

Article 5 of the Maputo Protocol and Ten Years of a New Constitutional Order: An Assessment of Child Marriages in Zimbabwe

Innocent Tonderai Mahiya and Isheanesu Chirisa¹

Abstract

Article 5 of Maputo Protocol sets a concrete yardstick for effective eradication of child marriage in Zimbabwe, and the rest of Africa. Despite several attempts to implement Article 5 of the Maputo Protocol, child marriage remains a clear infringement of human rights of girls. In 2013, Zimbabwe enacted a new Constitution with a comprehensive Declaration of Rights that guarantees the rights of women and girls was enacted. Further in May 2022, the government of Zimbabwe promulgated Marriages Act (Chapter 5.15) to harmonise various types of marriages and criminalise child marriage. This paper explores the potential efficiency of this Marriages Act in curbing child marriages in Zimbabwe to fulfil the spirit of the Maputo Protocol. It discusses the adequacy of this law to curb child marriage as a way to give effect to Article 5 of the Maputo Protocol in face of other non-legal drivers of child marriage in Zimbabwe. It has been observed that although there is a myriad of harmful practices against girls and women still existing in Zimbabwe, child marriage is among the most significant harmful practices which have thrived against a background of legal lacuna and misalignment of laws as well as cultural and religious value systems existing in Zimbabwe. The paper argues that efforts to eradicate child marriage should be predicated on solid legal framework and advocacy efforts targeting underlying cultural, religious, and socio-political factors contributing to the scourge of child marriages. The paper recommends adequate administrative and technical support and strategies that give full effect to the implementation of the recently enacted Marriages Act.

1 Introduction

Child marriage refers to a marriage in which either one or both contracting parties are below the age of 18 and said marriages can be entered voluntarily or involuntarily. While both men and women can be victims of child marriage, girls and women are disproportionately affected. Child and forced marriage have been identified by the Committee on the Elimination of Discrimination against Women (CEDAW) as one of the most pervasive forms of harmful practices perpetrated against girls and women.² These and other harmful practices have negative consequences for the physical and psychological health and infringe the socio-political rights of affected girls and their broader communities. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) was adopted to protect women and girls' rights against discriminatory cultural practices.³ In compliance with the Protocol, member states are obligated to eliminate all forms of discrimination against women and girls through appropriate legislative and institutional measures and commit to prohibit all forms of harmful practices which negatively affect the human rights of women and

¹ The authors are all human rights professionals and researchers active in Zimbabwe.

² CEDAW, 'Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices', 8 May 2019, CEDAW/C/GC/31/REV.1 - CRC/C/GC/18/Rev.1, p.7.

³ Was adopted by the African Union in Maputo, Mozambique on 11 July 2003, and came into force on 25 November 2005.

girls.⁴ The Protocol provides for a comprehensive legislative framework as a basis for national laws and has been instructive to national and regional courts in the adjudication of cases. It is

⁴ UNICEF, 'Early Marriage: Child Spouses', *Innocenti Digest No. 7*, <unicef-irc.org/publications/pdf/digest7e.pdf> (accessed 15 September 2017).

thus, a useful tool to ensure that women's rights enshrined in the Protocol become a reality for women and girls in Africa.

Article 5 of the Protocol states that "States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women, and which are contrary to recognized international standards. States parties shall take all necessary legislative and other measures to eliminate such practices."⁵ This wording and the language influenced the wording of the Constitution of Zimbabwe concerning the promotion and protection of women's rights especially from harmful cultural practices.⁶ Section 80(3) of the Constitution provides that all laws, customs, traditions, and cultural practices that violate or infringe against the broader rights of girls and women are deemed void.⁷ This constitutional provision gives effect to Article 5 of the Maputo Protocol that seeks to eliminate harmful cultural practices. The Protocol defines harmful practices as "all behaviour, attitudes, and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity".⁸ This definition is unique to the Protocol as it not only includes acts that disregard the fundamental rights of women and girls but also *attitudes* towards women including mind-sets, opinions and ways of thinking. This is not only ambitious but also raises the question of what can realistically be regulated by laws and legal mechanisms. Harmful cultural practises primarily target women and girls in certain communities and are frequently considered and deliberately presented as established and valuable cultural traditions.⁹ Harmful practices refer, amongst others, to child marriage, virginity testing, the appeasement of avenging spirits, and forced wife inheritance. These practices often extend beyond multiple generations and are continuously perpetuated.⁹

In Zimbabwe, the Constitution is the supreme law and nullifies all other laws, customs, and cultural practices that are inconsistent with its provisions. The national standard of human rights protection, cannot be compromised even in observance of traditional or cultural norms. In 2016, the Constitutional Court of Zimbabwe delivered a landmark judgment in relation to child marriage. The applicants, young women at the age of 18 and 19 years, applied to the Constitutional Court for a declaratory order that the Customary Marriages Act was unconstitutional in that it did not provide for a minimum age limit of 18 years.¹⁰ It was also held that section 22 of then Marriages Act, Chapter 5:11¹¹ was unconstitutional as it permitted the marriage of girls under the age of 18 with parental or guardians' permission and provided that girls below the age of 16 require a Minister's permission to marry.

Despite this progressive court ruling, the protection of girls in Zimbabwe from harmful cultural practices remains highly insufficient. Discriminatory and prejudicial norms that are perpetuated

⁵ African Union, 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa', 1 July 2003, <au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-womenafrica> (accessed 7 December 2022).

⁶ *Ibid*, p.7.

⁷ Constitution of Zimbabwe Amendment (No. 20) Act, section 80(3), 2013.

⁸ African Union, *supra* note 4, p.4.

⁹ Public Health Scotland, 'Harmful traditional practices', <healthscotland.scot/health-topics/gender-based-violence/harmful-traditional-practices#:~:text=Harmful%20traditional%20practices%20are%20forms,forced%20or%20early%20marriage> (accessed 17 November 2022) ⁹ *Ibid*.

