



## SALC POLICY BRIEF

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# AN OPPORTUNITY FOR LAW REFORM ON CHILD MARRIAGES IN ESWATINI

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SALC POLICY BRIEF

## **An opportunity for law reform on child marriages in Eswatini**

### **About the Southern Africa Litigation Centre**

The Southern Africa Litigation Centre (SALC), established in 2005, aims to provide support to human rights and public interest advocacy and litigation undertaken by domestic lawyers and human rights organisations in Southern Africa. SALC works in Angola, Botswana, Democratic Republic of Congo, Eswatini, Lesotho, Malawi, Mozambique, Namibia, Tanzania, Zambia, and Zimbabwe.

### **Authorship and acknowledgement**

The report was researched and written by Tambudzai Gonese-Manjonjo (SALC Deputy Director) with contributions by Thabo Buthelezi (researcher at SALC) and Deekshitha Ganesan (intern at SALC). The document was edited by Anneke Meerkotter (SALC Executive Director). The research and publication were made possible through the generous support of the Hivos SRHR Fund.



# Introduction

“Choosing when and whom to marry is one of life’s most important decisions. Child marriage denies millions of girls this choice each year.”<sup>1</sup>

**UNFPA Executive Director Dr Babatunde Osotimehin**

## Defining Child Marriage

The United Nations Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) define a child as a person who is under the age of 18 years. A marriage or informal union where one or both parties are under the age of 18 years is child marriage. According to Girls Not Brides, an organisation campaigning against child marriage, 1 in 5 girls in the world are married before the age of 18 and it is estimated that 40% of girls in sub-Saharan Africa are married before the age of 18.

Forced marriage involves a situation in which one or both parties do not freely and fully consent to the marriage. Since a child cannot provide the required free and full consent, child marriage can be regarded as forced marriage.<sup>2</sup> Although boys are also affected by child marriage, girls are disproportionately affected, due to gender inequalities.<sup>3</sup>

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1. United Nations (2016) “New UN initiative aims to protect millions of girls from child marriage”.
  2. Mbaku J.M. (2020) “International law and child marriage in Africa” *Indonesian Journal of International & Comparative Law*, 7(2), 104-105.
  3. UNICEF “Child marriage” <https://data.unicef.org/topic/child-protection/child-marriage/>

## The Problem with Child Marriages

### *Economic harm*

Examining the impact and problems of child marriage can be complicated since many of the social circumstances that result from child marriage also tend to increase its prevalence. The cycle of poverty renders girls vulnerable to child marriage. It is thus a cause, but girls who marry young tend to become trapped in poverty, which is also a consequence.

Girls who are married young often have the burden of bearing many children for their husbands. Because of limited financial options, they are usually economically dependent on their husband, which leaves them vulnerable to abuse.<sup>4</sup> The children born of child marriage also suffer from economic harm which continues the cycle of poverty and deprivation.<sup>5</sup>

### *Education*

Early marriage, low enrolment levels and girls' retention in school are co-related. The reasons for this correlation are complex since lack of access to formal education is a social factor that both results from and renders girls more vulnerable to child marriage. Girls who marry before maturity are often forced to drop out of school and thereby experience limitations in education and employment opportunities. This perpetuates the cycle of poverty.<sup>6</sup> Married girls tend to have lower educational outcomes because they are taken out of school when they marry. The lower a girl's educational attainment, the higher her chances of being married young. Conversely, the higher the levels of education, the lower the prevalence of child marriage. The World Bank estimates that every

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4. Musiwa A. (2018) "A critical analysis of Section 26 of the Constitution of Zimbabwe in relation to child marriage: Key insights for Zimbabwe's child protection practitioners" *Legal Issues Journal* 6(1) 90.
  5. Ibid.
  6. Mbaku J.M. (2020) "International law and child marriage in Africa" *Indonesian Journal of International & Comparative Law*, 7(2) 108-109.

additional year of secondary education is likely to reduce the rate of child marriage by at least 5% in most countries.<sup>7</sup> Thus, keeping girls in school has been one of the strategies encouraged to reduce child marriages.

### *Impacts on sexual and reproductive health rights*

Girls who are married are unlikely to be able to negotiate safe sex because of different power dynamics arising from large age differences, leading in some cases to gender-based violence and contracting sexually transmitted infections.<sup>8</sup> Child marriages that are polygynous marriages, increase the risk.<sup>9</sup> In addition, early marriages lead to early childbirth, that increases the risk of developing gynecological and obstetric complications like vaginal and urethral fistulas.<sup>10</sup> It is estimated that 25% of fistulas developed in young girls were a result of early pregnancies.<sup>11</sup>

## **Causes of Child Marriages**

Studies have attributed the prevalence of child marriage to gender inequalities, poverty, low education rates, customary and religious practices, and weak justice systems.<sup>12</sup> Girls from low-income families are more likely to be forced into child marriage.<sup>13</sup> According to UNFPA, girls from the poorest 20% of households are more likely to be married or in a union before age 18 than those from the wealthiest 20% of households.<sup>14</sup>

