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THE CONSTITUTIONAL COURT RULING AGAINST CHILD MARRIAGES IN ZIMBABWE: A LANDMARK DECISION FOR ADVANCING THE RIGHTS OF THE GIRL CHILD

Cowen Dziva * and *Delis Mazambani***

Abstract

On the 20th of January 2016, the Constitutional Court of Zimbabwe went a step ahead to protect children's rights by banning child marriages and other harmful practices that are detrimental to childhood. The ruling comes at an opportune time to denounce the inadequacy of marriage laws, and to ban all archaic practices responsible for an upsurge in child brides. This is undeniably a groundbreaking ruling in the eyes of diverse actors who for long have been battling it out against the upsurge and impact of child marriages. This article goes beyond acknowledgement of the ruling to commend the judiciary's role in ending harmful practices, and to decipher post-ruling strategies to end child marriages. Amongst other efforts, the legislature is urged to expedite harmonisation and alignment of marriage laws to the 2013 Constitution, and other international best practices as well as implementation of innovative and multi-sectoral approaches in tackling child marriages. The paper advocates for litigation in lower courts, as well as widespread awareness campaigns at all levels of society to rethink attitudes, beliefs and practices which are inconsistent with best practices in child protection.

Keywords: Child marriages, harmful practices, judiciary, girl child

1. INTRODUCTION

Child marriage or early child marriage refers to any marriage carried out with and by persons below 18 years of age. Anyone below 18 years is a child, and is physiologically and physically not ready for childbearing, and even to shoulder responsibilities that come with marriage (IPPF 2007). Child marriage involves either a female or male or both spouses being below the marriageable age of 18 years. However, girls are mostly affected by the practice compared to boys. Underage girls are not getting married to partners of their age groups, but older persons in the form of informal marriages; courtesy of religious, civil, or customary laws (Sibanda 2011). Child marriages are often arranged by the girl's parents or guardians whose desires take precedence over the rights and interests of the girl child (Warner 2004). This characteristic of child marriages has for long been making it difficult for stakeholders to end child marriage. Additionally, child marriages have been difficult to end as they occur and proliferate in

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the circles of poverty, and archaic traditional and religious beliefs, which are tolerated by customary law and society.

Globally, the number of girls being married under the age of 18 at was estimated at around 64 million (Sibanda 2011, quoting UNICEF n.d.). In 2015, the prevalence rate of child marriages in Zimbabwe's provinces was 42% in Mashonaland West, 50% in Mashonaland Central, 36% in Mashonaland East, 39% in Masvingo, 31% in Midlands, 27% in Matabeleland North, 18% in Matabeleland South, 10% in Bulawayo, 30% in Manicaland, and 19% in Harare (Makuzva 2016). An estimated 8,000 girls have been forced into early marriages or were held as sex slaves since 2008 in rural Zimbabwe (Sachiti 2011). Child marriages are most prevalent in rural Zimbabwe, where 21% of girls are becoming child brides before the age of 18 (Moyo 2011). Most rural communities are poverty stricken and view an underage girl child as a potential source of wealth. Besides, most rural communities are the custodians of culture and practices that tolerate child marriages. Statistics on the prevalence of child marriages are worrisome and unacceptably high, hence the need for innovative and collaborative efforts to eradicate the horrific practice.

Despite various international, regional and national human rights instruments against marrying off someone below the age of 18, child marriages are rampant. Zimbabwe is a signatory to various frameworks that speak against child marriages, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC). At regional level, Zimbabwe also ratified the African Charter on the Rights and the Welfare of the Child (ACRWC) together with the African Charter on Human and Peoples Rights (ACHPR). In a more positive way, Article 1 of the CRC and Article 2 of the ACRWC define a child and a young person to be anyone below 18 years of age. Furthermore, the Sustainable Development (SDG) Goal 5.3 and Article 21 of the ACRWC call for member states to eliminate all harmful practices: including child, early and forced marriages. By ratifying these instruments, Zimbabwe made an obligation to take appropriate measures, including legislative measures to promote, protect and enforce the rights of the girl child as enshrined in these instruments.