¹⁰ Constitution of Zimbabwe, *Chapter 5:11 Marriages Act (No. 1)*, <osall.org.za/docs/2011/03/ZimbabweMarriage-Act.pdf> (accessed 7 December 2022).

¹¹ This Act has since been repealed and substituted by Marriages Act, Chapter 5:15

across generations are deeply enshrined in religious and cultural norms which effectively maintains child marriage. Child marriage predominantly affects girls who live in low-income and rural communities. The prevalence of child and forced marriages oftentimes stems from a lack of education and widespread poverty. Zimbabwe has one of the highest rates of child marriage in Africa, with approximately 31 percent of Zimbabwean girls being married before reaching the age of 18 and 4 percent before they turn 15.¹² Early marriages frequently lead to premature pregnancies that pose numerous health risks for the girl child. In July 2021, a 15-year-old girl, who was married to a 26-year-old man, died giving birth inside a church which is only one example that sheds light on to the horrifying implications attributable to child marriage.¹³ This is certainly not a sole incident but rather a representative case that points towards the reality of countless Zimbabwean girls.

This study reviews the continued occurrence of child marriage as an infringement of women and girls' human rights despite the progressive Constitution of 2013. The study recognises the significance of the promulgation of the new Marriages Act for curbing child marriage in an attempt to give effect to Article 5 of the Maputo Protocol.¹⁴ It discusses the possible limitations and obstacles during the implementation of the law to give full effect to Article 5, especially in light of other non-legal drivers of child marriages in Zimbabwe. The study further proposes necessary administrative and technical support measures that may be necessary to facilitate the implementation of the Act to eradicate child marriages in Zimbabwe. Although the Maputo Protocol lists several practices that constitute harmful cultural practices, this study focuses solely on child marriage due to the scope of the paper.

1.1 The Maputo Protocol and Harmful Cultural Practices

The Maputo Protocol is a comprehensive document introduced to complement the African Charter on Human and People's Rights to protect and promote the women and girls' rights in Africa. The Protocol was designed to protect women in a more comprehensive manner than pre-existing instruments. Paragraph 11 of the Preamble explains that the adoption of the Protocol aimed to address the concern that “despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, [...] women in Africa still continue to be victims of discrimination and harmful practices”.¹⁴ It is often argued that the Protocol should not be viewed as correcting normative deficiencies in international human rights law dealing with women's rights, but rather as a response to the lack of implementation of these norms'.¹⁵ The Protocol focuses on gender inequality and abuse of women in order to provide legal and non-legal measures to protect them from violence, inequalities within marriages and during divorce as well as from discrimination in the education sector and the workplace. It further aims to extend protection to women concerning inheritance rights and counteract harmful practices such as child marriages and female genital mutilation.

¹² African Union, 'The Republic of Zimbabwe Launches AU Campaign to End Child Marriage in Africa', 2 August 2015, <au.int/en/newsevents/20150802/republic-zimbabwe-launches-au-campaign-end-child-marriageafrica> (accessed 24 September 2022).

¹³ <https://edition.cnn.com/2021/10/11/africa/zimbabwe-church-abuse-intl/index.html> ¹⁴ Chapter 5:15 was announced in May 2022 and came into force on 16 September 2022.

¹⁴ African Union, *supra* note 4, p.2.

¹⁵ F. Viljoen, 'An introduction to the Protocol to the African Charter on Human and Peoples,' 16, *Rights on the Rights of Women in Africa* (2009) page 17

Article 5 obligates state parties to take necessary legislative and non-legislative measures to eliminate harmful cultural practices. Such measures include public awareness campaigns in all sectors of society and the provision of comprehensive support for victims. Further, Article 6(c) states that the minimum age of marriage is 18, which effectively prohibits the practice of child marriage. Article 6(a) also declares that no marriage should be entered without the free and full consent of both parties. When one or both parties are under 18, their circumstances inevitably dictate that they are not able to give consent, which is why child marriage can never be free nor consensual. Considering that child marriage is frequently described as a cultural practise, it is noteworthy that the Maputo Protocol explicitly addresses the issue of culture. It does not deny the importance or relevance of culture in Zimbabwe's society but rather asserts, through Article 17, states must ensure women's right to live in a "positive cultural context".¹⁶ The Protocol is hailed as the most inventive and promising development in women's rights protection since the formation of the African Union (AU) as it defines essential human rights standards for African women.¹⁷

1.2 Zimbabwe's Obligation to Eradicate Child Marriages Under Regional and International Conventions

Zimbabwe is a signatory to some of the significant international treaties on children's rights, including the Convention on the Elimination of all Forms of Discrimination against Women (1984) and the Convention on the Rights of the Child (1989).¹⁸ The Joint General Comment No. 31 of the CEDAW Committee and No. 18 of the Committee on the Rights of the Child on Harmful Practices of 2014 provide clarification on child marriage. The provisions of Article 1 of the African Charter on the Rights and Welfare of the Child (ACRWC) weighs in and state that "any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations in the Charter shall, to the extent of such inconsistency be discouraged".¹⁹ Article 21(2) further provides that "child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be eighteen years and make registration of all marriages in an official registry compulsory".²¹ This does not provide for any exceptions.

Section 78(1) of the Constitution was enacted for the purpose of complying with the obligations Zimbabwe had committed to under Article 21(2) of the ACRWC to legally establish 18 years as the minimum age for marriage and abolish child marriage. Section 78(1), as read together with section 81(1) of the Constitution, shows that Zimbabwe is a signatory to the Convention on the Rights of the Child (CRC) and the ACRW. The signing of these conventions is an expression of commitment to take all appropriate measures, beyond legislative reforms, to protect, promote, and fulfil children's rights. Under Article 18 of the Vienna Convention on the

¹⁶ African Union, *supra* note 4, p.16.