Some poor families marry off their girl children in order to get money through the payment of bride price to feed the family and also to lessen the burden of an additional mouth to feed.<sup>15</sup> Girls are often seen as a burden because they are considered most likely to leave the family and so not worth sacrificing for where there is competition for resources.<sup>16</sup> In addition, the bride price that marrying girls off brings are in some cases used to settle debts owed by the family.<sup>17</sup>

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7. World Bank (2017) "Educating Girls, Ending Child Marriage".
  8. Panos Institute Southern Africa (2015) "Media brief on ending child marriages in Zimbabwe".
  9. Centre for Human Rights (2018) "A report on Child Marriage in Africa" 44.
  10. United Nations Population Fund (2012) "Marrying too young: End child marriage".
  11. Fookes F. (2013) "Fistula, a silent tragedy for child brides" *Girls Not Brides*.
  12. Human Rights Watch (2015) "Ending Child Marriage in Africa".
  13. Mbaku J.M. (2020) "International law and child marriage in Africa" *Indonesian Journal of International & Comparative Law* 7(2) 115.
  14. United Nations Population Fund (2012) "Marrying too young: End child marriage".
  15. Mbaku J.M. (2020) "International law and child marriage in Africa" *Indonesian Journal of International & Comparative Law* (2) 112.
  16. Id 113.

Cultural, religious and social beliefs also add to the prevalence of child marriage, as child marriage is ingrained in many cultural and religious beliefs. In many cultures girls who have reached puberty are considered to be mature enough for marriage, and this is reflected in some marriage laws that differentiate minimum ages of marriage between boys and girls. For example, in Tanzania and Zimbabwe, the marriage laws provided for a higher minimum age of marriage for boys than girls. The State, in court proceedings in both countries, defended this by citing the stereotypical adage that girls supposedly mature earlier than boys.<sup>18</sup>

Some cultural practices where young girls are abducted by potential husbands like *ukuthwala*<sup>19</sup> traditionally practiced in South Africa and *kupura*<sup>20</sup> in Tanzania, increase and encourage child marriages. In some instances, child marriage is used as a protection against the “shame” brought on a family should the girl become pregnant out of wedlock.<sup>21</sup>

### *The legal system*

A major contributor to the prevalence of child marriages is the legal system, which often, if not directly permissive, has weak safeguards. Most countries that do not have a minimum age of marriage often have legislation to protect children from harm, including sexual exploitation. However, the child protection legislation is often in conflict with the legislation on marriage, with some providing exceptions from child protection for married children. There is thus a need for some harmonisation of child protection legislation with marriage laws. In other instances, there are dual systems of law (which is in the majority of States in Southern Africa). For example, in the application of statute, received and developed common law, sometimes called “general law” and African customary law, one system of law may be protective whilst the other either is silent or non-protective. This is the case with Eswatini and Zimbabwe, where there is no minimum age of marriage in terms of customary law. In other instances, implementation of the law is poor, either due to lack of clarity and understanding of the law by law enforcers, including the prosecutors, police and the courts or lack of political will. In Tanzania, the court outlawed child marriage, but the legislature has not followed up the judgments with laws to put this in effect.

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17. Id 114.

18. See *Attorney General v Rebeca Gyumi* (Civil Appeal 204 of 2017) [2019] TZCA 348 (23 October 2019) and *Mudzuru and Anor v Minister of Justice, Legal and Parliamentary Affairs and 2 Ors* (Constitutional Application 79 of 2014, CC 12 of 2015) [2016] ZWCC 12 (20 January 2016).

19. DOJ&CD “What is Ukuthwala?”

20. Ellison M. “Tales of a child bride: ‘My father sold me for 12 cows’” Al Jazeera 12 July 2016.

21. Mbaku J.M. (2020) “International law and child marriage in Africa” *Indonesian Journal of International & Comparative Law*. 7(2) 114.

# International Standards regarding Child Marriage

International instruments such as the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) all play a part in protecting the rights of women and girls, and the elimination of child marriages.

The CRC defines a child as a person under the age of 18, and establishes the principle of the best interests of the child as the primary consideration in all matters relating to them.<sup>22</sup> Although the CRC does not directly address child marriage, some provisions are applicable. These include the duty of States to protect children from violence and abuse;<sup>23</sup> the duty to abolish traditional practices harmful to children;<sup>24</sup> addressing child labour;<sup>25</sup> protection of children from sexual exploitation and abuse<sup>26</sup> and protection of children from torture or cruel, inhuman and degrading treatment.<sup>27</sup>

The African Charter on the Rights and Welfare of the Child (ACRWC) directly addresses child marriage and requires that legislative and other measures are taken to protect their rights.<sup>28</sup> Article 16 of CEDAW obligates States to ensure, based on equality of men and women, the right to freely choose a spouse and to enter into marriage only with free and full consent.