Locally, there is the Constitution of Zimbabwe which came into force on 22 May 2013, the Marriage Act [Chapter 5:11] of 1964, the Criminal Law Codification and Reform Act [Chapter 9:23] of 2004, Children's Act (Chapter 5:06) of 1971 and the Customary Marriages Act [Chapter 5:07] of 2004. These instruments speak to child protection. Under sections 19, 26, 27 and 81, the Constitution resembles international instruments in providing for children's rights in society. Even with these frameworks in place, children, in particular the girl child, continued to be subjected to the harmful practice of child marriage. Subsequently, human rights defenders

have been forced to question the possible factors behind the upsurge of this harmful practice in Zimbabwe. The key question in Zimbabwe has been whether marriage laws are inadequate or whether it is a matter of litigation and enforcement that is not being fully utilised (Sibanda 2011). What is known is the fact that pieces of legislation on the rights of children in Zimbabwe were promulgated way before the Constitution of 2013, but they contradict the best international practices in a great way.

Indeed, the major challenge in fighting child marriages remains the inconsistencies of marriage laws in many African countries. Under the Marriage Act (1964) of Zimbabwe, the minimum marriageable age is 16 for girls and 18 for boys against the stipulated 18 years for both girls and boys in Section 81 of the Constitution of Zimbabwe (2013). In addition, Section 78(1) of the Constitution of Zimbabwe (2013) accords the right to marry and found a family to anyone who has attained the age of 18 years. Thus, the Marriage Act (1964) is inconsistent with the Constitution as it only extends protection against child marriages to boys. Besides being clearly discriminatory to the girl child, this marriage law exposes girls to manipulation. One then wonders why the Marriage Act allows the girl child to marry at 16, when she is the most vulnerable to such harmful practices compared to a boy child.

The Customary Marriages Act (2004) has also been under criticism for its failure to provide a minimum age for marriage for both boys and girls. As the country follows a dual legal system, there is continued recognition of both general and customary laws, especially in matters relating to the family, such as the administration of property and marriage (WLSA 2002). The application of customary law has been detrimental to the fight against child marriages for it does not stipulate the age of marriage and sometimes upholds practices that are inconsistent with provisions for protection of human rights. Taking advantage of such legal inconsistencies, young girls are married off to adults in society. Similarly, Section 70 of the Criminal Law Codification and Reform Act (2004) criminalises sexual activity with a young person (under 16 years); and a minor (under 12 years), with both categories of children being deemed “incapable of consenting to sexual intercourse or a sexual act”. In addition, the Children’s Act (2002) of Zimbabwe defines a: minor as someone under the age of 18 years, and young person as someone between the ages of 16 and 18 years of age. Evidently, the definition by the Children’s Act and the Criminal Law Codification and Reform Act are not in tandem with the CRC and ACRWC as they do not elaborate on when the age of maturity is attained. With these inadequate laws, childhood remains a precarious stage within society where the girl child remains susceptible to adult activities that are detrimental to their survival and development.

Against this background, the role of the judiciary in banning child marriages is found judicious. The paper presents the ruling and discusses its importance to Zimbabwe, and other African countries where child

marriages are prevalent. In coming up with the paper, the authors reviewed the Constitutional Court ruling and related documents, including regional and international instruments, the Constitution and other local legislation related to children's rights. The paper has four sections starting with this introduction. The second section is a brief description of the ruling in question. The third section commends the role of the judiciary in ending child harmful practices, and justifies why the ruling is a landmark in ending child marriages. Under this section, the authors find the ruling timed considering the prevalence and impacts of child marriages as well as the numerous calls at international, regional and national level to end child marriages. The paper ends with a conclusion before envisioning strategies for practical protection of the girl child. In a way, the paper is an eye-opener to the judiciary in Zimbabwe, and in other African countries where harmful practices are rampant, to step up to, innovatively protect and enforce children's rights.

2. THE CONSTITUTIONAL COURT CASE

In the year 2015, the full bench of the Constitutional Court heard the matter between two young women: Loveness Mudzuru and Ruvimbo Tsopodzi *vs.* Legal and Parliamentary Affairs from The Ministry of Justice, Gender and Community Development from the Ministry of Women's Affairs, and the Attorney General of Zimbabwe. The applicants were aged 19 and 18, and approached the Court complaining about the infringement of the fundamental rights of girl children who are subjected to early marriages. The two wanted the Constitutional Court to declare the Marriage Act (1964) and Customary Marriage Act (2004) unconstitutional for failure to give equal treatment and protection of girls under the age of 18 years (CCZ 2016). Section 22(1) of the Marriage Act (1964) provided that a girl who had attained the age of 16 years was capable of contracting a valid marriage subject to written consent by her parent/s or legal guardian. A boy under the age of 18 years and a girl under the age of 16 years had no capacity to contract a valid marriage except with the written permission of the Minister of Justice, Legal and Parliamentary Affairs (Marriage Act 1964).