¹⁷ E. Durojaye and L.N. Murungi, 'The African Women's Protocol and sexual rights', 18 *The International Journal of Human Rights*, p. 893.

¹⁸ As early as 1998, in its concluding comments addressed towards Zimbabwe, the Human Rights Committee recommended that the Government of Zimbabwe adopt measures to prevent and eliminate prevailing social and cultural attitudes supporting early and child marriage and to address perspective legal reforms.

¹⁹ African Union, 'African Charter on the Rights and Welfare of the Child', 1 July 1990, <au.int/en/treaties/african-charter-rights-and-welfare-child> (accessed 8 December 2022), p.8.

²¹ *Ibid.*, p.19.

Law of Treaties which came into force on 2 January 1980, a state party is enjoined to hold in good faith and observe the rights and obligations in a treaty to which it is a party.

Thus, the state parties are placed under a positive obligation to take effective measures, including legislation, to specify the age of 18 years as the minimum age for marriage. The paper is based on the firm conviction that legislation cannot suffice as the sole tool for effectively addressing child marriage. Contrary to other human rights conventions, Article 21(2)

successfully avoided omissions and exceptions that previously allowed state parties to exploit local laws to authorise child marriages. Article 19(1) of the UN Convention on the Rights of the Child (CRC) provides that the State should take measures to “protect the child from all forms of physical abuse or mental violence, maltreatment or exploitation including sexual abuse”.²⁰

Zimbabwe’s initial report to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) was submitted in 2013 and considered by the Committee in April 2015 under Article 43 of the ACRWC. In July 2015, the Human Rights Council also adopted its first substantive resolution recognizing child and forced marriage as a human rights violation. In its 2015 concluding observations, the ACERWC raised similar concerns against the Marriages Act of Zimbabwe that still did not provide a minimum age of marriage, hence creating a gap that permitted child marriages in direct violation of Articles 2 and 21 of the African Children’s Charter.²³ This shows that Zimbabwe’s efforts of eradicating child marriages remained insufficient at that time. The Committee on the Convention on Rights of the Child noted that statutory difference in the minimum age of girls and boys for marriage, should be prohibited by law.²¹ The Government of Zimbabwe was asked to adopt measures to prevent and eliminate prevailing social and cultural practices that threaten the welfare of children. CEDAW also noted that section 22(1) of the Marriages Act, which provided for different ages for girls and boys, assumed incorrectly that girls have a different rate of intellectual development from boys or that their stage of physical and intellectual development at marriage was immaterial.²² The Committee recommended that these provisions should be abolished.

Zimbabwe submitted its initial country report to the UN Committee on the Rights of the Child which was due in 1992, sometime in 1995. The second report was submitted 19 years later in 2015. From a procedural perspective on reporting under the UNCRC, Zimbabwe continuously fails to uphold its obligations has not been doing as well as it should. This inconsistency and poor adherence to reporting requirements prevent effective monitoring and the evaluation of the implementation of the Convention on the Rights of the Child. The 1995 initial report from Zimbabwe to the UNCRC is relevant to the understanding of the commitment of Zimbabwe in fighting child marriages. Converging observations from concluding observations from both committees show that Zimbabwe is still battling to address certain gaps in its legal frameworks which are impeding the full implementation of the provisions of both commitments. The 1995 initial report from Zimbabwe to the Committee on the UNCRC acknowledged the challenges around the definition of the child in the context of cultural and religious practices that perpetuated child marriages.²⁶ There is a specific reference to the Apostolic Faith Sect sustained a pattern of obstructing national immunisation efforts carried out by the government. The silence in the Customary Marriages Act on the minimum age for marriage perpetuated child marriages. The concluding observations from the CRC Committee recommend that the minimum age should be raised to 18 for both girls and boys and that the government ought to facilitate the effective enforcement of laws that outlaw child marriage to counteract practises based on religious beliefs.

²⁰ OHCHR, ‘Convention on the Rights of the Child’, General Assembly resolution 44/25, 20 November 1989, <ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> (accessed 8 December 2022), p.

5. ²³ CRC Committee, ‘Concluding observations on the second periodic report of Zimbabwe’, CRC/C/ZWE/CO/2, 7 March 2016, <icj.org/wp-content/uploads/2016/01/Concluding-Observations-CRC-Zimbabwe-2016eng.pdf> (accessed 22 September 2022).

²¹ CRC Committee, ‘Concluding Observations on Zimbabwe’, A/53/40, (1998), para. 214.

²² CEDAW, ‘General Recommendation No. 21: Equality in Marriage and Family Relations’, 1994, para. 38.

²⁶ CRC Committee, ‘Concluding Observations: Zimbabwe’, CRC/C/15/Add.55, 7 June 1996.

As part of the internal monitoring systems of state parties, the CRC acknowledged and commended the government for its pledge to submit annual reports to both the parliament and cabinet.²³ Though this was deemed progressive, the lack of alignment of national laws with the UNCRC provisions and the dual system of common law and customary law compromise the successful implementation of the provisions.²⁴ Some of the key issues highlighted in the concluding observations focus on the rampant corruption which misuses resources from the national budget that could have contributed to end child marriages. In its periodic report in 2015, the CRC concluding observations raised recurring concerns over slow progress, scarce evidence for a practical framework of investigation, and insufficient rehabilitation of all victims including compensation through the government.²⁵ There was also a highlight of the need to have a robust monitoring system in place to monitor the gains being made.³⁰