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22. Convention on the Rights of the Child (CRC), Art 1, 3

23. CRC Art 19.

24. CRC Art 24.

25. CRC Art 32.

26. CRC Art 34.

27. CRC Art 37.

28. African Charter on the Rights and Welfare of the Child, Art 21.



Article 16(2) of CEDAW, provides that “the betrothal and the marriage of a child shall have no legal effect” and requires States to set a minimum age of marriage at 18 years. Article 5 of the Maputo Protocol requires Member States to eliminate harmful practices that affect women’s human rights, and that are not in line with international standards. Harmful practices are defined 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”.<sup>29</sup> Article 6 of the Maputo Protocol, requires States to put laws in place to ensure that all marriages take place with the full and free consent of the parties and that the minimum age of marriage is set at 18 years. States are also required to provide for the registration of all marriages.

The Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child have stressed the importance of additional legal safeguards to protect the right of all individuals to freely enter into marriage, even in plural legal systems that include both customary and statutory laws.<sup>30</sup> The 2017 Joint General Comment of the African Commission on Human and Peoples’ Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage, defines a child as a person below the age of 18 years, sets out the contours of free and full consent and reiterates that 18 years is the minimum age for marriage.<sup>31</sup>

The UN Human Rights Council, concurs with the CEDAW Committee and the Committee against Torture in identifying child marriage as “a harmful practice which leads to the infliction of physical, mental or sexual harm or suffering, with both short- and long-term consequences, and negatively impacts on the capacity of victims to realise the full range of their rights”.<sup>32</sup> The report recognises the classification of child marriage as gender discrimination which has implications on the right to equality and non-discrimination for women and girls.

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29. Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, Art 1.

30. Joint General Recommendation/General Comment No.31 of the Committee on the Elimination of all forms of Discrimination Against Women and No.18 of the Committee on the Rights of the Child.

31. General Comment of the African Commission on Human and Peoples’ Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage, 2017.

32. UN Human Rights Council, (2014) “Preventing and eliminating child, early and forced marriage”, Report of the Office of the United Nations High Commissioner for Human Rights.

The best interests of the child principle should guide all measures, actions and national strategies and they should be contextual and in line with international human rights standards. The envisaged policies and strategies should include:

- a. Ensuring a national legal framework in line with international human rights standards, including with regard to the age of majority and the legal age for marriage for girls and boys, the prohibition of forced marriage and birth and marriage registration;*
- b. Harmonising national laws on marriage, including by amending existing laws to remove legal obstacles faced by girls who seek the enforcement of national laws on child marriage prevention or prohibition and legal remedies; removing unreasonable legal requirements for formally ending a child marriage; and providing access to remedies for those who leave a marriage;*
- c. Promoting girls' access to high-quality education, in accordance with relevant international standards, including tailored reintegration programmes for girls who are forced to drop out of school owing to marriage and/or childbirth; the provision of economic support and incentives to girls attending schools and to their families has proven to be effective in allowing girls to pursue higher education and delay marriage;*
- d. Promoting women's economic empowerment and access to productive resources, including by addressing discriminatory norms and practices in this regard.*
- e. Addressing the widespread cultural and social acceptance of child, early and forced marriage, including by raising awareness of its harm to the victims and the cost to society at large and by providing platforms and opportunities for discussion within communities and families on the benefits of delaying marriage and ensuring that girls receive education. The involvement of older women and of religious and community leaders, and the engagement of men and boys as key participants in these efforts is essential;*
- f. Providing age-appropriate, culturally relevant and empirically based comprehensive education on sexuality, sexual and reproductive health, gender equality and life-skills training for women and girls, and ensuring that women and girls are made aware of and have the capacity to claim and exercise their rights in relation to marriage;*
- g. Supporting the establishment of networks to facilitate the exchange of information between girls and young women on child, early and forced marriage through the innovative use of technology;*
- h. Implementing training programmes for government officials, the judiciary, law enforcement and other State officials, teachers, health and other service workers, those working with immigrants and asylum seekers, and relevant professionals and sectors on how to identify girls at risk or actual victims and on applicable legislation and prevention and care measures;*
- i. Providing adequate financial resources and support to comprehensive programmes to address child, early and forced marriage, including those aimed at married girls and those within indigenous and rural communities, in cooperation with United Nations agencies, regional organisations, civil society organisations and other relevant stakeholders;*
- j. Improving data collection, research and dissemination of existing good practices and ensuring a clear analysis and assessment of the impact of existing policies and programmes as a means of strengthening them, ensuring their effectiveness and monitoring their implementation.”<sup>33</sup>*

### ***The SADC Model law***

In 2016, the SADC Model Law on eradicating child marriage and protection of children already in marriage<sup>34</sup> was adopted by the Southern Africa Development Community (SADC).

The Model Law is intended to present a uniform legal framework that acts as a guidance for SADC States to enact their own laws prohibiting and preventing child marriage. In terms of the law, States should:

- a. Set the minimum age of marriage at 18 years for both boys and girls without exceptions;
- b. Prohibit pledging or betrothals and marriage of children, including creating offences that do not criminalise the child concerned;
- c. Put in place measures to mitigate and protect children already in marriage including providing for maintenance, retention of properties; and
- d. Put in place measures to prevent child marriage, such as education and awareness programmes.