In making this request, applicants relied on Section 78(1) of the Constitution of Zimbabwe (2013), arguing that the Constitution had the effect of setting 18 years as the minimum age of marriage. Section 78(1) of the Constitution (2013) states that:

Every person who has attained the age of eighteen years has the right to found a family.

And Section 78(2) provides for marriage to be founded on the will of the parties entering into marriage.

No person may be compelled to enter into marriage against their will. (Section 78(2) of the Constitution (2013).

The applicants supported Section 78(1) with part of Section 81(1) of the Constitution (2013), which provides for the right by every person who has attained 18 years of age to found a family. The section further stipulates that boys and girls below the age of 18 years must not be compelled to enter into marriage against their will (Constitution of Zimbabwe 2013). The applicants contended that on a broad, generous and purposive interpretation of Section 78(1) as read with Section 81(1) of the Constitution, the age of 18 years had become the minimum age for marriage in Zimbabwe. The two applicants argued that Section 78(1) of the Constitution could not be subjected to a strict, narrow and literal interpretation to determine its meaning if regard was made to the contents of similar provisions on marriage and family rights found in international human rights instruments, from which Section 78(1) derived its inspiration (CCZ 2016).

The applicants contended that since “a child” is now defined by Section 81(1) of the Constitution to mean a girl and a boy under the age of 18 years, no child had the capacity to enter into a valid marriage in Zimbabwe since the coming into force of Sections 78(1) and 81(1) of the Constitution on 22 May 2013 (CCZ 2016). Applicants further contended that Section 22(1) of the Marriage Act or any other law which authorised a girl under the age of 18 years to marry, infringed the fundamental right of the girl child to equal treatment before the law enshrined in Section 81(1) (a) of the Constitution. The argument was that Section 22(1) of the Marriage Act exposed the girl child to horrific consequences of early marriage, which are violations of fundamental rights, from which every child requires protection (CCZ 2016).

On the question whether the applicants had *locus standi* or the right to approach the court, applicants claimed that the right to approach the court seeking the relief they sought under Section 85(1) (a) and (d) of the Constitution, which states that one can approach the courts acting in public interest. In paragraph 16 of the founding affidavit, the first applicant, with whom the second applicant agreed, stated that:

.... [t]he issues I raise below are in the public interest and therefore I bring this application in terms of s 85(1) (a) and (d) of the Constitution of Zimbabwe (CCZ 2016).

In paragraph 21 of the founding affidavit, the first applicant stated:

The instant application is an important public interest application that seeks to challenge the law in so far as it relates to child marriages in Zimbabwe. It is motivated by my desire to protect the interests of children in Zimbabwe (CCZ 2016).

The respondents (the State) opposed the application and the granting of the relief sought by the applicants on two alternative grounds. They took as a preliminary point the contention that the applicants lacked the right to approach the court claiming the relief sought. The argument made on behalf of the respondents was that although the applicants claimed to have

approached the court in terms of Section 85(1) (a) of the Constitution, they did not allege that any of their own interests had been adversely affected by the alleged infringement of the fundamental rights of the girl child (CCZ 2016). The argument was that the applicants were no longer children protected from the consequences of early marriage by the fundamental rights of the child enshrined in Section 81(1) of the Constitution.

The grounds of opposition to the application on the merits pertained to the effect of Section 78(1) of the Constitution on the minimum age of marriage. The respondents denied that Section 78(1) of the Constitution has the effect of setting the age of 18 years as the minimum age for marriage in Zimbabwe. The reason for the denial was that Section 78(1) gave a person who attained the age of 18 years the “right to found a family” (CCZ 2016). The contention was that the meaning of Section 78(1) of the Constitution was apparent from the grammatical and ordinary meaning of the language used in giving the “right to found a family”. The respondents contended further that Section 78(1) of the Constitution did not give a person who had attained the age of 18 years the “right to enter into marriage”. The minor premise on which the contention was based is that the “right to found a family” did not imply the right to marry (CCZ 2016).