Zimbabwe continues to undertake to deal with the pervasive issue of child marriage that continues to be a dominant practice. As part of the efforts to address the culturally and religiously imbedded roots of child marriages, Zimbabwe reported that it identified the Apostolic Sect as a risk factor. The government, therefore, partnered with the Apostolic Christian Councils to change the attitudes and perceptions of its members. This was to be followed by a plan to increase awareness through apostolic ambassadors for child rights in collaboration with civil society organisations. The *Mudzuru case* was a step towards the realisation of the provisions of the ACRWC because child marriage was found to be unconstitutional. This judgment affirmed the provisions of the ACRWC that established 18 years as the age of marriage to counteract the prevalence of child marriages in Zimbabwe. The Marriages Act in section 22(1) allowed women of the ages of 16 and older to be lawfully married.²⁶ In the *Mudzuru case*, the Constitutional Court noted the importance of adopting legislative measures for the abolition of the offending statutory provisions such as section 22(1) of the Marriages Act which had become a compelling social need. The Court further noted that there was overwhelming empirical evidence of the horrific consequences of child marriage. Study after study has exposed child marriage as an embodiment of all the evils against which the fundamental rights are intended to protect the child.²⁷

Zimbabwe has remained confronted with a high volume of cases of child marriage that can be attributable to religious and cultural norms which support and protect these practices. The practices also thrive through the persistence of legal dualism, fragmentation of laws and low policy implementation.

1.3 Relevance of the Study to the Overall Theme

Zimbabwe has made substantial progress towards the implementation of Article 5 of the Maputo Protocol from 2008 through constitutional, legal and policy provisions targeting the elimination of harmful practices such as child marriages. Thus, the recent enactment of the Marriages Act is a welcome development, and it is important for the legislation to have the necessary implementation framework and plan of action to give it full effect. The study purposively focuses on the Maputo Protocol Article 5 because of its overarching nature which is particularly relevant for the response to child marriage as a harmful practice. It consequently

²³ CRC Committee, *supra* note 23, para 4.

²⁴ *Ibid*, para 42.

²⁵ CRC Committee, 'Concluding observations on the second periodic report of Zimbabwe', 29 January 2016, 47 (a-d). ³⁰ *Ibid*.

²⁶ Chapter 5.11 was subsequently repealed in May 2022 through Chapter 5.15.

²⁷ *Mudzuru & Anor v. Minister of Justice*,

highlights the significance of the Declaration of Rights. Any efforts to eradicate child marriage should be based on solid legal analysis to determine any gaps to then address them systematically through programming and advocacy efforts that target underlying cultural, religious, and socio-political factors. The Constitution provides, arguably, for some of the most advanced international standards for the protection of human rights. This study was conducted at an opportune time, when the enactment of the new legislation was underway and there was a greater room to influence future policy frameworks necessary for the implementation of laws that apply to child marriages. The study sought to generate insights into how child marriage may be effectively dealt with under the new legislative framework while equally acknowledging non-legal drivers of the practice to contribute to recommendations that may be considered for subsequent policy briefs.

1.4 Methodology

The current legislative framework on child marriage particularly section 3 of the Marriages Act, Chapter 5:15, offers an opportunity to consider and build momentum for the eradication of child marriage in Zimbabwe.²⁸ This study is built on thorough and nuanced secondary review of existing literature and the legal framework, complemented by limited primary data collection using the data collection methods of key informant interviews and mapping. These research tools enabled the data collection on child marriage prevalence in Zimbabwe as well as the legal and policy framework affecting the issue. It is also based on doctrinal review of domestic and international laws, policy documents, court judgements relevant to the study, relevant concluding observations, and general comments from treaty monitoring bodies. In terms of primary data, in-depth interviews from selected key informant interviews were utilised (human rights lawyers, gender activists, programmers and policy makers) to complement the legal and policy analysis.

Since this was an exploratory study done to gather prominent views about the subject, purposive sampling of key informants was preferred as it provided higher chances of including relevant cases for the study. Following this approach, a total of 12 key informant interviewees (KIIs) were selected as the sample. This selection was viewed as adequate since the participants were from diverse backgrounds with substantial organisational experiences and knowledge on the subject matter that goes beyond personal views. This brought to light, historical evidence that has previously been gathered by organisations on the topic of child marriages.

To ensure the effectiveness of the sampling procedure, referral sampling or snowballing method was used to identify participants for the study. Suitable inclusion criteria were established to guide the sampling process that took the commitment of the participants concerning related issues such as girl child rights, education of marginalised peoples and general child protection efforts into consideration. People who had experience in any of the highlighted areas were deemed knowledgeable on the subject matter, hence were recruited as KIIs. The utilisation of different data collection methods for the study intended to generate information relevant for answering the project questions. Although child marriage is now established as illegal, it is still a contested issue as it is deeply embedded in and protected through religious and cultural practices. Such practises are oftentimes met with insufficient

²⁸ Constitution of Zimbabwe, *Chapter 5:15 Marriages Act (No. 1)*, < veritaszim.net/sites/veritas_d/files/MARRIAGES%20ACT%20No.%201%20of%202022.pdf > (accessed 8 December 2022).

counteraction that fails to address the root causes and usually face little opposition from within cultural and religious communities.

This often takes place with the consent from the girls' parents or guardians. Special attention has been paid to the ethical considerations given the sensitive nature of the research topic that requires participants to share highly personal information. The researchers were aware that getting people to freely share such information could be problematic hence a strict observance to ethics was followed. The data that was collected from KIIs was treated confidentially with any potentially identifying information being carefully omitted in the presentation. An effort to restrict narratives to broader societal dynamics was followed to respect the sources of information. This also involved not mentioning the organisations from which KIIs came from since their participation in the study involved sharing information to third parties.

2 Child Marriage and the Law: Understanding Recent Legal and Policy Developments in Zimbabwe

When discussing the issue of child marriage, regard must also be paid to the existing legal framework and emerging consensus of values in the international community to which Zimbabwe is a party. The said frameworks provide on how children should be treated and their well-being protected so that they can play productive roles in society upon attaining adulthood.

