²³⁸ C Burris (note 65 above) 160.

²³⁹ Ibid.

²⁴⁰ D Bharti (note 235 above) 26.

²⁴¹ Ibid.

²⁴² S Deb 'A Critical Analysis of Child Marriage Law in India with Special Reference to Hindu Law' (2012) 23 available at <http://ssrn.com/abstract=1998189>, accessed on 25 November 2014.

Research has shown that legislation is an effective means of introducing social change.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.

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.’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.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.²⁴⁶ Further, India is relevant because it has incorporated its international obligations into a national legal instrument.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.

²⁴³ D Francavilla “Interacting Legal Orders and Child Marriages in India” 2011 (2) 19 American University *Gender Social Policy and the law Journal*, 543.

²⁴⁴Ibid 532.

²⁴⁵ C Burris (note 65 above) 153.

²⁴⁶ Ibid 158.

²⁴⁷“Child marriage in India: achievements, gaps and challenges” Submissions by HAQ: Centre for Child Rights available at <http://www.ohchr.org/Documents/Issues/Women/WRGS/ForcedMarriage/NGO/HAQCentreForChildRights1.pdf> 2, accessed on 22 August 2015.

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 18.²⁴⁸ Child marriages in India have been the result of gender inequality,²⁴⁹ poverty,²⁵⁰ lack of education, dowry among others. Also child marriages have flourished in disadvantaged communities that still have religious,²⁵¹ customary and cultural practices.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.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.’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.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.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.²⁵⁷ As noted in Chapter

²⁴⁸ ‘Draft National Plan of Action to Prevent Child Marriages in India’ available <http://wcd.nic.in/childwelfare/draftmarrige.pdf>, accessed on 12 September 2015.

²⁴⁹ S Tomkinson ‘Childhood to Womanhood-Child Brides and the Inefficiency of the Indian State’ available at <https://genderandlaw.murdoch.edu.au/index.php/sisterinlaw/article/view/17/49>, accessed on 10 October 2015.

²⁵⁰ ‘Child marriage around the world: India’ available at <http://www.girlsnotbrides.org/child-marriage/india>, accessed on 01 October 2015.

²⁵¹ S Tomkinson (note 249 above).

²⁵² A Abbhi, K Jayakumar, M Ram Raj & R Padmanabhan, ‘Child Marriages in India- an Insight into Law and Policy’ Final Report of the Red Elephant Foundation on Submission to the OHCHR 2013, 5 available at <http://www.ohchr.org/Documents/Issues/Women/WRGS/ForcedMarriage/NGO/TheRedElephantFoundation.pdf>, accessed on 5 August 2015.

²⁵³ Ibid.

²⁵⁴ Ibid 6.

²⁵⁵ Ibid.

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.

²⁵⁷ A Abbhi (note 252 above) 12.

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 family²⁶¹ 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

²⁵⁸A Bassu “Harmful Practices against Women in India An Examination of Selected Legal Responses” 2009 8 http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20_Asmita%20Basu_.pdf, accessed on 8 September 2015.

²⁵⁹ 1961.

²⁶⁰A Bassu (note 258 above) 8.

²⁶¹ S Tomkinson (note 249 above).

²⁶²Ibid.

²⁶³ D Francavilla (note 243 above) 541.

²⁶⁴ S Deb (note 242 above) 12).

²⁶⁵ D Francavilla (note 243 above) 532.

²⁶⁶C Burris (note 65 above) 159.

among the citizens of India²⁶⁷ in cases of application and use. Further, Burris highlights that this has created a huge barrier to the enforcement of domestic legislation.²⁶⁸

4.3 Legislation in India on Child Marriages

India enacted the Child Marriages Restraint Act, 1929²⁶⁹ (hereafter the Restraint Act) which aimed to eliminate the ‘dangers to life and the health of a female child’²⁷⁰ in marriages. Initially it raised the age for marriage to 14 years which was later amended and increased in 1978 to 18 years.²⁷¹ This Act created room for punishment of males above 18 years of age who contract a marriage with a child.²⁷² But more importantly, the Act punished those that officiated the child marriage.²⁷³ The Act punished a guardian who promoted a child marriage with imprisonment of up to three months or payment of a fine.²⁷⁴ The Act prescribed punishment for the solemnisation of a child marriage or for those that promoted and permitted such to take place.²⁷⁵ It has been held that the Act was a ‘perfunctory gesture’²⁷⁶ and as the name suggests, it did not bring ‘drastic changes’ but only acted to restrain such marriages.²⁷⁷ Further, the Act was ‘regulatory’, with no preventative measure hence it did not succeed in curbing child marriages.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’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.²⁸⁰ The PCMA has been seen as more

²⁶⁷Ibid.