The respondents supported their denial of the contention that Section 78(1) of the Constitution set the age of 18 years as the minimum age of marriage by the argument, advanced on their behalf, that Section 78(1) was not amenable to a broad, generous and purposive interpretation in the determination of its meaning (CCZ 2016). The argument was that it was only accommodative of a literal interpretation. The effect of the respondents’ argument was that the question of interpretation did not arise as the words used were clear and unambiguous. Having denied the allegation that Section 78(1) of the Constitution set the age of 18 years as the minimum age for marriage, the respondents went on to deny that Section 22(1) of the Marriage Act or any other law which authorised a girl child who attained the age of 16 years to marry contravenes Section 78(1) of the Constitution. The State raised a rationale for the different treatments of a girl child and a boy child under Section 22(1) of the Marriage Act: the old notion that a girl matures physiologically and psychologically earlier than a boy (CCZ 2016). The respondent put forward the notion of the alleged difference in the rates of maturity in the growth and development of girls and boys, as justification for the legislation which subjects a girl child, under the pretext of marriage, to a life of sexual exploitation and physical abuse (CCZ 2016).

The respondents took the view that there was nothing unconstitutional about the legislation which authorised child marriage. The respondents suggested that the applicants were the cause of the problem. The contention was that instead of seeking to have legislation on child marriage declared unconstitutional, the applicants should have taken advantage of their painful experiences to embark on advocacy and educational programmes to

share their experiences with girl children (CCZ 2016). In that way, the applicants could have given the girl child the skills and knowledge necessary to enable them to make the right choices on matters of reproductive and sexual health.

In spite of all the unmeritorious arguments put forward by respondents, on the 20th of January 2016, the full bench of the Constitutional Court of Zimbabwe delivered a ruling to the effect that all forms of child marriages are unconstitutional. Part of the court's order was as follows;

- i. It is declared that Section 78(1) of the Constitution of the Republic of Zimbabwe Amendment (No. 20) 2013 sets 18 years as the minimum age of marriage in Zimbabwe (CCZ 2016).
- ii. It is further declared that Section 22(1) of the Marriage Act [*Chapter 5:11*] of 1964 or any law, practice or custom authorising a person under 18 years of age to marry or to be married is inconsistent with the provisions of Section 78(1) of the Constitution and therefore invalid to the extent of the inconsistency. The law is hereby struck down (CCZ 2016).
- iii. With effect from the 20th of January 2016, no person, male or female, may enter into any marriage, including an unregistered customary law union or any other union, including one arising out of religion or religious rite, before attaining the age of 18 years (CCZ 2016).

3. THE IMPORTANCE OF THE RULING IN ENDING CHILD MARRIAGES

The Court ruling confirms the important role of the judiciary in upholding the supremacy of the Constitution of Zimbabwe. The supremacy of the Constitution is reiterated in Section 2(1) of the Constitution of Zimbabwe (2013), which states that the "... Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it, is invalid to the extent of the inconsistency." Thus, the marriage laws (in particular the Marriage Act 1964 and Customary Marriage Act 2004), which allowed for child marriages are banned. The ruling put it on record that no person, boy or girl, should be married before the age of 18 years. The ruling further held that other illegitimate marriages solemnised on cultural or religious grounds are also unconstitutional. In a way, the judiciary made a positive step to exercise the power and responsibility entrusted to it: to ensure that human rights of Zimbabweans are fully interpreted, protected and enforced in society. As the highest court of law in the land, decisions by the Constitutional Court set a valuable precedence for the future resolution of disputes in lower courts between individuals or between the State and individuals (Abul-Ethem 2002). A momentous ruling of this kind assures children of effective protection in lower courts of law

and all levels of society in Zimbabwe. In addition to setting of precedents, decisions by the superior courts provide for the effective implementation of the law, the protection of the rights of individuals and groups, and set a standard for the subsequent equitable enforcement of the law (Abul-Ethem 2002).

The role of the judiciary is indeed critical in law reform, human rights protection and enforcement. Decisions made by the judiciary are binding, and have a beneficial effect to people's lives and the accomplishment of the government's goals. In 2014, in South Africa, the Western Cape High Court came up with a similar ruling in the case of *Mvumelani Jezile vs. The State*, where an abductor of a 14 year old girl child under the guise of *ukutwala*² was handed a 22 year jail sentence. The court found the accused guilty of numerous crimes emanating from his actions, including one count of human trafficking and three counts of rape. The ruling and many of the same nature prompted law review process, including the drafting of the Prohibition of Forced Marriages and Child Marriages Bill which will be enacted into law soon after completion of public consultations, in an attempt to criminalise forced and child marriages. The above legislative efforts were called for and necessitated by judicial decisions, which point to the inadequacy of laws and various protection measures. Hence, the judiciary sets standards for the subsequent development of better frameworks, and ultimate enforcement of the law.