2.1 The Law and Child Marriage in Zimbabwe

The Constitution ensures gender equality, which provides for justiciable rights and well-elaborated array of children's rights under section 81. Section 78 of the Constitution (Marriage Rights) sets a minimum age for marriage at 18 and prohibits forced marriage. Section 80(3) of the Constitution permits no exception for religious, customary, or cultural practices that permit child marriage, nor does it allow for exceptions based on the consent of a public official, or of the parents or guardian of the child. When read together with section 81(1) of the Constitution, section 78(1) has effectively reviewed local traditions and customs on marriage. The legal change is consistent with the goals of social justice at the centre of international human rights standards requiring Zimbabwe to take appropriate legislative measures, including constitutional provisions, to modify or abolish existing laws, regulations, customs and practices inconsistent with the fundamental rights of women and by implication the girl child.²⁹ The apparent need to overcome obsolete traditions that allow for girls to enter into marriage below the age of 18, or at times, even at the age of 16, is indisputable.

The Domestic Violence Act criminalises domestic violence, any cultural or customary rites as well as any practices that discriminate or degrade women.³⁰ Examples of such practices include virginity testing, female genital mutilation, offering women and girls for purposes of appeasing spirits, abductions, child marriage, forced marriage, and forced wife inheritance. In terms of section 4 of the Act any person who commits an act of domestic violence shall be guilty of an offence and liable to a fine, not exceeding level fourteen, or imprisonment for a period not exceeding ten years, or to both. Section 94(1b) Criminal Law (Codification and Reform Act)

²⁹ http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2225-71602021000100002 accessed September 2022

³⁰ Constitution of Zimbabwe, *Chapter 5:16 Domestic Violence Act (14)*, <www.law.co.zw/download/160> (accessed 8 December 2022).

also prohibits the pledging of a woman without her consent and of anyone under 18 years of age in marriage.³¹

In the case of *S v Ivhurinosara Ncube*, the High Court on review noted that, although the State had not incorporated the CRC into domestic law, it takes its obligations seriously, including the requirement under Article 19 that it ought to protect children from all forms of violence including sexual abuse.³² The High Court disapproved of the magistrate considering a consensual relationship as a mitigating factor in such a case, particularly due to the age discrepancy seeing as the accused was 30 years old and the complainant was only 15 years old at the time of the crime. In the court's view, this age difference placed the girl in a vulnerable position. The High Court did not approve the decision by the magistrate to endorse a child marriage, the magistrate ought to have been more critical of the nature of the relationship and considered that the family reported the criminal charges against the accused.

The Customary Marriages Act did not specify the minimum age of contracting into a marriage. The new Marriages Act in section 3 outlaws child marriage. This legislation is in line with the SADC Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage (Model law). The main objective of the Model Law is to serve as a measurement and advocacy tool for legislators in the SADC region. It also establishes the most advanced practice and language that can be easily adopted or adapted by member states in their national laws. The Marriage Act reaffirms a human rights approach focused on the rights of women and children to effectively tackle the issue of child marriage. This is the first legislation in Zimbabwe that comprehensively outlaws child marriages without any exceptions. However, it can be argued that specific issues relating to child marriage should have been addressed in a separate legislation.

There is room for improvement as the problems associated with child marriage requires substantial and comprehensive approaches to curb it. The Act could have borrowed some of the standards set out in the SADC Model law on child marriages to promote full implementation, hence some sentiments to the effect that the issues of child marriage would have been best provided for in a separate Act. This would have resulted in a more encompassing institutional framework and a necessary multi-sectoral approach. Nonetheless, parts of the legislation such as section 46 appear promising since it enables the responsible Minister to introduce regulations to provide for administrative implementation framework of the Act.

2.2 Potential Legal and Policy Gaps as Drivers for Child Marriages

Laws on their own do not transform people's circumstances unless there are deliberate coordinated efforts to implement them. The implementation and enforcement of laws on child marriage across Africa are associated with several common problems.³³ These include weak judicial systems, a lack of effective monitoring and enforcement mechanisms that could

³¹ Constitution of Zimbabwe, *Chapter 9:23 Criminal Law (Codification and Reform) Act 23, 2004* <old.zimlil.org/zw/legislation/numact/2004/23/Criminal%20Law%20%28Codification%20and%20Reform%29%20Act%20%5BChapter%20923%20%5D.pdf> (accessed 8 December 2022).

³² *S v. Ivhurinosara Ncube*, High Court of Zimbabwe (CRB M 225/10, REV 33 of 2010), ZWHHC 335 (25 September 2013).

³³ See B. Kombo *et al.* (eds.), 'A journey to equality: 10 years of the Protocol on the Rights of Women in Africa : Equality now', 201:3.; V. O. Ayeni, 'The impact of the African Charter and the Maputo Protocol in selected African states: Zimbabwe', 2016, p.281-296.; F. Banda, 'Blazing a trail: The African Protocol on women's rights comes into force', 50, *Journal of African Law*, 2006, p.72-84.

prevent or sanction child marriage, a poor understanding of laws, a lack of adequate training and coordination between amongst government ministries, a lack of a clear delegation of responsibilities to specific authorities, a lack of guidelines on how to handle child marriage cases, and ad hoc responses.³⁴ Concerning the African continent, very few examples of prosecutions are mentioned within the literature.³⁵ It is also noteworthy, that in cases where existing laws have been reinforced, child marriage is conducted in secrecy. This has farreaching implications for the accessibility of health care services for underage married children, forcing them to give birth without medical supervision and support.

Enacting a law that addresses child marriage allows the government to clarify its position around this controversial and sensitive issue. Whilst it may be premature to discuss the consistency of implementation at this stage, it is important to analyse whether the legislation has been framed with the necessary imperatives that support effective and consistent application. Notably, the Act is meant to consolidate and provide various laws pertaining to marriage in Zimbabwe. This immediately shows that child marriage is not the focus of this Act but is rather one of the issues dealt with amongst other marriage-related topics.