²⁶⁸Ibid 160.

²⁶⁹India: Child Marriages Restraint Act, 1929.

²⁷⁰S Deb (note 242 above) 19.

²⁷¹ Ibid.

²⁷²India: The Prohibition of Child Marriage Act, No. 6 of 2007, section 3.

²⁷³Ibid section 5.

²⁷⁴Ibid section 6.

²⁷⁵ D Bharti (note 235 above) 26.

²⁷⁶D Ray ‘Child marriage and the law’ 2015 4 NALSAR University of Law, Hyderabad, available at http://www.researchgate.net/publication/228226362_Child_Marriage_and_the_Law, accessed on 22 November 2015.

²⁷⁷ D Bharti(note 235 above) 26.

²⁷⁸ Ibid.

²⁷⁹S Deb (note 242 above) 21.

²⁸⁰Ibid.

progressive as it directly prohibits rather than restrain child marriages.²⁸¹ PCMA is a ‘territorial law’ which means that it applies to all Indians²⁸² and it is a uniform piece of legislation that applies to all Indian communities.²⁸³

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.²⁸⁴ The child marriage will be voidable at the option of either party to the marriage.²⁸⁵

(ii) The Act deals with issues of custody, maintenance²⁸⁶ and legitimacy²⁸⁷ 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.²⁸⁸ The Act further makes the offence of ‘permitting and or solemnizing’ a child marriage ‘unbailable.’²⁸⁹ The sections reads as follows;

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.

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

²⁸¹ Draft National Plan of Action to Prevent Child Marriages in India available at <http://wcd.nic.in/childwelfare/draftmarrige.pdf>, accessed on 14 September 2015.

²⁸² D Francavilla (note 243 above) 541.

²⁸³ P Sarkar (note 237 above).

²⁸⁴ Either party means the male or female party to the child marriage.

²⁸⁵ Section 3.

3. Child marriages to be voidable at the option of contracting party being a child.

(1) Every child marriage, whether solemnized before or after the commencement of this

Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage.

²⁸⁶ India: PCMA section 5.

²⁸⁷ Ibid section 6.

²⁸⁸ Ibid section 9, 10 and 11.

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 'injunction' 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.

²⁹¹Section 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.

²⁹²Section 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.

²⁹³C Burris (note 65 above) 161.

²⁹⁴ India: PCMA section 10.

²⁹⁵V Odala (note 146 above).

²⁹⁶ India: PCMA section 16 (3).

²⁹⁷ Ibid section 16.

The Act also creates a statutory duty to create awareness²⁹⁸ on the adverse consequences that child marriages carry²⁹⁹ 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.³⁰⁰ It has been held that there is need to amend the PCMA to completely prohibit child marriages.³⁰¹ Child marriages in India are considered to be merely voidable and not illegal.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.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’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’³⁰⁵ to be void whilst others are only voidable at the instance of the minor.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

²⁹⁸ Ibid section 16 (3) (d).

²⁹⁹ A Bassu (note 258 above) 2.

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=VGsKfXbtHn&sig=MWcfQC3Gx3sugVYdH-25DkiAERw&hl=en&sa=X&ved=0CCEQ6AEwAWoVChMIlbPtzsLEyAIVgl4eCh2AOQ3q#v=onepage&q=Still%20out%20of%20focus%20state%20of%20India%E2%80%99s%20children&f=false>, accessed on 22 September 2015.

³⁰¹ Ibid 214.

³⁰² A Abbhi, (note 252 above) 8.

³⁰³ India: PCMA section 3.

³⁰⁴ Child Marriage in India (note 258 above) 11.