The Constitutional Court of Zimbabwe ruling reinforced the inalienable, integral and indivisibility of children's rights. For this reason, the ruling is consistent with best international human rights principles, and the Constitution of Zimbabwe, which emphasise equality and non-discrimination. The ruling outlawed the 16 years minimum marriageable age for girls in the Marriage Act (1964) and called for alignment of marriage laws with the Constitution. The marriage law is clearly discriminatory to girls as the marriageable age for boys is 18 years and was contributing much to the rampant rights violation for the girl child. Under Section 56, the Constitution of Zimbabwe (2013) prohibits discrimination on the basis of gender and age. Indeed, all forms of discrimination on grounds of gender and age violate fundamental freedoms and human rights. For this reason, the ruling is a positive step towards child protection as it repealed laws inconsistent with the Constitution, and called for immediate promulgation of more progressive and child friendly laws, which are in line with the Constitution, and international standards.

The ruling confirms Zimbabwe's obligation to respect, protect, and fulfil children's rights under international human rights system. Under Article 16 of the ACRWC and Article 3(2) of the CRC, stakeholders including the state and its apparatus such as the judiciary are obligated to take positive steps to ensure the protection, promotion and enforcement of human rights. Specifically, Article 16(1) of the ACRWC (1999) states:

States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of a parent, legal guardian or school authority or any other person who has care of the child.

Positive measures include adopting legislative and other measures to prohibit private persons from violating the human rights of children through child marriages. This means that the Constitutional Court of Zimbabwe implements calls by the CRC and the ACRWC.

The Constitutional Court ruling resonates international, regional and national stakeholders' efforts to end child marriages. In July 2014, the government of the United Kingdom and UNICEF jointly hosted the first ever Girl Summit to publicise and mobilise stakeholders to end early, child and forced marriage (SADC PF 2016). In 2016, the SADC region came up with a model law to guide member states in eradicating child marriages. The model law was launched at the 40th plenary assembly session of the SADC parliamentary forum in Zimbabwe to guide member states on measures for the eradication of early and child marriages (*ibid.*). As a member of the region, Zimbabwe has since adopted the model law to guide in the development of the country's specific legislation. The model law comes at a time when Zimbabwe was directed to develop new laws by the court ruling. The ruling and the model law complements other efforts by stakeholders to end child marriages, including the publication of awareness-raising material and sensitisation of society on children's rights. On the 16th of June 2015, Zimbabwe joined the rest of the world in commemorating the Day of the African Child. The theme for 2015 was "25 Years after the adoption of the African Children's Charter: Accelerating Our Collective Efforts to end Child Marriage in Africa." This was followed by the National launch of the African Union Campaign to end Child Marriages on 31 July 2015 (ZHRC 2015).

It was important that in coming up with the ruling, the Constitutional Court sought to identify and deal with deep down causes of child marriages such as poverty. In its ruling, the court quoted Warner (2004), who notes how child marriages are arranged by the girl's parents or guardian whose desires take precedence over the wishes of the child. When families are poor, a young girl is considered to be an economic burden to the family; therefore, if she gets married, that is one mouth less to feed (Sibanda 2011). For instance, a 10 year old girl was sold off to a 40 year old man for Z\$2000 (equivalent to US\$7) in 2001, in order to obtain food for her family in rural Zimbabwe (Basiyange 2011). The judgement noted that the 'marriage' was a bartered transaction, accompanied by payment of a negotiated 'bride price' from the groom's family to the bride's family (CCZ 2016). By highlighting these causes of child marriages, the court made it known that there is no justification, whatsoever for one to sell-off young girls in the

name of marriage. In so doing, the court dealt with the commodification of the girl child, which is rampant in most Zimbabwean societies. It is anticipated that the criminalisation of this archaic practice will go a long way to promote a culture of hard work, entrepreneurship and industriousness instead of 'selling girl children' for purposes of gratification of hunger or financial profitability.

The court was also quick to acknowledge the contribution of culture to the upsurge in child marriages. Church leaders (prophets and seers) are at the forefront of promoting child marriage as they claim to have been directed by God and ancestors to take young girls as wives. Many religious leaders hide behind false prophecies and the Holy Spirit to coerce underage girls into marriages (Kachere 2011), and to validate their 'unholy' marriages with young girls. Parents of child brides consent to the marriages due to fear of acting in conflict with God. In addition, opposing the spirit can result in expulsion from the church. Crucially, the court banned all these practices, which are being taken advantage of by child abusers to marry young girls and escape the wrath of law. Outlawing of such archaic practices is in line with Article XXI of the ACRWC (1999), which provides that child marriage and the betrothal of girls shall be prohibited and effective action, including legislation, shall be taken to set 18 years as the minimum age of marriage.