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33. UN Human Rights Council, (2014) "Preventing and eliminating child, early and forced marriage", Report of the Office of the United Nations High Commissioner for Human Rights.

34. SADC Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage.

# An Opportunity for Law Reform in Eswatini

Eswatini, in March 2022, introduced proposed legislation to amend the marriage laws, the Eswatini Marriages Bill.<sup>35</sup> The State officially gazetted the Bill, although the consultation process has been ongoing for some years. Although gazetted, the Bill has not gone through parliamentary processes. This brief will examine the proposed reform within the respective international law and constitutional standards to see how far it goes towards eliminating and mitigating the effects of child marriage.

## The Current Legal Position and the Need for Law Reform

Section 27(2) of Eswatini Constitution<sup>36</sup> provides that marriage may only be entered into only with the free and full consent of the parties. It also provides for protection of children from abuse<sup>37</sup> and requires the State to put in place measures to ensure special protection for children from harm within and outside the family.<sup>38</sup> However, the practice of marriage of men to underage girls, known as *kwendizisa*,<sup>39</sup> has long been an accepted social norm and cultural practice in Eswatini. In more recent times, with increasing evidence of the relationship between the spread of HIV within child marriages and polygamous unions, the issue of child marriage has drawn greater attention. As a result, Eswatini enacted the Children's Protection and Welfare Act, No. 6 of 2012, which defines a child as a person below the age of 18 years. The Act makes provision for protection of children from harmful cultural practices, including providing for the right of a child to decline to consent to cultural practices that may be harmful to them.<sup>40</sup>

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35. Marriages Bill 2022 Eswatini Government Gazette Vol IX

36. Constitution of the Kingdom of Swaziland Act 2005 (the Constitution).

37. Constitution of the Kingdom of Swaziland, section 29(1).

38. Constitution of the Kingdom of Swaziland, section 29(7)(d).

39. CANGO Joint Shadow Report to the CRC (2014).

40. Children Protection and Welfare Act, sections 14 and 15.

These sections have been interpreted as outlawing child marriages in Eswatini. However, the provisions do not take into account the social pressure that women and girls often face to uphold social and cultural norms. They fail to recognise the prevalent unequal power relations and gender inequalities that reduce girls' ability to negotiate or refuse to participate in harmful cultural practices. The lack of direct reference to and prohibition of child marriages in the law makes it ineffectual in dealing with them. It is reported, as well, that Eswatini's traditional leadership have rejected the law and claim that child marriage continues to be acceptable under customary law.<sup>41</sup>

The Sexual Offences and Domestic Violence Act, No. 15 of 2018, has stronger protective provisions against child sexual abuse. In terms of section 3(c) and 6(e) of the Act, anyone who has sexual intercourse with a person under 18 is guilty of rape. In addition, it is an offence to have a sexual relationship with a child, which may apply to relationships that fall short of legal marriage. Section 43 of the Act states that a person who marries a child in contravention of the Marriages Act of 1964 or any Act that will succeed it commits an offence. This seems to criminalise child marriages, but would only be effective if the marriage law itself outlawed them.

Consequently, child marriages continue to be prevalent, as well as sexual activity with children within marriage. According to UNICEF, 5% of girls were married before the age of 18, and 1% before the age of 15. Child marriage is most prevalent in Lubombo (where 14% of women aged 20-49 were married before the age of 18) and Hhohho (12%).<sup>42</sup>

Some of the causes of child marriage in Eswatini are harmful traditional practices such as *inhlanti* (the giving of a younger sister for marriage to a woman's husband, usually invoked when she cannot bear children of her own) and *kwendizisa*, which are officially prohibited but allowed by traditional authorities.<sup>43</sup> The arranged marriage of minors has been publicly legitimised

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41. Reuters "In Swaziland, child marriage still a grey area" 29 January 2013.

42. Girls Not Brides <https://atlas.girlsnotbrides.org/map/swaziland>.

43. CANGO Joint Shadow Report to the CRC(2014).

by the King, who has previously taken adolescent girls as new wives at an annual Swazi event known as *Umhlanga* meant to celebrate the purity and virginity of women and girls.<sup>44</sup>

Another contributor to child marriage is low levels of education. Thirty per cent of women who were not educated were married as children, compared to only 2% with higher education.<sup>45</sup> Poverty is also a huge factor, with 18% of women in Eswatini's poorest households being married before the age of 18, compared to 4% in the wealthiest households.<sup>46</sup>

Section 252 of the Eswatini Constitution states that the principles of Swazi law and custom are recognised and adopted as part of the law of the land. It also circumscribes its applicability and validity only to the extent that it is "not inconsistent with a provision of the Constitution, a statute, repugnant to natural justice or morality or general principles of humanity." Although on a strict interpretation of the domestic law governing marriage and the Children's Protection and Welfare Act, child marriages would not be permitted and consequently would be a customary practice against the terms of section 252, traditional Swazi leaders claim that it is a good practice governed by Swazi law and custom.