³⁰⁵ Ibid.

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 void³⁰⁷ as the harmful effects of the marriage are the same.³⁰⁸

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 India³⁰⁹ 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.³¹⁰ 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.³¹¹

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.³¹² The legislation in India is not favourable for the females.³¹³ In addition many states in India have not yet enforced the PCMA and this has further helped in making it ineffective.³¹⁴

Implementation and design of the Act has been labelled as very faulty.³¹⁵ There is lack of implementation of the provisions in the Act and its policies³¹⁶ as well as lack of translation from law to practice which has made the law 'toothless and non-existent.'³¹⁷ An Act that cannot be fully implemented and enforced will not yield results.³¹⁸ 'Proper enforcement is what translates domestic legislation from words into action, and without it, child marriages will continue to plague

³⁰⁷ Ibid.

³⁰⁸ Ibid.

³⁰⁹ 'Children in India- A statistical Appraisal' Social Statistics Office Min of Statistics and Programme Implementation Government of India, available at http://mospi.nic.in/Mospi_New/upload/Children_in_India_2012.pdf, accessed on 10 October 2015.

³¹⁰ Ibid.

³¹¹C Burris (note 65 above) 161.

³¹²A 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.³¹⁹ Deb is therefore of the view that the Act has merely discouraged child marriages and not banned them.³²⁰

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 15.³²¹ However there has been an increase in the age of first marriage of girl children.³²² 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.³²³ 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.³²⁴ 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.³²⁵ This has been seen as a slow decrease.³²⁶ Lastly, for the year 2008, the decrease in child marriages for both urban and rural areas moved to 43 per cent.³²⁷

³¹⁹ Ibid 162.

³²⁰ S Deb (note 242 above) 32.

³²¹ International Institute for Population Sciences 'National Family Health Survey (NFHS -3), 2005-2006 : India', 163 available at <http://www.socialprotection.org/gimi/gess/ShowResource.action?ressource.ressourceId=20101>, accessed on 13 October 2015

³²² Ibid.

³²³ UNICEF 'Child Marriage in India an Analysis of Available Data' New Delhi 2012 10 available at <http://www.unicef.in/Itstartswithme/childmarriage.pdf>, accessed 1 October 2015.

³²⁴ Ibid.

³²⁵ Ibid.

³²⁶ S Goli, A Rammohan, D Singh. 'The Effect of Early Child Marriages and Early Child Bearing on Women's Nutritional Status in India' 2015 19 *Maternal Child Health Journal* 1865.

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.'³²⁸ 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.³²⁹ The man and the girl usually would have consented to the marriage before the ukuthwala takes place.³³⁰

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.³³¹ Such a marriage will be regarded as void.³³² Section 12 (2) (b)³³³ of the Act prohibits the giving away of a child below the minimum age, out in marriage or in engagement without her consent.³³⁴ Incorporating a section like this is vital in protecting the children from any harmful social or cultural practises 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 practises which are detrimental to his or her well-being.'

³²⁹V Msthalali 'Forced Child Marriage Practiced Under the Pretext of Customary Marriage in South Africa' (2014) 15 (2) *Child Abuse Research: A South African Journal* 56

³³⁰Ibid.

³³¹Section 12(2) (a).

³³² H Bosman Sadie, & L Corrie A *Practical Approach To The Children's Act 2nd* (ed) (2010) 28.

³³³ A child.

(b) Above that minimum age may not be given out in marriage or engagement without her consent.

³³⁴ D Kassin & P Mahery 'Special Child Protective Measures in the Children's Act' in Boezart T (ed) *Child Law in South Africa*. (year) Claremont Juta and Co Ltd 196.

4.5.3 Recognition of Customary Marriages Act No. 120 of 1998

The South African Customary Marriages Act³³⁵ 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...’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

³³⁵Ibid.

³³⁶V 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.³³⁷ Legislation becomes an expression of the states ‘accountability and commitment’³³⁸ 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.’³³⁹ 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 force³⁴⁰ 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.³⁴¹ 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.³⁴² This dissertation has sought to recommend and propose the creation of legislation that deals with child

³³⁷ Plan International (note 159 above) 9.

³³⁸Ibid.