In addition, traditional societies have for long forced girls below the age of 18 to be married off to their brothers-in-law after the demise of their sisters or paternal aunts, so that they put on the deceased's shoes by looking after the surviving family or to bear children in place of a barren sister or aunt. Now that these practices have been outlawed, adult alternate brides have to be seconded to the brothers-in-law if the practices are to continue. The court's judgment is therefore, a milestone ruling as it deems invalid the customs, religious beliefs and cultural practices that infringe on the constitutional rights of underage girls. Resultantly, Zimbabwe moves towards abiding with its international obligations. In particular, this is in tandem with the 2011 ICCPR Human Rights Committee's General Comment 28 which elaborates on the obligation of the State to ensure that traditional, religious and cultural attitudes are not used to justify violations of women's rights to equality before the law and to equal enjoyment of all rights in the Covenant". What remains to be seen are the effects of non-compliance with the spiritual dictates to marry off young girls to prophets and seers and whether there will be any divine retribution.

The ruling upholds the protection of the girl child from human rights vulnerabilities that come with child marriages. Traditional practices which are detrimental to the health of the girl child are a form of physical or mental violence, injury, maltreatment or exploitation and sources for poverty amongst young girls. In addition, child marriage comes with consequences including the separation of child brides from family and friends, lack of freedom to interact with peers and community members.

Child marriages are one of the most persistent forms of sanctioned sexual abuse of girls and young women (IPPF 2007). As young as they are, child brides are often exposed to intimate and domestic violence, marital rape, complicated pregnancies and vulnerability to sexually-transmitted diseases. A survey by the Gender Links on Violence Against Women confirmed that child brides are most vulnerable to intimate violence (MWAGCD and Gender Links 2013). A child bride is often regarded as an apprentice wife or wife-in-training who is considered to be docile, malleable and therefore easy to manipulate. This assumption exposes child brides to the greater risk of domestic violence and sexual abuse by in-laws (CCZ 2016). These forms of treatment cause permanent, serious physical damage to the child, and one can only imagine the accompanying mental agony (Sibanda 2011). The ruling is therefore a step forward in child development, in particular their protection from all forms of sexual exploitation and sexual abuse in society.

The ruling is applauded for noting the impact child marriages pose to the education of the girl child. Once married, young girls drop out of school and become full time housewives or servants for their new husbands and in-laws, and this negatively impacts on the community and society as a whole as well as the well-being of future generations (Basiyange 2011). A majority of child brides in developing countries have had no formal education. Women with primary education are significantly less likely to be married or enter into marital unions as children than those who received no education. In Zimbabwe, for example, 48% of women who attended primary school got married by the age of 18 compared to 87% of those who did not attend school (World Press 2011). The Constitutional Court ruling noted this urgent need to end the scourge for realisation of the SDG goal on education, other SDGs and ultimate child development. Undeniably, education is critical for socio-economic development and for building human capabilities as well as opening future opportunities for children. The importance of education was fully recognised by classical economists. For example, Marshall (1920: 10) observed as follows:

The wisdom of expending public and private funds on education is not to be measured by its direct fruits alone. It will be profitable as a mere investment, to give the masses of the people much greater opportunities, than they can generally avail themselves of. For by this means many, who would have died unknown, are able to get the start needed for bringing out their latent abilities. The most valuable of all capital is invested in human beings.

Limiting access of young girl to education has a drastic effect on her future employment prospects, and this effectively undermines sustainable development efforts of a nation. In essence, the banning of child marriages by the ruling must be preceded by widespread endeavours to make sure every girl of school-going-age is in school since girls out of school are prone to child marriages. This is in line with the articles 28 and 29 of the

CRC (1990) which provide for the right to education on the basis of equal opportunity.

In this regard, the ruling comes as a positive step towards ending challenges being faced by child brides, and achieving the ultimate goal of sustainable development in Zimbabwe. Surely, SDGs 1, 2, 3, 4 and 10 provide for hunger and poverty reduction, inclusive education, good health and well-being, gender equality and reduced inequalities are poised to be achieved if this ruling is followed with pro-active measures. In this view, the banning of child marriage is a step in the right direction in ensuring that children's rights are protected, promoted and enforced.