At present, marriages in Eswatini are governed by a dual system<sup>47</sup> of uncodified customary law and practice and the Marriage Act No. 47 of 1964. Section 27 of the Eswatini Constitution provides that a marriage can be conducted between a man and a woman only with free and full consent. Further, section 28 provides that a woman shall not be compelled to undergo or uphold any custom she is opposed to in conscience. However, there is no clear enforcement mechanism for this under any law, and the degree of freedom and independence that a woman or a girl child will have in resisting a child marriage is unclear.

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44. Assarsson S. "Swaziland's reed dance: cultural celebration or sleazy royal ritual?" *The Guardian* 22 September 2016.

45. Girls Not Brides <https://atlas.girlsnotbrides.org/map/swaziland>.

46. Swaziland Multiple Indicator Cluster Survey 2014.

47. Social Institutions and Gender Index 2019.

The Marriage Act governs civil marriages and clearly states that it does not apply to marriages contracted in accordance with Swazi law and custom. Section 3(1) of the law prohibits marriage of a male below the age of 18 years and female below the age of 16 years, except where the Minister grants permission for it in case of certain special circumstances. Therefore, even under civil law, the minimum age for marriage appears to be flexible. Moreover, these special circumstances are not spelt out under the law. Further, as per section 3(2), persons below the age of 21 years but above 18 years and 16 years as described above may marry with the consent of their legal guardians. The provisions are also clearly discriminating between girls and boys. A minor who was married according to Swazi customary law, however, is no longer considered a minor for the purposes of this provision.

Under Swazi customary law, the general minimum age for marriage is the age at which puberty is attained. The effect of this and the disparate ages of marriage provided under the existing Marriage Act is that Eswatini does not have an absolute minimum age of marriage.<sup>48</sup> The lack of harmonisation of the child protection law and sexual offences law with the marriage law means that the legal reform has not gone far enough to eliminate child marriage.

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48. Braun T.(ed) *The Role of the Law in Eliminating Child Marriage in the Commonwealth* 2018 CLA, 31.

## **The Eswatini Marriages Bill, 2022**

The Eswatini government introduced the Marriages Bill with a view to consolidate the laws relating to marriage and bring them in conformity with constitutional principles and international human rights law. This Bill addresses the issue of child marriage directly and indirectly through a number of provisions.

Section 2, which interprets various terms used under the Act, defines a “child” as a person under the age of 18 years, and applies equally to girls and boys. Section 3 provides for the validity of civil and customary marriages, which must comply with prescribed formalities including being solemnised by a marriage officer (for civil marriages) and notice, licensing and registration requirements. However, in terms of section 7, co-habiting relationships are not recognised as marriages but will be considered for purposes of equitable distribution of property. Of note is section 7(4) which stipulates that the right to equitable distribution of property after cohabitation is only available to those who would have capacity to otherwise enter into marriages in terms of the law. The implication is that, although this may discourage co-habiting with a minor, it may also disadvantage minors in co-habiting relationships because of the inherent unequal power relations. It is also likely to keep child marriages that are not solemnised under the radar.

The most significant change introduced by the Bill is in section 8, which provides for a minimum age of marriage – 18 years. Therefore, unlike the existing Marriage Act which has a different minimum age for boys and girls, the Bill proposes a common minimum.

The effect of solemnising a marriage in violation of any of these provisions, including where the parties are below the age of 18 years is significant. Section 15 states that marriages contracted



in violation of the provisions of the Act will be null and void and also makes it an offence punishable by imprisonment not exceeding two years or a fine of E5,000. However, concerning the marriage of persons under 18, the framing of the provision implies that the children who are married, in addition to adults who enter into the union, will be prosecuted, which is undesirable. This is also inconsistent with the Sexual Offences and Domestic Violence Act. For it to be clearer that children will not be criminalised, there should be a link or reference to the Sexual Offences and Domestic Violence Act.

The Marriages Bill also lays down the procedure for solemnisation of both civil and customary marriages. Specifically for customary marriages, which are typically how child marriages are currently conducted in Eswatini, Section 23 requires that the parties give notice of intention to marry to the Registrar and Chief of the locality of the bride and groom. This notice will be displayed for a period of 21 days in a public place to allow for objections and within 21 days of such notice, a marriage license will be issued stating that the parties have complied with all the provisions of the Act and there is no objection to the marriage. Within 14 days after the marriage has taken place, the Marriage Officer will record that the marriage has taken place. These measures, particularly the objection period and verification by the Registrar and Marriage Officer, are ostensibly with a view to ensure that child marriages are not conducted through the back door.

## **Outlawing Child Marriage**

Specific offences created in terms of section 68 addressing betrothal, charging dowry, forced marriage or marriage or facilitation of marriage by deceit of a child attract a sentence of a fine of E10 000 or imprisonment for 5 years. These provisions unequivocally outlaw child marriages and provide for consequences. However, this appears to only target marriages as defined in the law, and would not extend or apply to co-habitation arrangements, which is a gap in the proposed law.

Eswatini, being a member of the Southern Africa Development Community (SADC) has adopted the SADC Model Law on eradicating child marriage. For the most part, the Marriages Bill aligns with the object, purpose, and key provisions on child marriage in the Model Law.