The law also fails to address the role of traditional justice systems as chiefs who will be appointed as customary marriage officers under the Act. A clear framework for technical support and training for traditional leaders should be in place. The impact of informal justice system on curbing child marriage cannot be undermined. The key consideration should be on what entails real community participation in fighting child marriages. Community participation in this case can therefore be equated with a local or bottom-up approach, and can be contrasted with state-driven, top-down or legalistic approaches. Sceptics would argue that several governments adopt laws initially to look good and to satisfy developmental aid donors and other powerful international actors rather than meeting the societal needs.³⁶ It is imperative for communities to have ownership of this law for improved attitudinal and practice reforms. Local courts should have jurisdiction to deal with cases involving child marriage within the limits of their ordinary jurisdiction in terms of the Customary Law and Local Courts Act [*Chapter 7:05*]. Child marriage remains prevalent in remote rural areas where there is limited access to information and infrastructure. The other ever-present challenge that remains is the necessity to raise awareness and promote acceptance of the recently enacted law, particularly in areas where child marriage is disproportionately often practised such as in rural areas. Thus, laws can often be seen as foreign or irrelevant concepts to remote rural populations. Thus, to improve implementation and ownership of this Act, the responsible minister should, in consultation with other relevant ministries, such as the Ministries of social welfare, health, child welfare and gender or women's affairs, set up committees of social welfare officers or any person involved in community work, such as chiefs or headmen, to anti child marriage champions. Section 9(1) of the Act makes every chief a marriage officer for a customary law marriage in the district in which they hold office. Section 9(2) provides that:

No later than four months from the date of commencement of this Act, or from the date of investiture of any

³⁴ *Ibid.*

³⁵ C. Chikunda *et al.*, 'The impact of *khomba* - a Shangaan cultural rite of passage - on the formal schooling of girls and on women's space in the Chikombedzi area in Zimbabwe, Indilinga', 5 (2), *African Journal of Indigenous Knowledge*, 2006.

³⁶ M. Kim *et al.*, 'When Do Laws Matter? National Minimum-Age-of-Marriage Laws, Child Rights and Adolescent Fertility, 1989-2007'. 47(3), *Law & Society*, 2013, pp.589-619.

Chief, as the case may be, the Minister shall ensure that every chief is certified as competent to carry out the duties of a marriage officer for the purposes of solemnising marriages according to customary rites. Chiefs could even be prosecuted under s3 if they solemnise a marriage of underage persons or a person.^{37,38}

Following the introduction of the Marriages Act, by January 2023, all chiefs should have received such training. This is an ambitious timeframe and will require that the Minister of Justice prioritises that effort. This training is key in detecting instances or likelihood of child marriage.

In 2019, a novel National Action Plan and Communication Strategy on Ending Child Marriage (2019-2021) was crafted. The plan was said to be an expression of the commitment by the government, civil society organisations, and development partners to work together to end child marriage.³⁹ A simple yet effective evaluation process should have been adopted to determine accomplishments and to inform future actions especially in light of the new legislation.

2.3 The Intersection Between of Gender, Culture, and Child Marriages – Conceptualising Non-Legal Drivers of Child Marriages.

Besides the gaps that exist in the legal and policy framework in Zimbabwe, child marriage must be understood as a practice that is ingrained in normative and structural arrangements of the society. In 2018, UNICEF recorded that one in every five children is married before reaching 18 years, with one in every three of these children being from Sub-Saharan Africa.⁴⁰ This is further supported by the Plan International report from 2019 that identifies the prevalence of child marriages as a worrying development in Africa.⁴¹ In other parts of communities, child marriage has been normalised. Cultural, gender, and structural dynamics of society have a crucial impact on child marriage both as risk factors and as potential protective factors. This paper argues that, in addition to legal and policy gaps that facilitate child marriages, there are other factors that must be considered such as the intersections of poverty, lack of educational opportunities as well as norms which are gendered in their existence.

2.3.1 Cultural and Religious Norms Enabling Child Marriages

Culture is a source of identity for every community and plays a crucial role in the life of individuals and the community at large.⁴² It represents customs, practices, and beliefs which provide a sense of belonging, identity, and continuity with past existing values.⁴³ Different cultures exist around the world and the

³⁷ Constitution of Zimbabwe, *Chapter 7:05 Customary Law and Local Courts Act*, <www.zimlil.org/akn/zw/act/1990/2/eng@2016-12

³⁸ #:~:text=AN%20ACT%20to%20provide%20for,or%20incidental%20to%20the%20foregoing.> (accessed 8 December 2022).

³⁹ The National Action Plan, coordinated by the Ministry of Women Affairs, Community, Small and Medium Enterprises Development, was developed in consultation with several stakeholders.

⁴⁰ UNICEF, 'Child Marriage: Latest Trends and Future Prospects', July 2018, <data.unicef.org/resources/childmarriage-latest-trends-and-futureprospects/>, (accessed 9 December 2022).

⁴¹ Plan International, '18+ Ending Child Marriage and Teen Pregnancy in Eastern and Southern Africa, Learning for Change', 20 August 20, <plan-international.org/publications/18-ending-child-marriage-and-teenpregnancy/>, (accessed 9 December 2022).

⁴² T. Kaime, (ed.), *The African Charter on the Rights and Welfare of the Child: A Socio-Legal Perspective*, (Pretoria University Law Press, 2009), p.32.