³³⁹Ibid.

³⁴⁰A Gill, S Anitha ‘The Illusion of Protection? An Analysis of Forced Marriage Legislation and Policy in the UK’ (2009) 31 (3) *Journal of Social Welfare & Family Law*, 264.

³⁴¹Ibid 266.

³⁴² L Kalenga *Law reform: whose responsibility? An analysis of efforts made towards reforming laws in Zimbabwe in light of human rights instruments as experienced by the Zimbabwean Women Lawyers Association (ZWLA)* (unpublished Master’s Thesis, University of Zimbabwe, 2003) 5

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

8. Child Marriage Prohibition Officers.
9. Powers of the Child Marriage Prohibition Officers.

10. Competencies of the Child Marriages Officers.

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)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;³⁴⁶
- (d) “Child Marriage Prohibition Officer” means the Child Marriage Prohibition Officer appointed as per part IV³⁴⁷ appointed by the Minister after consultation and election;
- (e) “Customary marriages” means a marriage celebrated in terms of customary law³⁴⁸ 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;³⁴⁹
- (h) “Trafficked” means involuntarily taken outside or within Zimbabwe by the following means
- i. ‘Force, violence or threats
 - ii. Administering drugs to subdue the victim
 - iii. Abduction or detention
 - iv. Fraud, extortion and deceit
 - v. Abuse of power or trust over the victim’³⁵⁰
 - vi. Kidnapping
 - vii. The direct or indirect giving or receiving of payment to persons in authority or control of another person, to obtain consent.³⁵¹
 - viii. The direct or indirect giving or receiving of payments, rewards and compensation to immediate family members for the purpose of exploitation.³⁵²

³⁴⁵ India: PCMA Section 1 (c).

³⁴⁶ Ibid.

³⁴⁷ Ibid.

³⁴⁸ Malawi: Marriage Bill (note 345 above) clause 6.

³⁴⁹ ‘Provinces of Zimbabwe’ available at <http://www.statoids.com/uzw.html>, accessed on 22 October 2015.

³⁵⁰ Zimbabwe: Trafficking in Persons Act, [Chapter 9:5] Act No 4 of 2014 section 3.

³⁵¹ South African Prevention and Combating of Trafficking in Persons Act 7 of 2013, section 4 (i).

³⁵² Ibid section 4 (j).

ix. Adoption of a child through legal or illegal means.³⁵³

PART II: ESSENTIAL ELEMENTS OF MARRIAGE³⁵⁴

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.³⁵⁵

(2) No child below the age of 18 shall be deemed as having the capacity to consent to a marriage.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.'³⁵⁷

(4) Any marriage entered into with one party being a child, will be voidable at the instance of the child³⁵⁸ or any other legally interested party.

PART III OFFENCES AND PENALTIES³⁵⁹

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.³⁶⁰

5. Punishment for solemnizing a child marriage.-

³⁵³ Ibid section 4 (2).

³⁵⁴ Malawi: Marriage Bill, (note 346 above) Clauses 10 and 14.

³⁵⁵ Ibid clause 10.

³⁵⁶ R Mutyaba (note 205 above)350

³⁵⁷South 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.

³⁵⁸ India: PCMA section 3.

³⁵⁹R Mutyaba (note 205 above) 350.

³⁶⁰ India: PCMA section 9.

(1) Whoever performs, conducts, facilitates, advises, attempts, condones³⁶¹ encourages, directs or assists any child marriage shall be punishable with imprisonment which may extend to three years.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.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,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. 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.³⁶⁶

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

³⁶¹ Plan International (note 159 above) 40.

³⁶² India: PCMA section 10.

³⁶³ Ibid.

³⁶⁴ ‘Religion in Zimbabwe’ available at <http://relzim.org/major-religions-zimbabwe/>, accessed on 20 October 2015.

³⁶⁵ India: PCMA section 11.

³⁶⁶ Ibid.

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.’³⁶⁸

PART V

APPOINTMENT OF MARRIAGE PROHIBITION OFFICERS

8. Child 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.

9. Powers of the Child Marriage Prohibition Officers³⁶⁹

- (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.’³⁷⁰
 - (h) to investigate reports on child marriages within a reasonable time that may be required to prevent the child marriage.³⁷¹

³⁶⁸ India: PCMA section 12.