An important issue that has not been adequately addressed under the Marriages Bill, but which is contained in the Model Law is the question of maintenance and legitimacy of children born out of a child marriage. In section 21, the Model Law provides that children born of such marriages are legitimate and that the court should make orders for the custody and maintenance of children born out of a child marriage by the party to the marriage and the parents of the victim of the child marriage. Most importantly, section 28(3) of the Model Law provides that marriage is not a defense to a charge of rape, which the new Marriages Bill does not explicitly provide for, though it may be read to mean

so in conjunction with the Sexual Offences and Domestic Violence Act. The Model Law also recommends a range of measures that countries can take to prevent child marriages and provide protection to children, but since the Marriages Bill is a general law covering all marriages in Eswatini, it is doubtful if such detailed measures will be spelled out in this version of the Bill.

The Marriages Bill is a significant step forward in addressing the issue of child marriages in Eswatini that rightly focuses on bringing the civil and customary marriages within a single legal regime. The setting of a minimum age of marriage as 18 years, clear criminal prohibition of child marriages and betrothals and invalidation of non-compliant marriages goes a long way towards harmonisation with the sexual offences and child protection laws. The Bill, however, stops short of completely protecting children whose marriage is solemnised despite the law and these remain aspects for further review and amendment to ensure that the Bill meets the standards set under international and regional human rights law. However, The true test of the effectiveness of the Marriages Bill will lie in whether its insistence and focus on registration is successful in bringing to attention instances of child marriage, without consequently invalidating marriages solemnised between adults who are unaware of the law or the legal compulsion to register marriages.

# Comparative Law Reform in the Region

## Zimbabwe

According to UNICEF, 34% of girls were married before 18 in Zimbabwe, 5% of which were married before the age of 15.<sup>49</sup> Zimbabwe is considered one of the countries with the highest prevalence of child marriage in the world.

Child marriage is more common in rural areas of Zimbabwe. Available data from the 2019 Zimbabwe Multiplier Indicator Cluster Survey (MICS) indicates that 40% of women aged 20-24 living in rural areas, compared to 19% in urban areas, were married or in a union before the age of 18.<sup>50</sup>

Studies point at various factors explaining the continued prevalence of child marriages, such as cultural practices, religious practices, and poor policy/law enforcement.<sup>51</sup> Poverty exacerbates the situation, where daughters are sometimes married off to reduce their perceived economic burden, with their bride price (lobola) used by families as a means of survival.<sup>52</sup> Low levels of education contribute as well, with girls who have dropped out of school early more likely to marry before the age of 18.<sup>53</sup> Many girls drop out of school because their parents cannot afford to pay school fees, which in turn puts girls at a higher risk of being married off.

Religion along with harmful traditional practice also contribute. Child marriages in Zimbabwe are most associated with members of the Johane

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49. United Nations Children's Fund (2021).

50. Zimbabwe Multiple Indicator Cluster Survey 2019 Survey Findings Report.

51. Bengesai A.V. et al (2021) "The impact of girl child marriage on the completion of the first cycle of secondary education in Zimbabwe: A propensity score analysis" *PLoS ONE* 16(6).

52. Chingono N. 'My dreams were destroyed': Poverty costs child brides dear in Zimbabwe" *The Guardian* 4 January 2019.

53. Bengesai A.V. et al (2021) "The impact of girl child marriage on the completion of the first cycle of secondary education in Zimbabwe: A propensity score analysis" *PLoS ONE* 16(6):10.

Marange apostolic sects who constitute a large portion of members of the religious community in Zimbabwe.<sup>54</sup> Members of the indigenous apostolic church reportedly coerce girls as young as ten to marry much older men ostensibly in obedience to the “holy spirit.”

Teenage pregnancies also lead to child marriages. Traditionally girls who fall pregnant are required to get married to the “perpetrator”, as having a child out of wedlock is seen as taboo. It has been argued that marriage where there has been a teenage pregnancy is protective of the girl-child as it forces the man to take responsibility for the pregnancy. However, the court in the *Mudzuru*<sup>55</sup> case found this argument untenable and stated that this responsibility did not require forcing a girl into child marriage.

Section 26 of the Constitution provides that the State must take appropriate measures to ensure that marriages are entered into with the free and full informed consent of the parties involved and that children are not pledged in marriage. Section 78 provides that every person who has attained the age of 18 years has the right to establish a family and no person may be compelled to enter into a marriage against their will. Section 80 builds on the rights of women and provides that customs, traditions and practices which infringe the rights of women guaranteed under the Constitution are void to that extent. Further, children have a right to be protected from sexual exploitation and any form of abuse according to section 81.

More relevant to addressing cultural practices, such as *kuzvarira*, where a girl is pledged into marriage at a young age in return for financial support for the family, section 26(a) of the Constitution requires the State to take measures to ensure that children are not pledged in marriage.<sup>56</sup>

The Constitutional Court, in the *Mudzuru* case, has interpreted the right to found a family at the age of 18 years in section 78 of the Constitution to mean that marriages of people under 18 are invalid, thus outlawing child marriages. The Court struck down section 22(1) of the Marriage Act and also declared that the prohibition would apply to customary unions and marriages as well, which do not have a minimum age of marriage. Section 22 was found to be discriminatory as it set different minimum ages of marriages for boys and girls (18 years for boys and 16 years for girls, and younger, with parental, ministerial or judicial consent).