⁴³ N. Wadesango *et al.*, 'Violation of Women's Rights by Harmful Traditional Practices', 13:1, *The Anthropologist* (2017), pp.121–129.

diversity that exists among cultures is recognised and emphasised in the values of cultural relativism and specifically in the discourse on the relationship between human rights and culture.⁴⁴ Consequently, within African societies contradictions prevail between the practical application of human rights standards and the promotion of customs and traditional practices. The discourse on the contradictions often results in a debate between the universality of human rights and cultural relativism.⁴⁵ The age of marriage for a girl, for example, is such an area of contradiction between human rights and culture that is highly contested. Equally controversial and disputed are the concepts of adulthood and childhood in Africa. While Article 21(2) of the ACRWC sets the minimum legal age of marriage at 18 years, there are cultural practices and religious beliefs in several African states that do not recognise the legal age of marriage, nor do they use age to determine a girl's level of maturity.⁴⁶

In our exploratory investigation in the study, we engaged key informants to gather their views on the subject. It was apparent that child marriage is still upheld as part of certain communities' way of life especially from a religious point of view. This was corroborated by the advent of puberty among girls which was seen as the key trigger development for child marriages especially for girls who were then considered mature enough for marriage.⁴⁷ This is further supported by studies conducted in and on Tanzania that identified puberty as one of the main triggers of child marriages for girls.⁵² In the context of Zimbabwe, key informants who included activists against child marriage, identified the Apostolic Sect which is mostly concentrated in the Manicaland province of Zimbabwe as the most prominent region where the practice continues to be prevalent. The religious factors were said to promote child marriages mostly due to the polygamous practice of the sect which promotes early marriages of underaged girls. Evidence showed that such apostolic sects are highly exclusive societies which are sheltered by norm enforcement among the followers making it difficult to access to victims. The limited access to such communities facilitates the perpetuation of the practice and sometimes makes it difficult for the law to take its course in punishing those committing or aiding child marriages. One key informant described apostolic sects as communities governed by their own rules and norms which are mostly contrary to the national laws especially concerning adolescent health and child marriages. The respondent further highlighted that there is a political dimension to the issue in which the state is reluctant to completely enforce the law because members of the Apostolic Sect are a key population of loyal voters whose values and norms need to be protected. It is difficult to conclusively confirm this argument but most activists shared similar sentiments through extrapolation. Anecdotal evidence shows rampant practice of child marriage in Manicaland especially in the apostolic sects, yet there is limited evidence of the national law being enforced to punish those aiding or committing child marriage.

⁴⁴ *Ibid.*

⁴⁵ UNICEF, 'Early Marriage Harmful Traditional Practice, A Statistical Exploration', October 2015, <data.unicef.org/resources/early-marriage-a-traditional-harmful-practice-a-statistical-exploration/>, (accessed 9 December 2022).

⁴⁶ C. Himonga, 'The Right of the Child to Participate in Decision Making - A Perspective from Zambia', in W. Ncube (ed.), *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* (Ashgate Dartmouth, 1998) p. 100.

⁴⁷ African Union, 'The Effects of Traditional and Religious Practices of Child Marriage on Africa's Socio Economic Development - A Review of Research, Reports and Toolkits from Africa', October 2015, <au.int/sites/default/files/documents/31018-doc-5465_ccmc_africa_report.pdf>, (accessed 9 December 2022).

⁵² L. Stark, 'Poverty, Consent, and Choice in Early Marriage: Ethnographic Perspectives from Urban Tanzania', 54:6, *Marriage & Family Review*, (Taylor & Francis, 2018), pp. 565–81.

The study also attempted to engage people who have married underage girls to establish their reasons behind such actions. Evidence showed that cultural norms driven by the need to satisfy masculinity fantasies was a strong force. The desire to marry a virgin was highlighted as particularly significant in line with the notion of purity. There was a strong belief that younger girls who are just entering puberty were most likely to be pure and virgins, hence they would be the best candidates to satisfy masculine fantasies. This consequently promoted a belief system that is based on the idea that the purity of girls would be damaged or diminished if they were allowed to grow into adults prior to their marriage. This unwritten normative belief system directly influences and enables men as the main drivers and perpetrators of child marriage. Such positions were also supported by key informants who shed light on the topic through their experiences gathered as they worked in communities with high levels of child marriages. They indicated that men believe that marriage is meant to meet the expectations and fantasies of men.

Linked to the above, it emerged that men viewed underage girls as more submissive and generally amenable to go under cultural practices or rites. By extrapolation on the mentioned point, victims of child marriages were easy to manipulate and dominate which reinforces toxic patriarchal tendencies that portray girls and women as objects for manipulation. Girls and women were, therefore, relegated to the reproductive duty and being exposed for exploitation by men who viewed themselves as entitled to the control of girls and women. It can then be argued that child marriage becomes a manifestation of the sexual conquest perpetuated by toxic masculinities in Zimbabwe, concentrated in areas where child marriages is rampant. In one interview with an activist whose organisation has been working in the Chipinge area of Manicaland Province to eradicate child marriages, an exercise referred to as normative mapping has shed light on why men end up marrying underage girls. Their reasons showed that deprivation and limited exposure to external environments creates low self-esteem among men who then seek validation through marrying someone they can dominate, exploit, and fulfil a sense of power. In their analysis, this becomes reverse exploitation which starts from men being marginalised and exploited by the broader macro system. It is important to note that these toxic ideas and perceptions of masculinity and the notion of purity is deeply enshrined and oftentimes stems directly from religious beliefs. The broader macro environment in which people live influences how they make every day decisions including sexual relations.