4. CONCLUSION AND RECOMMENDATIONS

The Constitutional Court of Zimbabwe saved the day for victims and potential victims of child marriage by upholding the supremacy of the Constitution as reiterated in Section 2. The ruling confirmed the crucial role of the judiciary in the development of beneficial standards for the protection, promotion and enforcement of children's rights. The court banned child marriages, and declared all practices, customs or conduct inconsistent with the Constitution invalid to the extent of the inconsistency. In essence, the Marriage Act (1964), Criminal Law Codification and Reform Act (2004) and the Customary Marriages Act (2004) were outlawed as they failed to either define the marriageable age or protect girls from child marriages. The failure to clearly define the marriageable age by the marriage laws was one of the biggest hurdles to the fight against child marriages in Zimbabwe as customary law was often favoured to justify girl child abuse. The Constitutional Court repealed sections of the marriage laws which promoted child marriage and called for speedy alignment of the marriage laws to the Constitution of Zimbabwe. In handing down the judgment, the court took into consideration the prevalence, root causes, impact of child marriage as well as efforts at national and international levels to curb the scourge showing how much a judgment of this nature was long overdue in order to do away with archaic practices in society. For this reason, the ruling is lauded by legal and development practitioners as a positive step in the effort to attain gender equality and fight against child abuse in general and child marriage in particular.

It is important for the justice delivery system of other African countries where child marriages are rampant to follow suit, and repeal all laws and practices that infringe on the rights and welfare of the girl child. For the Zimbabwean society, the judiciary has done its part in an effort to end child marriages by setting a valuable precedent for future use by stakeholders in the field of child protection. Undeniably, the judiciary provides for the effective implementation of the law, the protection of the rights of minors in its capacity as the upper guardian of all minors, and sets a standard for the subsequent equitable enforcement of the promotion and enforcement of the law by lower courts and other stakeholders. The State, lower courts,

civil society and individuals have to take the issue head on in courts, homes and society so as to implement the judgment and punish perpetrators.

The State, as a duty bearer which is supposed to take measures to protect children from retrogressive cultural, religious beliefs and practices has been challenged by the judiciary to take child protection as a serious issue. In light of the directions already given by the Constitutional Court, prompt steps should be taken to align the marriage laws with Section 78(1) of the Constitution, SADC model law and the best human rights instruments. Other arms of the government should pick up the momentum and expedite alignment of the marriage laws to the Constitution of Zimbabwe, to criminalise child marriage and give deterrent punishment to offenders. Non-criminalisation or delayed criminalisation of child marriage will render the ruling, a *brutum fulmen* that is a powerless thunderbolt, so criminalisation of child marriage is long overdue. Specifically, the Executive and the legislature are supposed to put into effect the provisions of the ruling, which require amendment of the marriage laws so as to encapsulate the minimum age for marriage of 18 years as enshrined in Section 78(1) of the Constitution. All marriage laws have to be aligned to the Constitution, which is the supreme law regarding age for marriage.

Most importantly, social reform should go hand-in-hand with legal reform so that cultural and religious dynamism, which is human rights compliant, is a necessity. There is therefore, need for widespread campaigns by government departments, churches and NGOs to get societies to rethink attitudes and beliefs inconsistent with the Constitution and international best practices in child protection. Section 7 of the Constitution calls for the State to promote public awareness of the Constitution, through encouraging all persons and organisations, including civic organisations, to disseminate awareness and knowledge of the Constitution throughout the society. By so doing, the ruling will make the society a safe haven for all children and the girl child at large.

Endnotes

¹ This section is a summarised version of the Constitutional Court of Zimbabwe ruling against child marriages in 2016. The case in question is: *Loveness Mudzuru and Ruvimbo Tsopodzi vs The Minister of Justice, Legal and Parliamentary Affairs and Minister of Women's Affairs, Gender and Community Development and the Attorney General of Zimbabwe* Constitutional Court of Zimbabwe [2015] Case: 79/14.

² *Ukuthwala* is a cultural practice mainly done by man and his peers or friends when they abduct girls to compel the girl to marry the abductor.

References

- Abul-Ethem, F. 2002. The role of the judiciary in the protection of human rights and development: A Middle Eastern Perspective, *Fordham International Law Journal*, 26. 3: 8.