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54. Sibanda M. “Married too soon: Child marriage in Zimbabwe” Research and Advocacy Unit (2011).

55. *Mudzuru and Anor v Minister of Justice, Legal and Parliamentary Affairs and 2 Ors* (Constitutional Application 79 of 2014, CC 12 of 2015) [2016] ZWCC 12 (20 January 2016).

56. Mwambene L. (2018) “Recent Legal Responses to Child Marriage in Southern Africa: The Case of Zimbabwe, South Africa and Malawi” *African Human Rights Law Journal* 18(2) 527-550, 540.

Marriages in Zimbabwe are governed by a dual system, general law, and customary law, namely the Marriage Act, Chapter 5.11, which applies to civil marriages, and the Customary Marriages Act, which applies to solemnization and registration of customary marriages. The Customary Marriages Act, Chapter 5.07, does not specify any minimum age for marriage, even though section 11 of the Act prohibits the pledging of girls in marriage. In terms of section 3(5) of the Customary Marriages Act, an unregistered customary law marriage is not considered a valid marriage, and is only recognised for limited purposes including guardianship and custody of children. This, despite the fact that the majority of customary marriages in Zimbabwe are unregistered.<sup>57</sup> This makes it difficult to detect and mitigate or eliminate child marriages.

It may be possible to deal with child marriages in terms of the criminal law, from the provisions of the Criminal Law (Codification and Reform) Act Chapter 9.23 (Criminal Code) and the Domestic Violence Act, Chapter 5.16. Section 80 of the Criminal Code penalises “extra marital” sex with a “young person”, defined as someone under the age of 16 years. The reference to extramarital sex gives the impression that an accused person could use marriage to a young person as a defence, although child marriage was outlawed by the Constitutional Court. The absence of a clear provision reflecting this means that the prohibition is not clear and unequivocal, making prosecution difficult. Section 94 of the Criminal Code penalises pledging of girls in marriage and forced marriages. Section of the Domestic Violence Act defines child marriage as a harmful cultural practice but stops short of explicitly creating a specific offence, instead, criminalising “abuse derived from child marriage”. This implies that child marriage can be acceptable as long as it does not result in abuse that can be prosecuted as domestic violence.

It seems the above provisions, particularly section 94 of the Criminal Code and section 3(l)(v) of the Domestic Violence Act are either unknown or ineffective in dealing with child marriages. This can be seen by the lack of known prosecutions. An illustration in point is a case reported in August 2021, of a 14 year old girl who died in childbirth after being married off to a man within an apostolic sect.<sup>58</sup> The 27 year old man was charged with rape. The family members who allegedly married the victim off were also charged with other offences.

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57. Gonese-Manjonjo T “The Recognition Of Customary Marriages In Zimbabwe And The Proposed Marriage Bill” SALC 2019.

58. “Fresh Details Emerge on the Late Memory Machaya who Died While Giving Birth” Zim Eye 20 August 2021.

## ***Zimbabwe Marriages Bill, 2019***

In March 2022, the Marriages Bill passed through both houses of parliament and now awaits presidential assent. The Marriages Bill aims to bring customary and civil marriages under a single framework by making registration of marriages mandatory and ensuring that there are institutions and bodies that can facilitate this process, like the Registrar of Marriages.

Section 3 of the Bill deals with child marriages and provides that no person under the age of marriage (18 years) can enter into any kind of marriage or union, whether customary or civil. Child marriages are prohibited, and no person can contract, solemnise, promote, coerce or pledge a child into marriage. Violation of this provision would constitute an offence, with the involvement of the parent or guardian considered an aggravating factor. Section 4 makes the requirement of free and full consent to the marriage essential. The insistence on notice and registration under the law is ostensibly to ensure that child marriages do not go undetected.

The provisions of the Marriages Bill and the constitutional provisions prohibiting pledging of children in marriage and requiring full and free consent to marriage are consistent with the standards laid down under international human rights law. The Bill incorporates the requirements of Article 16(2) of CEDAW for registration of all marriages under section 3.

Similarly, the Bill complies with the requirements in the Maputo Protocol for equality in marriage, minimum age of marriage and that all marriages take place with the full consent of the parties. The Bill is substantially also in compliance with the SADC Model Law in setting 18 years as the minimum age of marriage and providing for penal consequences for facilitators of child marriages. The SADC Model Law, however, calls for specific measures to protect children who are already in marriage, for example, the recognition of the legitimacy of their children, property rights protection, and resource-based and psycho-social support.

Apart from the measures prohibiting child marriage, and the provision providing for saving of rights acquired in an otherwise invalid marriage, which is general, there is nothing else in the Bill dealing comprehensively with child marriages and this is a gap that needs to be plugged. Perhaps this could be done more comprehensively through child protection legislation.