2.3.2 Limited Educational Opportunities

The intersectionality of drivers of child marriages should be understood in their broader context to achieve a more nuanced picture. There is evidence that poor educational opportunities could be understood as both a driver and consequence of child marriage.⁴⁸ One key informant from an organisation dealing with survivors of child marriages elaborated that child marriages resulting in teenage pregnancies are the biggest drivers of school dropouts for girls. Contextualising this with the COVID-19 pandemic, there was an acceleration of incidences of teenage pregnancies in Zimbabwe. According to a report presented by Women Affairs Minister Mrs. Sithembiso Nyoni on the level of public service delivery related to sexual and gender-based violence during the COVID-19 pandemic in Parliament, Zimbabwe recorded, for instance, approximately 5 000 teenage pregnancies and about 2 000 child marriages between January and February 2021. Such high numbers reflect the rampant sexual exploitation that adolescents especially girls suffered during the COVID-19 lockdown. Interviews with key informants in the education sector confirmed that teenage pregnancies during COVID-19 led

⁴⁸ A. Karam, (2015), 'Faith-Inspired Initiatives to Tackle the Social Determinants of Child Marriage', 13:3, *The Review of Faith & International Affairs* (2015), pp.59–68.

to school dropouts among girls despite the law providing for the reintegration of girls into the official school system.

The study highlights that once girl becomes pregnant; they be expected to get married. This was also explained as being perpetuated by family pressure that drives girls to enter marriages to avert bringing shame to the girl's family. These are additional normative systems which are contributing towards child marriage despite the existing legal and policy framework against such practices. The nexus between child marriage and poor education opportunities was also explained by our key informant in the education sector who described schools as protective factors. It was established that the more girls remain in schools, the more they are protected from teenage pregnancies and child marriage. In communities where child marriage is particularly prevalent, there is evidence that girls have an extremely low educational attainment level. The schools' system occupies the girls and provides an alternative life pathway outside of marriage.⁴⁹

The law, especially in the context of Zimbabwe, is often poorly understood in rural areas and it is indisputable that it would become more effective to those who are aware of it and who can utilise it to advocate for their rights. People who have a substantial understanding of the law and are aware of its implications are mostly based in urban areas and rarely in rural ones. Such people are mostly based in urban areas and a few in rural areas who are enlightened. The gap that is created in rural communities due to lack of knowledge is quickly exploited in by cultural and religious norms. Rural communities find their norms as more relevant to their way of life than state laws. This was supported by a key informant who has been working in rural areas to sensitise rural communities on laws around child marriages. The key informant indicated that there is a general perception among people in the rural areas that the law serves the interests of the state while culture serves the interests of the people. This divide, therefore, implies that people are likely to believe in their cultural norms than they are likely to embrace law which they see as foreign and serving the state's interests. This has led to the perpetuation of harmful cultural practices such as child marriages despite the laws against it.

2.3.3 Vulnerability of Children Due to Poverty

Families that have children who become victims to child marriages are generally extremely poor in both absolute and relative forms. This section connects to the earlier explored normative factors that drive child marriages by contextualising how deprivation and pervasive poverty has also catalysed child marriage in Zimbabwe. In this view, girls are then regarded as economic objects their families. This is also linked closely to the payment of *roora/lobola* (bride price) and how this is inadvertently considered as a source to secure livelihoods for the overall survival of the family. In this study, KIIs corroborated that the marrying off girls is often for economic gains. Under such circumstances, parents of the victims become complicit in the commission of the practice and participate in the covering up against any possible prosecution and investigation.

KIIs who have collaborated with survivors of child marriages explained that the practice thrives on legacy referencing in which a mother who was a victim of child marriage would not see

⁴⁹ A. Biddlecom *et al.*, 'Associations between Premarital Sex and Leaving School in Four Sub-Saharan African Countries', 39 (4), *Studies in Family Planning* (2008), pp. 337-350.

anything wrong about the practice and will likely have her girls enter into marriage while they are still underage. This creates generations upon generations of victims of child marriage.

2.4 Best Standards to Curb Child Marriages

Legislative reforms alone may not lead to the desired change. Instead, a comprehensive approach is recommended. The SADC Model Law lays out concrete guidance around prevention of child marriage and betrothal and takes a multi-faceted approach. It provides that a person who is requested to, or is about to, solemnise a marriage, and suspects that one or both parties are children, must verify the age of the child by means of a birth certificate, identification card, or other official document that can reveal the identity and age of the child. The issue of birth registration remains problematic in Zimbabwe with most people not having personal identity documents including birth certificates. The need to make birth registration mandatory is, consequently, urgent. The law should provide for establishment and continuous training of child marriage prohibition officers, judicial officers, law enforcement officers, traditional leaders, religious authorities, other public officers and policy makers to raise awareness about the dangers and effects of child marriage and how to report them.

For the law to work, a clear collaborative framework for stakeholders is necessary. The Minister of Justice Legal and Parliamentary Affairs should immediately set out the regulations specific to section 3 of the Act to build necessary framework for awareness raising and preventive measures. The framework should involve and mobilise local committees to enable reporting of child marriages and, for instance, to establish community watch committees with the support of traditional leaders or religious authorities to prevent and respond to child marriages. The Model law also recommends the establishment of an anti-child marriage fund for purposes of eradicating child marriage, preventing child marriage, assisting children already in marriages, assisting victims of child marriages and supporting the general implementation of the measures towards this cause. This is very pertinent as fighting child marriages urgently requires more resources.

The law will only be effective if there is increased awareness among the local communities, traditional leaders, and comprehensive strategies to address the main drivers of child marriage such as poverty, gender inequality, and lack of security. Traditional and religious leaders ought to be given pronounced roles and responsibilities in curbing child marriages considering that some of the key causes are embedded in cultural and religious beliefs.

3 Conclusion

The enactment of the Marriages Act is a progressive step towards the elimination of child marriage in Zimbabwe. However, there is a lack of a strong framework to implement it in order to successfully curb the scourge of child marriage. The critical question that must be raised to design and implement this framework is: In what context does child marriage exist? This question looks at the political, economic, and social environment. This includes judicial systems that conduct criminal trials, investigations, tracking, monitoring, effective prosecutions, other constitutional systems that create a framework for administering justice and accountability processes, education, and religious and cultural norms.