³⁶⁹Children'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).

³⁷¹Ibid.

(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

³⁷²Ibid (19) (2) (b).

³⁷³ Girls not Brides 'The Role of Parliamentarians in Ending Child marriages' 2015 available at http://www.pgaction.org/pdf/2015-GNB_The_Role_of_Parliamentarians_Toolkit.pdf accessed on 20 October 2015.

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.³⁷⁴

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.³⁷⁵ 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.³⁷⁶ 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.³⁷⁷ It has also been held that if there is a criminal sanction, this will encourage victims to report the crime.³⁷⁸ 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.³⁷⁹ 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.³⁸⁰ In the United Kingdom legislation has been enacted that is civil in nature³⁸¹ and this allows for forced marriage protection orders³⁸² to be passed by family courts to protect those being forced into child marriages.³⁸³ The civil remedies in the Act are aimed at protection of the victim and not punishing the perpetrator.³⁸⁴ However, the Act still seems to have both civil and criminal remedies

³⁷⁴A Gill, (note 340 above) 262.

An injunction is 'a court order requiring an individual to do or omit doing a specific action' available at <https://www.law.cornell.edu/wex/injunction>

³⁷⁵Ibid 260.

³⁷⁶Ibid 261.

³⁷⁷Equality Now (note 91 above) 19.

³⁷⁸ Ibid 19.

³⁷⁹A Gill, (note 340 above) 261.

³⁸⁰ Ibid.

³⁸¹Forced Marriage (Civil Protection) [UK.] (note 61 above).

³⁸² Ibid section 63.

³⁸³A Gill, (note 340 above) 261.

³⁸⁴Ibid 262.

as it makes provision for imprisonment of up to 2 years³⁸⁵ 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.³⁸⁶

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 engagement³⁸⁷ education and awareness initiatives.³⁸⁸ 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.³⁸⁹ There is need to combine behavioural change mechanisms and the law as a means of tackling child marriages.³⁹⁰

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 effective³⁹¹ 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.³⁹²

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.³⁹³ However, this paper has taken such a position on voidability mainly because child marriages ‘once solemnized and consummated makes

³⁸⁵Forced 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.

³⁸⁹A Bunting (note 79 above) 18.

³⁹⁰Ibid 12.

³⁹¹ V Odala (note 146 above).

³⁹² D Ray (note 276 above)16.

³⁹³Ibid 10.

it very difficult, if not impossible, for girls to escape those marriages.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.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.³⁹⁶ Non-registration of marriages has been seen as one of the reasons why child marriages occur unnoticed.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.³⁹⁸ Also, birth registration provides an official record of a child's existence, nationality and age.³⁹⁹ Lack of birth registration will continue to make children vulnerable to child marriages.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.

5.5 Standardize Existing Laws

Secondly, this dissertation sought to challenge the existing Zimbabwean marriage⁴⁰¹ 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

³⁹⁴ Ibid.

³⁹⁵ Ibid

³⁹⁶R Hanzi (note 167 above) 6.

³⁹⁷ Child Marriage in India (note 247 above) 4.

³⁹⁸ Ibid.

³⁹⁹ Plan International (note 159 above) 26.

⁴⁰⁰Ibid.

⁴⁰¹ Zimbabwe: Marriage Act (note 28 above).

Marriage Act to 18 years for both boys and girls⁴⁰² and eliminate existing gender based age discrimination existent herein.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,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.⁴⁰⁵ Lastly the Children's Act⁴⁰⁶ must be amended to include provisions on harmful cultural practices similar to those in section 12 of the South African Children's Act.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.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.

⁴⁰²Equality now (note 92 above) 14.

⁴⁰³Ibid.

⁴⁰⁴Zimbabwe: Customary Marriages Act (note 29 above).

⁴⁰⁵South Africa: Recognition of Customary Marriages Act (note 59 above).

⁴⁰⁶Zimbabwe: Children's Act (note 220 above).

⁴⁰⁷South Africa: Children's Act, (note 60 above).

⁴⁰⁸A Gill (note 340 above) 264.

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