In addition, by maintaining the current position of non-recognition of unregistered customary law marriages, the proposed law continues to make it difficult to formally define, detect and prevent child marriages entered into in terms of customary law but

that are not registered. It appears that it is only upon registration that the age restriction on child marriage can practically be enforced.

The Marriages Bill is a positive and overdue step in the movement towards eliminating child marriage in Zimbabwe, as it sets 18 years as the minimum age of marriage, and provides for penal consequences for the adults, and not the children involved. The amended marriage law, together with the Criminal Code and the Domestic Violence Act properly implemented, will go a long way towards eliminating child marriage. The gaps, however, include the absence of more comprehensive provisions dealing with the protection of children already in marriage and the problems arising from the non-registration of customary marriage.

## Malawi

In 2017, Malawi amended its Constitution<sup>59</sup> and unequivocally set the marriageable age of both women and men at 18 years. The Marriage Divorce and Family Relations Act sets 18 years as the minimum age of marriage, and as a condition for the validity of a marriage.<sup>60</sup> Persons who facilitate marriages that do not comply with the minimum conditions for validity, like the minimum age, are subject to arrest and sentencing to a hefty fine or imprisonment for up to 5 years.<sup>61</sup> In addition, the Gender Equality Act makes it an offence for anyone to commit, facilitate or coerce the commission of a “harmful practice”.<sup>62</sup> A harmful practice is defined as a:

*“Social, cultural or religious practice which, on account of sex, gender or marital status does or is likely to*  
*a. Undermine the dignity, health, or liberty of any person or*  
*b. Result in physical,sexual, emotional,or psychological harm to any person.”<sup>63</sup>*

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59. Constitutional Amendment Act, 36 of 2017.

60. Marriage, Divorce and Family Relations Act No. 4 of 2015, section 14.

61. Marriage, Divorce and Family Relations Act, section 54.

62. Gender Equality Act Chapter 25:06, section 5.

63. Gender Equality Act, section 3.



The Child Justice and Protection Act<sup>64</sup> provides for the protection of children through provisions addressing subjecting children to harmful social and cultural practices and prohibiting child marriage.<sup>65</sup>

Although the law on its own would not be able to end child marriage, it has enabled communities in Malawi to take up practical actions in dealing with cases. Some communities, with the help of civil society organisations, have put in place community by-laws aimed at identifying and dealing with child marriages in the community. This has led, in some cases, to traditional leaders intervening and causing arrests of perpetrators and stopping reported marriages.

## **Mozambique**

In 2019 the Mozambican Parliament eliminated exceptions to the minimum age of marriage.<sup>66</sup> In terms of the new provisions, adults who marry children can be sentenced to between 8 and 12 years in prison, and marriages between children are invalid. In addition, any public servant who conducts a marriage ceremony for children faces arrest and a sentence of between 2 and 8 years imprisonment. Parents, relatives or guardians who pledge children in marriage for payment or any other material benefit face a prison sentence of between 2 and 8 years.

Despite the changes in the law, however, it is reported that the prevalence of child marriages in Malawi and Mozambique is still high, implying that the law alone will not suffice to end child marriage. It is clear, therefore, that ending child marriage is a process that requires comprehensive multi-sectoral action and cannot be achieved by the enactment of laws on their own. However, without an enabling legal framework, it is hard to empower stakeholders to take concrete actions.

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64. Child Justice and Protection Act, 2010.

65. Child Justice and Protection Act , sections 80, 81.

66. Lei de Prevencao e Combate as Unioes Prematuras Act no.19 of 2019.

# The Need for Comprehensive Measures

As highlighted in the various international instruments dealing with child marriage, national experiences, legal frameworks require to be bolstered by comprehensive measures to eliminate child marriage. For example, criminalisation alone without providing support mechanisms for the victims of child marriage may prove ineffective.

The victims are often unlikely to be able to file cases on their own, relying on parents or guardians, who might, themselves be the ones facilitating the marriage.<sup>67</sup> Thus, reporting child marriage might mean risking parents/guardians' imprisonment. There is, therefore, a need for measures to empower victims to come forward. This dilemma is similar to that faced by domestic violence survivors, who need practical support like safe houses and economic support to escape perpetrators, without which reporting might seem counter-productive.<sup>68</sup>

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67. Mwambene L. (2018) "Recent legal responses to child marriage in Southern Africa: The case of Zimbabwe, South Africa and Malawi" 18 *African Human Rights Law Journal* 527-550, 548, 549.

68. Gonese T (2018). "Calling for the total elimination of violence against women and children in Zimbabwe through a more effective State response"

In addition, engagement with the main drivers of child marriages is important, including cultural, religious practices and poverty. Raising awareness and encouraging community agents of change will bolster law reform efforts.

Ending child marriage in Africa requires concerted and comprehensive efforts involving multiple stakeholders and sectors, of which law reform is an essential part. The law reform efforts, brought to their conclusion, will go a long way in the fight against child marriage, as they aim to change marriage laws to set minimum ages of marriage and prohibit child marriage, with penal consequences.

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