- Constitution of Zimbabwe [Amendment (No. 20) Act of 2013. *Harare: Fidelity Printers and Refiners.*
- Basiyange, J. 2011. Early Marriage as a barrier to girl's education: A development challenge in Africa. National University of Rwanda. Retrieved January 2, 2016, from <http://www.ifuw.org/fuwa/docs/Early-marriage.pdf> Accessed 7/12/2011.
- International Planned Parenthood Federation (IPPF). 2007. *Ending Child Marriage: A guide for Policy Action.* Retrieved February 2016, 2015, from <http://www.ippf.org/NR/rdonlyres/8415A7E9-08334500-AE53-9AA09F1A56D8/0/endchildmarriage.pdf>.
- Kachere Phyllis. 2011. Religion and Poverty Force girls into early marriage. Retrieved January 29, 2016, from <http://www.infosdelaplanete.org/5308/religion-and-poverty-force-girls-into-early-marriages.html?L=EN>.
- Ministry of Women Affairs, Gender and Community Development (MWAGCD) and Gender Links. 2013. *Peace begins @ Home: Violence Against Women (VAW) Baseline Study.* Harare: MWAGCD and Gender Link.
- Makuzva, E. 2016. Real men needed to end early child marriages in Zimbabwe. Retrieved November 19, 2016, from <http://263chat.com/2016/11/real-men-needed-early-child-marriages-zimbabwe/>.
- Marshall. A. 1920. *Principles of Economics.* London: Macmillan and Company.
- Moyo. L. (2010 September 26). Zimbabwe: GCN in Drive to Stop Child Marriages. *The Standard.* Retrieved 25 January 2016, from <http://allafrica.com/stories/201009270684.html>.
- Newsday. 2011 January 04. Chiefs defend girl-child marriages. *Newsday.* Retrieved 2 February 2016, from: <http://www.newsday.co.zw/article/2011-04-01-chiefs-defend-girlchild-marriages>.
- Sachiti. R. 2011 January 31. The tragedy of Johane Marange's child brides. *The Herald.* Retrieved 4 February 2016, from <http://www.herald.co.zw/the-tragedy-of-johane-maranges-child-brides/>.
- SADC Parliamentary Forum. 2016. A Great Day in SADC Says Vice President as he Launches SADC Anti-Child Model Law, SADC Parliamentary Forum. Retrieved 18 November 2016, from http://www.sadcpf.org/index.php?option=com_content&view=article&id=187%3Aa-great-day-in-sadc-says-vice-president-as-he-launches-sadc-anti-child-model-law&catid=125%3Anews-a-events&Itemid=1.
- Sibanda. M. 2011. Married too Soon: Child Marriage in Zimbabwe. Harare: The Research and Advocacy Unit.
- UNICEF Innocenti Research Centre. 2001. Early marriage: Child spouses. No 7, Florence: UNICEF.
- Warner, E. 2004. Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls. *Journal of Gender, Social Policy & the Law*, 12. 2: 247.

World Press. 2011, February 25. Retrieved 25, January 2016, from <http://hatefsvoice.wordpress.com/2011/02/25/child-marriages-%E2%80%93-robbing-them-of-their-innocence>.

WLSA. 2002. *Lobola its implications for women's reproductive rights in Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe*. Harare: Weaver press.

Zimbabwe Human Rights Commission (ZHRC). 2015. Position Paper on the Child Marriages in Zimbabwe, ZHRC, Harare.

Zimbabwe National Statistics Agency (ZimStats). 2010. Zimbabwe Multiple Indicator Monitoring Survey (MIMS) 2009 Report. Harare: ZimStats.

Court Cases

Constitutional Court of Zimbabwe (CCZ). 2016. 'Loveness Mudzuru and Ruvimbo Tsopodzi vs The Ministry of Justice, Legal and Parliamentary Affairs Dept and Ministry of Women's Affairs, Gender and Community Development Dept. and the Attorney General of Zimbabwe'. Constitutional Court of Zimbabwe [2015] Case: 79/14.

High Court of South Africa. 2014. 'Mvumelani Jezile vs. The State, South Africa', High Court of South Africa [2014] Case: 127/2014.

Acts

Criminal Law (Codification and Reform) Act [Chapter 9:23] of 2004, Zimbabwe.

Customary Marriages Act [Chapter 5:07] consolidated as of 2004, Zimbabwe.

Children's Act [Chapter 5:06] of 2002, Zimbabwe.

Marriage Act [Chapter 5:11] of 1964, Zimbabwe.

Recognition of Customary Marriages Act 120 of 1998, South Africa.

Regional and International Human Rights Instruments

African Charter on the Rights and Welfare of the Child (ACRWC) (1999)

African Charter on Human and People's Rights (ACHPR) (1986)

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1981).

Convention on the Rights of the Child (CRC) (1990)

Covenant on Civil and Political Rights (CCPR) General Comment no 28. 2011, Retrieved 29 January 2016, from [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/13b02776122d4838802568b900360e80?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/13b02776122d4838802568b900360e80?Opendocument).